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## Chapter 13

# Historical Statistical Trends

Crime statistics compiled over the years do not, in themselves, answer the question whether more or fewer sexual offences against children are being committed now than in the past. They do, however, provide an historical perspective against which current enforcement and judicial practices concerning these offences can be compared.

The statistics for the period between 1876 and 1973 on charges laid and convictions for sexual offences indicate that there have been significant changes in: the rates of charges laid; the ratio of convictions to charges; the types and lengths of sentences; conviction rates among different provinces; and the rates of charges and convictions for specific types of sexual offences in which children were victims. The results given in this chapter summarize a more detailed review prepared for the Committee by the Research and Analysis Division of Statistics Canada. They complement the preceding historical review of sexual offences in Canadian law.

### Limitations of Historical Criminal Statistics

The compilation of information on charges and convictions from the majority of Canadian courts (with the exception of Alberta, Saskatchewan, Newfoundland and the Yukon) was mandated by the *Criminal Statistics Act* of 1876. In the early years, this information was assembled by the Minister of Agriculture. From 1917 until the termination of the publication of national court statistics in 1973, the responsibility for issuing these reports lay with Statistics Canada. The submission by the courts of statistical reports on their previous year's proceedings was provided initially on a voluntary basis. Since this system was based on voluntary reporting and since there is no way to check the completeness and reliability of the courts' submissions, the accuracy of these statistics is debatable.

In reviewing crime committed against children and youths, a serious limitation of official statistics, both those now being assembled and those compiled in the past, is that no information is provided on the ages of the victims. In the research undertaken by the Committee in co-operation with police forces

across Canada, it was found that the general occurrence records maintained on cases investigated by the police typically contained detailed information about victims, suspects and the criminal acts committed. However, in the assembling of information on crimes reported to authorities across Canada, the emphasis has been to list findings for suspects and for persons who were charged or convicted.

None of the information that is usually available in police records about victims is drawn upon in the aggregation of national and provincial criminal statistics. **For the purposes of official crime statistics, now and in the past, the young victims of criminal offences are invisible. Consequently, it is not known what proportion of all offences reported to the authorities is committed against children and youths. It is often assumed that most victims of sexual offences, both against children and against adults, are females. Even this assumption, however, cannot be documented by resorting to official criminal statistics for the nation.**

**In the Committee's judgment, steps should be taken to assemble and publish on a regular basis information that specifies the age and sex of the victims of different offences, including sexual offences. Having this type of information available would provide much needed documentation of the extent to which children and youths are the victims of different types of sexual offences known to the authorities, and could serve as a basis for considering more effective means for their protection.**

In addition to the absence of information about victims in official crime statistics, there are a number of other limitations in these sources which preclude their more extensive use in the analysis of the reported occurrence of sexual offences. These limitations include:

- *Unit of Analysis:* There have been shifts in the unit of analysis from counts of *persons* who were charged, to the number of *charges* that were laid against persons. Between 1876-1894, the unit of analysis was the number of persons charged; between 1895-1922, the unit was changed to count the charges that were laid; and between 1923-1925, the unit of analysis reverted to information on persons charged.
- *Amendments to Legislation:* Corresponding to changes in legislation during this period, certain types of offences have disappeared or been redefined and new categories of offences have been introduced.
- *Counting of Juveniles and Adults:* The statistics list offences committed by juveniles and adults for some years, and only give information for adults in other years.
- *Summary and Indictable Offences:* Both summary and indictable offences are reported in some years, while in other years only indictable offences are reported.
- *Incomplete Reporting:* Information was not collected uniformly from all provinces during this period. Before 1900 and after 1969, the reports from some provinces were not included.

- *Decline in Reporting:* Toward the end of the 1960s there was a marked decline in the reporting of court statistics. The reasons for this decline have not been fully documented. This reduction may have been due to: increased court caseloads; the rising costs of court administration; and reservations about the utility of these statistics. As a result, the statistics for the 1970s are likely to be less reliable than those for preceding years.

## Classification of Sexual Offences

In the sexual offences of the *Criminal Code*, the ages of persons with whom certain sexual acts are proscribed are specified in some instances but not in others. The following classification was developed as an operational framework within which to assess historical trends in the reported occurrence of sexual offences.

1. Sexual offences committed solely against children and youths, for example, sexual intercourse with a female under 14, or with a female 14 or 15.
2. Sexual offences that are committed predominantly against children and youths, for example, incest and the "seduction" offences.
3. Sexual offences that may be, but are not necessarily, committed against children and youths, for example, rape, indecent assault, gross indecency, buggery, and sexual intercourse with a feeble-minded female.

This classification was used as the basis for extracting, for even-numbered years from 1876 to 1972, information on sexual offences from the annual publications, *Criminal Statistics* and *Statistics of Criminal and Other Offences*.

Because of the inherent limitations in the statistical sources, only broad trends are noted and no analysis is given of the persons charged or convicted of sexual offences. Even so, **the statistics clearly indicate that sexual offences reported to the authorities are committed almost exclusively by males.** In 1981, for instance, a total of 4361 adults were charged with rape or indecent assault, of whom only 62 (1.4 per cent) were women (all of whom were charged with indecent assault).

In the early 1900s, the conviction rates for sexual offences committed by juveniles, typically at the 85 to 95 per cent level, were much higher than those for adults. Since that time, these rates have fallen below the level for adults. Of the males who were charged with sexual offences, statistics for recent years indicate that between 10 and 20 per cent are juveniles. In contrast to the rising trend in conviction rates concerning sexual offences committed by adults, comparable rates for juveniles have declined. These changes are most likely a reflection of the phased introduction of other kinds of procedures adopted for the management of juvenile offenders. As the research findings of the Committee indicate, a substantial proportion of sexual offences against children and youths is committed by persons who are themselves juveniles.

## Reported Incidence

During the closing years of the nineteenth century, Canadian courts annually reported fewer than 200 charges of sexual offences. During this period, the *number* of persons who were charged ranged between a low of 94 and a high of 160. By the late 1960s, the annual number of persons who were charged with sexual offences had risen, approximately by a factor of 10, to more than 1400 each year.

When the number of reported sexual offences is viewed relative to the size of the Canadian population at different times during this period, broad trends become evident: there was a gradual increase in the reported rates of these offences during the first three decades; a sharp rise occurred during World War I; and, since then, there has been a gradual decline up to the beginning of the 1970s. From an average level of about 3.5 charges per 100,000 persons during the late 1800s, the rate peaked at 11.0 charges in 1914. Subsequently it declined, passing through a series of cyclical fluctuations to a level below 8.0 charges per 100,000 persons. Each of the first four cyclical fluctuations lasted approximately eight years. A more marked decline in the rate of charges started at the end of World War II. The fifth fluctuation occurred in the mid-1960s; this was followed by a drop to 6.0 charges per 100,000 persons, a level comparable to that of about half a century earlier.

The annual rates of charges per 100,000 persons were re-analyzed by the statistical procedure known as linear spline regression analysis. This procedure highlights the nature of the major trends which occurred. Based on this analysis, there were three different periods in the reporting of charges involving sexual offences. These periods correspond generally to the trends in annual rates per 100,000 persons of all charges reported.

The results obtained by using this more powerful statistical procedure show that between 1876 and 1902, there was a gradual increase in: the rates of charges involving sexual offences; and the rates of persons who were charged with sexual offences. These rates rose sharply between 1902 and 1914. During the third period, there was an extended and gradual decline of about 25 per cent between the beginning of World War I and the end of the 1960s.

The results of both methods of statistical analysis (the annual rates and regression analysis) indicate that the early years of World War I were a watershed point of change, namely, from a long-term rise to a subsequent decline in the rates of sexual offences officially reported to the authorities. Not unexpectedly, these rates declined during both World Wars and increased briefly during the postwar years.

Acknowledging the limitations of these statistics, there are two possible explanations which may account for these trends: that the changes in the reported incidence of sexual offences represented basic changes in the extent to which these crimes were occurring at different times; or that the trends noted are only an artifact of changing legal definitions and statistical practices in the

classification and labelling of sexual offences. These explanations can be partially tested by reviewing the relationship of reported sexual offences as a proportion of: all offences committed against persons; and all types of criminal offences. The results of this analysis suggest that the trends which have occurred in the incidence of sexual offences are likely to have stemmed from basic changes in Canadian society, and are less likely to have resulted from variations in the classification procedures or from the incomplete reporting of offences.

If the long-term trends in the rates of reported sexual offences were due to changes in the reliability and completeness in the reporting of court cases, then comparable changes could be expected in the reporting of other categories of offences (for example, offences against persons and all types of offences).

Over the half century between 1876 and 1924, sexual offences (charges and persons charged) rose from 2 per cent of offences against the person to a peak of 18 per cent in 1924. If allowance is made for the reduced reliability of court statistics prior to the mid-1880s, and if 1888 is selected as the starting point, the ratio approximately doubled during this period. A change of the same magnitude occurred in the proportion of sexual offences among all indictable offences, representing a rise from 1.6 per cent to 3.5 per cent.

Between 1924 and 1938, these two proportions declined to about their pre-1900 levels, through a series of small cyclical fluctuations. Then, starting about 1948, the two rates peaked in the late 1950s and early 1960s. Since then, these proportions showed, within an erratic pattern of fluctuation, an overall decline.

The variation in the rates of these two broad categories of offences is comparable over a period of about a century, but is dissimilar to the trends for reported sexual offences. The results indicate that the relative proportions of sexual offences to all offences against the person and to all indictable offences have varied considerably. The sequence of changes occurring in these ratios suggests that there have been four identifiable periods since 1876 in the reported occurrence of sexual offences. The proportion of sexual offences rose during two periods (1876 to 1922; and 1950 to about 1960), and declined during two other periods (1922 to 1950; and from 1960 onward). These fluctuations suggest that the actual occurrence of sexual offences was also rising and falling cyclically, and providing a flow and ebb in the number of cases brought to court.

A number of factors may account for historical changes in the incidence of sexual offences known to the authorities. For example, the rise in the proportion of sexual offences relative to other sorts of offences from 1876 to 1922 can at least partly be attributed to the important legal initiatives undertaken during that period. Although incest had been an offence under the laws of some provinces, it became a federal criminal offence in 1890. The offence of "gross indecency" came into effect the same year. The offence of sexual intercourse with a feeble-minded female was enacted in 1886, and was gradually widened to include females who were insane (1887) and females who were deaf and dumb

(1892). The year 1886 also witnessed the enactment into Canadian criminal law of the offence of seducing girls between the ages of 12 and 16. Similarly, the offence of seduction under promise of marriage, which first appeared in 1886 and which originally applied only to females who were under 18, was widened in 1887 to apply to girls under 21. In 1890, the offence of unlawful "carnal knowledge" of a female, which since 1869 had applied to girls under 12, was extended to include girls 12 and 13. This offence was widened further in 1892: the accused's belief that the girl was older than the prescribed age was made irrelevant to the charge.

Another important criminal law amendment was introduced in 1890; henceforward, it was no defence to a charge of indecent assault on a female or male under 14 that the young person consented to the sexual act. These several legal initiatives, which materially widened the scope of sexual offences relating to children and youths in the last part of the nineteenth century undoubtedly account for much of the trend noted earlier. Other, less identifiable, factors also come into play. Changes in the law of evidence, for example, the necessity of "corroboration", may influence the extent to which alleged sexual offenders can be successfully prosecuted, and may, in turn, influence the charging practices of the police and the Crown. Enforcement policies and resource allocation within police forces and within provincial departments of the Attorney General will also bear on the charging and conviction rates relating to sexual offenders at a given time.

During the past three decades, an increasing number of persons charged with sexual offences has been remanded by the courts for psychiatric and psychological assessment, counselling and treatment. This option has been advocated strongly in briefs put forward by the medical specialty of psychiatry, in which it has been contended that sexual deviates can be dealt with more effectively by means other than imprisonment. From this viewpoint, persons who commit certain types of sexual acts are less appropriately viewed as criminals than as persons having some type of personal disorder, and in a few instances, as persons suffering from mental illness. To the extent that the option of treatment has been taken in the management of suspected sexual offenders in recent years, decisions of this kind would have served to reduce the number of convictions for sexual offences.

Another explanation that may partially account for the cyclical fluctuation in the reported incidence of sexual offences is the changing nature of the moral boundaries of Canadian society. From this perspective, during periods of heightened public morality, the types of marginal behaviour that are tolerated will diminish and, consequently, more of those persons displaying unacceptable behaviours are liable to be caught and to be punished more severely than when social and moral norms are more elastic. Conversely, during periods when society's moral boundaries are more flexible and permeable, there is likely to be greater tolerance of all forms of deviance, and less emphasis on punishment. When this happens, the social controls imposed on persons committing sexual offences are less severe and the punishments meted out are lighter.

If this explanation is valid, then the initial gradual increase in reported sexual offences could possibly have displaced to some degree the reporting of other offences considered to be less serious, resulting in sexual offences appearing as an increase in the proportion of all indictable offences. Following an extended period of growth in the reported rates of sexual offences, the moral boundaries may have subsequently contracted in response to pressures from the community and resulted in the application of more stringent sanctions. A response of this kind would be in force for a number of years until the moral boundaries again became more elastic, resulting in a gradual relaxation of social controls.

There is undoubtedly some validity in each explanation that may be drawn upon to account for the historical variation in the reported incidence of sexual offences. However, there is insufficient documentation to confirm or reject these several hypotheses. Regardless of why the changes happened, and recognizing the methodological limitations in the statistics, there can be little doubt that these changes did occur. **It is reasonable to conclude that in recent decades in Canada, there has been a gradual decline in the reported incidence of sexual offences.** This observation makes no inferences about the actual number of sexual offences which may have occurred in different periods.

## Specific Sexual Offences

The composite rates for all types of sexual offences mask variations in the historical incidence of specific types of sexual offences.

At the end of the nineteenth century, the annual charges for sexual intercourse with a minor varied between six and 10 per cent of all sexual offences. The proportion of this offence rose during the early 1900s to a peak of 28 per cent in the 1920s, and then decreased gradually to between six and seven per cent by the late 1960s.

The offences of incest and seduction were not recorded in published statistics until the 1890s. During the period for which information on incest is available, its proportion relative to all sexual offences has fluctuated between a low of 2.9 per cent and a high of 11.0 per cent, without any consistent trends.

The rates for the offence of seduction varied between about 10 and 15 per cent of all sexual offences in the 30 or so years after 1890. In the 1920s, a long-term decline began, decreasing to less than one per cent by 1948. At most, only one or two cases of seduction were recorded in each year during the 1960s and 1970s.

The proportion of rapes to all charges involving sexual offences ranged between about 18 and 28 per cent from 1890 to 1910. This proportion then decreased to a low of 4.3 per cent in 1936, and subsequently rose to an average annual level of about 10 per cent of all sexual offences by the end of the 1960s. Indecent assault, the offence with the highest incidence of the six types of



Table 13.1

Specified Sexual Offences as Percentage of All Sexual Offences (1876-1968)

Year	Sexual Intercourse with Minor*		Incest		Seduction	
	Charges	Convictions	Charges	Convictions	Charges	Convictions
1876	40	21	—	—	—	—
1878	2	2	—	—	—	—
1880	35	18	—	—	—	—
1882	35	21	—	—	—	—
1884	2	2	—	—	—	—
1886	2	2	—	—	—	—
1888	9	8	—	—	—	—
1890	8	13	—	—	10	7
1892	10	12	—	—	8	6
1894	8	10	8	3	13	5
1896	9	12	6	8	11	3
1898	7	7	5	1	16	5
1900	12	13	5	5	15	13
1902	11	12	4	2	16	8
1904	15	13	6	7	9	4
1906	17	21	3	2	13	6
1908	14	18	3	3	13	5
1910	16	18	8	11	11	11
1912	17	15	4	4	9	5
1914	12	12	4	4	17	12
1916	16	16	5	4	12	9
1918	17	21	3	2	15	12
1920	17	17	4	3	13	10
1922	20	21	6	9	15	11
1924	27	26	5	6	13	9
1926	28	28	5	5	13	9
1928	21	18	6	6	10	7
1930	20	18	8	10	9	8
1932	19	15	8	10	9	8
1934	21	18	7	8	22	7
1936	23	22	11	13	6	4
1938	18	17	9	11	4	3
1940	17	16	7	8	3	2
1942	14	13	7	7	3	3
1944	13	13	7	7	2	1
1946	13	11	6	6	1	1
1948	12	12	6	7	1	1
1950	11	10	4	4	0	1
1952	11	20	4	4	1	1
1954	10	10	5	5	1	1
1956	10	9	4	4	1	0
1958	11	12	5	5	0	0
1960	13	14	3	3	0	0
1962	10	10	3	3	—	—
1964	7	7	3	3	—	—
1966	7	7	3	3	—	—
1968**	6	7	3	3	—	—

Research and Analysis Division, Statistics Canada.

\*In statistics published prior to 1955 this category was designated "carnal knowledge of a young girl". From 1955 on, it was listed as "sexual intercourse".

\*\*1968 is the terminating year because of the absence of Alberta and Quebec figures for 1970 and later years.

Table 13.1 (continued)

Specified Sexual Offences as Percentage of All Sexual Offences (1876-1968)

Year	Rape		Indecent Assault		Other Sexual Offences	
	Charges	Convictions	Charges	Convictions	Charges	Convictions
1876	—	—	54	72	5	5
1878	48	40	45	53	4	6
1880	—	—	59	74	6	8
1882	—	—	63	75	2	4
1884	39	36	55	57	4	6
1886	41	36	54	59	4	3
1888	23	15	60	68	9	9
1890	29	21	46	53	8	7
1892	19	15	57	61	7	7
1894	18	15	46	58	6	6
1896	22	11	44	58	7	8
1898	21	17	43	59	7	10
1900	28	18	36	46	4	4
1902	20	19	42	50	7	9
1904	18	20	47	55	3	2
1906	16	13	41	45	11	13
1908	18	9	46	58	6	2
1910	14	7	40	42	11	12
1912	12	8	49	57	9	12
1914	11	7	42	48	14	17
1916	9	5	43	49	13	16
1918	9	5	40	41	16	19
1920	8	6	43	41	16	22
1922	8	6	38	38	12	15
1924	6	5	37	42	10	11
1926	6	6	36	40	11	12
1928	11	9	39	44	11	13
1930	9	5	37	41	13	18
1932	8	6	41	44	14	18
1934	7	7	40	44	12	15
1936	4	3	37	34	19	23
1938	8	6	40	41	21	22
1940	7	6	45	45	20	23
1942	7	5	46	46	24	25
1944	9	5	43	44	26	30
1946	8	6	47	47	27	30
1948	10	5	44	43	28	32
1950	13	8	49	50	23	27
1952	13	8	49	52	21	25
1954	7	5	41	39	36	40
1956	11	7	39	39	36	40
1958	11	7	42	41	31	36
1960	10	7	52	51	22	25
1962	8	6	56	55	23	26
1964	10	6	48	46	33	37
1966	9	6	57	58	23	26
1968**	15	10	54	53	22	27

Research and Analysis Division, Statistics Canada.

\*\*1968 is the terminating year because of the absence of Alberta and Quebec figures for 1970 and later years.

sexual offences, varied between 36 and 63 per cent. Its proportion, which was generally stable within the mid-40 per cent range during the late 1890s and early 1900s, dropped to the upper 30 per cent range in the 1920s, and then rose again to the upper 40 per cent range by the early 1950s.

The final category of "other" sexual offences included: buggery, bestiality and gross indecency. As a proportion of all sexual offences, the rates for this "other" category rose to a peak of 36 per cent between 1954 and 1956, and then declined to a range between 20 and 30 per cent in the 1960s.

These results indicate that indecent assault has always been the most frequently reported offence. During this period of almost a century, no other offence ranked consistently in second place. At different times, the second most frequently reported offence was: sexual intercourse with a minor; rape; seduction; and "other" sexual offences. Of the six categories of sexual offences for which historical statistics were reviewed, only incest was consistently at or near the bottom in relation to its reported occurrence.

Two of the three categories of sexual offences in which children are most frequently victims (sexual intercourse with a minor and seduction) peaked in reported occurrence in the 1920s, and subsequently declined. **These results confirm the conclusion (based on the spline regression analysis) that not only had the reported occurrence of all types of sexual offences declined during the several decades preceding the 1970s, but that the proportion of reported sexual offences committed against children had also declined during this period.**

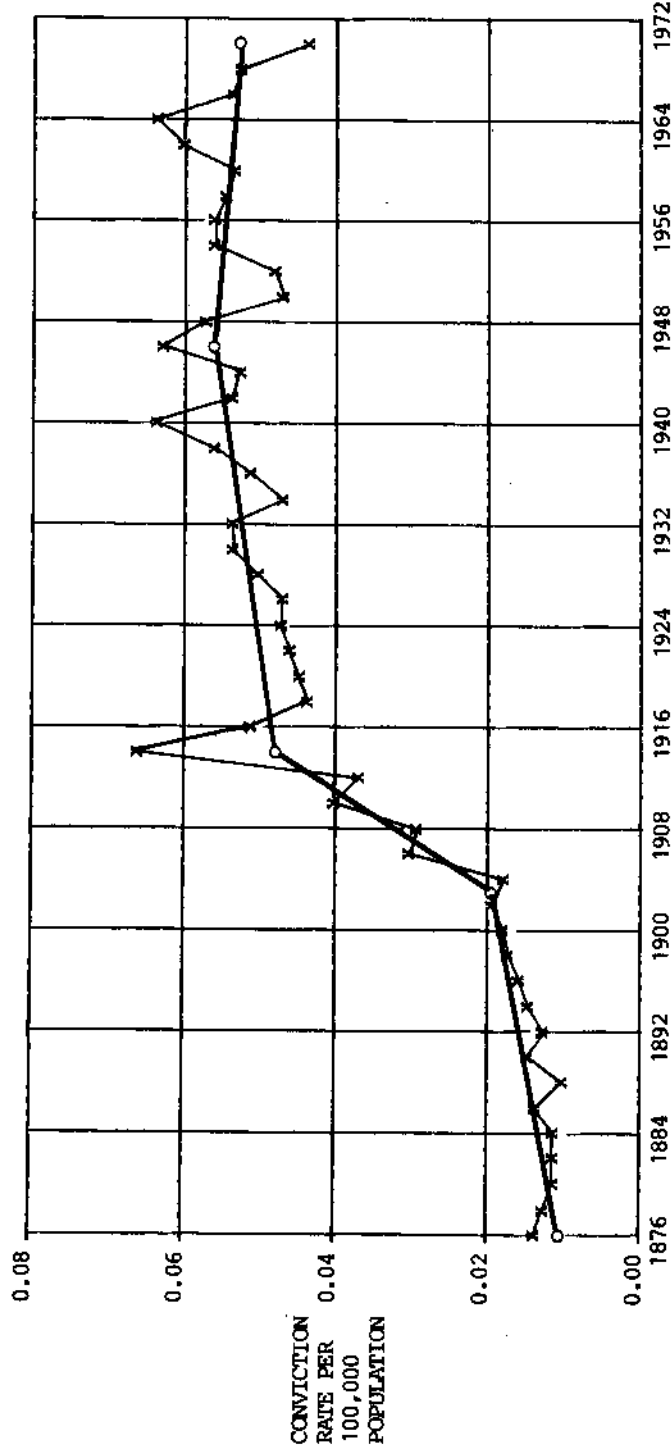
These observations on the changing patterns of sexual offences against children do not indicate the nature of such offences. As the findings given elsewhere in this Report show, some sexual offences, for example, indecent assaults, encompass a wide variety of sexual acts.

## Conviction Rates

In comparison with statistics based on charges and/or persons charged with offences, statistics on convictions offer a clearer indication of the application of prevailing legal standards in different periods. Between 1876 and the early 1970s there was a sharp increase in the number of convictions for sexual offences. During the 1880s and 1890s, there were fewer than 100 convictions annually; the number of the convictions rose to almost 500 each year by around 1930 and then doubled to approximately 1000 convictions per year by 1960. The number of convictions remained about this level until the early 1970s. When the number of convictions is converted to a rate per 100,000 persons, the results indicate that the apparent absolute increase during this period was offset by growth in the Canadian population.

The conviction rates for sexual offences are depicted in Graph 13.1 (based on a spline regression analysis). In comparison with the rates of charges and

Sexual Offence Conviction Rate, 1876-1970



YEARS, 1876 TO 1970

RAW DATA SERIES = X  
MULTI-SEGMENT LINE = O

SOURCE: Statistics of Criminal and Other Offences, Statistics Canada. Persons convicted selected sexual offences per 100,000 population; Biennial Data

FIRST SLOPE = 0.00  
Y ZERO INTERCEPT = 0.01  
SECOND SLOPE = 0.0  
Y ZERO INTERCEPT = 0.07  
THIRD SLOPE = 0.00  
Y ZERO INTERCEPT = 0.04  
FOURTH SLOPE = -0.00  
Y ZERO INTERCEPT = 0.06

FIRST TURNING POINT X:28.50 Y:0.02  
SECOND TURNING POINT X:30.50 Y:0.05  
THIRD TURNING POINT X:70.50 Y:0.06

TOTAL SSR = 0.00

Table 13.2

Convictions as Percentages of Charges For: Sexual Offences,  
Offences Against the Person and All Indictable Offences (1876-1968)

Year (1876-1968)	Type of Offence		
	Sexual Offences	Offences Against Person	All Indictable Offences
	Per Cent	Per Cent	Per Cent
1876	39.9	72.1	76.0
1878	36.4	67.4	71.1
1880	44.2	68.1	69.0
1882	41.9	70.5	70.0
1884	52.5	58.1	57.0
1886	52.0	64.8	63.8
1888	56.4	62.7	63.9
1890	56.3	65.8	67.6
1892	45.7	67.1	67.3
1894	49.4	69.5	69.2
1896	45.9	68.4	70.4
1898	47.7	65.7	71.0
1900	44.9	63.8	68.5
1902	50.0	60.7	66.3
1904	42.6	63.7	68.2
1906	57.0	69.4	74.2
1908	46.8	70.9	74.4
1910	58.9	74.9	76.4
1912	57.1	74.5	77.2
1914	59.1	71.7	76.5
1916	58.3	73.9	80.0
1918	59.7	70.9	62.6
1920	59.7	72.0	79.5
1922	56.4	68.0	74.7
1924	60.6	72.1	78.7
1926	64.6	74.5	79.4
1928	64.8	74.2	81.4
1930	65.2	71.7	81.9
1932	67.2	70.6	83.4
1934	66.6	71.7	84.7
1936	69.8	71.5	84.8
1938	72.5	75.3	85.5
1940	76.2	77.3	87.3
1942	76.7	76.8	86.8
1944	71.9	76.7	87.4
1946	76.2	78.6	87.0
1948	71.7	77.0	86.6
1950	76.1	77.7	86.0
1952	76.9	76.2	84.8
1954	82.1	78.6	87.4
1956	80.6	80.6	88.9
1958	82.2	81.4	89.9
1960	81.3	81.6	90.1
1962	82.2	82.3	90.1
1964	83.3	83.5	90.4
1966	80.2	83.1	89.4
1968	76.1	81.0	87.7

Research and Analysis Division, Statistics Canada.

persons who were charged, the conviction rates for sexual offences show greater stability and fewer short-term cyclical fluctuations. During the last quarter of the nineteenth-century, the conviction rates for sexual offences remained relatively stable, rising to a rate of just under 2.0 convictions per 100,000 persons by the turn of the century. During the second period, starting about a decade later, there was a sharp increase: the conviction rate for sexual offences more than doubled during this period. Starting in 1914, and continuing during World War I, there was a brief but sharp decline in the conviction rates for sexual offences. Between the two World Wars, there was a slight increase in these rates; following World War II, there has been an equally slight decrease.

While there was no appreciable change in the conviction rates for sexual offences between the end of World War I and the early 1970s, there was a sharp increase in the proportion of cases resulting in convictions. From 1876 to 1910, this proportion fluctuated between 30 and 52 per cent. Between 1910 and 1922, the proportion remained in a range between 56 and 59 per cent. From 1922 to the 1960s, there was a steady increase: the proportion of cases heard to convictions reached a plateau at above the 80 per cent level. **These results show clearly that, in relation to cases of sexual offences which came to their attention, police and prosecutors have in recent years been more successful in securing convictions for sexual offences than in the past.**

The rates of convictions to charges for sexual offences rose sharply in comparison to comparable rates, which were initially higher for: all offences against the person; and all indictable offences. The sexual conviction rate (as a percentage of charges) was, until the early 1900s, between one-third and one-half of those for the other types of offences (against the person and all indictable offences); it rose to parity with the other two series toward the end of this period.

This increase in the conviction rates for sexual offences occurred in all regions of the country, but was consistently higher in some provinces than in others. During this period of about a century, the rank order of the provinces in terms of these rates remained relatively stable. New Brunswick and Quebec were, in that order, the provinces with consistently the highest conviction rates, while Nova Scotia and Ontario were consistently the provinces with the lowest conviction rates. **These trends suggest that there may have been long-standing differences between provinces in the administration of justice relating to the prosecution of sexual offenders.**

During the 1960s and early 1970s, the range of differences narrowed in the provincial conviction rates for sexual offences. At this time the rates for British Columbia, Alberta, Manitoba, Ontario and Nova Scotia converged into a closer cluster for three categories of offences: sexual offences; offences against the person; and all indictable offences. **These rising and converging rates suggest that in recent times there may have been a more consistent and uniform application of prosecutorial practice than in the past.**

The trends in the ratio of convictions to charges have not been uniform in relation to specific categories of sexual offences. These historical trends for specific categories of sexual offences include:

*Variation in Conviction Rates*

- High year-to-year variability in conviction rates for: sexual intercourse with a minor; incest; and rape.
- High rates in the 1800s for indecent assault. These rates decreased to a relatively low level by the 1970s.

*Level of Convictions* (relative to the average for all sexual offences)

- Significantly below average for rape.
- Significantly below average for sexual intercourse with a minor.
- Significantly above average for incest.

*Provincial Variations*

- Quebec was consistently above, and Ontario consistently below, the national average for each category.

These trends in the ratio of convictions to charges suggest that sexual offences in which children have been victims have not been handled differently than those that were committed against adults.

## Sentences

The sentences handed down by courts are a measure of the relative gravity with which different types of acts are regarded by the courts. Sentences for sexual intercourse with a minor appear to have become less severe over the years; prior to 1900, over half of the persons who were convicted of this offence were sentenced to a term in penitentiary, but this proportion has subsequently declined. Sentences for incest have generally remained severe; in the 1960s, almost two-thirds of persons convicted of incest were sentenced to penitentiary. Sentences for rape have shown a slow progressive rise in severity: penitentiary terms (two years or more) were imposed in about half of all such convictions around the turn of the century, in contrast to a proportion of almost two-thirds by the 1960s. Indecent assault convictions have, with general consistency, resulted in sentences that have been light, and appear to have gotten progressively lighter. The majority of offenders convicted of indecent assault have been sentenced to incarceration in provincial institutions, with 5-15 per cent of convicted offenders receiving penitentiary terms. The lightest sentences of all have been for sexual offences in the "other" category, especially for the offence of bestiality.

## Summary

The review of historical statistics on charges and convictions for sexual offences reveals a number of significant trends in the reported incidence of these offences. Between 1876 and the early 1970s, these changes include:

1. *Incidence of Charges:* The rates of charges for sexual offences rose gradually at the turn of the century, peaked in 1914, and declined in recent decades to a level of about 6.0 charges per 100,000 persons by the early 1970s.
2. *Incidence of Specific Sexual Offences:* Offences comprising sexual intercourse with a minor were initially between six and 10 per cent of all offences, peaked at 28 per cent in the 1920s, and decreased to between six and seven per cent in the 1960s. The rates for incest have fluctuated between 2.9 and 11.0 per cent of all sexual offences. In recent years, there have been few reported cases of seduction.
3. *Conviction Rates:* The conviction rates for sexual offences were at a level just under 2.0 per 100,000 persons in 1900; these rates increased sharply before World War I, and then declined. There has been no appreciable change in the convictions rates for sexual offences between the end of World War I and the early 1970s.
4. *Proportion of Convictions to Charges:* Of the cases of sexual offences that have been brought to court, there has been a sharp increase in the proportion of persons who have been convicted. Between 1876 and 1910, the proportion of convictions to charges was between 30 and 52 per cent; from 1910 to 1922, it rose to a range between 56 and 59 per cent; and from 1922 onward, it increased to a level above 80 per cent.
5. *Provincial Variations:* There have been longstanding differences between provinces with respect to conviction rates for sexual offences. In recent years, there has been a trend towards a convergence in these rates.
6. *Conviction Rates — Children and Adults:* There are no consistent differences in the conviction rates for sexual offences in which children or adults were victims.
7. *Sentences:* The trends for the sentencing of convicted sexual offenders have differed for specific types of sexual offences. Sentences for incest have generally been severe. In contrast, sentences for sexual intercourse with a minor and indecent assault have become less severe in recent years, while those for rape have increased in severity.



## Chapter 14

# Evidence of Children

A crucial issue in cases of child sexual abuse is whether the young victim will be deemed legally competent to testify. Since the child typically is the only witness to the assault other than the offender (who cannot be compelled to testify), eliciting the child's testimony in court will usually be vital in order to secure a conviction.<sup>1</sup> The legal tests which determine whether a child may testify in court are reviewed in this chapter.

### Historical Background

At common law, no person could testify at trial unless he or she had sworn an oath before the court that he or she would speak truthfully;<sup>2</sup> this requirement applied to adults and children alike.<sup>3</sup> The historical rationale behind the oath requirement was to admonish witnesses to speak the truth under pain of divine retribution.<sup>4</sup>

It was recognized in the late nineteenth century, however, that disempowering children from testifying because they did not understand the nature of an oath tended to thwart the protections the criminal law sought to afford them. In 1885, the British Parliament passed a statute (whose long title was *an Act to make further provisions for the Protection of Women and Girls, the suppression of brothels, and other purposes*) which allowed a "child of tender years" to testify in court even though the child's evidence was not taken upon oath.<sup>5</sup> The statute provided that, on charges of "unlawfully and carnally knowing" a girl under the age of 13, or of attempting to do so, the evidence of a child complainant or other child witness of tender years could be received even though unsworn, "provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused."<sup>6</sup>

A comparable provision was enacted by the Canadian Parliament in 1890, and applied to the offences of unlawful carnal knowledge of a girl under the age of 14, or an attempt to do so, and of indecent assault on a female.<sup>7</sup> The

1892 *Criminal Code* incorporated a substantially similar provision.<sup>8</sup> The original *Canada Evidence Act* of 1893 likewise adopted a policy of allowing the unsworn evidence of children to be received and acted upon, provided such evidence was corroborated, and extended it to all proceedings under federal law.<sup>9</sup> The sworn-unsworn distinction with respect to the evidence of young children was later introduced into the *Juvenile Delinquents Act*<sup>10</sup> and into most provincial evidence acts. In the 1955 revision of the *Criminal Code*, the mandatory and somewhat wider<sup>11</sup> corroboration requirement enacted in 1890 (which applied to the unsworn evidence of children in trials for certain sexual offences) was made applicable to all *Criminal Code* offences, sexually related or not.<sup>12</sup>

### Current State of the Law<sup>13</sup>

In trials for sexual offences under the *Criminal Code*, the qualification of a "child of tender years" (namely, a child under 14)<sup>14</sup> to testify is governed by section 16 of the *Canada Evidence Act*,<sup>15</sup> which provides:<sup>16</sup>

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

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

Most provincial<sup>17</sup> and territorial evidence acts contain a similar provision,<sup>18-20</sup> as did the recently repealed *Juvenile Delinquents Act*.<sup>21</sup> The law presumes that a child of 14 years of age or older has the capacity to understand the nature of an oath and hence to give sworn evidence.<sup>22</sup> Accordingly, the great majority of problems of competency arise with children under 14 who are called as witnesses at criminal or civil trials.

Under section 16 of the *Canada Evidence Act* and analogous provisions, when a child under 14 is offered as a witness, the trial judge conducts an inquiry to determine whether the child is competent to testify. Where the accused is being tried by jury, the jury remains in the courtroom during this inquiry. If the child is eventually ruled competent to testify, whether upon oath or unsworn, the jury may consider the child's conduct at the hearing in assessing the weight which should be given to his or her subsequent testimony.<sup>23</sup>

In the hearing pursuant to section 16, the trial judge must first determine whether the child understands the nature of an oath. The essence of this inquiry is whether the child understands the moral obligation to tell the truth implicit in the taking of an oath.<sup>24</sup> It is not necessary that the child believe in God or in another Supreme Being, nor is it necessary that the child appreciate

the spiritual "consequences" of lying upon oath,<sup>25</sup> whatever they may be.<sup>26</sup> If the child meets this test, he or she may be sworn.

Where, however, the trial judge is not satisfied that the child understands the nature of an oath, a further inquiry must be made to determine whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. If the judge is satisfied that the child has such intelligence and understanding, the unsworn evidence of the child may be heard.<sup>27</sup>

The usual procedure on the inquiry is for the judge to question the child briefly about his or her age, family and schooling, and about the difference between truth and falsehood. After the judge has completed this examination, the respective counsel may ask questions of the child, after which the judge rules on whether the child may testify either under oath, unsworn, or not at all.<sup>28</sup> Canadian courts have held that counsel have an obligation to prepare child witnesses in this respect before the commencement of the trial.<sup>29</sup> In appropriate cases, the trial may be adjourned in order to provide counsel an opportunity to do so.<sup>30</sup>

The law traditionally has assumed that the testimony of children may suffer from certain frailties which diminish its reliability and which render it incautious for a court to make a legal determination on the basis of a child's testimony standing alone. A child's relative immaturity, susceptibility to errors in perception, limited powers of recall and articulation, vulnerability to the persuasive influence of others, and other factors,<sup>31</sup> have variously been put forward as justifying the differential treatment of children's as opposed to adults' evidence.<sup>32</sup> Accordingly, where a child under 14 testifies under oath, the trial judge must nonetheless warn the jury about the possible unreliability of the child's evidence and the danger of acting on the child's uncorroborated evidence.<sup>33</sup> Further, where a child gives unsworn evidence, corroboration of the child's evidence is required as a matter of law.<sup>34</sup>

In proceedings under the *Young Offenders Act*,<sup>35</sup> the qualification of a "child" or a "young person"<sup>36</sup> to testify is governed by sections 60 and 61 of the Act, which provide:

60 (1) In any proceedings under this Act where the evidence of a child or a young person is taken, it shall be taken only after the youth court judge or the justice, as the case may be, has

- (a) in all cases, if the witness is a child, and
- (b) where he deems it necessary, if the witness is a young person, instructed the child or young person as to the duty of the witness to speak the truth and the consequences of failing to do so.

(2) The evidence of a child or a young person shall be taken under solemn affirmation as follows:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

(3) Evidence of a child or a young person taken under solemn affirmation shall have the same effect as if taken under oath.

61 (1) The evidence of a child may not be received in any proceedings under this Act unless, in the opinion of the youth court judge or the justice, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence.

The evidence of children (and young persons) may only be taken under solemn affirmation under the Act. Section 61(1) qualifies section 60(2), with the result that a child's evidence is to be taken under solemn affirmation only where the judge or justice is of the opinion that the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Requiring the evidence of children to be given under solemn affirmation removes the basis for distinguishing between sworn and unsworn evidence; the provision that "no case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence" removes the protection afforded by sworn evidence by treating all children's evidence as inherently unreliable. A child who could give evidence under oath in other proceedings is thus at a disadvantage when testifying under the *Young Offenders Act*. The requirement of a solemn affirmation need not have involved removing the protection afforded by sworn evidence. Bill S-33 provides that no corroboration of evidence is required.

## Canada Evidence Bill, 1982 (Bill S-33)

Bill S-33, which, if enacted, would repeal the existing *Canada Evidence Act*<sup>37</sup> and introduce significant changes to the Canadian law of evidence, provides:

96. Every witness shall be required, before giving evidence, to identify himself and either to take an oath or make a solemn affirmation at his option, in the form and manner provided by the law that governs the proceeding.

97. (1) Where a proposed witness is a person of seven or more but under fourteen years of age or is a person whose mental capacity is challenged, the court, before permitting that person to give evidence, shall conduct an inquiry to determine whether, in its opinion, that person understands the nature of an oath or a solemn affirmation and is sufficiently intelligent to justify the reception of his evidence.

(2) A party who challenges the mental capacity of a proposed witness of fourteen or more years of age has the burden of satisfying the court that there is a real issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

98. A person under seven years of age or a person who cannot give evidence under section 97 shall be permitted to give evidence on promising to tell the truth if, in the opinion of the court after it has conducted an inquiry, that person understands that he should tell the truth and is sufficiently intelligent to justify the reception of his evidence.

125. (1) No corroboration of evidence is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.

(2) The court shall instruct the trier of fact on the special need for caution in any case in which it considers that an instruction is necessary, and shall in every case give the instruction with respect to

- (a) the evidence of a witness who has testified without taking an oath or making a solemn affirmation;
- (b) the evidence of a witness who, in the opinion of the court, would be an accomplice of the accused if the accused were guilty of the offence charged;
- (c) the evidence of a witness who is proved to have been convicted of perjury;  
or
- (d) a charge of treason, high treason or perjury where the incriminating evidence is that of only one witness.

These proposals would effect a welcome, if modest, liberalization of the competency rules with respect to children's evidence. Although a child between the ages of seven and 14 would be entitled to "affirm" instead of taking the oath, the common criterion for the reception of both sworn and unsworn evidence would continue to be the perceived intelligence of the child. The most significant reform proposed by Bill S-33 is the repeal<sup>38</sup> of section 586 of the *Criminal Code*, which provides that "no person shall be convicted on an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused." Under Bill S-33, although a trial judge would be required to warn the jury of the special need for caution in acting on the unsworn evidence of a child, the corroboration of a child's unsworn evidence would no longer be required as a matter of law.<sup>39</sup>

## Summary

A central term of reference of the Committee was "to conduct a study to determine the adequacy of the laws in Canada in providing protection from sexual offences against children and youths, and to make recommendations for improving this protection." **The Committee is strongly of the view that Canadian children cannot fully enjoy the protections the law seeks to afford them unless they are allowed to speak effectively in their own behalf at legal**

proceedings arising from allegations of sexual abuse. Accordingly, the Committee recommends that there be no special rules of testimonial competency with respect to children; a young person's testimony should be heard and weighed by the trier of fact in the same manner as the testimony of any other witness in the proceedings. Given the generally private nature of child sexual abuse, the overarching legal principle that all relevant evidence should be admissible in court takes on added significance. In the Committee's judgment, those who believe that fetters should be placed on the reception of young children's testimony by way of special competency requirements should bear the onus of demonstrating that the approach advocated by the Committee is contrary to the demands of justice.

The Committee draws support for its approach to children's testimony from the following grounds:

1. To make a child's testimonial competency contingent upon or influenced by the child's age fails to take into account the cognitive and developmental differences among children of the same age and, in the Committee's view, is wrong in principle.

Further, the common law was itself equivocal in this regard. For example, one eighteenth century case stated that a child under the age of seven years could, in appropriate circumstances, be sworn,<sup>40</sup> while another case, decided in the same century, expressed the view that only a child nine years of age or older could take the oath.<sup>41</sup> In *Sankey v. The King*,<sup>42</sup> Chief Justice Anglin of the Supreme Court of Canada stated that "of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath."<sup>43</sup> That an age-presumptive test of competency tends to be arbitrary is also borne out by actual judicial experience with Canadian children of different ages. In one case, a child five years and nine months old was deemed competent to take the oath,<sup>44</sup> while in another, a child four years-old was qualified to give unsworn evidence.<sup>45</sup>

2. The legal tests for the reception of children's evidence either upon oath (sworn) or not upon oath (unsworn) have become very close together in practice,<sup>46</sup> notwithstanding that the corroboration requirements are completely different depending on whether the child gives sworn or unsworn evidence. The Committee considers that the subtle practical distinction between these two tests is far too tenuous a basis upon which to support a legal distinction.
3. The Committee's research findings indicate that the conventional assumptions about the veracity and powers of recall and articulation of young children are largely unfounded and, in any event, vary significantly among different children, as they do among adults.
4. Permitting the trier of fact to determine the weight that should be accorded a child's testimony and generally to assess the child's credibility, without "qualifying" the child witness beforehand, is by no means unprecedented in common law jurisdictions. Rule 601 of the United States

Federal Rules of Evidence abolishes all specific grounds of testimonial incompetency, including those relating to children, and renders the child's testimony a matter of weight to be determined by the trier of fact, rather than a matter of admissibility or presumed unreliability.<sup>47</sup> Thirteen states have adopted this standard in proceedings under state criminal law.<sup>48</sup>

The common sense approach to child credibility implicit in Rule 601 also finds strong support in the scholarly writings of the two leading American commentators (Wigmore and McCormick) on the law of evidence.<sup>49</sup> The Committee adopts the following comments of Wigmore:<sup>50</sup>

A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure "a priori" the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable. The desirability of abandoning this attempt and abolishing all grounds of mental or moral incapacity has already been noted. . . The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is on their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come.

5. The Committee would add, however, that in the context of child sexual abuse, children's alleged "disposition to weave romances and to treat imagination for verity" is strongly refuted by the research findings obtained in its several national surveys.

The approach to children's evidence advocated by the Committee finds additional support in the *Evidence Code* proposed by the Law Reform Commission of Canada.<sup>51</sup> The Law Reform Commission states, in its commentary on the pertinent provisions of the *Evidence Code*:<sup>52</sup>

There are no special rules of competency in the Code with respect to children. The frailties inherent in the testimony of immature witnesses should affect the weight of the evidence rather than its admissibility.

**In light of these several considerations, the Committee recommends that the *Canada Evidence Act*, the *Young Offenders Act* and each provincial and territorial evidence act be amended to provide that:**

1. Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, and not a matter of admissibility.
2. A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying.

3. **The court shall instruct the trier of fact on the need for caution in any case in which it considers that an instruction is necessary.**

**In the Committee's view, these reforms would help to ensure that Canadian children receive the full benefit of the protection the law seeks to afford them.**



## References

### Chapter 14: Evidence of Children

- <sup>1</sup> Eliciting the child's testimony in court will not be necessary where the accused enters a guilty plea, or where the Crown secures the probative testimony of other witnesses.
- <sup>2</sup> Schiff, *Evidence in the Litigation Process* (Toronto: Carswell, 1978) at 141.
- <sup>3</sup> *R. v. Brasier* (1779), 168 E.R. 202.
- <sup>4</sup> Schiff, *supra*, note 2.
- <sup>5</sup> *Criminal Law Amendment Act, 1885*, 48 & 49 Vict., c. 69, s. 4. (U.K.).
- <sup>6</sup> *Ibid.*
- <sup>7</sup> *An Act further to amend the Criminal Law*, S.C. 1890, c. 37, s. 13.
- <sup>8</sup> *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 685.
- <sup>9</sup> *The Canada Evidence Act, 1893*, S.C. 1893, c. 31, s. 25.
- <sup>10</sup> *The Juvenile Delinquents Act, 1908*, S.C. 1908, c. 40, s. 15.
- <sup>11</sup> Section 586 of the *Criminal Code* provides that a child's unsworn evidence must be corroborated "in a material particular by evidence that implicates the accused" (emphasis added), while section 16(2) of the *Canada Evidence Act* provides that such evidence must be corroborated "by some other material evidence".
- <sup>12</sup> S.C. 1953-54, c. 51, s. 566.
- <sup>13</sup> This section has been adapted from the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Ottawa: Department of Justice, 1981) at 285-91.
- <sup>14</sup> See *R. v. Antrobus* (1946), 87 C.C.C. 118 (B.C.C.A.); *R. v. Nicholson* (1950), 98 C.C.C. 291 (B.C.S.C.); and *R. v. Armstrong* (1959), 125 C.C.C. 56 (B.C.C.A.).
- <sup>15</sup> *Canada Evidence Act*, R.S.C. 1970, c. E-10.
- <sup>16</sup> *Ibid.*, s. 16.
- <sup>17</sup> British Columbia: *Evidence Act*, R.S.B.C. 1979, c. 116, s.5.  
Alberta: *Alberta Evidence Act*, R.S.A. 1980, c. A-21, s. 20.  
Saskatchewan: *Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16, s. 42.  
Manitoba: *Manitoba Evidence Act*, R.S.M. 1970, c. E-150, s. 26.  
Ontario: *Evidence Act*, R.S.O. 1980, c. 145, s. 18.  
Quebec: *Code of Civil Procedure*, R.S.Q. 1980, c. C-25, s. 301.  
New Brunswick: *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 24.  
Nova Scotia: *Evidence Act*, Cons. Stat. N.S. 1980, c. E-18, s. 57A.  
Prince Edward Island: *Family and Child Services Act*, S.P.E.I. 1981, c. 12, s. 30.  
Newfoundland: *The Evidence (Amendment) Act*, S. Nfld. 1972, No. 3, s. 2.
- <sup>18</sup> Yukon Territory: *Evidence Ordinance*, R.O.Y.T. 1971, c. E-6, ss. 23, 17.
- <sup>19</sup> Northwest Territories: *Evidence Ordinance*, R.O.N.W.T. 1974, c. E-4, ss. 23, 17.
- <sup>20</sup> The *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 13 at 285-86, is in error in this regard.
- <sup>21</sup> *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, s. 19.
- <sup>22</sup> *R. v. Armstrong* (1959), 125 C.C.C. 56 (B.C.C.A.).

- <sup>23</sup> *R. v. Bannerman* (1966), 55 W.W.R. 257 (Man. C.A.), *aff'd* (1966), 57 W.W.R. 736 (S.C.C.); *R. v. Reynolds* (1950), 34 Cr. App. R. 60 (C.C.A.).
- <sup>24</sup> *Fletcher v. The Queen* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.); *R. v. Bannerman, ibid.*; *R. v. Truscott*, [1967] S.C.R. 309; *R. v. Taylor* (1970), 1 C.C.C. (2d) 321 (Man. C.A.); and *R. v. Dinsmore*, [1974] 5 W.W.R. 121 (Alta. S.C.).
- <sup>25</sup> *R. v. Bannerman, supra*, note 23; *Fletcher v. The Queen, supra*, note 24. But see *R. v. Budin* (1981), 58 C.C.C. (2d) 352 (Ont. C.A.).
- <sup>26</sup> *R. v. Bannerman, supra*, note 23.
- <sup>27</sup> *R. v. Bannerman, supra*, note 23.
- <sup>28</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, supra*, note 13 at 286.
- <sup>29</sup> *R. v. Bannerman, supra*, note 23; *R. v. Brown* (1951), 99 C.C.C. 305 (N.B.C.A.); and *R. v. Armstrong* (1907), 12 C.C.C. 544 (Ont. C.A.).
- <sup>30</sup> *R. v. Cox* (1898), 62 J.P. 89; *R. v. Baylis* (1849), 13 L.T. (O.S.) 509; and *R. v. Nicholas* (1846), 175 E.R. 102.
- <sup>31</sup> See generally Lloyd, "The Corroboration of Sexual Victimization of Children" in *Child Sexual Abuse and the Law* (3rd ed. Washington, D.C.: American Bar Association, 1982) at 103 ff.
- <sup>32</sup> *Ibid.*, at 103-106. See also Melton, Bulkley, and Wilkan, "Competency of Children as Witness" in *Child Sexual Abuse and the Law, ibid.*, at 125-39.
- <sup>33</sup> *Kendall v. The Queen*, [1962] S.C.R. 469; *R. v. Burdick* (1975), 27 C.C.C. (2d) 497 (Ont. C.A.); and *R. v. Tennant and Naccarato* (1975), 23 C.C.C. (2d) 80 (Ont. C.A.).
- <sup>34</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 586; *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 16(2); *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, s. 19(2).
- <sup>35</sup> *Young Offenders Act*, S.C. 1980-81-82, c. 110.
- <sup>36</sup> *Ibid.*, section 2(1): In this Act, "child" means a person who is or, in the absence of evidence to the contrary, appears to be under the age of twelve years; "young person" means a person who is or, in the absence of evidence to the contrary, appears to be (a) twelve years of age or more, but (b) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation, and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act.
- <sup>37</sup> *Canada Evidence Act*, R.S.C. 1970, c. E-10.
- <sup>38</sup> *Canada Evidence Act*, 1982, Bill S-33, 1980-81-82 (32nd Parl. 1st Sess.).
- <sup>39</sup> *Ibid.*, s. 125.
- <sup>40</sup> *R. v. Brasier, supra*, note 3.
- <sup>41</sup> *R. v. Travers* (1726), 93 E.R. 793 (K.B.).
- <sup>42</sup> [1927] S.C.R. 436.
- <sup>43</sup> *Ibid.*, at 440.
- <sup>44</sup> *Strachan v. McGinn* (1936), 50 B.C.R. 394 (S.C.).
- <sup>45</sup> *R. v. Pailleur* (1909), 20 O.L.R. 207 (C.A.).
- <sup>46</sup> See, e.g., *Fletcher v. The Queen, supra*, note 24.
- <sup>47</sup> Fed. Rules Evid. Rule 601, 28 U.S.C.A.
- <sup>48</sup> Ark. Stat. §28-1001 (Rule 601) (1975); Fla. Stat. §90.601 (1978); Me. R. Evid. 601 (1976); Mich. Evid. Rule 601 (1978); Neb. Rev. Stat. §27-601 (1975); Nev. Rev. Stat. 50.015 (1977); N.J. Stat. §2A:81-1 (1976); N.M. Rule of Evid. 601 (1978); N.D.R. Evid. 601 (1977); Pa. Consol. Stat. tit. 42, §5911 (1978); Wis. Gen. Stat. §906.01 (1975); Wyo. R. Evid. 601 (1978).
- <sup>49</sup> Wigmore, 2 *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed. Boston: Little, Brown and Co., 1940) §509 at 600-601; McCormick, *Handbook of the Law of Evidence* (2nd ed. St. Paul: West Publishing Co., 1972) §62 at 140-41.
- <sup>50</sup> Wigmore, *ibid.*, at 600-601.
- <sup>51</sup> Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Supply and Services Canada, 1977), ss. 50-53.
- <sup>52</sup> *Ibid.*, at 87.

## Chapter 15

# Corroboration

The requirement of corroboration is closely bound up with the different legal tests which determine whether a child may testify at a judicial proceeding. As noted in Chapter 14, where a child gives evidence not under oath (unsworn evidence), the child's testimony needs to be corroborated, namely, there must exist some additional evidence which is consistent with the child's story and which tends to confirm his or her credibility as a witness. **Although Canadian law relating to corroboration, particularly in the context of sexual offences, has undergone significant changes in recent years, these statutory reforms have not reflected any change in the conventional assumptions about the credibility of children. Canadian legal doctrine continues to assume that a young child's testimony is inherently untrustworthy.**

This chapter reviews the nature of corroborative evidence, the situations in which it is required by law, and the conventional justifications for requiring that a young person's testimony be corroborated.

### The Nature of Corroboration

Recent decisions of the Supreme Court of Canada<sup>1</sup> have tended to cast aside "the technical *impedimenta* with which the idea of corroboration has increasingly been loaded and return(ing) to the conceptual basics."<sup>2</sup> The Supreme Court has held that the notion of corroboration at common law simply requires that there be confirmation of a material particular of the evidence of the witness whose testimony needs to be corroborated. The key issue is whether the witness's credibility is strengthened by other pertinent evidence, regardless of whether such evidence also serves to implicate the accused.<sup>3</sup> In relation to this issue, the *Criminal Code*<sup>4</sup> and the *Canada Evidence Act*<sup>5</sup> contain statutory provisions which, by their very wording, restrict the scope for judicial reassessment of the corroboration requirement for the unsworn evidence of young children. The provision under the *Young Offenders Act*<sup>6</sup> affects all children's evidence which may be received, since under the Act the evidence of a child may be taken only under solemn affirmation.

## The Required Quality of Corroborative Evidence

Essentially, corroboration is evidence, independent of the witness whose testimony requires corroboration, that tends to show that the testimony of such witness is true. Where corroboration of a witness's testimony is required, the trier of fact must determine whether the witness is credible and, if so, whether the testimony of the witness is strengthened or confirmed (corroborated) by other evidence that is independent of the witness's testimony. Corroboration therefore serves to bolster the reliability of a witness whose testimony might otherwise (for a variety of reasons) be considered untrustworthy.<sup>7</sup>

## Evidence Which May Constitute Corroboration

Corroboration has proven to be an elusive concept in the law of evidence, and the various verbal formulae which judges have used to explain its nature are less instructive than the actual decisions they have reached in particular cases. Before considering corroboration in the context of sexual offences, two general observations should be borne in mind. First, where corroboration of a witness's testimony is required, it is for the judge to determine whether, as a matter of law, there is evidence which may constitute corroboration. It is for the *jury* to determine whether corroborative inferences should in fact be drawn.<sup>8</sup> Second, although corroboration is a general concept, whether particular facts may constitute corroboration is a situation-specific problem for the trial judge. Canadian courts have continually emphasized that what may afford corroboration in one case may not afford it in another; it all depends on the circumstances of the particular case.

The nature of potentially corroborative evidence in sexual cases may usefully be grouped into three broad categories: corroboration based on the *complainant's* condition or behaviour at the time of, or after, the sexual incident; corroboration based on the *accused's* condition or behaviour at the time of, or after, the sexual incident; and corroboration based on *other factors*.

## Corroboration Based on the Complainant's Condition or Behaviour at the time of, or after, the Sexual Incident

The following circumstances have been considered to constitute corroboration of a fact in issue, in the particular circumstances of each case:

- Torn clothing of the complainant and bruises found on the complainant.<sup>9</sup>
- The distressed condition of the complainant soon after the assault.<sup>10</sup>
- Medical evidence of injuries to the complainant's sexual organs.<sup>11</sup>
- Traces of the complainant's presence at the scene of the sexual assault.<sup>12</sup>
- The emotional state of the complainant on reporting the incident.<sup>13</sup>

- The screams and flight of the complainant from the scene of the sexual assault.<sup>14</sup>
- The complainant's pronounced emotional trauma in the days following a sexual assault.<sup>15</sup>

Evidence of the complainant's prompt complaint is *not* corroborative of his or her evidence against the accused, since it lacks the quality of independence.<sup>16</sup>

### Corroboration Based on the Accused's Condition or Behaviour at the time of, or after, the Sexual Incident

The following circumstances have been considered to constitute corroboration of a fact in issue, in the particular circumstances of each case:

- The flight of the accused after the sexual assault.<sup>17</sup>
- Traces of the accused's presence at the scene of the assault.<sup>18</sup>
- Inadequate denial or silence by the accused.<sup>19</sup>
- False statements by the accused, implying his guilty conscience.<sup>20</sup>
- The accused's attempt to bribe the complainant to drop the charges.<sup>21</sup>
- The accused's giving of false or contradictory testimony.<sup>22</sup>

The accused's failure to testify at trial may *not* be used for the purpose of drawing corroborative inferences.<sup>23</sup>

### Corroboration Based on Other Factors

A variety of other factors has been considered to constitute corroboration of the complainant's testimony, in the particular circumstances:

- The coincidence of the same type of venereal disease in the accused and the complainant.<sup>24</sup>
- Evidence of the accused's longstanding "guilty passion" for the complainant, coupled with evidence of opportunity.<sup>25</sup>
- Similar fact evidence concerning earlier assaults on other persons by the accused, in like circumstances.<sup>26</sup>
- Forensic evidence, such as the presence of semen on the complainant's underclothes.<sup>27</sup>

The mere fact that the accused had the opportunity to perpetrate the act may *not* be used for the purpose of drawing corroborative inferences. It does not sufficiently connect the accused with the crime, in the absence of other inculpatory circumstances.<sup>28</sup>

Prior to the amendments introduced in January, 1983, the *Criminal Code* stipulated that corroboration was required in order to convict a person accused

of certain sexual offences on the evidence of only one witness (usually the complainant).<sup>29</sup> The provision requiring corroboration in these circumstances was repealed in January, 1983<sup>30</sup> and section 246.4 of the *Criminal Code* provides that:

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

For the sexual offences to which this section applies, it is clear that corroboration of the complainant's testimony is no longer an issue. With respect to other sexual offences, however, especially the offences of buggery<sup>31</sup> and sexual intercourse with an under-age female,<sup>32</sup> the legal position concerning a complainant's uncorroborated testimony is less clear. Corroboration is still required for the offences relating to procuring<sup>33</sup> and the communication of venereal disease.<sup>34</sup>

The reforms introduced in January, 1983 did not affect the requirement of corroboration for young persons' testimony. Section 586 of the *Criminal Code* provides that:

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

The *Canada Evidence Act*<sup>35</sup> and provincial evidence acts<sup>36</sup> also contain provisions regarding the necessity for corroboration of the unsworn testimony of a child, and the *Young Offenders Act*<sup>37</sup> requires corroboration of all children's testimony. Although the January, 1983 amendments improve the evidentiary position of the *adult* sexual victim, they do little to improve that of the *child* sexual victim. Accordingly, complex legal issues concerning whether one child may corroborate the evidence of another child,<sup>38</sup> or whether it is dangerous to convict on the basis of a child's sworn testimony,<sup>39</sup> will continue to arise in trials of sexual offences involving young persons.

## Corroboration of Evidence of Children

That the testimony of adult sexual victims is no longer considered by Canadian law to be inherently untrustworthy is apparent from the enactment of section 246.4 of the *Criminal Code*, which explicitly removes the requirement of corroboration in most sexual cases, and which provides that the judge shall not instruct the jury that it is unsafe to convict in the absence of corroboration. It remains to examine the reasons why the law continues to treat the evidence of young children with caution and to scrutinize these reasons in light of the Committee's research findings.

In *Kendall v. The Queen*,<sup>40</sup> Mr. Justice Judson of the Supreme Court of Canada made the following observation:

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

**With respect to these presumed testimonial frailties of children, the Committee's findings are illuminating (see Chapter 7, *Dimensions of Sexual Assault*, and Chapter 24, *Police Investigation*). In the National Police Force Survey, it was found that the vast majority of sexual assaults on children were considered to be "founded" by the police and that the reports of young children were typically perceived by the police to be both truthful and sufficiently detailed. It would appear that, at least in the context of child sexual abuse, the requirement of corroboration for a young child's testimony has traditionally been based on both untested and unfounded assumptions about the intrinsic reliability of children's evidence.**

## Summary

The Committee considers that the current state of the law with respect to the corroboration of an "unsworn" child witness's testimony is unacceptable for the following reasons:

1. The legal tests for the reception of children's evidence either upon oath (sworn) or not upon oath (unsworn) have come very close together in practice,<sup>41</sup> notwithstanding that the corroboration requirements are completely different depending on whether the child gives *sworn* or *unsworn* evidence. The Committee considers this an arbitrary distinction.
2. With respect to the unsworn evidence of a child, the statutory wording of section 586 of the *Criminal Code*, is different from the wording of section 16(2) of the *Canada Evidence Act*, in the absence of any indication whether the corroboration required by the sections differs depending on the legal context in which the issue of corroboration arises. Section 586 of the *Criminal Code* provides that the unsworn evidence of a child must be corroborated "in a material particular by evidence that implicates the accused" and section 16(2) of the *Canada Evidence Act* provides that such evidence must be corroborated by "some other material evidence". The different formulae are illustrative of the arbitrariness with which the evidence of young children has been treated by Canadian legal doctrine.
3. The Committee's research findings indicate that the assumptions on which the special requirement of corroboration for young children's evidence are based, are largely unfounded.

4. A special legal requirement for corroboration of a young child's evidence is unsound in principle. The Committee agrees with the "common sense" approach to witness credibility espoused by Mr. Justice Dickson of the Supreme Court of Canada (now Chief Justice of Canada):<sup>42</sup>

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

Accordingly, the Committee recommends:

1. That there be no statutory requirement for the corroboration of an "unsworn" child's evidence. The implementation of this recommendation would involve the repeal of section 586 of the *Criminal Code*, section 16(2) of the *Canada Evidence Act*, section 61(2) of the *Young Offenders Act*, and corresponding sections of provincial evidence acts.
2. That the statutory corroboration requirements in sections 195(3) [procuring] and 253(3) [communicating a venereal disease] of the *Criminal Code* be repealed.
3. For greater certainty, that the *Criminal Code* be amended to provide that the "corroboration not required" provision in section 246.4 of the *Criminal Code* applies to *all* sexual offences, and not only to those offences currently listed in section 246.4.

These reforms would place the testimony of a child in no better or worse position than that of an adult, which the Committee believes is the correct legal approach in principle. The cogency of a given child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of admissibility or presumed unreliability, as is currently the case. The Committee endorses the comments of the *Law Reform Commission of Canada* in this regard, namely, that judges and juries "have the necessary experience and common sense to evaluate the testimony before them, and in doing so to take into account such matters as its source and the fact that it is unsupported by other evidence."<sup>43</sup>

As the *Law Reform Commission of Canada* has further argued:<sup>44</sup>

There is no evidence to suggest that [triers of fact, whether a judge or jury] are more likely to be misled by the evidence of accomplices, the victims of certain sexual offences, or young children than by any other witness.

Nor would the reforms recommended by the Committee be inconsistent with the accused's right to make a full answer and defence to the charges



against him or her. The accused retains his or her traditional rights of cross-examination and of address to the jury. Further, the Crown bears the strict onus of proving its case beyond a reasonable doubt.

## References

### Chapter 15: Corroboration

- <sup>1</sup> See, e.g., *Murphy and Butt v. The Queen*, [1977] 2 S.C.R. 603; *Warkentin v. The Queen*, [1977] 2 S.C.R. 355; *Vetrovec v. The Queen* (1982), 67 C.C.C. (2d) 1 (S.C.C.).
- <sup>2</sup> *Vetrovec v. The Queen*, [1982], 1 S.C.R. 811 at 819 per Dickson J.
- <sup>3</sup> *Murphy and Butt v. The Queen*, *supra*, note 1.
- <sup>4</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 586.
- <sup>5</sup> *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 16(2).
- <sup>6</sup> *Young Offenders Act*, S.C. 1980-81-82, c. 110, s. 61(2).
- <sup>7</sup> *Phipson on Evidence* (11th ed. 3rd Supp. 1974) at para 1567.
- <sup>8</sup> *Taggart v. The Queen* (1980), 13 C.R. (3d) 179 (Ont. C.A.).
- <sup>9</sup> *R. v. Harrison* (1956), 23 C.R. 387 (Ont. C.A.).
- <sup>10</sup> *R. v. Redpath* (1962), 46 Cr. App. R. 319 (C.C.A.).
- <sup>11</sup> *R. v. Huffman* (1958), 28 C.R. 5 (Ont. C.A.).
- <sup>12</sup> *R. v. Creemer and Cormier*, [1968] 1 C.C.C. 14 (N.S.C.A.).
- <sup>13</sup> *R. v. Lindsay* (1970), 24 C.R.N.S. 105 (Ont. C.A.).
- <sup>14</sup> *Childs v. The Queen* (1958), 122 C.C.C. 126 (N.B.C.A.).
- <sup>15</sup> *R. v. Basken* (1974), 28 C.R.N.S. 359 (Sask. C.A.).
- <sup>16</sup> *Thomas v. The Queen*, [1952] 2 S.C.R. 344.
- <sup>17</sup> *R. v. Bondy* (1958), 28 C.R. 342 (Ont. C.A.).
- <sup>18</sup> *R. v. LaRochelle* (1952), 104 C.C.C. 349 (N.S.S.C.).
- <sup>19</sup> *R. v. Christie*, [1914] A.C. 545 (H.L.).
- <sup>20</sup> *Budin v. The Queen* (1981), 20 C.R. (3d) 86 (Ont. C.A.).
- <sup>21</sup> *R. v. Mazza* (1975), 24 C.C.C. (2d) 508 (Ont. C.A.), *aff'd sub nom. Mazza v. The Queen* (1978), 40 C.C.C. (2d) 134 (S.C.C.).
- <sup>22</sup> *R. v. Collerman* [1964], 3 C.C.C. 195 (B.C.C.A.).
- <sup>23</sup> *Kolnberger v. The Queen*, [1969] S.C.R. 213.
- <sup>24</sup> *R. v. Jones* (1939), 27 Cr. App. R. 33 (C.C.A.).
- <sup>25</sup> *R. v. Burr* (1906), 12 C.C.C. 103 (Ont. C.A.).
- <sup>26</sup> *R. v. Lawson* (1971), 3 C.C.C. (2d) 372 (Alta. C.A.).
- <sup>27</sup> *Warkentin v. The Queen*, *supra*, note 1.
- <sup>28</sup> *Burbury v. Jackson*, [1917] 1 K.B. 16.
- <sup>29</sup> The former section 139 (1) of the *Criminal Code*, R.S.C. 1970, c. C-34, provided that no accused could be convicted of the following offences on the evidence of only one witness, unless the evidence of that witness was corroborated in a material particular by evidence that implicates the accused:
- s. 148 — sexual intercourse with a feeble-minded female
  - s. 150 — incest
  - s. 151 — seduction of a female between 16 and 18
  - s. 152 — seduction under promise of marriage

- s. 153 — sexual intercourse with a step-daughter, foster daughter, or female ward, or with a female employee under 21
- s. 154 — seduction of a female passenger on board a vessel
- s. 166 — parent or guardian procuring defilement

<sup>30</sup> *An Act to amend the Criminal Code in relation to Sexual Offences and other Offences against the Person*, S.C. 1980-81-82-83, c. 125, s. 19.

<sup>31</sup> In *R. v. Gendreau* (1980), 3 Man. R. (2d) 245, a case involving charges of buggery and gross indecency, the Manitoba Court of Appeal considered that the following charge to the jury was a proper one:

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

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

<sup>32</sup> Section 146 of the *Criminal Code* was an offence to which the statutory “corroboration warning rule” applied, prior to the repeal of this provision by the *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8. On the current status of the common law “corroboration warning rule” in this respect, see:

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

<sup>33</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 195(3).

<sup>34</sup> *Ibid.*, s. 253 (3).

<sup>35</sup> *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 16(2).

<sup>36</sup> *Supra*, at note 6.

<sup>37</sup> See *supra*, Chapter 14, “The Evidence of Children”, notes 18-21.

<sup>38</sup> The current state of Canadian law with respect to the “mutual corroboration” of children’s evidence is as follows:

- (i) An unsworn child may not corroborate another unsworn child: *Paige v. The King* (1948), 92 C.C.C. 32 (S.C.C.).
- (ii) An unsworn child may not corroborate a sworn child: *Paige v. The King, supra*.
- (iii) A sworn child may corroborate another sworn child: *R. v. Taylor* (1970), 75 W.W.R. 45 (Man. C.A.).
- (iv) A sworn child may corroborate an unsworn child: *R. v. Pottle* (1978), 49 C.C.C. (2d) 113 (Nfld. C.A.).

<sup>39</sup> *Kendall v. The Queen*, [1962] S.C.R. 469; *R. v. Taylor* (1970), 75 W.W.R. 45 (Man. C.A.); *R. v. Parkin*, [1922] 1 W.W.R. 732 (Man. C.A.); *R. v. Burdick* (1975), 27 C.C.C. (2d) 497 (Ont. C.A.); and *R. v. Tennant and Naccarato* (1975) 23 C.C.C. (2d) 80 (Ont. C.A.).

<sup>40</sup> *Ibid.*, at 473.

<sup>41</sup> See, e.g., *Fletcher v. The Queen* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.).

<sup>42</sup> *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811 at 823.

<sup>43</sup> Canada. Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Information Canada, 1977) p. 108.

<sup>44</sup> *Ibid.*

## Chapter 16

### Complaints by Victims

Until the enactment of Bill C-127 in January, 1983, the admissibility of complaints made by victims of sexual assaults was governed by the common law doctrine of "recent complaint."<sup>1</sup> Historically, the common law took a skeptical view of the testimony of victims of sexual offences, particularly of women who made allegations of rape.<sup>2</sup> Where a victim of a sexual offence failed to complain of the incident at the first "reasonable" opportunity, the trier of fact was entitled and even encouraged<sup>3</sup> to infer that the complainant's allegation against the accused was either totally or substantially untrue.<sup>4</sup> In order to enable the complainant to rebut these prejudicial inferences, a practice developed which allowed the Crown to prove that the victim had made a complaint and to adduce evidence concerning the details of that complaint,<sup>5</sup> provided certain conditions were met. Although the particulars of the complaint could be proved, they could not be considered as evidence of the facts disclosed by the complaint, but only as evidence which confirmed the complainant's credibility and, where consent was in issue, of the absence of the complainant's consent.<sup>6</sup> Further, evidence so introduced could not be used to corroborate any aspect of the Crown's case.<sup>7</sup>

The Supreme Court of Canada summarized the trial judge's responsibilities in dealing with this issue as follows:<sup>8</sup>

Before admitting a complaint as evidence, the Judge shall hold a *voir dire*<sup>9</sup> to determine:

- Whether there is some evidence which if believed by the *trier of fact* (in this case the jury) would constitute a complaint.
- That the complaint was not elicited by questions of a "leading and inducing or intimidating character".<sup>10</sup>
- That it was "made at the first opportunity after the offence which reasonably offers itself."<sup>11</sup>

It has also been held that recent complaint evidence could only be admitted if the complainant testified at trial and that, where the details of the complaint were sought to be elicited from a witness other than the complainant (for example, from the recipient of the complaint), such details were properly introduced only after the complainant had testified.<sup>12</sup>

## Amendments Introduced in January, 1983

Section 246.5 of the *Criminal Code* provides:

246.5 The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

Accordingly, the common-law doctrine of "recent complaint" in sexual assault cases is abrogated, and the admissibility of complaint evidence will henceforward be governed by the general evidentiary rules relating to previous statements of a witness.

That the victim made a complaint will invariably be brought out during the Crown's initial examination of its witnesses. The details of that complaint, however, will be inadmissible unless:

1. The accused alleges or insinuates that the complainant's testimony at trial is a "recent fabrication", in which case the Crown can introduce the complainant's previous consistent statement of complaint and restore the complainant's credibility.<sup>13</sup>
2. There is an inconsistency between the complainant's testimony at trial and the complainant's previous statement of complaint, in which case defence counsel can introduce the previous inconsistent statement and impeach the complainant's credibility.<sup>14</sup>
3. The victim's complaint is otherwise admissible under an exception to the hearsay rule, for example, as a "spontaneous exclamation" or "excited utterance."<sup>15</sup>

The Committee considers that no adverse legal inferences concerning a sexual victim's credibility should be drawn because the victim did not promptly complain to someone after the sexual assault, and to that extent considers that the abrogation of the "recent complaint" doctrine in sexual assault cases is an appropriate legal reform. The Crown will continue to be able to adduce evidence concerning the making of the complaint, and details of the complaint may also be admissible under the general rules of evidence relating to previous consistent statements.

The possible circumstances which might deter a victim from promptly reporting a sexual assault are vastly more complex than those pertaining to the reporting of other sorts of crime. Young children may not even be aware that something aberrant has been done to them, or may not be sufficiently verbal to articulate their complaint in a manner recognized by the law. The offender, who is often a person the child trusts, may have told the child that their joint sexual activity is a "special secret" they share, or may have threatened the child with harm or punishment if the child tells anyone. Where the sexual assault is perpetrated by a family member, the victim may understandably wish to avoid the dire consequences which disclosure may have on his or her

family. Alternatively, the victim may fear being accused of somehow “provoking” the sexual assault, and of having to defend his or her prior sexual conduct and general reputation at subsequent legal proceedings.

The findings of the National Population Survey (see Chapter 6, *Occurrence in the Population*) document the reasons why most persons who were victims of sexual offences committed against them when they were children or youths did not seek assistance. The following case study, taken from the National Police Force Survey, is illustrative of the often compelling circumstances which sometimes deter young sexual victims from making a prompt complaint of the incident.

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

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

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

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

Although the Committee agrees with the abrogation of the “recent complaint” doctrine effected in January, 1983, it should be noted that section 246.5 of the *Criminal Code* states only that the “rules relating to evidence of recent complaint in *sexual assault cases* are hereby abrogated.”<sup>16</sup> On its face, the section would appear to abrogate the recent complaint doctrine only with respect to the “sexual assault” offences in sections 246.1, 246.2, and 246.3 of the *Criminal Code*. At common law, however, the doctrine of recent complaint applied to all sexual offences, whether or not the complainant’s consent was in issue. Further, a number of sexual offences against young persons do not require that the child be “assaulted” in the legal sense, for example, incest, gross indecency and the unlawful sexual intercourse offences. The credibility of a child victim of one of these offences may, accordingly, still be impugned

**under the recent complaint doctrine if the child does not complain of the incident at what the court considers to be the first reasonable opportunity.<sup>17</sup> The Committee considers this to be wholly unsatisfactory.**

## **Summary**

**The Committee recommends that section 246.5 of the *Criminal Code* be amended to provide that:**

**the rules relating to evidence of recent complaint are abrogated with respect to *all* sexual offences.**

Further, the Committee considers that the remarks the child or young person makes on reporting the incident often constitute the most cogent possible evidence, and should not be excluded from the trier of fact's consideration. In the Committee's judgment, this form of evidence should be admissible on the basis of a statutory exception to the hearsay rule. The rules concerning hearsay evidence are discussed in Chapter 17.

## References

### Chapter 16: Complaints by Victims

- <sup>1</sup> See generally the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Ottawa: Department of Justice, 1981) at 355-59; and MacCrimmon, *Consistent Statements of a Witness* (1979), 17 Osgoode Hall L.J. 285, esp. at 304-14.
- <sup>2</sup> Blackstone, IV *Commentaries on the Laws of England* (1st ed. Oxford: Clarendon Press, 1769) at 211; and Hale, I *The History of the Pleas of the Crown*, (London: Solum Emlyn, 1800) c. 58 at 635.
- <sup>3</sup> Where the Crown failed to show that the complainant made a complaint at the first reasonable opportunity, not only was the complaint rendered inadmissible, but the trial judge was required to comment on this failure. If the complainant's consent was at issue, the trial judge was required to instruct himself or the jury that an inference inconsistent with the complainant's evidence of no consent was to be drawn: *R. v. Walker* (1980), 58 C.C.C. (2d) 178 (Que. C.A.); *R. v. Boyce* (1974), 28 C.R.N.S. 336 (Ont. C.A.); *R. v. Kistendey* (1975), 29 C.C.C. (2d) 382 (Ont. C.A.); *R. v. Davidson* (1975), 24 C.C.C. (2d) 161 (Ont. C.A.).
- <sup>4</sup> See *R. v. Kistendey* and *R. v. Davidson*, *ibid.*
- <sup>5</sup> *R. v. Lillyman*, [1896] 2 Q.B. 167; *R. v. Osborne*, [1905] 1 K.B. 551.
- <sup>6</sup> *R. v. Lillyman*, *ibid.*
- <sup>7</sup> *Thomas v. The Queen*, [1952] 2 S.C.R. 344; *R. v. Plantus* (1957), 118 C.C.C. 260 (Ont. C.A.); *R. v. Cross*, [1970] 1 O.R. 693 (C.A.); *R. v. Deslaurier* (1977), 36 C.C.C. (2d) 327 (Ont. C.A.).
- At one time in Canadian law, however, a prompt complaint did have corroborative potential. See, e.g., *R. v. Bowes* (1909), 20 O.L.R. 111 (C.A.); *Shorten v. The King* (1918), 57 S.C.R. 118; and *R. v. Auger* (1929), 52 C.C.C. 2 (Ont. C.A.).
- <sup>8</sup> *Timm v. The Queen* [1981], 2 S.C.R. 315 at 337 *per* Lamer J.
- <sup>9</sup> A *voir dire* (sometimes called a trial within the trial) is a hearing conducted by the trial judge specifically to determine some fact on which depends the admissibility of evidence. See Schiff, *Evidence in the Litigation Process* (Toronto: Carswell, 1978) at 900.
- <sup>10</sup> See *R. v. Osborne*, *supra*, note 5; *Shorten v. The King* *supra*, note 7; *R. v. Lebrun*, [1951] O.R. 387 (Ont. C.A.); *R. v. Kulak* (1979), 46 C.C.C. (2d) 30 (Ont. C.A.); *R. v. Waddell* (1975), 28 C.C.C. (2d) 315 (B.C.C.A.); *R. v. Caldwell* (1974), 10 N.S.R. (2d) 187 (C.A.) and *R. v. Bell* (1973), 14 C.C.C. (2d) 225 (N.S.C.A.).
- <sup>11</sup> See *R. v. Creemer and Cormier* (1967), 1 C.R.N.S. 146 (N.S.C.A.); *R. v. Hall* (1927), 31 O.W.N. 451 (C.A.); *R. v. Bodechon* (1964), 50 M.P.R. 184 (P.E.I.C.A.); *R. v. MacNeil* (1976), 16 N.S.R. (2d) 366 (C.A.); *R. v. Hickey* (1980), 31 N.B.R. (2d) 147 (Q.B.); and *R. v. Jones*, [1945] 4 D.L.R. 515 (P.E.I.C.A.).
- <sup>12</sup> *Timm v. The Queen*, *supra*, note 8; *R. v. Cook* (1979), 9 C.R. (3d) 85 (Ont. C.A.); *R. v. Gillingham* (1981), 65 C.C.C. (2d) 42 (N.S.C.A.); *R. v. Lebrun*, *supra*, note 10.
- <sup>13</sup> See generally the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 1 at 351-82; and MacCrimmon, *supra*, note 1, esp. at 295-304.
- <sup>14</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *ibid.*; MacCrimmon, *ibid.*
- <sup>15</sup> *Report of Federal/Provincial Task Force on Uniform Rules of Evidence*, *ibid.* at 233-42; Cross, *supra*, note 2 at 575-93; and Bill S-33 (the proposed *Canada Evidence Act, 1982*, 1980-81-82 (32nd Parl. 1st Sess.) ss. 115-120.).
- <sup>16</sup> Emphasis added.



<sup>17</sup> See, e.g., *R. v. Lillyman*, *supra*, note 5; *R. v. Osborne*, *supra*, note 5; *R. v. Camelleri*, [1922] 2 K.B. 122; *R. v. Chenier* (1981), 63 C.C.C. (2d) 36 (Que. C.A.); *R. v. Budin* (1981), 58 C.C.C. (2d) 352 (Ont. C.A.), leave to appeal to S.C.C. refused (1981), 58 C.C.C. (2d) 352n; and *R. v. Walters* (1980), 53 C.C.C. (2d) 119 (Ont. C.A.).

## Chapter 17

# Hearsay

Hearsay may be defined as a statement, other than one made by a person while testifying at a proceeding, that is offered in evidence to prove the truth of the matters asserted in the statement.<sup>1</sup> As a general rule, a hearsay statement is inadmissible in evidence to prove the truth of the matters asserted therein. Although the exclusion of hearsay evidence has been justified on several grounds,<sup>2</sup> the central justification is that the person who originally made the statement cannot be cross-examined to determine the reliability of his or her observations and the meaning which the statement was intended to convey.<sup>3</sup>

At common law, exceptions to this exclusionary rule were established in order to render admissible certain forms of hearsay evidence where, in the circumstances, there was a compelling need to do so and the evidence was thought to have strong circumstantial guarantees of trustworthiness.<sup>4</sup> The nature and extent of these exceptions are highly significant in the context of child sexual abuse, particularly where the child is too young to testify under the current rules of testimonial competency. Where a child is deemed incompetent to testify, statements made by the child indicating or alleging that someone has sexually abused him or her will often be inadmissible in evidence to prove that the child's assertions are true, notwithstanding that the admissibility of the statements for this purpose will often be crucial to the outcome of subsequent legal proceedings. The following are examples of statements made by child sexual victims which under current doctrine would be held inadmissible to prove the truth of the matters asserted in the statements:

- A three year-old asks her daddy if milk comes out of his pee-pee. He says no, and then tells his wife. She later asks her daughter about it, who replies, "Well milk comes out of Susie's dad's pee-pee and it tastes yucky."<sup>5</sup>
- A four year-old boy sits in front of the television drinking soda pop. His dad sees that he is moving the bottle in and out of his mouth in a manner imitating fellatio. His dad asks him what he is doing, and the boy replies that this is what Uncle Joe taught him to do with his "banana".<sup>6</sup>

The following case study, taken from the National Police Force Survey, is also illustrative of how relevant assertions made by a child sexual victim would

be considered inadmissible hearsay statements under current legal doctrine in Canada.

The victim, a three year-old girl, aroused her parents' suspicions when she announced to them that she was not going to play the "bum game" with A. anymore. The suspect, A., a 19 year-old male, had intermittently been the child's baby-sitter for about a year. The victim was reluctant to disclose the nature of the "bum game" because the suspect had told her not to do so, but she eventually revealed that the game involved mutual oral sex. The incidents were alleged to have occurred on several occasions during the past year.

The suspect denied all allegations and contended that the child was overly imaginative. The suspect suggested that the child might have gained her knowledge of oral sex by watching her parents perform such acts, or from interaction with local children, and that her allegation against him was fabricated. The suspect refused to submit to a polygraph test.

The police occurrence report concluded as follows: "In view of the tender age of the victim and without corroborative evidence, no charges will be laid and this file is concluded here."

The balance of this chapter reviews the exceptions to the hearsay rule that are especially pertinent to investigations of child sexual abuse.

## Current Exceptions to the Hearsay Rule

The most important exceptions to the hearsay rule<sup>7</sup> in the context of child sexual abuse are those pertaining to records made in the course of a business or professional duty; confessions or admissions by an accused; excited utterances; and statements indicating the declarant's present bodily feeling or state of mind.

### Records Made Pursuant to a Business or Professional Duty

In *Ares v. Venner*,<sup>8</sup> the Supreme Court of Canada broadened the common law exception to the hearsay rule pertaining to records made pursuant to a business or professional duty.<sup>9</sup> The case involved an allegation of negligence against the respondent, a physician. The main issue concerned the admissibility of notes (technically hearsay) made by nurses who attended the appellant while he was receiving care in a hospital. In creating this new exception, the Court stated:<sup>10</sup>

Hospital records, including nurses' notes, made *contemporaneously* by someone *having a personal knowledge of the matters then being recorded* and *under a duty to make the entry or record* should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.

The decision of the Supreme Court in *Ares v. Venner*, although referring explicitly only to hospital records, has been taken to settle the law with respect to records of other "businesses" made in analogous circumstances,<sup>11</sup> and is directly pertinent to investigations of child sexual abuse. Hospital, police and social work records kept pursuant to cases of child sexual abuse may be admissible in evidence to prove the truth of the assertions contained therein, without it being necessary that the maker or makers of the entry testify orally concerning it.<sup>12</sup> Although the potential ambit of this common law exception to the hearsay rule is unclear,<sup>13</sup> it is unquestionably germane to the official records (and to the record-keeping practices) of helping agencies that routinely deal with cases of child sexual abuse.

Apart from these developments at common law, most jurisdictions in Canada have enacted statutory provisions mandating the admission into evidence of "business records"<sup>14</sup> and "official medical reports".<sup>15</sup> For example, it has been held that a recognized Children's Aid Society is a "business" within the business records exception to the hearsay rule. Accordingly, a record made by a social worker as part of his or her investigatory role is admissible in evidence to prove the truth of the matters asserted in the record, notwithstanding that the social worker is not called as a witness.<sup>16</sup>

### Admissions or Confessions

*Admissions.* An admission is a statement by, or attributable to, a party which is adverse to his or her case.<sup>17</sup> Admissions have traditionally been viewed as an exception to the hearsay rule, on the basis that a statement which is adverse to the legal position of the person who makes it may be presumed to be true.<sup>18</sup> For example, if, after an alleged sexual assault on a teenager, the accused says to his friend, "I didn't mean to be so rough — things just got out of hand," this statement constitutes an admission which can be admitted in evidence against the accused notwithstanding that the accused does not himself testify.

Where an accused makes an admission to a person other than a "person in authority,"<sup>19</sup> the admissibility of that statement in evidence against him or her is clear. More problematic, however, are cases in which an accused's conduct after the event may arguably be interpreted as an implied admission of culpability on his or her part.<sup>20</sup> In *R. v. Christie*,<sup>21</sup> the accused was charged with indecently assaulting a five year-old boy. The boy's mother and a police constable were examined as Crown witnesses. The constable testified that, after receiving certain information, he went to a field and saw a number of persons standing there, including the accused, the boy and the boy's mother; that she made a complaint to him (the constable) that a man had assaulted her son; and that the boy then said to his mother, "That is the man, mum." The constable then asked the boy which man he meant, whereupon the boy went up to the accused, touched him on the sleeve of his coat, and said, "That is the man." The boy was then asked, "What did he do to you?", in reply to which the boy

gave full particulars of the indecent assault. After the boy's narration, the accused merely stated, "I am innocent."

The House of Lords held that the accused's reply to the boy's allegations was properly admitted and declared that there is no rule of law that statements made in the presence of an accused may only be received in evidence if a foundation for their admission has first been laid by facts from which, in the judge's opinion, a jury might reasonably infer that the accused had implicitly accepted the statements as his own, in whole or in part.<sup>22</sup> It is the function of the trier of fact to determine whether the accused's words, actions, conduct or demeanour at the time the statement is made amounts to an acceptance by him of the statement in whole or in part, and hence as an admission of culpability.<sup>23</sup> This principle has been approved in Canada on several occasions<sup>24</sup> and has direct application to cases of child sexual abuse.<sup>25</sup> The following case study is taken from the National Police Force Survey.<sup>26</sup>

The grandmother of the victim (a three year-old girl) found her "playing with herself"; the three year-old was apparently masturbating. The grandmother admonished the girl not to do such things, whereupon the girl replied that it was "O.K. because B. (the suspect) plays with me that way." A child welfare agency was promptly notified.

The suspect, B., a 16 year-old male, subsequently admitted to the grandmother that he had assaulted the girl in the manner indicated, and that he had made the girl play with his penis. The incidents occurred during periods when the suspect was babysitting the little girl; the suspect admitted to the grandmother that he had performed similar acts with the young child on several occasions.

*Confessions.* A confession is a form of criminal admission and is accordingly admissible as an exception to the hearsay rule.<sup>27</sup> Where, however, an accused makes a statement (whether inculpatory or exculpatory)<sup>28</sup> to a "person in authority,"<sup>29</sup> the trial judge must hold a *voir dire* to determine whether the accused's statement was made voluntarily. In the words of Lord Sumner in *Ibrahim v. The King*:<sup>30</sup>

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

The so-called "confessions rule" is inextricably bound up with the accused's right not to incriminate himself and with "the clear common law principle that the Crown must establish its case without the assistance of the accused."<sup>31</sup>

The practical application of the confessions rule is well illustrated by the Supreme Court of Canada decision in *Powell v. The Queen*.<sup>32</sup> The accused was charged with one count of indecent assault on a female and one count of assault causing bodily harm. The complainant, G., and her common law husband, P., were walking on a street in the city in which they resided, accompanied by P.'s dog. The dog got loose and, as G. was pursuing the dog into a

parking lot, she was grabbed from behind and thrown to the ground. Her attacker then kicked her in the face and stomach and tried to pull her slacks down.

P. eventually caught up with G., and saw a man standing over her with his hand raised, as if to strike her. P. gave chase, lost sight of the man he was pursuing, but later caught sight of a man who he was sure was the attacker. The alleged assailant was forcibly restrained and the police were summoned.

The accused first denied having been in the area or having been with any woman. Later, in the police cruiser, and in response to a question by a police officer, the accused said that he had been helping the woman. Still later, the accused reverted to his earlier complete denial.

At trial, no *voir dire* was held to determine the voluntariness of the accused's statement that he had been helping the woman. On the accused's appeal from conviction, the Manitoba Court of Appeal held that, although the trial judge's failure to hold a *voir dire* on the issue of voluntariness may have been in error, no substantial wrong or miscarriage of justice had resulted thereby.

On the accused's further appeal to the Supreme Court of Canada, Mr. Justice de Grandpre, in delivering the judgment of the Court, stated:<sup>33</sup>

I am unable to accede to the proposition that if a trial Judge directs himself to the question of the voluntariness of a statement and is satisfied on the whole of the evidence of the guilt of the accused, there is no need for a *voir dire* . . . The onus at all times remains with the prosecution to establish that any statement by an accused offered in evidence against him is voluntary in the fullest sense of the word, and that onus was not discharged here . . . The admission of the statement without a *voir dire* was a fundamental error which may have effected the outcome of the trial.

Accordingly, the Court allowed the accused's appeal, quashed the conviction and ordered a new trial.

## Excited Utterances

An "excited utterance" is a statement made by a person while he or she was under the stress of nervous excitement caused by witnessing a startling event. In order for a declarant's excited utterance to be admitted into evidence as an exception to the hearsay rule, the event giving rise to the statement must have been sufficiently startling to suspend the declarant's reflective faculties, and the statement must have been uttered while the declarant was under the influence of the startling event.<sup>34</sup> These circumstances are thought to ensure the trustworthiness of the statement; on the other hand, such evidence is necessary because it is considered a more reliable source of proof than the declarant's subsequent testimony.<sup>35</sup>

The declarant need not be unavailable as a witness in order for this hearsay exception to operate. Both the declarant and another person who heard the declarant's statement may testify concerning the "excited utterance".<sup>36</sup> For example, if, immediately after being sexually assaulted, a girl makes an hysterical telephone call to the police wherein she indicates the nature of the

assault and the identity of her assailant, both the girl and the police officer who took the call may testify concerning the girl's telephone statement.<sup>37</sup> Alternatively, the statement of a three year-old boy, who runs down the stairs and exclaims to his mother, "Uncle Bob pulled my pee-pee, and it hurts!", would constitute an excited utterance to which the mother could testify, notwithstanding that her son fails to qualify as a witness.<sup>38</sup>

### Statements Indicating the Declarant's Present Bodily Feeling or State of Mind

Statements by a declarant indicating his or her present physical condition or state of mind constitute a further exception to the hearsay rule. For example, a four year-old boy might tell his family doctor, "My bum hurts," and indicate the onset of the pain, without offering an explanation as to its cause. This statement, given in evidence by the doctor as part of his testimony, could form part of the Crown's case against an accused charged with buggery.<sup>39</sup> Alternatively, a child might make statements to a social worker which reveal the child's present emotional state and his or her express preference for one dispositional outcome over another.<sup>40</sup>

### Summary

Hearsay evidence is dealt with extensively in Bill S-33<sup>41</sup> and, in general, the Committee considers that the treatment of hearsay evidence in this proposed legislation is adequate. Even so, there is one form of crucially relevant evidence in the context of child sexual abuse for which these proposals do not explicitly provide. An out-of-court statement made by a young child which indicates that the child may have been sexually abused is inadmissible hearsay unless the circumstances of the statement fall within one of the established exceptions to the hearsay rule. Given the nature of sexual abuse of young children, however, such statements typically will not fall within any of the established or proposed hearsay exceptions.<sup>42</sup> A young child often is not aware that something aberrant is being done to him or her, and consequently is unlikely to make an "excited utterance" about the incident. Alternatively, a child who is aware that "something is wrong" may be prevented from telling anyone because of threats, fear of reprisals, admonishments of secrecy on the part of the offender, or other pressures. When the child does eventually tell someone, the lapse of time will render the child's statement inadmissible for the purpose of proving the truth of the assertions made in it. **In the Committee's view, neither the exceptions to the hearsay rule at common law, nor the statutory proposals of Bill S-33, offer sufficient opportunities for the out-of-court statements of young children to be admitted in evidence for the purpose of proving that the matters asserted in those statements are true.**

**The exceptions to the hearsay rule at common law have traditionally been justified on the dual bases of necessity and presumed trustworthiness. That the**

**admission into evidence of a young child's express or implied allegation of sexual abuse is necessary in order to reach a proper and just legal determination can scarcely be doubted. Where the child has made such a statement but is deemed legally incompetent to testify in court, the trier of fact will often be precluded from hearing potentially the most relevant evidence in the case, namely, the content of the child's statement. Alternatively, where the child is competent to testify, several considerations combine to justify, in appropriate cases, the narration of the child's statement by the person who received it. As the Wisconsin Supreme Court stated in a 1974 case:<sup>43</sup>**

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

Further, where the child does testify in court, his or her perceived credibility as a witness will be a critical factor in the outcome. Allowing the recipient of the child's statement to testify concerning its content would enable the trier of fact to assess the child's credibility on a more realistic basis.

Whether a young child's express or implied allegation of sexual abuse should be assumed to be trustworthy is more problematic. To consider only two of the several factors which operate in this context:<sup>44</sup>

1. A young child is unlikely to verbalize about a form of sexual activity that is foreign to his or her personal experience.<sup>45</sup> As one writer put it, "[t]he child who can describe an adult's erect penis and ejaculation has had direct experience with them."<sup>46</sup>
2. On the other hand, a child's limited verbal capacity may sometimes lead to real ambiguities in the meaning which the child intended his or her statement to convey.<sup>47</sup>

In the Committee's view, whether a child's previous statements relating to his or her sexual abuse should be admitted in evidence as an exception to the hearsay rule is best approached on a case-by-case basis. An inflexible rule, whether inclusionary or exclusionary, would fail to take into account the wide variability of circumstances from one case to the next, and would be wrong in principle.

**The Committee recommends that the *Canada Evidence Act*, each provincial and territorial evidence act, and the *Quebec Code of Civil Procedure* be amended in order to provide that:<sup>48</sup>**

1. A previous statement made by a child when under the age of 14 which describes or refers to any sexual act performed with, on, or in the presence of the child by another person.
2. Is admissible to prove the truth of the matters asserted in the statement.



3. Whether or not the child testifies at the proceedings.
4. Provided that the court considers, after a hearing conducted in the absence of the jury, that the time, content and circumstances of the statement afford sufficient indicia of reliability.
5. "Statement" means an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion.<sup>49</sup>

The Committee considers that such a provision would strike an appropriate balance between the dictates of necessity and testimonial trustworthiness, and draws support for its conclusion from the enactment of comparable provisions in at least two American jurisdictions.<sup>50</sup>

## References

### Chapter 17: Hearsay

- <sup>1</sup> Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Supply and Services, 1977), s. 27(2)(a) of the proposed *Evidence Code*. This essentially is the definition of hearsay adopted in s. 2 of the proposed *Canada Evidence Act, 1982*, Bill S-33, 1980-81-82 (32nd Parl. 1st Sess.).
- <sup>2</sup> In Taylor, *A Treatise on the Law of Evidence* (12th ed. London: Sweet and Maxwell, Ltd., 1931) at 363, the author outlines the reasons for the hearsay rule as follows:
- The term *hearsay* is used with reference to what is done or written, as well as to what is spoken, and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that in many cases it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its extrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which may be practised with impunity under its cover, combine to support the rule that hearsay evidence is inadmissible.
- <sup>3</sup> Tollefson, *Cases and Comments on the Law of Evidence* (2d ed., 1972) at 450.
- <sup>4</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Ottawa: Department of Justice, 1981) at 175.
- <sup>5</sup> This example is adapted from Lasnik, *The Sexually Abused Child Act* (unpublished paper, King County Prosecutor's Office, State of Washington, 1981) at 3.
- <sup>6</sup> *Ibid.*
- <sup>7</sup> For a comprehensive review of the numerous exceptions to the hearsay rule in Canadian law, see the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4. The problem of "opinion" or "expert" evidence in child welfare controversies is discussed in Bala, Lilles, and Thompson, *Canadian Children's Law* (Toronto: Butterworths, 1982) at 190-97.
- <sup>8</sup> [1970] S.C.R. 608.
- <sup>9</sup> See generally Ewart, *Documentary Evidence: The Admissibility at Common Law of Records Made Pursuant to a Business Duty* (1981), 59 Can. Bar Rev. 52; and Lederman, *The Admissibility of Business Records — A Partial Metamorphosis* (1973), 11 Osgoode Hall L.J. 373.
- <sup>10</sup> [1970] S.C.R. 608 at 626 *per* Hall J. (Emphasis added.).
- <sup>11</sup> *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.* (1977), 15 O.R. (2d) 750 (Ont. H.C.J.).
- <sup>12</sup> See Ewart, *supra*, note 9 at 59 *ff.*
- <sup>13</sup> *Ibid.*
- <sup>14</sup> A review of the pertinent statutory provisions is given in Schiff, *Evidence in the Litigation Process* (Toronto: Carswell, 1978) at 351-52.
- <sup>15</sup> *Ibid.*, at 365-67. For discussing the admissibility of medical reports in Ontario child protection proceedings, see Bala, Lilles, and Thompson, *supra*, note 7 at 184-90.
- <sup>16</sup> *Re Maloney* (1971), 12 R.F.L. 167 (N.S. Co. Ct.).
- <sup>17</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4 at 189.
- <sup>18</sup> *Slatterie v. Pooley* (1840), 10 L.J.Ex. 8.

- <sup>19</sup> For a discussion of the principles which are applied in determining whether the recipient of an accused's admission is a "person in authority", see the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4 at 895-96.
- <sup>20</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4 at 194-95.
- <sup>21</sup> [1914] A.C. 545 (H.L.).
- <sup>22</sup> See Cross, *Evidence* (5th ed. London: Butterworths, 1979) at 529-30.
- <sup>23</sup> *R. v. Christie*, [1914] A.C. 545 at 554 *per* Lord Atkinson (H.L.).
- <sup>24</sup> See, e.g., *Hubin v. The King*, [1927] S.C.R. 442; *Chapdelaine v. The King*, [1935] S.C.R. 53; and *Stein v. The King*, [1928] S.C.R. 553. But *cf.* *R. v. Harrison*, [1946] 3 D.L.R. 690, esp. at 696 (B.C.C.A.).
- <sup>25</sup> See *R. v. Horn* (1923), 40 C.C.C. 117 (Alta. C.A.); *R. v. McKeivitt* (1936), 66 C.C.C. 70 (N.S.S.C.), and *R. v. Sayegh* (1982), 69 C.C.C. (2d) 84 (Ont. Prov. Ct.).
- <sup>26</sup> This case study is from the National Police Force Survey.
- <sup>27</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4 at 201 *ff.* For empirical data on criminal admissions in the context of child sexual abuse in Toronto, Canada, see Lane, *The Legal Response to Sexual Abuse of Children* (October, 1982) at 52-55.
- <sup>28</sup> *Piche v. The Queen* (1970), 12 C.R.N.S. 222 (S.C.C.).
- <sup>29</sup> *Supra*, note 19.
- <sup>30</sup> [1914] A.C. 599, at 609 (P.C.).
- <sup>31</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4 at 202.
- <sup>32</sup> [1977] 1 S.C.R. 362.
- <sup>33</sup> *Ibid.*, at 367, 369.
- <sup>34</sup> Wigmore, *Evidence* (Vol. 6, Chadborn rev. 1976) at ss. 1747-1749.
- <sup>35</sup> See generally Bulkley, "Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial in *Child Sexual Abuse and the Law* (3d ed. Washington, D.C.: American Bar Association, 1982) at 153; and Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae* (1922), 31 Yale L.J. 229.
- <sup>36</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4 at 236.
- <sup>37</sup> See *Ratten v. The Queen*, [1972] A.C. 378 (P.C.).
- <sup>38</sup> For Canadian cases in which an "excited utterance" was held to be admissible as an exception to the hearsay rule, see *R. v. Garlaw and Garlaw* (1976), 31 C.C.C. (2d) 163 (Ont. H.C.J.); *R. v. Mulligan* (1973), 23 C.R.N.S. 1 (Ont. S.C.), *aff'd on other grounds* (1974), 26 C.R.N.S. 179 (Ont. C.A.); *R. v. Presley*, [1976] 2 W.W.R. 258 (B.C.S.C.); *R. v. Schwartz* (1978), 40 C.C.C. (2d) 161 (N.S.C.A.); and *R. v. Belliveau* (1978), 41 C.C.C. (2d) 52 (N.S.C.A.).
- The American position regarding the admissibility of "excited utterances" of very young children appears to vary considerably from state to state: Bulkley, *supra*, note 35 at 157, and the excellent annotation in 83 A.L.R. 2d 1368, at 1368-1399 (1962). For American cases on this issue in which the child's statement was held *inadmissible*, see *Huntley v. State* (1917), 73 Fla. 800; *Ketcham v. State* (1959), 240 Ind. 107; and *State v. Rothi* (1922), 152 Minn. 73.
- <sup>39</sup> See the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 4 at 236-37.
- <sup>40</sup> *Re Harris* (1976), 28 R.F.L. 181 (Ont. Prov. Ct.).
- <sup>41</sup> *Canada Evidence Act*, 1982, Bill S-33, 1980-81-82 (32nd Parl. 1st Sess.) ss. 45-73.
- <sup>42</sup> See, e.g., *Re S.A.H.* (1982), 30 R.F.L. (2d) 23 (B.C. Co. Ct.). See also Bulkley, *supra*, note 35.
- <sup>43</sup> *Love v. State*, 64 Wis. 2d 432 (1974).
- <sup>44</sup> See Lloyd, "The Corroboration of Sexual Victimization of Children", in *Child Sexual Abuse and The Law* (3d ed. Washington, D.C.: American Bar Association, 1982) 103, esp. at 105-106.
- <sup>45</sup> A. Bernstein and P. Cowan, *Children's Concepts of How People Get Babies* (1975), 46 Child Development 77.
- <sup>46</sup> Lloyd, *supra*, note 44 at 105.

<sup>47</sup> See, e.g., *Re S.A.H.* (1982), 30 R.F.L. (2d) 23 (B.C. Co. Ct.).

<sup>48</sup> This proposal is based on s. 2 of the State of Washington's Substitute Senate Bill No. 4461, 1982.

<sup>49</sup> This is the definition of "statement" adopted in s. 2 of the *Canada Evidence Act, 1982*, Bill S-33, 1980-81-82 (32nd Parl. 1st Sess.).

<sup>50</sup> Substitute Senate Bill No. 4461, 1982, s. 2, State of Washington; Family Court Act, State of New York, s. 1046.

## Chapter 18

### Previous Sexual Conduct

That the common law tended to regard the testimony of female sexual victims as inherently untrustworthy was reviewed in Chapter 15, *Corroboration*,<sup>1</sup> and this tendency had its counterpart in the legal principles relating to the character of the complainant in sexual cases. In prosecutions for a sexual offence involving an assault, two related issues emerge which are of crucial importance to the outcome of the case:

- Has the Crown proven beyond a reasonable doubt that the complainant did not consent to the sexual activity which forms the basis of the charge?; and, more generally,
- Is the complainant perceived to be a credible witness, in the sense that the allegation against the particular accused is a *true* allegation?

The common law incorporated and fostered assumptions relating to both of these issues, namely, that a woman who was sexually experienced would be more likely to have consented to an alleged criminal sexual act than one who was “chaste,”<sup>1</sup> and that such a woman was generally more likely to be an untruthful witness.<sup>2</sup> This chapter elaborates on the common law position and on the pertinent statutory amendments introduced in 1976 and 1983, respectively.

#### The Position at Common Law<sup>3</sup>

Until 1976 in Canada, the admissibility of evidence concerning the complainant’s history of sexual behaviour where the accused was charged with a sexual offence was governed by the common law. The common law rules differed depending on whether such evidence was considered relevant to a material issue (for example, whether the complainant consented to the alleged sexual act) or to a collateral issue (for example, the complainant’s credibility).

In prosecutions for rape and indecent assault, the complainant’s lack of consent was an element required to be proved by the Crown, and hence was a material issue before the court. At common law, the accused could cross-examine the complainant on matters considered relevant to determining whether she granted or withheld her consent to the sexual act. The common

law reflected the view that a woman who was sexually experienced tended to grant her sexual favours indiscriminately, and hence was more likely to have given her consent to the act that formed the basis of the charge against the accused. Accordingly, the complainant could be cross-examined concerning her prior sexual conduct with the accused,<sup>4</sup> her reputation as a prostitute,<sup>5</sup> and generally, her reputation for "unchastity."<sup>6</sup> The complainant was required to answer these questions and, provided they were deemed relevant to the consent issue, the trial judge had no discretion to excuse the complainant from so answering.<sup>7</sup> If the complainant denied the insinuations or refused to respond to them, the accused could contradict her answers and adduce evidence to substantiate them.<sup>8</sup>

Concerning the issue of the complainant's credibility, the common law position was only slightly less compromising for the complainant. Since it was assumed that a sexually experienced woman or girl was less likely to be truthful than one who was chaste, a complainant could be cross-examined about her sexual conduct in order to impeach her credibility. That the trial judge could intervene<sup>9</sup> and that the complainant's denials did not entitle the accused to adduce evidence contradicting them<sup>10</sup> were somewhat illusory protections; the accused's insinuations as to the complainant's moral character, founded or not, could not fail to influence the trier of fact.

These rules of evidence have justly been criticized on the basis that they shifted the focus of a sexual assault trial from the alleged actions of the accused to the sexual life-style of the complainant.<sup>11</sup> Recent legislative attempts to redress this situation are discussed below.

## Amendments Introduced in 1976

In 1976, a provision was introduced into the *Criminal Code* which was intended to afford greater protection to female complainants in sexual cases.<sup>12</sup> It provided that:

142. (1) Where an accused is charged with an offence under section 144 [rape] or 145 [attempted rape] or subsection 146(1) [sexual intercourse with a female under 14] or 149(1) [indecent assault on a female], no question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless

- (a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the court; and
- (b) the judge, magistrate or justice, after holding a hearing *in camera* in the absence of the jury, if any, is satisfied that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.

As this section of the *Criminal Code* has since been repealed,<sup>13</sup> it is unnecessary to deal with the extensive case law it generated. It is opportune, however, to note the different ways in which this provision failed to provide appropriate protection for female complainants in trials of sexual offences. This failure was precipitated largely by the section's vague wording, which did not make clear whether the common law rules, in so far as they operated to exclude evidence of the complainant's past sexual conduct, had been preserved or abrogated:

1. The section was judicially interpreted as elevating the complainant's credibility from a *collateral* issue to a *material* one, thus removing even the minimal protections afforded by the common law;<sup>14</sup>
2. The section was judicially interpreted as rendering the complainant a compellable witness for the accused at the *in camera* hearing, and hence rendering her liable to be questioned in detail concerning her past sexual conduct with persons other than the accused;<sup>15</sup> and
3. The section applied not only to offences where consent was at issue (namely, rape, attempted rape and indecent assault on a female) but also to the offence of sexual intercourse with a female under 14, for which offence the complainant's consent is *irrelevant* to the accused's culpability. With respect to this offence, the 1976 amendment sanctioned an extensive inquiry into the complainant's past sexual conduct for the purposes of impugning her credibility, an inquiry which the rules of the common law did *not* permit.<sup>16</sup>

Manifestly, the former section 142 of the *Criminal Code* failed to realize its ostensible purpose and, if anything, tended to foster the notion that the complainant in a sexual case was *herself* on trial.

## Amendments Introduced in January, 1983

The amendments to the *Criminal Code* introduced in January, 1983 substantially restrict the admission of evidence concerning the complainant's prior sexual conduct with persons other than the accused. Sections 246.6 and 246.7 of the *Criminal Code* now provide:<sup>17</sup>

246. (1) In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless

- (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
- (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
- (c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where

that evidence relates to the consent that the accused alleges he believed was given by the complainant.

(2) No evidence is admissible under paragraph (1)(c) unless

(a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and

(b) a copy of the notice has been filed with the clerk of the court.

(3) No evidence is admissible under subsection (1) unless the judge, magistrate or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.

(4) The notice given under subsection (2) and the evidence taken, the information given or the representations made at a hearing referred to in subsection (3) shall not be published in any newspaper or broadcast.

246.7 In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

These provisions are noteworthy in the following respects:

- Where the accused is charged with one of the "sexual assault" offences in sections 246.1, 246.2, or 246.3, the sexual activity of the complainant with any person other than the accused may only be admitted into evidence if it meets one of the narrow conditions outlined in sections 246.6 (1)(a), 246.6 (1)(b), or 246.6 (1)(c).
- At the *in camera* hearing, both the jury and the members of the public are excluded, and the complainant is *not* a compellable witness.
- Evidence of the complainant's sexual reputation is not admissible for the purposes of challenging or supporting the credibility of the complainant in a proceeding in respect of any of the "sexual assault" offences.

## Summary

**The Committee considers that the amendments introduced in January, 1983 provide sufficient safeguards against unjustified inquiries into the complainant's past sexual conduct or sexual reputation, where the accused is charged with a form of "sexual assault."** In the Committee's view, these amendments strike an appropriate balance between protecting the complainant and preserving the accused's fundamental right of making a full answer and defence to the sexual assault charge against him.

**In the opinion of the Committee, however, these reforms fail to provide any additional protection at all to young persons who are victims of a sexual offence other than a form of sexual assault, for example, incest, gross indecency, and sexual intercourse with a female under 14.** In trials concerning the latter offences, the common law assumption that an unchaste young person is



more likely to be untruthful will continue to operate. Consequently, insinuations concerning a young complainant's sexual history may still be admissible simply to impeach his or her credibility as a witness. In the Committee's view, this state of affairs is unacceptable.

**The Committee recommends that the *Criminal Code* be amended to provide that:**

- 1. Sections 246.6 (1)(a) and 246.6 (1)(b), and the corollary provisions in sections 246.6 (3) through 246.6 (6), apply to *all* sexual offences.**
- 2. Section 246.7 applies to *all* sexual offences.**

These amendments would ensure that the complainant's past sexual conduct would be inadmissible merely to impeach his or her credibility as a witness, and would finally extinguish the dubious common law assumption that there is a direct correspondence between chastity and veracity.<sup>18</sup> Further, since the Committee recommends elsewhere in this Report that the concepts of "previously chaste character"<sup>19</sup> and "more to blame"<sup>20</sup> be removed from Canadian criminal law, there would be no inconsistency between the recommendations made above and the Committee's recommendations concerning amendments to the substantive criminal law of sexual offences.

## References

### Chapter 18: Previous Sexual Conduct

- <sup>1</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Ottawa: Department of Justice, 1981) at 83-84.
- <sup>2</sup> *Ibid.*, at 84.
- <sup>3</sup> This summary has been adapted from the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 1 at 83-85.
- <sup>4</sup> *R. v. Martin* (1834), 172 E.R. 1364; *R. v. Cockcroft* (1870), 11 Cox C.C. 410; *R. v. Holmes* (1871), L.R. 1 C.C.C.R. 334; *R. v. Riley* (1887), 16 Cox C.C. 191.
- <sup>5</sup> *R. v. Clay* (1851), 5 Cox C.C. 146; *R. v. Clarke* (1817), 171 E.R. 633; and *R. v. Tissington* (1843), 1 Cox C.C. 48.
- <sup>6</sup> *R. v. Moulton*, [1980] 1 W.W.R. 711 (Alta. C.A.); *R. v. Greatbanks*, [1959] Crim. L.R. 450; *R. v. Krausz* (1973), 57 Cr. App. R. 466 (C.C.A.).
- <sup>7</sup> *R. v. Basken and Kohl* (1974), 21 C.C.C. (2d) 321 (Sask. C.A.); *R. v. Moulton*, *ibid.*
- <sup>8</sup> *Ibid.*
- <sup>9</sup> *Ibid.* See also *Laliberté v. The Queen* (1877), 1 S.C.R. 117.
- <sup>10</sup> *Supra*, note 7.
- <sup>11</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 1 at 84.
- <sup>12</sup> S.C. 1974-75-76, c. 93, s. 8.
- <sup>13</sup> S.C. 1980-81-82-83, c. 125, s. 6.
- <sup>14</sup> *Forsythe v. The Queen*, [1980] 2 S.C.R. 268.
- <sup>15</sup> *Ibid.*
- <sup>16</sup> See *R. v. Cargill*, [1913] 2 K.B. 271 (C.C.A.), and generally Cambridge Department of Criminal Science, *Sexual Offences* (London: MacMillan and Co., 1957) at 384-86.
- <sup>17</sup> S.C. 1980-81-82-83, c. 125, s. 19.
- <sup>18</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, note 1 at 91-92. But see *R. v. Konkin*, (1983), 44 A.R. 10 (S.C.C.).
- <sup>19</sup> See ss. 146 (2), 151, 152, and 153 (1)(b) of the *Criminal Code* R.S.C. 1970, c. C-34.
- <sup>20</sup> See s. 146 (3) of the *Criminal Code*, *ibid.*

## Chapter 19

### Evidence of an Accused's Spouse

Where an accused is charged with a sexual offence against a young person, an important issue arises concerning the legal capacity of the accused's spouse to testify against him or her. For example, until the amendments introduced in January, 1983, the spouse of an accused charged with the offence of indecent assault on a female or indecent assault on a male was neither competent nor compellable to testify against his or her spouse, regardless of the potential cogency of that testimony. This chapter outlines the historical bases of these spousal privileges and disqualifications, and considers the current state of the law.

#### Spousal Competence and Compellability

It is necessary, before delving into the historical origins of the rules concerning spousal competence and compellability, to define what is meant by the legal terms "competent" and "compellable". A witness is *competent* if he or she may lawfully be called to give evidence.<sup>1</sup> On the other hand, a witness is *compellable* if he or she may lawfully be *obliged* to give evidence, under pain of being held in contempt of court if he or she refuses to do so. The general rule is that all competent witnesses are also compellable<sup>2</sup> and, in Canada, if not in England,<sup>3</sup> where a witness is competent for a party either at common law or by statute, then such witness is also compellable by that party.<sup>4</sup>

At common law the spouse of the accused was not competent as a witness either for the defence or for the Crown, except in cases where the offence involved the transgression by one spouse of the "person, liberty, or health" of the other spouse.<sup>5</sup> The incompetence extended to spouses of either sex and to testimony relating to events that occurred both before and during the marriage.<sup>6</sup>

The historical evolution of the rules concerning marital communications between spouses and spousal incompetency belies a clear, unbroken line of development. Wigmore suggested as a possible source the testimonial rules of the old ecclesiastical law, which excluded the testimony of an alleged transgressor's family, dependants and servants.<sup>7</sup> Other considerations which gave

impetus to the rules were: the common law concept of the unity of the marriage partners (which unity inhered in the husband);<sup>8</sup> the perception that one spouse would be unduly biased in testifying regarding a matter that concerned the other spouse;<sup>9</sup> and the fact that the spouse was at one time considered an "interested party" whose testimony should accordingly be excluded from the court's consideration.<sup>10</sup>

The most conspicuous contribution to the rules concerning spousal incompetence was, however, a pronounced judicial reluctance to disrupt "the peace of the families"<sup>11</sup> or to cause "dissensions in families between husband and wife"<sup>12</sup> by allowing one spouse (usually the wife) to be a witness for or against the other spouse (usually the husband). As Wigmore stated, "possibly the true explanation is, after all, the simplest one, namely, that a natural and strong repugnance was felt . . . to condemning a man by admitting to the witness stand against him those who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance and were almost numbered among his chattels."<sup>13</sup> Although many inroads to the common law rules have been made by legislative enactments over the years, the residue of these rules reflects the law's traditional reluctance to oblige one spouse to testify against the other in a criminal proceeding.

Before considering the current state of Canadian law in this regard, it should be noted that the special rules concerning spousal competence and compellability discussed below apply only where the persons concerned are legally married.<sup>14</sup> Persons who are not legally married, even though they may have lived together for several years, enjoy no special privilege in this regard.

## Evidence of an Offender's Spouse in Criminal Proceedings

In criminal proceedings, the statutory provision bearing on the issues of spousal competence and compellability and of interspousal communications during marriage is section 4 of the *Canada Evidence Act*,<sup>15</sup> which provides:<sup>16</sup>

4.(1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

(2) The wife or husband of a person charged with an offence or attempt to commit an offence against section 33 or 34 of the *Juvenile Delinquents Act* or with an offence against any of sections 146, 148, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 246.1, 246.2, 246.3, 249 to 250.2, 255 to 258 or 289 of the *Criminal Code*, is a competent and compellable witness for the prosecution without the consent of the person charged.

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

(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 218, 219, 220, 222, 223, 245, 245.1, 245.2 or 245.3 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

(4) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

(5) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution.

From the Committee's perspective, the most important of these provisions are sections 4(2) and 4(3.1), which set out those criminal offences on prosecutions for which the accused's spouse is both competent and compellable for the Crown without the consent of the accused. These sections, however, must be understood in light of the other provisions of section 4 discussed below.

Section 4(1) of the *Canada Evidence Act* is a statutory departure from the common law rule that a spouse was not competent either for the defence or for the Crown, except where the offence involved a transgression by the accused of the "person, liberty, or health" of the victim spouse. It provides that, subject to the other provisions in section 4, the spouse of an accused person is a competent witness for the defence. Further, the predominant judicial view in Canada is that, where a witness is competent for a party either at common law or by statute, then such witness is also compellable to testify at the instance of that party.<sup>17</sup>

Section 4(3) codifies the common law privilege of nondisclosure concerning communications by one spouse to another during their marriage and provides:

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

This privilege of non-disclosure can be claimed only by the spouse who received the communication sought to be introduced in evidence, not by the spouse who made the communication. Further, once the marriage has been dissolved by divorce, the marital privilege concerning communications between spouses may not be claimed.<sup>18</sup>

An important legal issue is whether the privilege conferred by section 4(3) can be claimed where the spouse claiming it is a competent and compellable witness for the Crown pursuant to section 4(2). Canadian courts have differed on this question. The Quebec Court of Appeal has held that the privilege conferred by section 4(3) does not apply to a spouse who is otherwise competent and compellable for the Crown pursuant to section 4(2);<sup>19</sup> the Alberta Court of Appeal has reached the opposite conclusion,<sup>20</sup> and the Court of Appeal for Ontario declined to determine this issue when an opportunity presented itself.<sup>21</sup>

Obviously, the provisions of section 4(2) lose much of their force, particularly in the context of intra-familial child sexual abuse, where an otherwise competent and compellable spouse who has pertinent testimony can nonetheless claim the privilege of non-disclosure concerning, for example, her husband's inculpatory statements to her.

It has been held both in Canada<sup>22</sup> and in England<sup>23</sup> that an inculpatory letter written by one spouse to another will be admissible in evidence if a third party is made aware of the letter's contents, as will evidence of a third party who overhears an interspousal communication.<sup>24</sup> On the other hand, where an interspousal "private communication" is electronically intercepted by the police pursuant to Part IV.1 of the *Criminal Code*,<sup>25</sup> the intercepted communication will be inadmissible where the non-accused spouse does not waive the privilege conferred by section 4(3), and where the offence is not one for which the non-accused spouse is a competent or compellable witness at the instance of the Crown.<sup>26</sup>

Section 4(4) of the *Canada Evidence Act* provides:

Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

As noted above, the common law exception to the general rule of spousal incompetence pertained to offences in which one spouse transgressed the "person, liberty, or health" of the other spouse. This exception was established in the early seventeenth century in *Lord Audley's Case*,<sup>27</sup> where a wife was held to be competent to testify against her husband, who was charged as an accessory to her rape. Cross argues that "the decision was based on necessity. Were the law otherwise the injured spouse would frequently have no remedy."<sup>28</sup>

Recent years have witnessed an expansion of the kinds of offences for which the victim spouse will be considered competent to testify against the offending spouse pursuant to section 4(4).<sup>29</sup> This development has broadened to include offences directed, not only against the spouse of the offender, but also against a child of the family. For example, in *R. v. MacPherson*,<sup>30</sup> the accused was charged with assaulting his infant son, and an issue arose concerning the wife's competence to testify against him. The Alberta Court of Appeal held that section 4(4) should be considered to include such a situation, and approved the Ontario County Court decision in *R. v. McNamara*,<sup>31</sup> which adopted a similar conclusion. In *R. v. Felliche*,<sup>32</sup> a mother was charged with the attempted murder of her infant son; the British Columbia Supreme Court held that the mother's husband was competent to testify against her. From these decisions, it is apparent that Canadian courts are taking a liberal, and altogether justifiable, view concerning the kinds of behaviours by one spouse which should be considered injurious to the "person, liberty, or health" of the other spouse.

## Amendments to the Canada Evidence Act Introduced in January, 1983

Sections 4(2) and 4(3.1) of the *Canada Evidence Act* provide:

4. (2) The wife or husband of a person charged with an offence or attempt to commit an offence against section 33 or 34 of the *Juvenile Delinquents Act* or with an offence against any of sections 146, 148, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 246.1, 246.2, 246.3, 249 to 250.2, 255 to 258 or 289 of the *Criminal Code*, is a competent and compellable witness for the prosecution without the consent of the person charged.

4.(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 218, 219, 220, 222, 223, 245, 245.1, 245.2 or 245.3 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

As a consequence of these amendments, the wife or husband of a person charged with virtually any sexual offence against a young person is a competent and compellable witness for the Crown, and this applies also to other assaultive offences where the offending spouse's victim is under the age of 14. The amendments to section 4 of the *Canada Evidence Act* introduced in January, 1983 are illustrative of the gradual erosion in Canadian law of the special testimonial privileges and disqualifications conferred by the common law on husbands and wives.

## Evidence of Spouses in Child Welfare Proceedings

The rules of evidence relating to spouses in child welfare proceedings are governed by provisions of the various provincial "child welfare" laws, or by provincial evidence acts, or by both. The applicable law in each province and territory is canvassed below.

### *Newfoundland*

In Newfoundland, section 12(3) of *The Child Welfare Act, 1972*, S. Nfld. 1972, No. 37, enables a judge to "compel the attendance of witnesses". Section 2 of *The Evidence Act*, R.S. Nfld. 1970, c. 115 makes spouses "competent and compellable" on the trial of any issue joined, or any matter or question, or on any enquiry arising in any suit action or other proceeding, in any court of justice. Section 4 of that Act retains the interspousal communication privilege of non-disclosure.

### *Prince Edward Island*

The Prince Edward Island *Family and Child Services Act*, S.P.E.I. 1981, c. 12, is silent as to witnesses' competence and compellability. However, section 4 of the *Evidence Act*, R.S.P.E.I. 1974, c. E-10, mandates spousal competence and compellability. Section 9 provides that a spouse receiving an interspousal communication is not compellable to disclose such communication.

#### *Nova Scotia*

In Nova Scotia, the *Children's Services Act*, S.N.S. 1976, c. 8, makes no express provision for the competence and compellability of witnesses. Section 42 of the *Nova Scotia Evidence Act*, R.S.N.S. 1967, c. 94, however, provides that spouses are competent and compellable and section 46 retains the interspousal communications privilege.

#### *New Brunswick*

The *New Brunswick Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, section 30(9), provides:

"Notwithstanding the *Evidence Act*, a spouse may be compelled to testify as a witness in the course of judicial proceedings brought against his spouse under this Act with respect to abuse or neglect of a child or an adult."

This provision seems to give paramountcy to this act over section 10 of the *New Brunswick Evidence Act*, R.S.N.B. 1973, c. E-11, which preserves spousal non-compellability with respect to the marital communications of the spouses. Section 3 of the *Evidence Act* provides generally for spousal competence and compellability.

#### *Quebec*

In Quebec, section 85 of the *Youth Protection Act*, S.Q. 1977, c. 20 incorporates by reference article 295 of the *Code of Civil Procedure* R.S.Q. 1980, c. C-25 (among others), which provides that "all persons are competent to testify . . . , and any person competent to testify may be compelled to do so. Relationship, connection by marriage and interest are objections only to the credibility of a witness".

#### *Ontario*

In Ontario, s. 8 of the *Evidence Act*, R.S.O. 1980, c. 145 makes parties to an "action" and their spouses "competent and compellable to give evidence on behalf of themselves or of any of the parties."

Section 1 of that Act defines "action" to include "an issue, matter, arbitration, reference, investigation, inquiry . . . and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario." In addition, s. 28(2) of the *Child Welfare Act*, R.S.O. 1980, c. 66, provides that the family court has "the same power to enforce the attendance of witnesses and to compel them to give evidence . . . as is vested in any court in civil cases." The exception is interspousal communications, for which the recipient spouse is not compellable by section 11 of the *Evidence Act*.

#### *Manitoba*

In Manitoba, *The Child Welfare Act*, S.M. 1974, c. 30, section 25(8), empowers a judge to "compel the attendance of any person and require him to give evidence under oath". *The Manitoba Evidence Act*, R.S.M. 1970, c. E-150, of that province provides for the competence and compellability of spouses (section 5) and also retains the limit on compellability of a recipient spouse regarding interspousal communications (section 10).

#### *Saskatchewan*

*The Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16, provides for spousal competence and compellability (section 35(1)) and retains the interspousal



communication privilege (section 36). *The Family Services Act*, R.S.S. 1978, c. F-7, of that province empowers a judge to "compel the attendance of witnesses in the same manner as a judge may compel the attendance of witnesses in summary conviction proceedings." (Section 25).

#### *Alberta*

The *Alberta Evidence Act*, R.S.A. 1980, c. A-21, is similar to that of Ontario in this regard. Section 4(2) of that Act sets out the general rule that spouses are "competent and compellable" and section 8 provides an exception for interspousal communications, for which the spouse receiving the communication is not compellable. The *Alberta Child Welfare Act*, R.S.A. 1980, c. C-8, section 13(1)(a), empowers a judge to "compel the attendance of any person and require him to give evidence on oath . . .". Similarly, section 12(1) of that Act provides that proceedings "may be as informal as the circumstances will permit". The combined effect of these provisions seems to confer "competence and compellability" on spouses. However, some uncertainty exists whether interspousal communications remain privileged at child welfare proceedings.

#### *British Columbia*

In British Columbia, the *Family and Child Service Act*, S.B.C. 1980, c. 11, provides in section 19(1) that a court may "compel the attendance of witnesses and administer oaths" in proceedings under the Act. Section 7 of the *Evidence Act*, R.S.B.C. 1979, c. 116, makes spouses of parties "competent and compellable" and section 8 retains the interspousal communication privilege by providing that the recipient spouse is not compellable to disclose marital communications.

#### *Yukon Territory*

The Yukon Territory's *Child Welfare Ordinance* R.O.Y.T. 1971, c. C-4 makes no express provision for the powers of a judge to compel witnesses at child protection hearings. However, section 4(1) of the *Evidence Ordinance*, R.O.Y.T. 1971, c. E-6, confers competence and compellability on spouses in an "action", which includes "any civil proceedings, inquiry, arbitration and . . . any other prosecution or proceeding authorized or permitted to be tried, heard, had or taken . . . under the law of the Territory" [section 2(1)]. Section 7(1) of the *Evidence Ordinance* provides that the recipient spouse is not compellable to disclose interspousal communications.

#### *Northwest Territories*

In the Northwest Territories, section 101 of the *Child Welfare Ordinance*, R.O.N.W.T. 1974, c. C-3, confers upon a judge the "same power . . . to enforce the attendance of witnesses and to compel them to give evidence . . . as is vested in the Court in civil cases." Section 4 of the *Evidence Ordinance* R.O.N.W.T. 1974, c. E-4, like its provincial counterparts, makes spouses competent and compellable. Similarly, section 7 of the *Evidence Ordinance* retains the interspousal communication privilege of non-disclosure.

As is apparent from the foregoing summary, there is uncertainty in a number of jurisdictions about whether a spouse who is compellable at a child welfare proceeding may also be compelled to disclose relevant communications made to him or her by the other spouse during their marriage.

## Summary

The Committee considers that, in cases of alleged sexual or physical abuse of a young person, the social importance of making available to the court all probative evidence far exceeds that of ostensibly protecting a marital relationship. That the sexual abuse of young persons, by its very nature, is difficult to prove makes it even more crucial that all potentially relevant testimony, whether elicited from the offender's spouse or from an other party, should be accessible to the judicial process. Public policy and children's safety alike require that probative evidence should not be withheld. In the words of a British jurist:<sup>33</sup>

Respect is due to the confidences of married life; but so is respect due to the ascertainment of the truth. Marital accord is to be preserved: but so is public security.

Accordingly, the Committee recommends that:

1. The *Canada Evidence Act* be amended to provide explicitly that, where a spouse is competent and compellable pursuant either to section 4(2) or 4(3.1) of that Act, the privilege of non-disclosure contained in section 4(3) may *not* be claimed by that spouse.
2. Each provincial and territorial evidence act, and the *Quebec Code of Civil Procedure*, be amended to provide explicitly that, where a spouse is otherwise competent and compellable at a child welfare proceeding, such spouse may *not* claim any privilege of non-disclosure relating to inter-spousal communications.

## References

### Chapter 19: Evidence of an Accused's Spouse

- <sup>1</sup> Cross, *Evidence* (5th ed. London: Butterworths, 1979) at 163.
- <sup>2</sup> *Ibid.*
- <sup>3</sup> See *Hoskyn v. Metropolitan Police Commissioner*, [1978] 2 All E.R. 136, 67 Cr. App. Rep. 88 (H.L.).
- <sup>4</sup> *R. v. Czippis* (1979), 101 D.L.R. (3d) 323, 48 C.C.C. (2d) 166 (Ont. C.A.); *R. v. Sillars* (1978), 45 C.C.C. (2d) 283, [1979] 1 W.W.R. 743 (B.C.C.A.); *R. v. Lonsdale* (1973), 15 C.C.C. (2d) 201, [1974] 2 W.W.R. 157 (Alta. C.A.). See also *Gosselin v. The King* (1903), 33 S.C.R. 255, 7 C.C.C. 139.
- <sup>5</sup> Uniform Law Conference of Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*. (Ottawa: Department of Justice, 1981) at 297.
- <sup>6</sup> Cross, *supra*, note 1, at 166.
- <sup>7</sup> Wigmore, 8 *Evidence in Trials at Common Law*, rev. McNaughton (Boston: Little, Brown & Co., 1961), s. 2227.
- <sup>8</sup> *R. v. Neal* (1835), 7 Car. & P. 168, 173 E.R. 74.
- <sup>9</sup> *Davis v. Dinwoody* (1792), 4 T.R. 678, 100 E.R. 1241.
- <sup>10</sup> Cross, *supra*, note 1, at 165.
- <sup>11</sup> *Barker v. Dixie* (1736), Cas. T. Hard. 264 at 264, 95 E.R. 171 at 171 *per* Lord Hardwicke.
- <sup>12</sup> *R. v. Cliviger* (1788), 2 T.R. 263 at 269, 100 E.R. 143 at 146 *per* Grose J.
- <sup>13</sup> Wigmore, *supra*, note 7, s. 2227.
- <sup>14</sup> *Ex parte Coté* (1971), 5 C.C.C. (2d) 49 (Sask. C.A.). See also *R. v. Lonsdale* (1973), 15 C.C.C. (2d) 201 (Alta. C.A.), and *R. v. Mann*, [1971] 5 W.W.R. 84 (B.C.S.C.).
- <sup>15</sup> *Canada Evidence Act*, R.S.C. 1970, c. E-10.
- <sup>16</sup> This section was amended by S.C. 1980-81-82-83, c. 125, s. 29.
- <sup>17</sup> See cases cited *supra*, note 4.
- <sup>18</sup> *R. v. Marchand* (1980), 55 C.C.C. (2d) 77 (N.S.C.A.).
- <sup>19</sup> *R. v. St.-Jean* (1976), 34 C.R.N.S. 378 (Que. C.A.).
- <sup>20</sup> *R. v. Jean and Piesinger* (1979), 46 C.C.C. (2d) 176 (Alta. C.A.), *aff'd* 51 C.C.C. (2d) 192n (S.C.C.).
- <sup>21</sup> *Re Mailloux and The Queen* (1980), 55 C.C.C. (2d) 193 (Ont. C.A.).
- <sup>22</sup> *R. v. Armstrong* (1970), 1 C.C.C. (2d) 106 (N.S.C.A.).
- <sup>23</sup> *Rumping v. D.P.P.*, [1962] 3 All E.R. 256 (H.L.).
- <sup>24</sup> See *R. v. Bartlett* (1837), 173 E.R. 362; *R. v. Smithies* (1832), 172 E.R. 999; *R. v. Simons* (1834), 172 E.R. 1355; *R. v. Jean and Piesinger*, *supra*, note 20; and *Rumping v. D.P.P.*, *supra*, note 23. But see *R. v. Dreher* (1952), 103 C.C.C. 321 (Alta. C.A.).
- <sup>25</sup> *Cr. Code*, ss. 178.1 — 178.23.
- <sup>26</sup> *R. v. Jean and Piesinger*, *supra*, note 20.
- <sup>27</sup> (1631), 3 State Tr. 401, followed in *R. v. Azire* (1725), 1 Stra. 633.
- <sup>28</sup> *Supra*, note 1, at 167.
- <sup>29</sup> See, e.g., *R. v. Sillars*, [1979] 1 W.W.R. 743, 45 C.C.C. (2d) 283 (B.C.C.A.) (charge of arson); *R. v. Bowles*, [1967] 3 C.C.C. 60, 50 C.R. 353 (Alta. Prov. Ct.) (charge of forcible entry into a

dwelling-house); *R. v. Beam* (1974), 19 C.C.C. (2d) 41 (Ont. Prov. Ct.) (charge of assault causing bodily harm); *Maida v. The Queen* (1979), 12 C.R. (3d) 227 (Ont. Co. Ct.) (charge of dangerous driving); *R. v. Cripps* (1979), 101 D.L.R. (3d) 323, 48 C.C.C. (2d) 166 (Ont. C.A.) (charge of possession of a weapon for a purpose dangerous to the public peace).

<sup>30</sup> (1980), 36 N.S.R. (2d) 674 (C.A.).

<sup>31</sup> (1979), 48 C.C.C. (2d) 201 (Ont. Co. Ct.).

<sup>32</sup> (1979), 12 C.R. (3d) 207 (B.C.S.C.).

<sup>33</sup> *Rumping v. D.P.P.*, *supra*, note 23 at 276 *per* Lord Morris of Borth-Y-Gest.

## Chapter 20

### Similar Acts

The doctrine of similar fact evidence is an exception to the general rule that the Crown may not lead evidence of the accused's criminal disposition<sup>1</sup> unless the accused has in some way put his or her character in issue. Where, for example, the accused is charged with sexual assault on a pre-pubescent girl, the Crown may lead evidence of prior sexual assaults by the accused on other young girls, even though the prior incidents were not the subject of criminal charges against the accused and the accused has not previously put his character in issue, provided that the so-called "similar fact evidence" is considered by the trial judge to be highly probative on an issue before the court. Many of the leading Canadian and English legal decisions on similar fact evidence have involved the sexual molestation either of one child or of a number of children in a roughly similar fashion over a period of time.

As exemplified in the following case study from the National Police Force Survey, this behavioural tendency of some sexual offenders against children was documented in the research findings of the Committee.

The adult male accused was charged with a total of 10 counts, for offences including buggery, indecent assault on a male and assault with intent to commit buggery. He committed the acts for which he was charged on five separate occasions with five boys aged 13 and 14 years. The male victims were runaways, and the accused's consistent "recruitment" pattern was to befriend the runaway, invite him to the accused's apartment to spend the night, and thereupon commit the assault. He apparently chose runaways as his victims because they were unlikely to make complaints, for fear of involving the police and being sent home or to a child welfare agency. The accused's activities came to light when two of his victims spoke to a social worker, which subsequently prompted a police investigation.

The common denominator in cases where similar fact evidence is sought to be introduced by the Crown is that such evidence will, if admitted, invariably taint the accused with an odour born of activities other than the one for which he or she stands trial. Canadian courts have, accordingly, professed to admit such evidence only where its relevance to an issue before the court materially outweighs its prejudicial nature, and where there is a demonstrated link between the allegedly similar facts and the accused.<sup>2</sup>

Whether similar fact evidence can afford corroboration is an important issue in the context of sexual offences against young persons, in spite of the repeal effected in January, 1983 of the statutory corroboration requirement for assaultive sexual offences. In all sexual offences, where the Crown adduces the evidence of a child who is unsworn, no conviction may be registered against the accused unless such evidence "is corroborated in a material particular by evidence that implicates the accused".<sup>3</sup> Accordingly, whether a particular form of evidence is capable of corroborating a child's unsworn testimony will continue to be crucial in cases of child sexual abuse, in the absence of wholesale changes to the evidentiary rules concerning children's testimony.

The doctrine of similar fact evidence tends to afford protection for sexually abused young persons. It allows the previous sexual behaviour of the accused with the same child or with others to be used to show that the accused may be guilty of the sexual offence charged, while safeguarding the accused against far-fetched inculpatory inferences based on his or her prior behaviour.

**The Committee therefore recommends that this evidentiary doctrine be retained. Further, the Committee considers that the "similar acts" exception to the character evidence rule should not be codified, and in this respect, agrees with the Federal/Provincial Task Force on Uniform Rules of Evidence<sup>4</sup> and with the legislative proposals of Bill S-33.<sup>5</sup>**

The Committee also makes the following observations concerning this form of evidence:

1. The potential probative value of similar fact evidence reinforces the necessity of allowing children of younger ages to testify in court. The admissibility of similar fact evidence depends, where the similar facts are proffered by young children, largely on whether those children are deemed legally competent to testify to those facts at trial.
2. Evidence of past incidents of child abuse by parents (evidence of "past parenting"<sup>6</sup>) has an important role to play in child welfare proceedings, in determining whether a child is in need of protection from a particular person or persons and, if so, the most appropriate legal disposition vis-a-vis the child. The Committee considers that the court should have before it all relevant evidence in making these determinations.

**With respect to provincial child welfare legislation, the Committee recommends that a provision similar to section 28(4) of the Ontario *Child Welfare Act*<sup>7</sup> be enacted in each province and territory. Section 28(4) of that Act provides:**

**Notwithstanding any privilege or protection afforded under the *Evidence Act*, before making a decision that has the effect of placing a child in or returning a child to the care or custody of any person other than a society, the court may consider the past conduct of that person towards any child who is or has at any time been in the person's care, and any statement or report whether oral or written, including any transcript, exhibit or finding in a prior proceeding whether civil or criminal that the court considers relevant to such consideration and upon such proof as the court may require, is admissible in evidence.<sup>8</sup>**

## References

### Chapter 20: Similar Acts

- <sup>1</sup> Cross, *Evidence* (5th ed. London: Butterworths, 1979) at 354.
- <sup>2</sup> *Sweitzer v. The Queen* (1982), 68 C.C.C. (2d) 193 (S.C.C.); *Guay v. The Queen* (1979), 42 C.C.C. (2d) 536 (S.C.C.).
- <sup>3</sup> *Criminal Code*, R.S.C. 1970, c. C-34, as am., s. 586. See also *Canada Evidence Act*, R.S.C. 1970, c. E-10, as am., s. 16(2); and *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, as am., s. 19(2).
- <sup>4</sup> *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, (Ottawa: Department of Justice, 1981) at 100.
- <sup>5</sup> *Canada Evidence Act*, Bill S-33, 1982 (32nd Parl. 1st Sess.), 26(b). See generally ss. 23-31 of the proposed Bill.
- <sup>6</sup> See generally Bala, Lilles, and Thompson, *Canadian Children's Law* (Toronto: Butterworths, 1982) at 181-84.
- <sup>7</sup> *Child Welfare Act*, R.S.O. 1980, c. 66.
- <sup>8</sup> Judicial experience with this provision in Ontario indicates that family court judges are mindful of the prudential limits of this form of evidence: see *C.A.S. of Metro Toronto v. N.H.B.*, (unreported) May 8, 1980, (Ont. Prov. Ct.); *Kawartha Haliburton C.A.S. and Haylock* (1980), 3 F.L.R.R. 27 (Ont. Prov. Ct.); *C.A.S. of Metro Toronto v. C. and C.* (1981), 21 R.F.L. (2d) 426 (Ont. Prov. Ct.); and *Elizabeth and James C. v. Catholic Children's Aid Society of Metropolitan Toronto* (1982), 37 O.R. (2d) 82 (Ont. Co. Ct.). For an example of the application of similar fact evidence in the context of the manslaughter of a child by a parent, see *R. v. Schell and Pacquette* (1977), 33 C.C.C. (2d) 422 (Ont. C.A.).

## Chapter 21

# Public Access to Hearings

This chapter reviews federal and provincial provisions concerning who may attend a legal proceeding in which a sexual assault on a young person is alleged and what effects these provisions may have in relation to obtaining a full and candid presentation of the child's or youth's testimony. The issue of protecting the privacy of young victims of sexual offences is considered separately in Chapter 22, *Publication of Victims' Names*.

### Provincial and Territorial Child Welfare Legislation

Canadian child welfare legislation reflects the four major options which may be followed in relation to the closed or open nature of child welfare/child protection proceedings: closed (or *in camera*); open to any member of the public; open to some members of the public but not to others; or left to the discretion of the presiding judge, on a case-by-case basis. The following is a summary of how each province and territory deals with this issue.

#### *Newfoundland*

The judge must investigate the case of every child and dispose thereof in premises other than an open courtroom. In the case of a person charged with an offence against the child, the judge may in his or her discretion proceed *in camera*.<sup>1</sup>

#### *Prince Edward Island*

The judge has discretion to allow persons other than the immediate parties to the proceeding to attend, and he or she may exclude the child from any part of the hearing.<sup>2</sup>

#### *Nova Scotia*

The judge has discretion to permit attendance at the hearing of persons other than the immediate parties to the proceeding.<sup>3</sup>

#### *New Brunswick*

The judge has discretion to hold proceedings either in open court or *in camera*, and this discretion should be exercised in light of:

- the public interest in hearing the proceedings in open court;



- any potential harm or embarrassment that may be caused to any person if matters of a private nature are disclosed in open court; and
- any representations made by the parties.<sup>4</sup>

#### *Quebec*

It is provided that Youth Court hearings should be held *in camera*, subject to the presence of a member or authorized agent of the Committee for the Protection of Youth. It is also provided, however, that any journalist must be admitted unless the Court considers that his or her presence would cause prejudice to the child.<sup>5</sup>

#### *Ontario*

There is a presumption that hearings shall be closed, subject to the judge's discretion to hold otherwise having regard to the wishes of and interests of the parties and to whether the emotional health of any child who is present at the hearing would be injured by the presence of others at the hearing. Two media representatives may be present, subject to their being excluded if the judge determines that their presence would be injurious to the emotional health of any child before the court.<sup>6</sup>

#### *Manitoba*

The public is excluded from child protection hearings, and the presence of the child at such hearing is not required unless the judge so orders.<sup>7</sup>

#### *Saskatchewan*

The judge has a discretion to admit persons other than the immediate parties to the proceeding.<sup>8</sup>

#### *Alberta*

It is provided that the judge shall exclude from the room where the hearing is held all persons other than counsel, any law officer, any child welfare worker involved in the matter, the Director or his representative and the parent or guardian of the child or the immediate relatives of the child concerning whom the hearing is being held, and such other persons as the judge in his or her discretion permits. Further, if the judge considers it desirable, he or she may exclude from the room where a hearing is being held the child concerned, the parent or guardian, and the immediate relatives of the child.<sup>9</sup>

#### *British Columbia*

It is provided that proceedings before a court that deals with family or children's matters shall be open to the public, subject to the judge's discretion to exclude any person from the courtroom, *other than* a child before the court, a party to the proceedings or their counsel, where he or she is satisfied that the person's presence:

- may materially prejudice the best interests of a child;
- will substantially prejudice the interests of any adult party to the proceedings; or
- will interfere with the administration of justice.<sup>10</sup>

#### *Yukon Territory*

The judge has discretion to permit attendance of persons other than immediate parties to the proceeding, and he or she may exclude the child in

respect of whom a hearing is being held, except where the child's presence is necessary.<sup>11</sup>

#### *Northwest Territories*

The judge has discretion to permit attendance of persons other than immediate parties to the proceeding, and he or she *shall* exclude the child in respect of whom a hearing is being held, except where the child's presence is necessary.<sup>12</sup>

## Juvenile Delinquents Act and Young Offenders Act

The question of public access to hearings pursuant to the *Juvenile Delinquents Act*<sup>13</sup> was in a somewhat unsettled state in light of recent judicial and constitutional developments. Sections 12(1) and 12(2) of the *Juvenile Delinquents Act* specified that the trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and preferably in a private office or room. In *C.B. and The Queen*,<sup>14</sup> the Supreme Court of Canada held that the phrase "without publicity" in section 12(1) should be taken to mean *in camera* and that, apart from the exceptions listed in sections 10(1), 28(2), and 31(b) of that Act, the trial judge had no discretion to admit members of the public to the trial of a juvenile. This decision was rendered, however, before the coming into force of the *Constitution Act 1982* and the attendant *Charter of Rights and Freedoms*. The *Charter* guarantees, among other provisions, the following fundamental freedoms: freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication.<sup>15</sup> In the case of *Re Southam Inc. and The Queen (No. 1)*,<sup>16</sup> the Ontario Court of Appeal held (for reasons considered later) that:

1. Although "free access to the courts" is not specifically enumerated under the heading of "fundamental freedoms" in the *Charter*, such access is an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression, which includes freedom of the press.
2. The respondent's right to attend the juvenile hearing had accordingly been infringed.
3. The virtual blanket exclusion of the public under section 12(1) was not a reasonable limit which could be demonstrably justified in a free and democratic society.
4. Section 12(1) of the *Juvenile Delinquents Act*, being inconsistent with the provisions of the Constitution, was of no force or effect.

Accordingly, proceedings under the *Juvenile Delinquents Act* remained open to the public.

The *Juvenile Delinquents Act* was replaced effective April, 1984 by the *Young Offenders Act*,<sup>17</sup> which takes a much different approach to this issue. Under the *Young Offenders Act*, hearings are open to the public, with the court retaining the power under certain circumstances to exclude any or all members

of the public from the proceedings, with specified exceptions.<sup>18</sup> It is much more likely that these provisions will withstand constitutional challenge, since they appear to strike a more appropriate balance between the right of access by the public to the work of the courts and society's interest in the protection and reformation of young offenders.

## Proceedings under the Criminal Code

A number of provisions in the *Criminal Code* are relevant to the issue of public access to criminal proceedings. Section 465 (1)(j) provides that, on a preliminary inquiry, a justice may "order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing."<sup>19</sup> Further, in preliminary hearings or trials in respect of a "sexual assault" offence under section 246.1, section 246.2 or section 246.3, no evidence is admissible concerning the sexual activity of the complainant with any person other than the accused unless the presiding judicial officer, after holding a hearing *in which the jury and the public are excluded*, is satisfied that the conditions set out in section 246.6 are met.<sup>20</sup>

Section 441 of the *Criminal Code* pertains to trials of young persons under the age of 16 who have been transferred to adult criminal court pursuant to section 9 of the *Juvenile Delinquents Act*. It provides that trials of such young persons shall take place "without publicity" (namely, *in camera*), regardless of whether the young person is charged alone or jointly with another person. In light of the decision of the Ontario Court of Appeal in *Re Southam Inc. and The Queen (No. 1)*,<sup>21</sup> however, section 441 of the *Criminal Code* would seem to be of doubtful constitutional validity. In any event, section 441 of the *Criminal Code* was repealed by the *Young Offenders Act*.

The most important provisions governing the question of openness of criminal trials are found in sections 442(1) and 442(2) of the *Criminal Code*, which provide:

442.(1) Any proceedings against an accused that is a corporation or who is or appears to be sixteen years of age or more shall be held in open court, but where the presiding judge, magistrate or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

(2) Where an accused is charged with an offence mentioned in section 246.4 and the prosecutor or the accused makes an application for an order under subsection (1), the presiding judge, magistrate or justice, as the case may be, shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.

In reference to section 442(2), the offences mentioned in section 246.4 of the *Criminal Code* are: incest (section 150); gross indecency (section 157); sexual assault (section 246.1); sexual assault with a weapon, threats to a third

party, or causing bodily harm (section 246.2); and aggravated sexual assault (section 246.3).

The opening clause of section 442(1) reflects the general principle at common law that judicial proceedings shall be held in open court. As was stated by Mr. Justice Clement in *R. v. Warawuk*<sup>22</sup>:

A principle of administration of justice that is fundamental to common law Courts and has been so over the centuries [is] that trials, whether civil or criminal in their purpose, shall be held in open court.

Apart from the exceptional circumstances governed by section 246.6 and discussed above, members of the public cannot be banned from a criminal trial unless the presiding judge determines that the nature of the charge or of the evidence likely to be presented is such as to warrant excluding the public under one of the three headings set out in section 442(1), namely, the interest of public morals, the maintenance of order or the proper administration of justice. If a criminal trial has been improperly held *in camera*, the judgment may be set aside and a new trial ordered.<sup>23</sup>

The strength of the presumption in favour of open courts in criminal proceedings, which has now been given constitutional force in the *Charter of Rights and Freedoms*,<sup>24</sup> is apparent from the legal decisions that have interpreted the scope of the exceptions relating to “the interest of public morals” and “the proper administration of justice.”

The reluctance of Crown witnesses to testify due to embarrassment over having to appear in open court and testify on a charge of keeping a common bawdy-house is not a sufficient reason to conduct a trial, or any part thereof, *in camera*.<sup>25</sup>

On charges of unlawful sexual intercourse, indecent assault and gross indecency where the complainants were four teenage girls, the Ontario Court of Appeal held that the embarrassment which would thereby be occasioned to the teenage complainants is not a sufficient ground to hold the trial *in camera*.<sup>26</sup>

In *R. v. Warawuk*,<sup>27</sup> the accused was charged with two counts of unlawful sexual intercourse with teenage girls. Because he was related by blood to the victims (his cousins), and because it was likely that school children would attend the proceedings, the Crown applied to have the trial conducted *in camera*. The court granted the application, and the accused was convicted. On appeal, it was held that the trial judge did not have sufficient grounds to hold the entire trial *in camera*. A new trial was ordered on the ground that a trial held in contravention of the law cannot sustain the adjudication of the issue. The Alberta Court of Appeal held that a genetic relationship between the parties is not in itself a sufficient ground for holding the trial *in camera*, nor is the fact that the charges are for sexual offences. Although the presence of children at such a trial might well justify an order excluding such children from the courtroom, it would not warrant the exclusion of the public generally. On general principles, exclusion of the public in the interest of public morals relates not to the type of offence charged but to the evidence proposed to be tendered, namely, evidence of acts or circumstances which might reasonably be expected to offend, or to have an adverse or corrupting effect on,

public morals by the publicity of obscenities, perversions, or the like. Alternatively, a witness might need the reassurance of exclusion of the public in testifying to certain matters, which would justify the order of exclusion on the grounds of the proper administration of justice. The discretion to exclude the public must be exercised cautiously and only as circumstances demand.

In *R. v. Brint*,<sup>28</sup> the accused was tried on a charge of indecent assault on a female. Notice had been served under the former section 142(1) of the *Criminal Code* that the complainant would be asked questions concerning her prior sexual conduct with persons other than the accused. The proceedings were held *in camera* while the complainant was testifying, but the trial judge also allowed the court to remain closed for the balance of the trial. Because the complainant was 15 years-old, the Alberta Court of Appeal held that her evidence was properly given *in camera*; it also held, however, that there had been insufficient grounds to justify excluding the public for the remainder of the trial in the interest of public morality. The accused's conviction was quashed and a new trial ordered.

In *Re Cullen and The Queen*,<sup>29</sup> the accused was charged with contributing to juvenile delinquency on the basis that he performed an act of fellatio on a 15 year-old male. The accused was a 39 year-old male. At trial, the Crown applied successfully for an order that the public be excluded from the courtroom during the complainant's testimony, and that everyone under the age of 18 be excluded from the courtroom for the whole trial. The accused applied for an order of *mandamus* with *certiorari* in aid, arguing that the trial judge's exclusion order was improper in the circumstances. The Alberta Court of Queen's Bench dismissed the accused's application. Mr. Justice Cousey considered that the proper administration of justice required that the public be excluded during the period of the trial when the complainant gave his testimony:<sup>30</sup>

"I can see no need to exclude the public from the preliminary and trial in the interest of public morals but the public should be excluded in the interest of the proper administration of justice. There is sufficient evidence and information in the transcript to suggest to me that if the complainant is required to give his evidence before the public he would not be able to do so and it is in the interest of the administration of justice that all admissible evidence be before the Court and the public should therefore be excluded from the courtroom while the complainant is giving his evidence."

The *F.P. Publications* case<sup>31</sup> points up the relationship between who may be excluded from the trial and what may be published about the trial. The accused was charged with keeping a common bawdy-house, and the Crown presented as witnesses certain patrons who testified about the various services offered at the accused's establishment. The Crown requested and obtained an order excluding *Winnipeg Free Press* reporters from the courtroom, as the newspaper had refused to comply with a request not to publish the names of the witnesses. The Manitoba Court of Appeal ruled that the trial judge had no authority to make such an order. Chief Justice Freedman stated:

"[I]t was a misuse of s. 442(1) to prevent conduct that was not wrongful and that was an expression of freedom of the press on the theory that its prevention was required for the proper administration of justice. Stronger grounds than there emerge are required to warrant a departure from the principle of trial in open court. In misusing the section the learned trial judge acted in excess of jurisdiction and his order so made cannot stand."

## Summary

The Committee acknowledges the vital importance of keeping criminal trials open to public scrutiny. The several considerations which support this long-standing principle of the administration of justice have been well expressed by a Canadian jurist:<sup>32</sup>

An open trial provides some safeguard against unjust or unfair proceedings against an accused; it militates against the use by the executive of the courts to achieve its own ends; it reduces the possibility of any abuse of judicial power; it maximizes the chances of equal and impartial administration of justice to all accused persons; many aspects of the enforcement of criminal law, such as general abhorrence of certain acts or general deterrence, demand that the public be informed; witnesses who have to give their testimony in public will be more reluctant to give false evidence for fear of exposure. In general, of course, this merely means that it is in the interest not only of the accused and the prosecutor that a criminal trial be in public, but that it is in the interest of the public itself.

**In the Committee's view, the limited exceptions to this principle sanctioned by section 442(1) of the *Criminal Code* and by section 39 of the *Young Offenders Act* are both appropriate on policy grounds and sufficiently narrow to be defensible on constitutional grounds. However, the Committee concludes that, for sake of greater clarity these provisions should be amended in order to facilitate obtaining the full and spontaneous account of the child's evidence. Where, for example, the presence of a public "gallery" in the courtroom would prevent a child or other young witness from giving as clear, full and spontaneous an account of his or her evidence as would be possible if his or her evidence was heard *in camera*, there should be express statutory authority for excluding the public.**

The question of public access to child welfare proceedings is grounded in somewhat different considerations. As noted earlier, Canadian provinces and territories have taken widely varying positions on this question, in accordance with their differing views about the most workable model for resolving child welfare controversies and the most appropriate set-off between public scrutiny and institutional effectiveness. Particularly in light of the Committee's research findings that most children are not considered to be harmed by participating in criminal or child welfare proceedings, whether open or closed, the Committee considers it inadvisable to recommend a single, uniform approach to this issue in the context of child welfare proceedings. Even so, and for the reasons outlined above:

**The Committee recommends that the *Criminal Code*, the *Young Offenders Act* and each child welfare act or equivalent contain a provision authorizing a judge to proceed *in camera* where such a course is required in order to obtain a full and candid presentation of a child's testimony. The proper administration of justice requires that the "best evidence" of all parties be accessible to the judicial process.**

In the Committee's view, an emphatic change of attitude towards young sexual victims and young witnesses generally would do much to reduce the anxiety of the courtroom experience for children, for example:

1. The inculcation of a strong presumption on the part of parents, teachers, doctors, police officers, social workers, Crown attorneys and others that a child's allegation of sexual abuse is true, and that it warrants immediate investigation and follow-up.
2. The employment of police officers and social workers specially trained in the management of cases of child sexual abuse and in child interviewing techniques, and the continued support from such persons throughout the investigative and judicial stages.
3. The training of Crown attorneys in the special social and legal issues of child sexual abuse, and the use of such attorneys in all contemplated child sexual abuse prosecutions.
4. The thorough preparation of child witnesses for the courtroom experience, in a manner appropriate to the child's intellectual and emotional development.
5. Where possible, and consistent with the accused's procedural and constitutional rights, the provision of special court facilities enabling a young child's testimony to be elicited in a more informal legal atmosphere.

These steps, as well as others advocated elsewhere in this Report, would materially improve the opportunities for children to speak effectively in their own behalf.

## References

### Chapter 21: Public Access to Hearings

- <sup>1</sup> *The Child Welfare Act*, 1972, S.N. 1972, No. 37, s. 17.
- <sup>2</sup> *Family and Child Services Act*, S.P.E.I. 1981, c. 12, ss. 31 and 29(2).
- <sup>3</sup> *Children's Services Act*, S.N.S. 1976, s. 59(1).
- <sup>4</sup> *Child and Family Services and Family Relations Act*, S.N.B. 1980, c.C-2.1, s. 10.
- <sup>5</sup> *Youth Protection Act*, S.Q. 1977, c. 20, s. 82. See also *Code of Civil Procedure*, R.S.Q. 1977, c.C-25, s. 13.
- <sup>6</sup> *Child Welfare Act*, R.S.O. 1980, c. 66, s. 57. See also *Judicature Act*, R.S.O. 1980, c. 223, s. 82; and *Unified Family Court Act*, R.S.O. 1980, c. 515, s. 10.
- <sup>7</sup> *The Child Welfare Act*, S.M. 1974, c. 30, ss. 25(5) and 25(6).
- <sup>8</sup> *The Family Services Act*, R.S.S. 1978, c. F-7, s. 35.
- <sup>9</sup> *Child Welfare Act*, R.S.A. 1980, c.C-8, ss. 12(3) and 12(4).
- <sup>10</sup> *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 3.
- <sup>11</sup> *Child Welfare Ordinance*, R.O.Y.T. 1971, c.C-4, s. 94.
- <sup>12</sup> *Child Welfare Ordinance*, R.O.N.W.T. 1974, c.C-3, s. 105.
- <sup>13</sup> *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3.
- <sup>14</sup> (1981), 23 C.R. (3d) 289 (S.C.C.).
- <sup>15</sup> *Canadian Charter of Rights and Freedoms*, s. 2(b). See also s. 11(d) of the *Charter*.
- <sup>16</sup> (1983), 3 C.C.C. (3d) 515 (Ont. C.A.). But see *Re Edmonton Journal and A.G. for Alberta et al* (1983), 4 C.C.C. (3d) 59 (Alta. Q.B.).
- <sup>17</sup> *Young Offenders Act*, S.C. 1980-81-82-83, c. 110.
- <sup>18</sup> *Ibid.*, s. 39.
- <sup>19</sup> See generally *Re Armstrong and State of Wisconsin (1972)*, 7 C.C.C. (2d) 331 (Ont. H.C.J.); *Re Regina and Grant* (1973), 13 C.C.C. (2d) 495 (Ont. H. C.J.); *Re Learn and the Queen* (1981), 63 C.C.C. (2d) 191 (Ont. H.C.J.); and *Re O'Callaghan and The Queen* (1982), 65 C.C.C. (2d) 459 (Ont. H.C.J.).
- <sup>20</sup> Emphasis added.
- <sup>21</sup> *Supra*, note 16.
- <sup>22</sup> (1978), 42 C.C.C. (2d) 121, at 123 (Alta. C.A.).
- <sup>23</sup> *R. v. Warawuk*, *ibid.*
- <sup>24</sup> *Canadian Charter of Rights and Freedoms*, s. 11(d). See also s. 2(b) of the *Charter*, and the decision of the Ontario Court of Appeal in *Re Southam Inc. and The Queen* (No. 1) (1983), 3 C.C.C. (3d) 515.
- <sup>25</sup> *Re F.P. Publications (Western) Ltd.* (1979), 51 C.C.C. (2d) 110 (Man. C.A.).
- <sup>26</sup> *R. v. Quesnel and Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.).
- <sup>27</sup> *Supra*, note 22.
- <sup>28</sup> (1978), 45 C.C.C. (2d) 560 (Alta. C.A.).
- <sup>29</sup> (1981), 62 C.C.C. (2d) 523 (Alta. Q.B.).
- <sup>30</sup> *Ibid.*, at 525.
- <sup>31</sup> *Supra*, note 25.
- <sup>32</sup> Mewett, *Public Criminal Trials* (1978-79), 21 Cr.L.Q. 199, at 199. See also Wright, *The Open Court: The Hallmark of Judicial Proceedings* (1947), 25 Can. Bar Rev. 721; and Beckton, *Freedom of Expression-Access to the Courts* (1983), 61 Can. Bar Rev. 101.



## Chapter 22

### Publication of Victims' Names

Chapter 21, *Public Access to Hearings*, dealt with the question: Who may attend legal hearings pertaining to sexual offences against young persons? This chapter addresses a related question, namely: What legal restrictions are placed on the publication of the names of parties to the proceeding (particularly victims) or of evidence presented at such hearings? The connection between these two issues is illustrated by the judicial accommodation to the press known as "the device":<sup>1</sup>

The media are on occasion dealt with by the courts as representatives of the public. It is a common judicial procedure, when excluding the public from the courtroom, to allow the media to remain with the understanding that they will not publish the proceeding, or else not identify certain information. This accommodation by the courts does not arise from an enforceable right of the press to attend, but from a genuine respect by the courts for the necessity and effectiveness of public review of the court processes. The public have a greater confidence in the administration of justice if the proceedings can be viewed, even if there is some restriction on publication.

This chapter reviews the various statutory provisions bearing on this issue in different proceedings and presents the Committee's research findings concerning the practices of a number of Canadian newspapers, major legal reporting services and Canadian courts in reporting information identifying the young victims of sexual offences.

Most Canadian provinces contain explicit provisions in their child welfare/child protection legislation prohibiting the publication of the identity of any child at the proceedings and of anything that would tend to disclose the identity of any child at the proceedings.<sup>2</sup> The Committee's review of the practices of Canadian newspapers and legal reporting services indicates that these provisions in child welfare laws are respected.

Sections 12(3) and 12(4) of the recently repealed *Juvenile Delinquents Act* provided that:

12(3) No report of a delinquency committed, or said to have been committed, by a child, or of the trial or other disposition of a charge against a child, or of a charge against an adult brought in the juvenile court under section 33 or under section 35, in which the name of the child or of the child's

parent or guardian or of any school or institution that the child is alleged to have been an inmate is disclosed, or in which the identity of the child is otherwise indicated, shall without the special leave of the court, be published in any newspaper or other publication.

(4) Subsection (3) applies to all newspapers and other publications published anywhere in Canada, whether or not this Act is otherwise in force in the place of publication. [Note: The federal *Juvenile Delinquents Act* did not apply in Newfoundland. See the Newfoundland *Welfare of Children Act*, R.S.N. 1970, c. 190, *as am.*, ss. 12 and 13.]

Several points should be noted about these provisions which were repealed in April, 1984. First, section 12(3) is directed at the child's identity; there is no restriction on publishing the name of an accused adult. Second, the prohibition is technically not absolute; where special leave of the juvenile court is obtained, such information may be published. In determining whether to grant special leave, the court should consider the welfare of the child, the community's best interest and the proper administration of justice.<sup>3</sup> Third, where the child is in no way identified, juvenile court proceedings may be reported without leave of the court.<sup>4</sup> Fourth, although the prohibition in section 12(3) extends to "any newspaper or other publication," section 12(3) can also be contravened where identifying information appears in the electronic media.<sup>5</sup> Finally, it has been held that the provisions in the *Juvenile Delinquents Act* that had prohibited the identification of children in delinquency proceedings did not offend the *Canadian Bill of Rights*.<sup>6</sup>

The *Young Offenders Act*, which came into force in April, 1984, also contains provisions prohibiting the identification of young offenders in the media. Section 38 of the *Young Offenders Act* provides:

38(1) No person shall publish by any means any report

- (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
- (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence in which the name of the young person, a child or a young person aggrieved by the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.

Anyone who contravenes this provision is guilty either of an indictable offence and liable to imprisonment for not more than two years, or of an offence punishable on summary conviction.<sup>7</sup>

Before considering the various sections of the *Criminal Code* that govern issues of publication, it should be noted that these provisions supplement the powers of courts (which vary depending on the "superior" or "inferior" status of the court) to sanction interferences by the news media with the proper administration of justice by way of the contempt of court power. Contempt of court may be committed either inside or outside the courtroom, but the most

common examples involving the media are instances of “constructive contempt,” where court proceedings are published in a manner which is considered to interfere with the administration of justice. The *sub judice* rule is the guiding consideration here: when a legal matter has come under the jurisdiction of a court (*sub judice*), the court’s proper adjudication of the matter should not be interfered with.<sup>8</sup> The common law powers of courts to punish for contempt of court in criminal proceedings, preserved by section 8 of the *Criminal Code*, are wider (although incapable of precise definition) than the specific statutory provisions in the *Code* relating to non-publication in stated circumstances.

Since this review is concerned mainly with restrictions on publishing the identities of sexual victims, other provisions in the *Criminal Code* relating to publication are only mentioned briefly.

- Where the Crown intends to “show cause” why detention of the accused or a conditional release of the accused is necessary, the accused can apply for a ban on publication of the evidence and information presented at the hearing, and the court must order it. The effect of the order is to ban publication from the time the order is made until the accused is either discharged, or his trial ended.<sup>9</sup>
- In reference to preliminary inquiries, where an accused so requests, the presiding judge shall order that there shall be no publication of any of the evidence until the accused is either discharged, or his trial ended.<sup>10</sup> Since section 467 bans only the *evidence* taken at the inquiry, “[it] would not be unlawful, where an order has been issued under s. 467, to publish the identity of *witnesses* appearing at the preliminary inquiry”, although “[such] reporting would always be subject not only to the laws of contempt, but also to the laws of defamation.”<sup>11</sup> Similarly, section 470 prohibits the publication of a report of any admission or confession tendered in evidence at a preliminary inquiry until the accused is either discharged, or his trial ended.
- Section 162 of the *Criminal Code* prohibits the publication, in relation to judicial proceedings and with specified exceptions, of “any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals.”

## Publishing the Identity of the Accused

The *Criminal Code* contains no express statutory authority for prohibiting the publication or broadcast of an accused’s identity in a criminal proceeding. Although it has been held that a superior Court has the power to order that the name of an accused not be published,<sup>12</sup> two recent decisions illustrate the manifest judicial reluctance to invoke this power. In a Newfoundland case,<sup>13</sup> it was held that a magistrate could not ban the publication of the identity of the accused even on the compassionate grounds of avoiding a perilous shock to the accused’s sick father. The court stated that the magistrate’s power to exclude the public from the courtroom under section 442 did not extend to prohibiting

the publication of the identity of the accused or of other evidence from which he could be identified.<sup>14</sup>

The case of *R. v. P.*<sup>15</sup> well illustrates the principle that only in the most extraordinary circumstances will the court order a ban on publishing the name of an accused. In Toronto in 1978, a man was arrested for soliciting for the purpose of prostitution. Although he had intended to enter a guilty plea, the presiding judge invited him to plead not guilty as the judge considered that a male customer could not be convicted of soliciting under section 195.1 of the *Code*. The accused then entered a not guilty plea and the charge against him was dismissed. The Crown appealed the decision and indicated that this case would be an appropriate one for testing whether a male who was not a prostitute could be convicted under section 195.1. Because the accused had not originally wanted to engage in the process in the first place and because the Crown was using his predicament as a "test case", the court ordered that the accused not be identified in the media and that he be known only as Mr. P.

When the order banning identification came up for review, the reviewing judge held that the discretion to make such an order should be exercised only in extraordinary circumstances and only when it is necessary to depart from the principle of a completely open trial. Mr. Justice Steel stated:

If normal embarrassment is to be the [criterion] of suppressing the [name] of an individual then there would be such an argument in almost every case that is brought before the courts. Against this must be weighed the right of the public to know the facts so that they honestly, fairly and responsibly assess those facts without speculation.

The court lifted the ban on publication of the accused's identity and it was published in the media.

On the basis of its review, the Committee considers that, where the publication of an accused's identity will serve to identify his or her alleged sexual victim (for example, in prosecutions for incest), the young *victim's* identity can only effectively be protected by prohibiting the identification of the *accused* in the media and in the law reports. The larger, more general issue of identification of accused persons in the media prior to their conviction or guilty plea is not within the Committee's Terms of Reference.

## Publishing the Identity of the Complainant

The *Criminal Code* contains two basic provisions restricting the publication of the identity of a sexual victim "in any newspaper or broadcast." Section 246.6 provides that, where an accused who is charged with a "sexual assault" offence under sections 246.1, 246.2 or 246.3 seeks to adduce evidence of the sexual activity of the complainant with persons other than the accused:

246.6(3) No evidence is admissible under subsection (1) unless the judge, magistrate or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.

246.6(4) The notice given under subsection (2) and the evidence taken, the information given or the representations made at a hearing referred to in subsection (3) shall not be published in any newspaper or broadcast.

246.6(5) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (4) is guilty of an offence punishable on summary conviction.

246.6(6) In this section, "newspaper" has the same meaning as in section 261.

Although pertinent in this context, the provisions of section 246.6 are directed more at the evidence adduced at such a hearing than at protecting the identity of the complainant *per se*.

A more specific provision authorizing the non-publication of the identities of complainants in sexual offence cases appears in section 442 of the *Criminal Code*, which provides:<sup>16</sup>

442(3). Where an accused is charged with an offence mentioned in section 246.4, the presiding judge, magistrate or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.

442(3.1). The presiding judge, magistrate or justice shall, at the first reasonable opportunity, inform the complainant of the right to make an application for an order under subsection (3).

442(4). Every one who fails to comply with an order pursuant to subsection (3) is guilty of an offence punishable on summary conviction.

442(5). In this section, "newspaper" has the same meaning it has in section 261.

The offences referred to in section 246.4 of the *Criminal Code* are: incest (s. 150); gross indecency (s. 157); sexual assault (s. 246.1); sexual assault with a weapon, threats to a third party, or causing bodily harm (s. 246.2); and aggravated sexual assault (s. 246.3). "Newspaper" in section 261 of the *Criminal Code* is defined as meaning "any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally."

Before considering the adequacy of these legal provisions in protecting the privacy of young sexual victims, the Committee's research findings are presented concerning the practices of Canadian newspapers and legal reporting services in publishing the identities of young victims of sexual offences.

## Naming of Young Victims of Sexual Offences in Canadian Newspapers

In order to assess the extent to which Canadian newspapers respect the privacy of young complainants in cases involving sexual offences, the Committee monitored the practices of 34 leading and smaller newspapers. Over a period from mid-May, 1982 to mid-May, 1983, the Committee reviewed 2806 news articles concerning sexual offences and related matters. Information was obtained concerning the details reported in each story, with the primary focus being on those stories in which the names of sexual complainants had been reported. The newspapers reviewed were:

<i>Newfoundland</i>	North Bay Nugget
Corner Brook Western Star	Ottawa Citizen
St. John's Telegram	Owen Sound Sun-Times
	Thunder Bay Chronicle-Journal
<i>Prince Edward Island</i>	Toronto Globe and Mail
Charlottetown Guardian	Toronto Star
	Toronto Sun
<i>Nova Scotia</i>	Windsor Star
Halifax Chronicle-Herald	
Sydney Cape Breton Post	
<i>New Brunswick</i>	<i>Manitoba</i>
Fredericton Gleaner	Thompson Citizen
Moncton L'Evangeline	Winnipeg Free Press
New Brunswick Telegraph-Journal	
	<i>Saskatchewan</i>
<i>Quebec</i>	Regina Leader Post
Le Devoir	
Le Dimanche Matin	<i>Alberta</i>
The Gazette	Calgary Herald
La Presse	Edmonton Journal
	Lethbridge Herald
<i>Ontario</i>	<i>British Columbia</i>
Barrie Examiner	Prince George Citizen
Hamilton Spectator	Vancouver Sun
Kingston Whig-Standard	Victoria Colonist
London Free Press	Victoria Times

The findings of this review clearly indicate that these Canadian newspapers seldom reported the names of young victims of sexual offences. Information tending to identify sexual complainants was given in only 11 news stories (0.4 per cent). Of these, three stories concerned American cases in which the names of sexually abusive parents or step-parents were reported. Six stories

reported the identities of young complainants in Canadian cases. These stories included reports of:

- A sexual assault involving a 15 and a 16 year-old female.
- The sexual assault by a father of his eight year-old daughter (father's name reported).
- A case in which the father repeatedly committed incest with his daughter from the time the girl was 11 until she was 18 years-old (father's name reported).
- A case in which the offender indecently assaulted his two step-daughters, aged 13 and 16 at the time of the trial, over a five year period (offender's name reported).
- A case in which the accused was acquitted of living on the avails of the prostitution of his juvenile daughter and a 14 year-old boy (accused's name reported).

In addition, two stories were found in which sexual complainants were named, but whose ages were not reported. In one of these cases, the person accused of the sexual offence was acquitted.

A number of news reports contained information which might tend to identify the young victims of sexual offences. These included six stories which named the street or neighbourhood where the complainant or complainants lived. Nine stories from different newspapers reported allegations of sexual abuse involving young males at a group home. The reports included the name and location of the group home, the ages of the alleged victims, their ethnicity and the region from which they originally came.

**The Committee found that the practice of Canadian newspapers which were reviewed with respect to restricting the publication of information which might serve to identify young victims of sexual offences was one of commendable restraint and circumspection.** With few exceptions, the identities of young victims were not reported.

## Naming of Young Victims of Sexual Offences in Canadian Legal Reporting Services

Early in the Committee's work, it became apparent that young victims of sexual offences were sometimes identified by name in the reports of legal judgments published by various commercial reporting services. These reporting services enjoy an extensive readership among judges, lawyers, law teachers and law students, and frequent resort to them is inevitable for anyone engaged in or preparing for the practice of law. Since the reasons for judgment of Canadian courts constitute an important primary source of what the law is in a particular area, the contents of these reporting services are a staple of professional life for most members of the legal community. For example, where the victim of a sexual offence is identified by name in a leading case on the criminal law of sexual

offences, potentially thousands of lawyers and aspiring lawyers are apt, at some time or another, to read about it. This invasion of the victim's privacy is compounded by the fact that legal judgments in which the names of sexual victims are disclosed are preserved, in bound volumes to which anyone has access, virtually indefinitely.

In order to document the extent of this problem, the research conducted by the Committee included:

1. A survey, particularly of cases reported between 1970 and 1982, of the reported case law pertaining to sexual offences.
2. The editor of each major legal reporting service and the Chief Justice or Chief Judge of every Canadian court having criminal jurisdiction was requested to inform the Committee of its policy in this regard.

### Policies of Legal Reporting Services

The Committee contacted the major Canadian legal reporting services in order to obtain statements of policy concerning the reporting of cases involving the young victims of sexual offences. The reporting services contacted were:

- Newfoundland and Prince Edward Island Law Reports
- Nova Scotia Law Reports
- New Brunswick Law Reports
- Recueils de Jurisprudence du Quebec
- La Revue Legale
- Ontario Law Reports
- Manitoba Law Reports
- Saskatchewan Law Reports
- Alberta Law Reports
- British Columbia Law Reports
- Canadian Criminal Cases
- Criminal Reports
- Dominion Law Reports
- Federal Court Reports
- Supreme Court Reports
- Weekly Criminal Bulletin
- Western Weekly Reports

The replies received from these legal reporting services indicate that, in general, it is not their policy to publish information which may identify children and youths in cases involving sexual offences. The statements received included:

- The policy in this office is to identify sexual complainants by initials only. This is particularly true of children, whose identities we protect in any case in which identification seems likely to prove detrimental to the child's interests, including all juvenile delinquency and child protection cases. In cases which are not clear-cut, we prefer to err on the side of caution, using initials rather than names. On the basis of these guidelines, the identity of a child victim of a sexual offence should always be protected. I can conceive of no situation which would justify an exception to this general rule.

For a number of years, our policy was to follow the practice of the courts,



deleting names only where the courts did so. Our current policy of protecting children and victims of sexual offences has evolved over the past seven or eight years, and has been applied fairly consistently since at least 1979. However, until recently, this policy was informal and was often a discretionary matter. In the past year, we have attempted to develop firm rules and to apply them consistently to all our reports. While there will always be an element of discretion in determining how far we should go in protecting the identities of the innocent, our present rules favour the deletion of names and other information identifying the victims of sexual offences.

- Our policy with respect to the publication of the names of children and youths and other sex complainants is simply that we comply with the provisions of the *Juvenile Delinquents Act* where the identity of a youthful accused is involved and we, of course, would delete the name of any complainant where the name had been deleted from the judgment before we receive it or when we have been requested to do so by the court. As you are no doubt aware with the recent amendments of the *Criminal Code*, the occasions on which the Court will make an order prohibiting the publication of the name of the complainant have increased and we, of course, comply with such orders where we are made aware of them.

One matter that would be of assistance to us and which you may consider when making your recommendations is for the Courts to indicate clearly in some portion of the judgment whether or not an order has been made prohibiting the publication of the name of the complainant.

- The policy with respect to the identity of a complainant is to report what is contained in the judgment of the court. If the judgment of the court does not contain the name, or wishes the name not to be revealed, then it will not be revealed in the reported decision. There are no exceptions to this practice.
- Our policy with respect to this issue is not to reveal the identity, or any information that might disclose the identity, of complainants of sexual offences. There are no exceptions to this policy, and we take every precaution possible to ensure complete anonymity of sexual complainants.

We rely primarily upon the judges who, in writing their judgments, normally would not identify a child or youth where it might prove embarrassing in the future. In some instances, we will take the initiative ourselves and use initials in place of a name.

## Policies of Courts

The Committee contacted the chief judicial officers of 37 courts across Canada requesting information concerning statements of policy established with respect to identifying a complainant or children and youths in connection with sexual offence cases. The following replies are representative of the statements received.

- [This Court] has no uniform policy requiring the use of initials rather than names in either the style of cause or in the text of judgments for cases involving children or youths. The court considered the issue in 1975 and

conducted a review of cases since 1940 in which initials had been used. The cases considered included several related to infants and juveniles, five custody decisions of which three involved sexual perversion or unnatural offences. English practice also was considered.

The members of the Court are aware of the consequences of identifying a complainant or children and youths in connection with sexual offence cases, and where valid reasons exist, will delete the names of such persons or substitute initials. Factors to be considered include the nature of the sexual offence, the relationship, if any, between accused and complainant and the age of the child.

Members of the Court have become increasingly aware of this issue in recent years.

The Court may only be governed by the relevant provisions of the criminal law and the decisions of the various courts interpreting those provisions. In each individual case, the Court will hear evidence and submissions of counsel regarding identification of complainants and will make its decision on the basis of relevant statutory provisions and case law.

- [The Court follows] the procedures set out in section 442(3) of the *Criminal Code*. Some judges may have their own individual policies regarding the naming of the child, but there is no overall policy and the matter is left to the discretion of each judge.
- The Court has no general policy concerning the publication of the identities of complainants in sexual offence cases.

As an appellate court, [this Court] generally deals with points of law, so that it often finds it possible to dispose of these cases without listing the facts. Also, the Court notes that in criminal proceedings the Queen or the Crown, represented by one of Her officers, is the complainant, and not the victim of a sexual act. When the Court does find it necessary to refer to the victim, its practice is to use only the child's given name.

- [The Court] has no established policy concerning the reporting of names of children and youth. Publication is in the hands of certain private editors.
- The Court has no established policy with respect to naming the complainants in cases involving sexual offences against children.

When appeals are heard in open court, no great emphasis is placed on the identity of the complainant, but where the accused is a child's father or mother, it becomes almost impossible to conceal that name.

- [The Court] has no policy concerning publication of the names of complainants in sexual offence cases. The judges deal with this matter on a case-by-case basis, and in consideration of the relevant *Criminal Code* provisions.

The members of the Court are aware of the issue and in most instances would not find it necessary to mention the name of the complainant in giving reasons for judgment.

- There is no established Court policy concerning the publication of the names of juveniles. In the Criminal Division, judges and journalists are conscious of the fact that the names of juveniles involved in court proceedings are not to be published. Occasionally, where an adult is convicted of an offence, a juvenile's name may appear in print, but this is rare and probably results from inexperience of a media reporter.
- Certainly there is no policy concerning publication of the identity of complainant and, indeed, I am doubtful that there should be. In my view each case must be dealt with according to the particular situation.

[This] Court primarily hears criminal cases and the identification of complainants is governed by the *Criminal Code*.

- There is no special policy concerning the publication or concealment of the name of a child who has been the victim of a sexual offence. There is little that the Court of Appeal can do to prevent disclosure, since by the time a case reaches it, the victim's name has already appeared on the indictment and very likely, has been stated in the proceedings and decision of the court below. In its judgments, the Court of Appeal could use an initial in place of the child's name, but even on this there is no defined policy. Perhaps there should be.
- Since 1974 the policy of . . . [this Court] . . . has been to refrain in written judgments or opinions from giving the names or, so far as possible, other particulars identifying persons subjected to sexual offences.

## Reported and Unreported Cases

On the basis of its review, the Committee identified 189 cases in which the names of young Canadian victims of sexual offences had been disclosed in either the major legal reporting services or court transcripts. In the latter category, the cases reviewed constituted those which had not been published by any reporting service when the Committee conducted its review. In each of these cases, information was given in the Court's decision which either identifies or tends to identify the complainant. Since these decisions were not published by legal reporting services, the identification of the complainant must be attributed to the courts themselves rather than to the editors, publishers or to any other party.

In the examples given below, the use of an asterisk(\*) indicates that, because the complainant was related to the accused, the 'style of cause' serves to identify the complainant as well as the accused. In these instances, in order to protect the complainant's privacy, the Committee has deleted the accused's name from the style of cause.

## REPORTED CASES

### *Offence: Rape*

*R. v. Bresse, Vallieres and Theberge* (1978), 48 C.C.C. (2d) 78 (Que. C.A.).

Complainant named. Age: 14. A friend of the complainant also named.

*R. v. Trottier* (1981), 58 C.C.C. (2d) 289 (B.C.C.A.).

Both complainants named. Ages: both 16. One complainant was raped and the other indecently assaulted.

*R. v. D.\** (1981), 23 C.R. (3d) 56 (Ont. C.A.).

The two complainants' names indicated by style of cause. Accused's and complainant's address reported in a quotation from indictment. Ages: 6 and 17.

### *Offence: Incest*

*R. v. M.\** (1980), 55 C.C.C. (2d) 193 (Ont. C.A.).

Complainant's name indicated by style of cause, but not reported in text of decision. Decision concerned issue of spousal competence and compellability; accused's wife named.

*R. v. C.\** (1982) 69 C.C.C. (2d) 81 (Ont. C.A.).

Complainant's name indicated by style of cause, but not reported in text of decision. Age: 13.

*R. v. J.\** (1976), 1 A.R. 27 (C.A.).

Both female complainants (daughters of the accused) named. Ages: 17 and 19 at date of the appeal. Accused's other two daughters, aged 10 and 12, also named.

### *Offence: Sexual intercourse with a female under 14, and sexual intercourse with a female between 14 and 16*

*R. v. Kirby* (1976), 24 Nfld. & P.E.I.R. 260 (Nfld. Prov. Ct.).

Complainant named in a quotation from the indictment. Age: 13. In text of the decision, she is stated to be "relatively well developed physically".

*R. v. V.\** (1972), 18 C.R.N.S. 190 (B.C.C.A.).

Complainant named in a quotation from the indictment. Age: Between 14 and 16.

*R. v. Belanger* (1979), 46 C.C.C. (2d) 266, 8 C.R. (3d) S-10 (Ont. C.A.).

Complainant named. Age: 12.

*R. v. Quesnel and Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.).

Charges: sexual intercourse with a female under 14, sexual intercourse with a female between 14 and 16, gross indecency and indecent assault on a female.

All four complainants named in a quotation from the indictment. Ages: three complainants were under 14, one was between 14 and 16.

*R. v. G.\**, (1980), 53 C.C.C. (2d) 414 (Ont. C.A.).

Complainant named in quotation from the indictment. Age: between 14 and 16.

### *Offence: Indecent assault on a female*

*R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.).

Complainant named. Age: 13. Seven other children also named, one of whom was alleged to have been indecently assaulted by the accused.

*Re Stillo and the Queen* (1981), 56 C.C.C. (2d) 178 (Ont. H.C.).

Complainant named in a quotation from the indictment. Age: 7.

### *Offence: Gross indecency*

*Re Poirier and the Queen* (1981), 62 C.C.C. (2d) 452 (Que. C.A.).

Both male complainants named. Ages: both 13.

*R. v. B.\** (1982), 37 A.R. 177 (C.A.).

Both complainants named. Ages: 10 and 14 when the offences first were committed.

*R. v. Bennett* (1981), 30 Nfld. & P.E.I.R. 512, 84 A.P.R. 512 (Nfld. C.A.).

Male complainant named. Age: 14.

### *Offence: Indecent assault on a male*

*R. v. Robertson* (1982), 39 A.R. 273 (C.A.).

Complainant named. Age: not reported, but complainant is stated to have been an infant when indecently assaulted. Also reported: the name of a female whom the accused kidnapped and sexually molested. Age: 3.

*R. v. Troughton* (1982) 3 C.C.C. (3d) 79 (Man. C.A.).

Both complainants named. Ages: 7 and 9.

*R. v. Hopkins* (1977), 23 N.S.R. (2d) 550 (C.A.).

Complainant named. Age: 13.

*R. v. Pilgrim* (1981), 64 C.C.C. (2d) 523 (Nfld. C.A.).

Both complainants named. Ages: 16 and 17.

## UNREPORTED CASES

### *Offence: Incest*

*R. v. W.\**, June 24, 1980 (Ont. S.C.).

Charges: incest, indecent assault on a female. The complainant's name was indicated by the style of cause, in a quotation from the indictment, and in the text of the decision. The complainant was the daughter of the accused. Age: 6.

*R. v. P.\**, September 21, 1981 (Que. C.A.).

The complainant's name was indicated by the style of cause, in a quotation from the indictment, and in the text of the decision. The complainant was the daughter of the accused. Age: 11.

*R. v. M.\**, February 12, 1979 (B.C.C.A.).

The complainant's name was indicated by the style of cause and the text of the decision. The complainant was the daughter of the accused. Age: 15.

*R. v. H.\**, June 3, 1981 (B.C.C.A.).

Charges: incest, gross indecency. The name of one of the complainants was indicated by the style of cause. He was the son of the accused. Age: 13.

*R. v. J.\**, December 1, 1976 (Man. C.A.).

The name of the complainant was indicated by the style of cause. The complainant was the daughter of the accused. Age: 12.

*R. v. S.\**, October 20, 1979 (Man. C.A.).

The names of the complainants were indicated by the style of cause. They were the daughters of the accused. Ages: 12 and 15.

### *Offence: Sexual intercourse with a female under 14, and sexual intercourse with a female between 14 and 16*

*R. v. Fogarty*, January 27, 1981 (Ont. S.C.).

Charges: sexual intercourse with a female under 14, indecent assault on a female. The complainant was named. Age: 13.

*R. v. Kirby*, November 15, 1976 (Nfld. D.C.).

The complainant was named in a quotation from the indictment but not in the text of the decision. Age: 13.

### *Offence: Indecent assault on a female*

*R. v. Burke*, November 26, 1976 (Ont. C.A.).

The complainant was named in the quotation from the indictment and in the text of the decision. Age: 9.

*Thibeau v. The Queen*, April 20, 1979 (Ont. C.A.).

Charges: common assault, indecent assault, gross indecency. The three complainants were named. Ages: 9, 10 and 11.

*R. v. B.\**, March 30, 1981 (Ont. C.A.).

Complainant's name indicated by style of cause, but not reported in text of decision. The complainant was the daughter of the accused. Age: 12.

*R. v. Hudebine*, January 22, 1979 (Ont. D.C.).

The three complainants were named. Ages: 12, 15 and 16.

*R. v. Cloutier*, May 13, 1981 (Ont. D.C.).

The complainant was named. Age: 14.

*R. v. H.\**, October 5, 1981 (Ont. D.C.).

The complainant's name was indicated by the style of cause. She was the daughter of the accused. Age: 15.

*R. v. Neiser*, March 2, 1982 (Ont. D.C.).

The complainant was named. Age: 12.

*R. v. Wells*, October 19, 1977 (Alta. C.A.).

The complainant was named in a quotation from the indictment. Age: 13.

*R. v. Lunn*, November 18, 1981 (B.C.C.A.).

The two female complainants were named. Ages: 12 and 13.

*R. v. I.\**, August 25, 1980 (P.E.I. Prov. Ct.).

The complainant's name was indicated by the style of cause. She was the sister of the accused. Age: 16.

### *Offence: Gross indecency*

*R. v. Bennett*, March 3, 1981 (Nfld. C.A.).

The complainant was named. Age: 14.

*R. v. Gendreau*, October 2, 1979 (Man. Co. Ct.).

Charges: gross indecency, buggery, indecent assault on a male. The complainant's name was given. Age: started when the complainant was 11 and ended when he was 16.

*R. v. Saunders*, February 18, 1982 (B.C.C.A.).

Charges: gross indecency, assault with intent to commit buggery. The complainant was named. Age: 13.

### *Offence: Indecent assault on a male*

*R. v. White*, October 4, 1978 (Ont. Co. Ct.).

The complainant was named. Age: 16.

*R. v. Nelson*, May 28, 1980 (Man. C.A.).

Charges: indecent assault on a male, gross indecency. The three complainants were named. Ages: 9, 12 and 13.

*R. v. Racine*, December 10, 1981 (Ont. Co. Ct.).

The complainant was named. Age: 12.

*Offence: Unlawful intercourse*

*R. v. O.\**, December 1, 1976 (Man. C.A.).

The complainant's name indicated by the style of the cause. She was the step-daughter of the accused. Age: 9.

*R. v. Tomigo*, June 30, 1981 (Ont. C.A.).

The three complainants were named in a quotation from the indictment and in the text of the decision. Ages: under 14.

The Committee's summary findings listed in Table 22.1 indicate that about three in five cases (58.7 per cent) in which complainants were identified occurred between 1970 and 1982. Between 1980 and 1982, there were 54 cases, averaging 18 cases each year which were equally divided between reported and unreported cases.

The types of cases in which children and youths were identified were:

Type of Sexual Offence	Number	Per Cent
Rape	36	19.0
Attempted rape	3	1.6
Incest	33	17.5
Sexual intercourse with female under 14, and 14 but under 16	27	14.3
Indecent assault female	22	11.6
Gross indecency	13	6.9
Indecent assault male	12	6.4
J.D.A., section 33	4	2.1
Other offences	39	20.6
<b>TOTAL</b>	<b>189</b>	<b>100.0</b>

About nine in 10 of the young complainants who were named were females (88.4 per cent) and the remainder were males (11.6 per cent). Included in the 'Other' category of offences were: unlawful intercourse, seduction under promise of marriage, seduction of a female between ages 16 and 18, sexual intercourse with the feeble-minded and corruption of children.



Table 22.1  
The Naming of Young Victims of Sexual Offences in  
Judgments of Canadian Courts

Level of Court	Year of Occurrence							
	Before 1970		1970-79		1980-82		Total	
	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases
<i>Newfoundland</i>								
• Court of Appeal	—	—	—	—	2	1	2	1
• Supreme Court, Trial Division	—	—	—	—	—	—	—	—
• Provincial Court	—	—	1	—	—	—	1	—
• District Court	—	—	1	—	—	—	1	—
<i>Prince Edward Island</i>								
• Supreme Court	—	—	—	—	1	—	1	—
• Provincial Court	—	—	—	—	—	1	—	1
<i>Nova Scotia</i>								
• Supreme Court, Appeal Division	9	—	6	3	1	—	16	3
• Supreme Court, Trial Division	4	—	—	—	—	—	4	—
• Provincial Court	—	—	—	—	—	—	—	—
<i>New Brunswick</i>								
• Court of Appeal	2	—	—	—	—	—	2	—
• Supreme Court/ Court of Queen's Bench	1	—	—	—	—	—	1	—

(continued ...)

The Naming of Young Victims of Sexual Offences in Judgments of Canadian Courts

Level of Court	Year of Occurrence							
	Before 1970		1970-79		1980-82		Total	
	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases
<i>Quebec</i>								
• Court of Appeal	8	—	4	—	3	1	15	1
• Superior Court/ Court of Queen's Bench Court of Sessions	3	—	—	—	—	—	3	—
• Court of Sessions	1	—	—	—	—	—	1	—
<i>Ontario</i>								
• Supreme Court/ Court of Appeal	12	—	9	6	7	4	28	10
• Supreme Court/ High Court of Justice	—	—	2	—	1	3	3	3
• Provincial Court	—	—	—	—	—	—	—	1
• County Court	1	—	—	2	—	—	1	2
• District Court	—	—	—	1	—	3	—	4
<i>Manitoba</i>								
• Court of Appeal	3	—	—	3	2	2	5	5
• Court of Queen's Bench	1	—	—	—	—	—	1	—
• Provincial Court	—	—	—	—	—	1	—	1
• County Court	—	—	1	—	1	1	2	1
<i>Saskatchewan</i>								
• Court of Appeal	6	—	3	—	1	—	10	—
• Supreme Court/ Court of Queen's Bench District Court	1	—	—	—	—	—	1	—
• District Court	1	—	—	—	—	—	1	—

(continued...)

**Table 22.1 (concluded)**  
**The Naming of Young Victims of Sexual Offences in Judgments of Canadian Courts**

Level of Court	Year of Occurrence							
	Before 1970		1970-79		1980-82		Total	
	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases	Reported Cases	Unreported Cases
<i>Alberta</i>								
• Court of Appeal	6	—	3	—	5	1	14	1
• Court of Queen's Bench/Supreme Court	—	—	1	—	—	—	1	—
• Provincial Court	—	—	—	1	—	1	—	2
• District Court	—	—	1	1	1	—	2	1
<i>British Columbia</i>								
• Court of Appeal	8	—	3	1	1	4	12	5
• Supreme Court	2	—	1	1	—	1	3	2
• Provincial Court	—	—	—	—	—	—	—	—
• County Court	—	—	—	—	—	2	—	2
<i>Yukon</i>								
• Court of Appeal	1	—	—	—	—	—	1	—
<i>Northwest Territories</i>								
• Supreme Court	2	—	—	—	—	—	2	—
<i>Canada</i>								
• Supreme Court of Canada	6	—	1	—	1	—	8	—
• Court Martial Appeal Court of Canada	—	—	—	1	—	—	—	1
<b>TOTAL</b>	<b>78</b>	<b>—</b>	<b>37</b>	<b>20</b>	<b>27</b>	<b>27</b>	<b>142</b>	<b>47</b>

It is clearly evident from the findings that, while cases in which children and youths were named are notably absent in recent years for a number of Canadian courts, the dimensions of this problem are national in scope. **With respect to the likelihood of being named, the young complainants of sexual offences are at greater risk of being identified in the published accounts of legal reporting services and the transcripts of court decisions than they are of such disclosures being made in the nation's newspapers.**

Particularly disturbing in regard to the naming of young complainants are the performances of provincial Courts of Appeal, given their prominent status in Canadian law and the precedential value of their criminal law judgments. Of the 111 cases between 1970 and 1982 identifying young complainants of sexual offences, over two-thirds (68.5 per cent) involved decisions of Courts of Appeal. As a general rule, the higher the level of court, the more likely it is that its criminal law judgments will be commercially reported, and hence the more likely that these judgments (and the names of sexual victims identified therein) will reach a wide readership in the legal community. The Committee's research findings indicate that several provincial Courts of Appeal in Canada have been careless and shown little sensitivity to this issue.

## Summary

Since only a fairly comprehensive review of cases in which young victims of sexual offences were identified was conducted for the period between 1970 and 1982, the findings presented constitute a conservative estimate of the extent of this problem. In considering the implications of the findings, however, it is pertinent also to consider earlier instances in which such disclosures were made. For all persons named in these legal documents, a durable and accessible record has been established which discloses their identities for the remainder of their lives, whether they are youths or adults.

**On the basis of their statements of policy, the Committee is aware that judges and legal editors are becoming attentive to this problem and seeking to act accordingly. However, in this regard there can be no doubt that existing safeguards are ineffective and that the overall record of legal reporting services and Canadian courts is unsatisfactory.**

**In the Committee's judgment, this practice which may be harmful to children is an unacceptable invasion of their privacy. It should cease.**

Although the commercial reporting of legal decisions involves both the courts and the legal reporting services, the responsibility for ensuring that the identities of victims of sexual offences are not disclosed lies, in the Committee's opinion, primarily with the courts and with their administrative personnel. If appropriate deletions are made "at the source," there is no possibility that victims of sexual offences will subsequently be identified in commercially published legal reports, which are dependent on this source. In the Committee's view, this responsibility of the courts should be given express statutory force by

way of immediate amendments to the *Criminal Code*. The Committee's research findings indicate that the record of provincial family courts, acting under express statutory guidelines in provincial enactments, is exemplary in this regard; it is not unreasonable to assume that Canadian courts of criminal jurisdiction would be equally attentive in the face of a clear directive from Parliament.

Accordingly, the Committee recommends that the *Criminal Code* be amended to provide that:

1. In relation to any sexual offence contained in Part IV, Part V, or Part VI of the *Criminal Code*, no one shall publish any report in which the Christian name or surname of the child, or in which any information serving to identify the child, is disclosed.
2. "Information serving to identify the child" includes, but is not restricted to:
  - (i) the name of the offender, where the offender is biologically or legally related to the child, or has the same name as the child;
  - (ii) the address of the accused or the child;
  - (iii) the school that the child attends, or the child's place of employment;
  - (iv) the address or location where the offence is alleged to have been committed; and
  - (v) the names of any witnesses whose relationship to the child or to the accused might give an indication of the child's identity.
3. The prohibition referred to in point (1) above is automatic, and does *not* require an application by the complainant, the Crown or the accused.
4. The prohibition attaches immediately upon either the laying of an information against the accused, the preferring of an indictment against the accused, or the arrest of the accused, whichever occurs first.
5. The prohibition is of indefinite duration, and attaches to all stages of the proceedings.
6. The prohibition extends to the print media, the electronic media, published court transcripts and the legal reporting services.
7. Any one who fails to comply with this provision is guilty of an offence punishable on summary conviction.

(Implementation of these recommendations will require consequential amendments to sections 246.6, 261, 442, 457.2, and 467 of the *Criminal Code*, and to sections 38 and 16 of the *Young Offenders Act*).

The Committee further recommends that each court having criminal jurisdiction in Canada designate an officer whose responsibility it is to ensure that these provisions are complied with, and that each legal reporting service in Canada do likewise.

In the judgment of the Committee, prompt implementation of these recommendations will help to ensure that children and youths who have been victims of sexual offences are treated by the legal system with the respect and consideration that is due to them.

## References

### Chapter 22: Publication of Victims' Names

- <sup>1</sup> Robertson, *Courts and the Media* (Toronto: Butterworth, 1981) at 167-68.
- <sup>2</sup> *Newfoundland: Welfare of Children Act*, R.S.N. 1970, c. 190, as am. S.N. 1973, c. 48, ss. 12 and 13.
- Prince Edward Island: Family and Child Services Act*, S.P.E.I. 1981, c. 12, s. 48.
- Nova Scotia: Children's Services Act*, S.N.S. 1976, c. 8, s. 59(2).
- New Brunswick: Child and Family Services and Family Relations Act*, S.N.B. 1980, c.C-2.1, s. 10.
- Quebec: Youth Protection Act*, S.Q. 1977, c. 20, s. 83.
- Ontario: Child Welfare Act*, R.S.O. 1980, c. 66, s. 57(7).
- Alberta: Child Welfare Act*, R.S.A. 1980, c.C-8, ss. 4 and 5.
- British Columbia: Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 3.
- <sup>3</sup> *Re Proulx and The Queen* (1975), 27 C.C.C. (2d) 44 (Ont. Prov. Ct.). See also *Re R (M.J.), an infant*, [1975] 2 All E.R. 749.
- <sup>4</sup> *Re Proulx and The Queen*, *ibid.*, and see generally Robertson, *supra*, note 1 at 225-26.
- <sup>5</sup> *Re A.G. Man. and Radio O.B. Ltd.* (1976), 31 C.C.C. (2d) 1 (Man. Q.B.). That the prohibition on publishing a child's identity in delinquency proceedings extends to the electronic media is implicit in the Supreme Court of Canada decision in *C.B. and the Queen* (1981), 3 C.R. (3d) 289.
- <sup>6</sup> *Re Juvenile Delinquents Act* (1975), 29 C.C.C. (2d) 439 (Ont. Prov. Ct.); *Re Proulx and the Queen*, *supra*, note 3.
- <sup>7</sup> *Young Offenders Act*, S.C. 1980-81-82, c. 110, s. 38(2).
- <sup>8</sup> Robertson, *supra*, note 1 at 23.
- <sup>9</sup> *Cr. Code*, s. 457.2. See *Re Forget and The Queen* (1982), 65 C.C.C. (2d) 373 (Ont. C.A.).
- <sup>10</sup> *Cr. Code*, s. 467. In *R. v. Banville* (1983), 3 C.C.C. (3d) 312 (N.B.Q.B.), it was held that s. 467 is not inconsistent with the *Charter of Rights and Freedoms*.
- <sup>11</sup> Robertson, *supra*, note 1 at 202 (emphasis added).
- <sup>12</sup> *R. v. P.* (1978), 41 C.C.C. (2d) 377 (Ont. H.C.J.). See also *Re Regina v. Strupp et al.* (1982), 2 C.C.C. (3d) 111 (Ont. H.C.J.).
- <sup>13</sup> *Re Firth* (1979), 4 W.C.B. 142, cited in Robertson, *supra*, note 1 at 189.
- <sup>14</sup> See also on this point *Re F.P. Publications (Western) Ltd.* (1979), 51 C.C.C. (2d) 110 (Man. C.A.); and *Re Vaudrin and the Queen* (1982), 2 C.C.C. (3d) 214 (B.C.S.C.).
- <sup>15</sup> (1978), 43 C.C.C. (2d) 197 (Ont. H.C.J.), *reversed on other grounds* 4 C.R. (3d) 121 (Ont. C.A.).
- <sup>16</sup> See generally Mewett, *Public Criminal Trials* (1978-79), 21 Cr. L.Q. 199. For a case which elaborates the procedural requirements of a Crown application under s. 442(3), see *R. v. Calabrese and Renard* (No. 3) (1981), 64 C.C.C. (2d) 71 (Que. S.C.).

## Chapter 23

# The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* was proclaimed in force on April 17, 1982. As a central component of the *Constitution Act, 1982*, the *Charter* is part of the supreme law of Canada: any federal, provincial, territorial or municipal law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.<sup>1</sup> By virtue of its entrenched status in Canadian constitutional law, the *Charter* imposes a new set of limitations on the powers of Parliament and the provincial legislatures and overrides any statute that is inconsistent with its provisions.<sup>2</sup>

Among the legal rights and fundamental freedoms accorded constitutional protection in the *Charter* are:

- The right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;
- The right to be secure against unreasonable search or seizure;
- The right not to be arbitrarily detained or imprisoned;
- The right of any person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- The right not to be subjected to any cruel and unusual treatment or punishment;
- Freedom of conscience and religion;
- Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- Freedom of association.

Section 15(1) of the *Charter* further provides that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” This provision, however, does not come into effect until April 17, 1985.<sup>3</sup>

Anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court to obtain "such remedy as the court considers appropriate and just in the circumstances."<sup>4</sup> On the other hand, Parliament or a provincial legislature may expressly declare that a statute or provision thereof shall operate notwithstanding specified sections of the *Charter*<sup>5</sup>; such a declaration ceases to have effect five years after it comes into force, or on such earlier date as is specified in the declaration.<sup>6</sup>

While the *Charter* guarantees the enjoyment of certain basic rights and freedoms, and provides for legal remedies in the event of their infringement or denial, it also recognizes that individual rights and freedoms are not constitutional absolutes. Section 1 of the *Charter* states that:<sup>7</sup>

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

Although the judicial interpretation of *Charter* provisions to date must be viewed somewhat tentatively,<sup>8</sup> Canadian courts have nonetheless provided a measure of guidance concerning the requirements of Section 1. Where a limit on a fundamental right or freedom contained in the *Charter* is shown, the burden rests with the party claiming the benefit of such limit to establish that it is a reasonable limit which can be demonstrably justified in a free and democratic society. The "reasonableness" and "demonstrable justification" of such limit may be established by adducing evidence, by explaining the terms and purposes of the limiting law and its economic, social and political background, and by referring to comparable legislation in other acknowledged free and democratic societies.<sup>9</sup> A limit should be considered "reasonable" if it employs a means proportionate to the end at which the law is directed, and courts should not lightly substitute their opinion for that of the representative law-making body.<sup>10</sup> The limit must, however, have legal force in order to withstand constitutional challenge: a limitation which is imposed solely by administrative discretion cannot be considered a limit "prescribed by law."<sup>11</sup>

In determining whether a statutory provision is constitutionally consistent with the fundamental standards set forth in the *Charter*, Canadian courts will have to address themselves to two questions. First, does the provision "infringe" or "deny" any of the rights and freedoms enumerated in the *Charter*? Second, if the answer to the first question is yes, can the infringement be considered reasonable and demonstrably justified in a free and democratic society?<sup>12</sup> This process of constitutional adjudication of individual rights can be better understood in the context of specific legal issues raised since the advent of the *Charter*. Legal challenges under the *Charter* have generated a number of issues relevant to the Committee's mandate, particularly in relation to: child welfare proceedings; *Criminal Code* sexual offences; the sentencing of offenders; publicity; and the legal regulation of obscene materials.



## Child Welfare Proceedings

- *Issue:* whether a provincial child welfare statute which provides that a child welfare authority may authorize medical treatment, including blood transfusions, for a neglected child, offends against the *Charter's* guarantee of freedom of conscience and religion.<sup>13</sup>
- *Issue:* whether the apprehension of a child apparently in need of protection, pursuant to authorization in a child welfare statute, constitutes a reasonable and justifiable limit on freedom of association.<sup>14</sup>
- *Issue:* whether the apprehension of a child pursuant to child welfare legislation constitutes a "detention" within the meaning of section 9 of the *Charter*, which provides that "everyone has the right not be arbitrarily detained or imprisoned."<sup>15</sup>
- *Issue:* whether the removal of a child from his or her parents pursuant to child welfare legislation constitutes "cruel and unusual treatment or punishment."<sup>16</sup>
- *Issue:* whether evidence of the environment in which a child is being raised should be excluded from a proceeding to determine whether the child is in need of protection, on the ground that it was improperly obtained and hence might serve to bring the administration of justice into disrepute.<sup>17</sup>

## Criminal Code Sexual Offences

- *Issue:* whether the offence in section 146(1) of the *Criminal Code*, which proscribes sexual intercourse with a female under 14, and which excludes mistake as to the age of the female as a defence, offends against the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.<sup>18</sup>

## Sentencing of Offenders

- *Issue:* whether mandatory minimum sentences of imprisonment in penal statutes offend against the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.<sup>19</sup>
- *Issue:* whether the preventive detention provisions relating to dangerous offenders in Part XXI of the *Criminal Code* contravene the right not to be arbitrarily detained or imprisoned.<sup>20</sup>
- *Issue:* whether the preventive detention provisions relating to dangerous offenders in Part XXI of the *Criminal Code* constitute "cruel and unusual treatment or punishment."<sup>21</sup>

## Publicity

- *Issue:* whether a provincial child welfare statute, which gives the court power to exclude any member of the public from a child welfare proceeding in specified circumstances, offends against the *Charter's* guarantee of freedom of the press.<sup>22</sup>
- *Issue:* whether section 12 of the *Juvenile Delinquents Act*, which requires that the trials of juveniles shall be held *in camera*, offends against the *Charter's* guarantee of freedom of the press.<sup>23</sup>
- *Issue:* whether the right of a person charged with an offence to a "public hearing," contained in section 11(d) of the *Charter*, applies to civil, child welfare proceedings instituted to determine whether a child is in need of protection.<sup>24</sup>
- *Issue:* whether section 442 of the *Criminal Code*, which provides for the exclusion of the public from criminal trials in specified circumstances, contravenes the right of a person charged with an offence to a "public hearing."<sup>25</sup>

## Legal Regulation of Obscene Materials

- *Issue:* whether the "obscenity" provisions in section 159 of the *Criminal Code* constitute reasonable limits on freedom of expression which can be demonstrably justified.<sup>26</sup>
- *Issue:* whether the prohibition in the federal *Customs Tariff* against the importation of books and other materials of an "immoral or indecent character" constitutes a reasonable limit on freedom of expression which can be demonstrably justified.<sup>27</sup>

## Summary

That the protection of individual rights and freedoms in the *Charter* does not imply the paralysis of law enforcement is apparent both from legal decisions rendered to date and from explicit statements by Canadian courts.<sup>28</sup> Even so, the *Charter* obliges courts to consider the reasonableness of and justifications for the limits placed by government on individual rights and freedoms enumerated in the *Charter*. As Mr. Justice Laforest of the New Brunswick Court of Appeal has observed, this new judicial role should profoundly affect the sources on which courts will rely for guidance.<sup>29</sup> It is in this respect that the Committee's findings and recommendations are most relevant to the issues posed by the *Charter*.

In the course of its work, the Committee has collected extensive information on the nature and occurrence of child sexual abuse and exploitation in Canada, and on the manner in which Canadian social and legal institutions respond to it. The Committee's findings highlight the operation of the Canadian legal system in relation to matters within the Committee's mandate,

and the practical and conceptual deficiencies in the law from the standpoint of child protection. On the basis of a close scrutiny of these findings, the Committee has recommended, for example, specific legal reforms to *Criminal Code* sexual offences and to the rules of evidence in proceedings relating to child sexual abuse.

**In the view of the Committee, each of its legal recommendations is, in light of the research findings, necessary in order to provide young persons with optimal protection against sexual abuse and exploitation. The justifications for each reform are given in different parts of this Report. The end sought to be achieved in each case is the protection of young persons; the legislative means proposed to achieve it are proportionate to that end. In the Committee's judgment, these proposed reforms to the law constitute an appropriate and tailored response to the special needs and substantial vulnerabilities of Canadian children and youths.**

## REFERENCES

### Chapter 23: The Canadian Charter of Rights and Freedoms

<sup>1</sup> *Constitution Act, 1982*, s. 52.

<sup>2</sup> See Hogg, *Supremacy of the Canadian Charter of Rights and Freedoms* (1983), 61 *Can. Bar Rev.* 69; and Laforest, *The Canadian Charter of Rights and Freedoms: An Overview* (1983), 61 *Can. Bar Rev.* 19.

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, s. 32(2). Of course, the "equality before the law" clause in s. 1(b) of the *Canadian Bill of Rights* continues to operate: see Tarnopolsky, *The Equality Rights in the Canadian Charter of Rights and Freedoms* (1983), 61 *Can. Bar Rev.* 242.

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, s. 24(1).

<sup>5</sup> *Canadian Charter of Rights and Freedoms*, s. 33(1).

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, ss. 33(2)-33(5).

<sup>7</sup> Emphasis added.

<sup>8</sup> At the time of this writing, the Supreme Court of Canada had not yet decided any of the numerous appeals relating to the interpretation of the *Charter*.

<sup>9</sup> *Re Southam Inc. and The Queen (No. 1)* (1983), 3 *C.C.C. (3d)* 515 (Ont. C.A.).

<sup>10</sup> *Quebec Association of Protestant School Boards et al. v. Attorney General of Quebec et al. (No. 2)* (1982), 140 *D.L.R. (3d)* 33 (Que. Sup. Ct.), *affd* June 9, 1983 (Que. C.A.).

<sup>11</sup> *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (March 25, 1983), 19 *A.C.W.S. (2d)* 62 (Ont. Div. Ct.).

<sup>12</sup> B. Hovius and R. Martin, *The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada* (1983), 61 *Can. Bar Rev.* 354.

<sup>13</sup> *Re Davis*, August 15, 1982, Alta. Prov. Ct. (Fam. Div.).

<sup>14</sup> *Re S. et al and Minister of Social Services* (June 27, 1983), 21 *A.C.W.S. (2d)* 219 (Sask. Q.B.).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Re W. and Children's Aid Society of Regional Municipality of York* (November 5, 1982), 17 *A.C.W.S. (2d)* 147 (Ont. Prov. Ct.).

<sup>18</sup> *R. v. Stevens* (1983), 3 *C.C.C. (3d)* 198 (Ont. C.A.).

<sup>19</sup> *R. v. Newell (No. 4) et al.* (1982), 70 *C.C.C. (2d)* 10 (B.C.S.C.).

<sup>20</sup> *R. v. Simon (No. 3)* (1982), 69 *C.C.C. (2d)* 557 (N.W.T.S.C.); *Re Mitchell and The Queen* (July 7, 1983), 10 *W.C.B.* 235 (Ont. H.C.J.).

<sup>21</sup> *R. v. Simon (No. 3)*, *ibid.*

<sup>22</sup> *Re S.D.A.* (1982), 28 *R.F.L. (2d)* 121 (B.C. Prov. Ct.).

<sup>23</sup> *Re Southam Inc. and The Queen (No. 1)*, *supra*, note 9.

<sup>24</sup> *Re C. et al.* (June 23, 1983), 21 *A.C.W.S. (2d)* 311 (Alta. Prov. Ct.). See generally Beckton, *Freedom of Expression — Access to the Courts* (1983), 61 *Can. Bar Rev.* 101.

<sup>25</sup> *R. v. L'Espérance* (April 28, 1982), 8 *W.C.B.* 352 (Que. Ct. Sess.).

<sup>26</sup> *R. v. Red Hot Video Ltd.* (May 12, 1983), 10 *W.C.B.* 153 (B.C. Prov. Ct.).

<sup>27</sup> *Re Luscher and Deputy Minister, Revenue Canada Customs and Excise* (June 30, 1983), 20 *A.C.W.S. (2d)* 509 (B.C. Co. Ct.).

<sup>28</sup> See especially *R. v. Altseimer* (1982), 1 *C.C.C. (3d)* 7 (Ont. C.A.).

<sup>29</sup> Laforest, *supra*, note 2. On the use of opinion polls in constitutional adjudication, see Gibson, *Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms* (1983), 61 *Can. Bar Rev.* 377.

**Part IV**

**Police Services**

## Chapter 24

### Police Investigation

The 'general occurrence form' was the primary source of information for the findings obtained in the National Police Force Survey in which 28 police forces from all parts of Canada participated. The summary of the police investigation of cases of alleged child sexual abuse given in Chapter 7, *Dimensions of Sexual Assault*, is expanded in this Part of the Report. In this chapter, information is given concerning the time taken by complainants in reporting offences to the police, whether the police regarded these complaints as being 'founded' or 'unfounded', the laying of criminal charges and the reasons why charges were not laid. In Chapter 25, *Elements of the Offences*, information is given concerning the acts committed in relation to their classification as sexual offences specified in the *Criminal Code*.

The 'general occurrence form' is an internal report which records the narrative of events given by the victim, complainant (in police terminology, the "complainant" is the person who notifies the police), or witness to the first officer on the scene. It is largely from the information on these forms that police forces compile statistical information on overall crime rates. Because of the different practices among Canadian police forces, the completeness of the information recorded in the general occurrence form varies from city to city. In larger police forces, the first officer on the scene is usually involved only with the writing of the occurrence. This officer will then submit the form to a sergeant, who in turn will forward it to a specialized investigative unit for consideration. Should a follow-up be required, the investigators will re-interview the relevant parties. It is at this stage that the more technical legal and evidentiary questions are considered and a follow-up report submitted.

In the majority of the police forces participating in the survey, it is not the responsibility of the first officer to carry out the entire investigation. If, however, the officer happens upon the suspect at this initial stage, the occurrence form will contain a complete account of the event and will note whether an arrest was made. In smaller police forces, where manpower is at a premium, the officer called to the scene will also typically become the investigating officer responsible for the case. Accordingly, the general occurrence form will contain all information required for a case preparation in the event charges are laid.

Due to the "contemporaneous" nature of the information recorded on police occurrence forms, the findings presented are limited in certain respects from a strictly legal point of view. For example, although the investigating officer may consider that the occurrence discloses the offence of "incest", later discussions with the Crown attorney may indicate that a different criminal charge would be either more appropriate or more expedient in the circumstances. For evidentiary or other reasons, the charge against the accused may be withdrawn (which vacates the charge unless a new charge is subsequently laid) or the proceedings "stayed" (which suspends them until the Crown directs otherwise). The accused might agree to plead guilty to one charge in consideration of the withdrawal of other charges outstanding against him or her, which is one form of the practice known colloquially as "plea bargaining". Alternatively, the charge or charges against the accused might be dropped on the condition that he or she undergo some form of therapy; this practice is known as "pre-trial diversion". Where neither of the above occurs, the accused might nevertheless be acquitted at trial, and this legal result challenged on appeal. Since each of the 6203 cases was not followed up to its eventual conclusion, the findings do not provide information concerning these "longitudinal" aspects of law enforcement. (Information in this regard was collected by the Committee from other sources, particularly with respect to sentencing and corrections).

Accepting these limitations, however, the findings obtained are highly relevant to the social assumptions upon which the Canadian law of sexual offences against young persons has hitherto been based. Their strength lies in the extensive detail with which they describe the investigation of alleged child sexual abuse from a police perspective. The information presented constitutes a necessary empirical foundation from which the Committee derived a substantial proportion of its recommendations for law reform presented in Part III of the Report.

The information given in this chapter, unless otherwise specified, describes 4143 cases investigated by the police of alleged sexual assaults involving children and youths who were 20 years-old and younger. Findings concerning acts of exposure are considered separately in Chapter 8, *Acts of Exposure* and Chapter 9, *Exposure Followed by Assault*. The findings given in this chapter vary slightly from those given in Chapter 7, *Dimensions of Sexual Assault*. In the latter, the experience of children and youths age 15 and younger is considered while in this chapter, findings are presented for children and youths age 20 and younger.

## Reporting the Offence

As noted in Chapter 7, *Dimensions of Sexual Assault*, in comparison with victims who were known to other public services, those who sought police assistance did so more promptly. Most offences were reported to the police within 24 hours (65.3 per cent); more than three-quarters of the offences were reported to the police within one week of their occurrence (76.4 per cent). A



small portion of these offences, however, was not reported to the police until after a delay of more than six months (7.8 per cent). There is no significant variation in these time intervals based on the sex of the victim.

Interval Taken To Report Offence	Male Victims	Female Victims	Total
	Accum. %	Accum. %	Accum. %
Offence reported within 24 hours	60.2	66.4	65.3
Offence reported within 1 week	74.3	76.9	76.4
Offence reported within 6 months	95.2	91.5	92.2
Offence reported over 6 months after occurrence	100.0	100.0	100.0

There is no consistent trend between the time taken by female victims or by persons on their behalf to report the offence and the police decision to lay a criminal charge (Table 24.1). Of the 486 cases (15.9 per cent of the total) in which the offence was reported to the police more than a month after its occurrence, the proportion of charges laid is greater than that for cases in which the

**Table 24.1**  
**Interval Taken by Female Victims to Report Offence to the Police: Charges Laid**

Interval Taken to Report Offence by Victim	Charges Against Suspects					
	Not Laid		Laid		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Immediately	796	62.1	485	37.9	1,281	100.0
Within 4 hours	212	63.9	120	36.1	332	100.0
Within 8 hours	82	69.5	36	30.5	118	100.0
Within 12 hours	50	62.5	30	37.5	80	100.0
Within 16 hours	22	59.5	15	40.5	37	100.0
Within 24 hours	130	70.7	54	29.3	184	100.0
Within 1-3 days	114	62.0	70	38.0	184	100.0
Within 4-7 days	90	65.7	47	34.3	137	100.0
Under 1 month	135	60.8	87	39.2	222	100.0
Under 6 months	129	57.1	97	42.9	226	100.0
Under 12 months	38	50.7	37	49.3	75	100.0
Over 1 year	83	44.9	102	55.1	185	100.0
<b>TOTAL</b>	<b>1,881</b>	<b>61.4</b>	<b>1,180</b>	<b>38.6</b>	<b>3,061</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 310 cases.

police were notified more promptly. As in the case of female sexual victims, there is no consistent trend between the time taken by male victims or by persons on their behalf to report the offence and the police decision to lay a criminal charge. Of the 105 cases (15.8 per cent of the total) listed in Table 24.2 in which the offence was reported more than a month after its occurrence, the proportion of charges laid was greater than that for cases in which the police were notified more promptly.

**Table 24.2**  
**Interval Taken by *Male* Victims**  
**to Report Offences to the Police: Charges Laid**

Interval Taken to Report Offence by Victim	Charges Against Suspects					
	Not Laid		Laid		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Immediately	158	59.9	106	40.1	264	100.0
Within 4 hours	35	58.3	25	41.7	60	100.0
Within 8 hours	7	58.3	5	41.7	12	100.0
Within 12 hours	6	54.6	5	45.5	11	100.0
Within 16 hours	4	66.7	2	33.3	6	100.0
Within 24 hours	29	61.7	18	38.3	47	100.0
Within 1-3 days	30	55.6	24	44.4	54	100.0
Within 4-7 days	26	65.0	14	35.0	40	100.0
Under 1 month	37	56.1	29	43.9	66	100.0
Under 6 months	31	42.5	42	57.5	73	100.0
Under 12 months	3	18.8	13	81.2	16	100.0
Over 1 year	6	37.5	10	62.5	16	100.0
<b>TOTAL</b>	<b>372</b>	<b>55.9</b>	<b>293</b>	<b>44.1</b>	<b>665</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 107 cases.

When only those offences involving the specific sexual acts of vaginal and attempted vaginal intercourse with females, and anal and attempted anal intercourse with males and females are considered, the non-relationship between the time taken to report the offence and the police decision to lay a criminal charge is even more apparent. With respect to offences involving *vaginal or attempted vaginal intercourse with a female*, the time taken by the female victim or by someone on the victim's behalf to notify the police was not a critical factor in the police decision to lay a criminal charge (Tables 24.3 and 24.4).

**Table 24.3**

**Interval Taken by Female Victims to Report Offences  
Involving *Vaginal Intercourse* to the Police: Charges Laid**

Interval Taken to Report Acts of Vaginal Intercourse by Victims	Charges Against Suspects					
	Not Laid		Laid		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Immediately	90	48.9	94	51.1	184	100.0
Within 4 hours	45	60.8	29	39.2	74	100.0
Within 8 hours	28	73.7	10	26.3	38	100.0
Within 12 hours	19	90.5	2	9.5	21	100.0
Within 16 hours	1	25.0	3	75.0	4	100.0
Within 24 hours	22	62.9	13	37.1	35	100.0
Within 1-3 days	22	52.4	20	47.6	42	100.0
Within 4-7 days	17	60.7	11	39.3	28	100.0
Under 1 month	28	58.3	20	41.7	48	100.0
Under 6 months	36	63.2	21	36.8	57	100.0
Under 12 months	10	38.5	16	61.5	26	100.0
Over 1 year	27	37.5	45	62.5	72	100.0
<b>TOTAL</b>	<b>345</b>	<b>54.9</b>	<b>284</b>	<b>45.1</b>	<b>629</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 57 cases.

**Table 24.4**

**Interval Taken by Female Victims to Report Offences  
Involving *Attempted Vaginal Intercourse* to the Police: Charges Laid**

Interval Taken to Report Acts of Attempted Vaginal Intercourse by Victims	Charges Against Suspects					
	Not Laid		Laid		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Immediately	47	57.3	35	42.7	82	100.0
Within 4 hours	15	55.6	12	44.4	27	100.0
Within 8 hours	6	66.7	3	33.3	9	100.0
Within 12 hours	1	25.0	3	75.0	4	100.0
Within 16 hours	1	50.0	1	50.0	2	100.0
Within 24 hours	11	78.6	3	21.4	14	100.0
Within 1-3 days	4	30.8	9	69.2	13	100.0
Within 4-7 days	8	72.7	3	27.3	11	100.0
Under 1 month	13	68.4	6	31.6	19	100.0
Under 6 months	10	43.5	13	56.5	23	100.0
Under 12 months	3	75.0	1	25.0	4	100.0
Over 1 year	7	38.9	11	61.1	18	100.0
<b>TOTAL</b>	<b>126</b>	<b>55.8</b>	<b>100</b>	<b>44.2</b>	<b>226</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 24 cases.

Tables 24.5, 24.6, 24.7 and 24.8 pertain to offences involving *acts of anal or attempted anal intercourse with female and male victims*, respectively. In each instance, it is evident that the police decision to charge is largely independent of the time taken to report. For offences involving acts of anal intercourse with females, charges were laid in 23 out of a total of 32 cases (71.9 per cent). For offences involving acts of attempted anal intercourse with females, charges were laid in 24 out of a total of 41 cases (58.5 per cent). For

**Table 24.5**

**Time Taken by Female Victims or by Persons on their Behalf to Report Offences Involving *Anal Intercourse***

Interval Taken to Report Acts of Anal Intercourse	Charges Not Laid		Charges Laid	
	Number (n=9)	Accum. Per Cent	Number (n=23)	Accum. Per Cent
Offences reported within 24 hours	8	88.9	13	56.5
Offences reported within 1 week	1	100.0	3	69.6
Offences reported within 6 months	—	—	3	82.6
Offences reported over 6 months after occurrence	—	—	4	100.0

*National Police Force Survey.*

**Table 24.6**

**Time Taken by Female Victims or by Persons on their Behalf to Report Offences Involving *Attempted Anal Intercourse***

Interval Taken to Report Acts of Attempted Anal Intercourse	Charges Not Laid		Charges Laid	
	Number (n=17)	Accum. Per Cent	Number (n=24)	Accum. Per Cent
Offences reported within 24 hours	12	70.6	16	66.7
Offences reported within 1 week	1	76.5	2	75.0
Offences reported within 6 months	2	88.2	3	87.5
Offences reported over 6 months after occurrence	2	100.0	3	100.0

*National Police Force Survey.*

offences involving acts of anal intercourse with males, charges were laid in 35 out of a total of 55 cases (63.6 per cent). Although the number of cases in this category is small, it should be noted that the proportion of suspects charged with an offence involving anal intercourse with a young male (63.6 per cent) is considerably higher than that for all offences against young male victims (44.2 per cent). For offences involving acts of attempted anal intercourse with males, charges were laid in 16 out of a total of 39 cases (41.0 per cent).

**Table 24.7**

**Time Taken by Male Victims or by Persons on their Behalf to Report Offences Involving *Anal Intercourse***

Interval Taken to Report Acts of Anal Intercourse	Charges Not Laid		Charges Laid	
	Number (n=20)	Accum. Per Cent	Number (n=35)	Accum. Per Cent
Offences reported within 24 hours	8	40.0	14	40.0
Offences reported within 1 week	4	60.0	7	60.0
Offences reported within 6 months	8	100.0	12	94.3
Offences reported over 6 months after occurrence	—	—	2	100.0

*National Police Force Survey.*

**Table 24.8**

**Time Taken by Male Victims or by Persons on their Behalf to Report Offences Involving *Attempted Anal Intercourse***

Interval Taken to Report Acts of Attempted Anal Intercourse	Charges Not Laid		Charges Laid	
	Number (n=23)	Accum. Per Cent	Number (n=16)	Accum. Per Cent
Offences reported within 24 hours	16	69.6	7	43.8
Offences reported within 1 week	4	87.0	3	62.5
Offences reported within 6 months	3	100.0	3	81.3
Offences reported over 6 months after occurrence	—	—	3	100.0

*National Police Force Survey.*

The findings indicate that the time taken by a young victim of an alleged sexual abuse or by someone on the victim's behalf to report the offence to the police is not a critical factor in the police decision to lay a criminal charge. One can also infer that, at least from the police perspective, the likelihood that a young victim is making a true allegation is not a function of the promptness with which the incident is reported to the police. The findings strongly support the view that no particular inferences concerning the victim's credibility should be drawn merely because the victim did not complain "at the first reasonable opportunity".

**In view of the significant proportion of cases in which criminal charges were laid, notwithstanding that a month or more had elapsed since the date of the offence, it is evident that the police are mindful of the considerations which may prevent prompt reporting of these incidents. These findings support the Committee's recommendation given in Part III of the Report that the evidentiary rules concerning the doctrine of "recent complaint" in prosecutions for sexual offences be abrogated by statute.**

## Identity of Persons Contacting the Police

Due to the youth of some sexual victims, and for a variety of other reasons, the police will often be notified of the offence by someone other than the victim. The identity of the persons who reported these sexual offences against young persons to the police is presented in Tables 24.9 and 24.10. A caveat needs to be entered concerning these findings. In police terminology, the "complainant" is the person who reports an alleged offence to the police, and this will often be a person other than the victim of the offence. Some Canadian police forces, however, appear to have adopted the practice of designating on the police occurrence form the victim as the complainant in all cases, even though the body of the police report clearly indicates that someone other than the victim actually notified the police. Where this occurred, the person who notified the police was specified as the complainant for the purposes of the Committee's research.

In a large number of cases, the victim was listed as the complainant on the police occurrence form but the investigating officer gave no indication concerning who actually called the police. Although each general occurrence form used by the police forces of each city in the Committee's survey contained the category "complainant", there often was uncertainty in this regard in relation to the information provided by the investigating police officer. The implication of this reporting practice, to the extent that it occurs, is that the number of victims designated as "complainants" in the police sense, and the corresponding percentage of victims listed as "complainants" in the police sense, are inflated figures. This is particularly so in relation to reported offences against younger children.

**Table 24.9**  
**Identity of Persons Contacting the Police in Relation to Sexual Offences**  
**against Female Children and Youths: By Age of Victims**

Age of Female Victims	Persons Contacting the Police											
	Victim		Parent		Medical/Health Worker		Child Protection Service		Other Persons		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent
Under age 7	67	14.2	317	67.3	9	1.9	26	5.5	52	11.0	471	99.9*
7 - 11 years	165	22.8	389	53.9	6	0.8	38	5.3	124	17.2	722	100.0
12 - 13 years	193	40.7	163	34.4	2	0.4	26	5.5	90	19.0	474	100.0
14 - 15 years	421	56.8	152	20.5	2	0.3	47	6.3	119	16.1	741	100.0
16 - 17 years	275	67.6	54	13.3	5	1.2	11	2.7	62	15.2	407	100.0
18 - 20 years	389	81.2	15	3.1	1	0.2	4	0.8	70	14.6	479	99.9*
<b>TOTAL</b>	<b>1,510</b>	<b>45.8</b>	<b>1,090</b>	<b>33.1</b>	<b>25</b>	<b>0.8</b>	<b>152</b>	<b>4.6</b>	<b>517</b>	<b>15.7</b>	<b>3,294</b>	<b>100.0</b>

National Police Force Survey. Information missing for 77 cases.

\*rounding error

**Table 24.10**  
**Identity of Persons Contacting the Police in Relation to Sexual Offences**  
**against Male Children and Youths: By Age of Victims**

Age of Male Victims	Persons Contacting the Police													
	Victim		Parent		Medical/Health Worker		Child Protection Service		Other Persons		Total			
	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent		
Under age 7	26	12.8	157	77.3	1	0.5	8	3.9	11	5.4	203	99.9*		
7 - 11 years	77	28.5	142	52.6	—	—	11	4.1	40	14.8	270	100.0		
12 - 13 years	30	30.3	42	42.4	—	—	5	5.1	22	22.2	99	100.0		
14 - 15 years	70	60.3	27	23.3	—	—	4	3.5	15	12.9	116	100.0		
16 - 17 years	21	80.8	1	3.9	—	—	—	—	4	15.3	26	100.0		
18 - 20 years	20	76.9	1	3.9	—	—	1	3.9	4	15.3	26	100.0		
<b>TOTAL</b>	<b>244</b>	<b>33.0</b>	<b>370</b>	<b>50.0</b>	<b>1</b>	<b>0.1</b>	<b>29</b>	<b>3.9</b>	<b>96</b>	<b>13.0</b>	<b>740</b>	<b>100.0</b>		

*National Police Force Survey. Information missing for 32 cases.*

\*rounding error



Overall, about four in five sexual offences against young females were reported to the police either by the victim herself (45.8 per cent) or by her parents (33.1 per cent). Child protection services accounted for about one in 22 police referrals (4.6 per cent), while referrals from medical or health workers constituted about one in 132 (0.8 per cent). Other persons accounted for 15.7 per cent of referrals to the police.

Predictably, the likelihood that female victims themselves reported the offence to the police increased progressively with older victims. On the other hand, these offences came to the knowledge of the police through the agency of the victim's parents more often where the victim was a young child. That police referrals by child protection services decreased markedly with female victims 16 and older is noteworthy. This is partly a function of the legal mandate of these services, which does not extend to young persons over a certain age; in Ontario, for example, this age is 16.

As with female victims, about four in five sexual offences against young males were reported to the police either by the victim himself or by the victim's parents (83.0 per cent). Even so, a smaller proportion of male victims than female victims themselves reported the offence (33.0 versus 45.8 per cent), and, correspondingly, a larger proportion of male victims' parents than female victims' parents brought the offence to police attention (50.0 versus 33.1 per cent). Child protection services accounted for about one in 25 police referrals (3.9 per cent), while referrals from medical or health workers constituted only one in 1,000 (0.1 per cent). Other persons accounted for 13.0 per cent of referrals to the police. The age trends in reporting with respect to male victims are comparable to those observed for female victims. The likelihood that male victims themselves reported the offence to the police increased with older victims; correspondingly, the parents of male victims accounted for progressively fewer police referrals concerning older victims.

**At least with respect to pre-adolescent victims, it is evident on the basis of these findings that sexual offences against them were brought to police attention predominantly by persons other than the victims themselves. These children either made statements to someone concerning the offence or acted in a manner that aroused someone's suspicions, both of which resulted in the police being notified.**

**Under the current rules of evidence, however, many of these statements by child sexual victims would constitute hearsay and would be inadmissible in court. Moreover, under current legal doctrine, a large proportion of these young sexual victims would likely be deemed incompetent to testify, notwithstanding that their "allegations" are considered to be legitimate by the police. These findings strongly underscore the need for reform of the legal rules concerning the testimonial competency of children and the admissibility of hearsay statements along the lines recommended by the Committee in Part III of the Report.**

## “Founded” Occurrences

An occurrence investigated by the police is considered to be *founded* if the investigation indicates that the offence did occur, and *unfounded* if the investigation indicates that the offence did not occur. The founded-unfounded distinction is an internal police evaluation based on the results of its investigation. Whether or not charges are laid, however, depends on considerations relating

**Table 24.11**  
**Reports of Sexual Offences against *Female* Victims**  
**Listed by the Police as Founded Occurrences: By Age of Victim**

Age of Female Victims	Offences Listed as Founded Occurrences					
	Unfounded		Founded		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Under age 7	26	5.5	443	94.5	469	100.0
7 – 11 years	28	3.9	689	96.1	717	100.0
12 – 13 years	33	7.0	439	93.0	472	100.0
14 – 15 years	66	9.0	670	91.0	736	100.0
16 – 17 years	66	16.3	339	83.7	405	100.0
18 – 20 years	55	11.5	423	88.5	478	100.0
<b>TOTAL</b>	<b>274</b>	<b>8.4</b>	<b>3,003</b>	<b>91.6</b>	<b>3,277</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 94 cases.

**Table 24.12**  
**Reports of Sexual Offences against *Male* Victims**  
**Listed by the Police as Founded Occurrences: By Age of Victims**

Age of Male Victims	Offences Listed as Founded Occurrences					
	Unfounded		Founded		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Under age 7	15	7.4	187	92.6	202	100.0
7 – 11 years	9	3.4	258	96.6	267	100.0
12 – 13 years	5	5.1	94	94.9	99	100.0
14 – 15 years	3	2.6	113	97.4	116	100.0
16 – 17 years	3	11.1	24	88.9	27	100.0
18 – 20 years	1	3.8	25	96.2	26	100.0
<b>TOTAL</b>	<b>36</b>	<b>4.9</b>	<b>701</b>	<b>95.1</b>	<b>737</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 35 cases.

to the likelihood of securing a conviction in court. For example, the police may consider that an occurrence involving a sexual offence against a child was "founded" in the sense that they believed the event happened, but they may not lay charges because: the suspect cannot be found; the child victim (and principal Crown witness) will likely be deemed incompetent to testify at trial; there is no corroboration; the victim is unwilling to testify to the event; the victim's parents are unwilling to subject their child to the trauma of the trial process; or for other reasons. The reasons why charges were not laid by the police are considered following the review of founded and unfounded occurrences.

For both sexes and for victims of sexual assaults of all ages up to 20, 92.3 per cent of all occurrences were considered to be "founded" by the police. Conversely, only 7.7 per cent, or about one in every 13 occurrences, were listed as "unfounded".

Sex of Victim	Percentage of Occurrences Unfounded	Percentage of Occurrences Founded
Females	8.4	91.6
Males	4.9	95.1

With respect to female victims, there is a slight but statistically insignificant trend with age; the proportion of founded occurrences bottoms out in the 16-17 year category, and then rises again. Even so, the critical finding is that well over nine in 10 reported occurrences involving young female victims were considered to be "founded". With respect to male victims, there is no significant variation in the proportion of founded occurrences depending on the ages of victims.

**These findings are significant in light of the traditional legal assumptions about the testimonial trustworthiness of young sexual victims. As noted, 92.3 per cent of all occurrences were considered to be "founded" by the police, and the trends with age were statistically insignificant. The findings with respect to children under age 14 are especially salient; the proportion of "founded" occurrences is in the 95 per cent range for victims of both sexes. It is evident that the police not only believed that the vast majority of reported incidents had actually occurred, but also that their assessments in this regard were largely independent of the age of the young sexual victim. Further, the alleged danger of false allegations being made by persons on behalf of very young children is not borne out. The findings provide strong support for the reforms to children's evidence and hearsay recommended by the Committee in Part III of this Report.**

## Charges Laid

That an occurrence is considered "founded" does not necessarily mean that criminal charges will be laid. For victims of both sexes and of all ages in the survey, charges were laid in about two in five incidents (40.3 per cent).

**Table 24.13**

**Charges Laid by the Police against Suspects in Relation to Sexual Offences Committed against *Female* Victims: By Age of Victims**

Age of Female Victims	Charges Laid Against Suspects					
	Not Laid		Laid		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Under age 7	294	63.9	166	36.1	460	100.0
7 – 11 years	410	57.6	302	42.4	712	100.0
12 – 13 years	257	54.7	213	45.3	470	100.0
14 – 15 years	443	60.5	289	39.5	732	100.0
16 – 17 years	260	64.4	144	35.6	404	100.0
18 – 20 years	318	67.2	155	32.8	473	100.0
<b>TOTAL</b>	<b>1,982</b>	<b>61.0</b>	<b>1,269</b>	<b>39.0</b>	<b>3,251</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 120 cases.

**Table 24.14**

**Charges Laid by the Police against Suspects in Relation to Sexual Offences Committed against *Male* Victims: By Age of Victims**

Age of Male Victims	Charges Laid Against Suspects					
	Not Laid		Laid		Total	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Under age 7	143	71.5	57	28.5	200	100.0
7 – 11 years	134	51.0	129	49.0	263	100.0
12 – 13 years	47	48.4	50	51.6	97	100.0
14 – 15 years	39	34.5	74	65.5	113	100.0
16 – 17 years	13	52.0	12	48.0	25	100.0
18 – 20 years	17	65.4	9	34.6	26	100.0
<b>TOTAL</b>	<b>393</b>	<b>54.3</b>	<b>331</b>	<b>45.7</b>	<b>724</b>	<b>100.0</b>

*National Police Force Survey.* Information missing for 48 cases.

Whether charges were laid against a suspect did not vary appreciably with the sex of the victim. The proportion of charges laid peaks in the 12-13 age group for girls (45.3 per cent) and in the 14-15 age group for boys (65.5 per cent).

Sex of Victim	Percentage of Charges Not Laid	Percentage of Charges Laid
Females	61.0	39.0
Males	54.3	45.7
Average	59.7	40.3

What is striking about these findings is that the proportion of charges laid in occurrences relating to both male and female victims under 16 is greater than that for victims in the 16-20 category. The police were no more reluctant to act on the allegations of young children than they were on the allegations of older teenagers; if anything, the reverse is true. To the extent that the police decision to charge is contingent on the assessment that the victim's allegation is true, these findings belie the notion that the credibility of child sexual victims is appreciably less than that of older sexual victims. These findings furnish support for the reforms to the evidentiary rules concerning young children and hearsay recommended in Part III of this Report.

### Reasons Why Charges Were Not Laid

The findings given in Tables 24.15 and 24.16 list the principal reasons why criminal charges were not laid, broken down by the sex and age of the victim. In many instances, no charge was laid for a variety of reasons; each reason was noted in collecting this information from police records. Consequently, the number of "reasons charges not laid" greatly exceeds the total number of cases in which charges were not laid. Further, it was impossible to determine from the police records the relative weight that each of several reasons given may have contributed to the decision not to charge. Although each contributing factor was noted, no inferences were made concerning the relative importance of that factor in the police's decision not to lay a charge. Some factors, of course, would naturally be of controlling importance, for example, where the identity of the suspect was unknown.

The findings with respect to male and female victims, considered together, indicate that:

- In about one in three cases (males, 30.8 per cent; females, 33.8 per cent), charges were not laid because the identity of the suspect was unknown.
- In about one in five cases (males, 21.4 per cent; females, 17.3 per cent), there was no physical evidence (for example, no presence of semen after an alleged rape) was a contributing factor in no charge being laid.
- In about one in five cases (males, 26.2 per cent; females, 17.7 per cent), there was no corroboration of the victim's story (for example, a complete denial by the suspect coupled by a lack of other witnesses) was a contributing factor in no charge being laid.
- In about one in six cases (males, 18.8 per cent; females, 13.7 per cent), the intervention of a social service agency (and, in some cases, the institution of child protection proceedings) was a contributing factor in no criminal charge being laid.

**Table 24.15**  
**Reasons that Charges Were Not Laid by Age of Female Victims**

Reasons Charges Not Laid	Age of Female Victims														TOTAL (n=1982)
	Under Age 7 (n=294)		7-11 (n=410)		12-13 (n=257)		14-15 (n=443)		16-17 (n=260)		18-20 (n=318)		TOTAL (n=1982)		
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	
Identity of suspect unknown	65	22.1	132	32.2	71	27.6	135	30.5	129	49.6	138	43.4	670	33.8	
Age of child	112	38.1	52	12.7	11	4.3	4	0.9	4	1.5	2	0.6	185	9.3	
Lack of physical evidence	79	26.9	80	19.5	45	17.5	82	18.5	40	15.4	17	5.3	343	17.3	
Lack of corroboration	93	31.6	79	19.3	43	16.7	86	19.4	34	13.1	16	5.0	351	17.7	
Credibility of victim questioned	13	4.4	35	8.5	45	17.5	86	19.4	69	26.5	44	13.8	292	14.7	
Credibility of witness questioned	3	1.0	6	1.5	5	1.9	11	2.5	4	1.5	1	0.3	30	1.5	
Victim unwilling to testify	8	2.7	18	4.4	34	13.2	86	19.4	55	21.2	49	15.4	250	12.6	
Witness unwilling to testify	3	1.0	1	0.2	3	1.2	3	0.7	2	0.8	3	0.9	15	0.8	
Offender's spouse unwilling to testify	1	0.3	3	0.7	7	2.7	8	1.8	1	0.4	1	0.3	21	1.1	
Parents unwilling to lay charges	11	3.7	11	2.7	14	5.4	16	3.6	2	0.8	1	0.3	55	2.7	
Details of offence vague	24	8.2	39	9.5	30	11.7	60	13.5	48	18.5	20	6.3	221	11.2	
Social service agency intervention	63	21.4	64	15.6	42	16.3	70	15.8	22	8.5	11	3.5	272	13.7	
Suspect cautioned by police	94	32.0	119	29.0	78	30.4	93	21.0	23	8.8	10	3.1	417	21.0	

**Table 24.16**  
**Reasons that Charges Were Not Laid by Age of Male Victims**

Reasons Charges Not Laid	Age of Male Victims										Total (n=393)			
	Under Age 7 (n=143)		7-11 (n=134)		12-13 (n=47)		14-15 (n=39)		16-17 (n=13)			18-20 (n=17)		
	No.	%	No.	%	No.	%	No.	%	No.	%		No.	%	
	Non Accumulative Per Cent													
Identity of suspect unknown	29	20.3	54	40.3	12	25.5	15	38.5	5	38.5	6	35.3	121	30.8
Age of child	52	36.4	11	8.2	1	2.1	—	—	—	—	1	5.9	65	16.5
Lack of physical evidence	40	28.0	27	20.1	7	14.9	4	10.3	2	15.4	4	23.5	84	21.4
Lack of corroboration	40	28.0	31	23.1	14	29.8	10	25.6	4	30.8	4	23.5	103	26.2
Credibility of victim questioned	12	8.4	10	7.5	7	14.9	8	20.5	3	23.1	4	23.5	44	11.2
Credibility of witness questioned	2	1.4	1	0.8	—	—	1	2.6	1	7.7	1	5.9	6	1.5
Victim unwilling to testify	3	2.1	4	3.0	3	6.4	4	10.3	3	23.1	5	29.4	22	5.6
Witness unwilling to testify	1	0.7	—	—	1	2.1	1	2.6	—	—	—	—	3	0.8
Offender's spouse unwilling to testify	1	0.7	—	—	1	2.1	—	—	—	—	—	—	2	0.5
Parents unwilling to lay charges	4	2.8	1	0.8	3	6.4	—	—	—	—	—	—	8	2.0
Details of offence vague	13	9.1	10	7.5	5	10.6	4	10.3	2	15.4	1	5.9	35	8.9
Social service agency intervention	31	21.7	26	19.4	11	23.4	3	7.7	2	15.4	1	5.9	74	18.8
Suspect cautioned by police	44	30.8	33	24.6	11	23.4	7	17.9	3	23.1	2	11.8	100	25.4

- In one in four cases concerning male victims (25.4 per cent) and in more than one in five cases concerning female victims (21.0 per cent), the suspect was cautioned but not charged.

### Identity of Suspect Unknown

The proportion of cases in which the identity of the offender was unknown increases with the victims' ages. This trend is particularly apparent with respect to female victims. The findings suggest that young children were more apt either to know the identity of their assailants or to disclose this information than were older children and teenagers.

### Age of Child

The results here are predictable. Children under the age of seven, generally speaking, would likely be held incompetent to give even unsworn testimony at trial. It is therefore not surprising that the "age of child" constituted the main reason cited in police decisions not to charge in cases where the victim was under seven years of age, irrespective of the sex of the victim. In the absence of a confession by the offender or other strong confirmatory evidence, prosecutions of offenders who sexually assault very young children are often pointless. The findings indicate that the police are aware of these practical realities and, instead of charging suspected offenders, use the expedient of a caution proportionately more often in cases in which the victim is very young.

The importance of the child's age as a factor influencing the decision not to charge drops off sharply for victims who are 12 years-old and older. Children of these ages would normally be held competent to testify under current legal doctrine.

### Lack of Corroboration

These findings are significant especially with respect to male and female victims 14-20 years of age. It would appear that, at least in some instances, the police did not charge for reasons of "lack of corroboration", even where the suspect could have been charged with an offence for which corroboration was not required by law, for example, rape and indecent assault on a female. The offence-specific findings concerning "lack of corroboration" are presented later in this chapter.

### Credibility of Victim Questioned

These findings are striking when viewed in relation to the ages of victims. At least as far as the police are concerned, the credibility of young sexual victims decreased with age, irrespective of the sex of the victim. It strongly



appears that sexual victims of both sexes under the age of 12 were considered more credible than older sexual victims, and that victims 16-20 were perceived to be the least credible.

**These findings refute the assumption that the allegations of young sexual victims are intrinsically less trustworthy than those of older victims, and argue against the need for special corroboration requirements where young children are concerned. The findings also provide empirical support for the reforms to children's evidence and hearsay recommended in Part III of this Report.**

### Credibility of Witness Questioned

This reason came up too seldom to indicate a trend. The Committee's findings indicate that only rarely in cases investigated by the police was there a witness to a sexual assault on a young person.

### Victim Unwilling to Testify

This factor becomes progressively more important with older victims. That this reason appears only rarely with respect to young children is not surprising; where the police feel that a child victim will be incompetent to testify, the child's willingness to testify is somewhat academic. The significance of this factor in relation to older victims can perhaps be attributed in part to the victims' reluctance to submit to the criminal trial process.

### Parents Unwilling to Lay Charges

This occurred rarely, and was only a factor where the victim was a child or young teenager.

### Details of Offences Vague

This reason was a contributing factor in about one in 10 cases and increased in importance with the age of the victims, peaking in the 16-17 year group for both sexes. **That this was a relatively minor factor in cases involving children under 12 is yet another refutation of the assumption that young children are incapable of speaking effectively on their own behalf.** On the other hand, the relative prominence of this factor with respect to older teenagers may be accounted for in part by a reluctance to recount the details of the offence or to identify an offender known to them.

### Social Service Agency Intervention

The intervention of a social service agency was a factor in the police not laying criminal charges mainly with respect to children under 16. Many child

care professionals feel that the institution of "parallel" legal proceedings against an offender (namely, both in criminal court and in child welfare court) is counter-productive, unless the laying of a criminal charge will serve a pragmatic purpose, for example, ensuring that an incestuous father stays away from his daughters.

### Suspect Cautioned by Police

The use of informal "cautions" against suspected offenders happened most often where the victim was under 14, and particularly, where the victim was under seven years of age. As noted, in the absence of a confession by the offender or other strong confirmatory evidence, prosecutions of offenders who sexually assault very young children are often futile. It would appear that the police are aware of these practical realities, and caution suspected offenders proportionately more often where the child is very young. On the other hand, the use of cautions in cases of older victims may in part be attributable to discretionary decisions by police officers that a criminal charge would not be appropriate in the circumstances (for example, consensual sex between two 19 year-old males).

### Reasons Charges Were Not Laid by Types of Offences

The principal reasons why charges were not laid enables certain inferences to be drawn concerning how police charging practices are influenced by different reasons and in relation to the ages and sexes of the victims. Additional insights can be gained by considering these "reasons not to charge" in light of the different categories of sexual offences which the police are called upon to investigate. As noted, that a police occurrence form specifies, for example, "rape" as the most appropriate charge in the circumstances does not mean that the suspect could be successfully convicted of rape at trial. Even so, to the extent that the type of offence indicated on the police occurrence form requires certain key elements to be proven, the following findings are useful in considering how the police decision not to lay a charge may be influenced by the nature of the offence being investigated.

In Table 24.17, the number of "reasons charges not laid" exceeds the total number of cases in which charges were not laid. The percentages reported are based on the total number of instances a given reason was reported with respect to a specified offence, relative to the total number of cases involving that reported offence in which charges were not laid. Since more than one reason was often cited in investigations relating to a particular offence the total percentages under each offence exceed 100.0 per cent. A case in which no charges were laid is hereinafter called an "uncharged case".

Reasons that Police Charges Were Not Laid by Type of Offence

Reasons Charges Not Laid	Non Accumulative Per Cent												
	Rape (n=219)	Attempted Rape (n=53)	Female Under Age 14 (n=34)	Female Age 14 But Under 16 (n=54)	Indecent Assault Female (n=1464)	Indecent Assault Male (n=360)	Gross Indecency (n=83)	Buggery (n=16)	Incest (n=45)	Sex. Int. Step-Daughter Etc. (n=2)	Sexual Int. With Feeble-Minded (n=3)	Contributing to J.D.A. (n=18)	Average For 12 Offences (n=2351)
Identity of suspect unknown	31.1	62.3	8.8	3.7	37.7	31.4	37.3	18.8	—	—	66.7	11.1	34.4
Age of child	0.9	1.9	11.8	1.9	4.8	6.7	15.7	—	4.4	—	—	—	10.9
Lack of physical evidence	27.9	9.4	29.4	13.0	16.5	21.7	24.1	25.0	35.6	—	33.3	16.7	19.0
Lack of corroboration	21.0	18.9	32.4	7.4	17.4	25.8	30.1	25.0	37.8	100.0	33.3	5.6	19.9
Credibility of victim questioned	47.0	17.0	17.6	14.8	10.7	10.8	10.8	31.3	20.0	—	33.3	11.1	14.8
Credibility of witness questioned	1.8	1.9	5.9	1.9	1.5	1.4	6.0	6.3	4.4	—	—	—	1.8
Victim unwilling to testify	28.3	9.4	29.4	44.4	9.2	5.8	6.0	—	33.3	—	—	11.1	11.9
Witness unwilling to testify	0.9	—	2.9	—	0.6	0.8	2.4	—	2.2	—	—	—	0.8
Spouse unwilling to testify	—	—	—	—	1.2	0.6	3.6	—	6.7	—	—	—	1.1
Parents unwilling to lay charges	1.8	—	8.8	5.6	2.7	2.2	7.2	6.3	4.4	—	—	5.6	2.9
Details of offence vague	27.9	13.2	17.6	5.6	9.2	7.5	9.6	18.8	24.4	—	33.3	5.6	11.2
Complainants parents indifferent to laying charges	4.6	3.8	2.9	13.0	5.7	6.7	6.0	6.3	—	—	—	5.6	5.7
Social service agency intervention	5.5	3.8	5.9	7.4	14.1	18.9	19.3	18.8	60.0	100.0	66.7	16.7	14.8
Suspect cautioned by police	3.7	—	38.2	35.2	25.1	25.8	15.7	43.8	15.5	—	—	22.2	22.6

## Identity of Suspect Unknown

The highest proportion of uncharged cases in which it was reported that the suspect's identity was unknown concerned the offence of attempted rape (62.3 per cent); this reason was reported in about one in three uncharged cases of rape, indecent assault on a female, indecent assault on a male and gross indecency. These five offences accounted for 98.6 per cent of the uncharged cases in which it was reported that the suspect's identity was unknown. That this reason was progressively more prominent with respect to older victims is illustrated in Table 24.18.

**Table 24.18**  
**Reasons that Police Charges Were Not Laid**  
**by Age of Complainant: Suspect Unknown**

Age of Complainant	Type of Offence				
	Rape (n=68)	Attempted Rape (n=33)	Indecent Assault Female (n=552)	Indecent Assault Male (n=113)	Gross Indecency (n=31)
	Per Cent	Per Cent	Per Cent	Per Cent	Per Cent
Under age 7	—	—	22.5	19.7	26.1
7 – 11 years	33.3	50.0	32.7	41.4	40.7
12 – 13 years	33.3	60.0	38.9	26.2	14.3
14 – 15 years	29.9	55.6	36.4	38.2	57.1
16 – 17 years	35.4	60.0	56.2	41.7	57.1
18 – 20 years	27.7	83.3	74.5	41.7	80.0
<b>TOTAL</b>	<b>31.1</b>	<b>62.3</b>	<b>37.7</b>	<b>31.4</b>	<b>37.3</b>

*National Police Force Survey.* Non-accumulative totals based on the proportion of cases in which the suspect was unknown to the number of charges not laid for each offence and by age group. The five offences listed account for 98.6 per cent of the cases in which charges were not laid because the identity of the suspect was unknown.

This tendency is remarkable, especially in relation to the offences of indecent assault on a female and indecent assault on a male. The identity of the suspect was reported to have been unknown in only about one in five of the uncharged cases of indecent assault female (22.5 per cent) and indecent assault male (19.7 per cent) concerning victims under seven years of age. The importance of this factor increased progressively with older victims: the identity of the suspect was reported to have been unknown in three in four of the uncharged cases of indecent assault female (74.5 per cent) and in more than two in five of the uncharged cases of indecent assault male (41.7 per cent) concerning victims in the 18-20 age group. These findings strongly suggest that older children and teenagers are less apt either to know the suspect's identity or to disclose the suspect's identity, than are younger children.

## Age of Child

The offences of indecent assault on a female, indecent assault on a male, and gross indecency accounted for 96.1 per cent of the uncharged cases where the age of the child was given as a reason why charges were not laid. For reasons discussed earlier, the findings given in Table 24.19 indicate that this factor was, predictably, more important in cases involving victims under the age of 12.

**Table 24.19**  
**Reasons that Police Charges Were Not Laid**  
**by Age of Complainant: Age of Child**

Age of Complainant	Type of Offence		
	Indecent Assault Female (n=171)	Indecent Assault Male (n=62)	Gross Indecency (n=13)
	Non Accumulative Per Cent		
Under age 7	38.4	37.9	30.4
7 - 11 years	12.9	7.8	22.2
12 - 13 years	4.7	2.4	—
14 - 15 years	1.0	—	—
16 - 17 years	1.2	—	—
18 - 20 years	1.4	8.3	—
<b>TOTAL</b>	<b>4.8</b>	<b>6.7</b>	<b>15.7</b>

*National Police Force Survey.* Non-accumulative totals based on the proportion of reports citing the age of the child to the number of charges not laid for each offence and by age group. The three offences listed accounted for 96.1 per cent of cases where the age of the child was given as a reason why charges were not laid. The 10 other instances in which the age of the child was reported as a reason for not laying charges were: rape (2); attempted rape (1); sexual intercourse with a female under 14 (4); sexual intercourse with a female 14 or 15 (1); and incest (2).

## Lack of Physical Evidence

The seven offences listed in Table 24.20 account for 97.1 per cent of the uncharged cases in which lack of physical evidence was cited as a reason why charges were not laid. In general, this reason becomes less prominent with older victims. This finding is not surprising in light of the fact that the law presumes older persons to be more trustworthy than young children and, correspondingly, the need for independent evidence is most compelling where the victim is a young child.

**Table 24.20**  
**Reasons that Police Charges Were Not Laid**  
**by Age of Complainant: Lack of Physical Evidence**

Age of Complainant	Type of Offence						
	Rape (n=61)	Sexual Int. With Female Under 14 (n=16)	Sexual Int. With Female 14 or 15 (n=7)	Indecent Assault Female (n=241)	Indecent Assault Male (n=78)	Gross Indecency (n=20)	Incest (n=16)
	Non Accumulative Per Cent						
Under age 7	—	83.3	—	25.4	28.8	39.1	—
7 – 11 years	22.2	16.7	—	7.0	20.3	25.9	44.4
12 – 13 years	41.7	18.1	—	15.2	14.3	14.3	33.3
14 – 15 years	28.4	—	13.0	17.0	8.8	14.3	30.0
16 – 17 years	33.8	—	—	8.9	8.3	14.3	50.0
18 – 20 years	20.0	—	—	1.4	8.3	—	—
<b>TOTAL</b>	<b>27.9</b>	<b>29.4</b>	<b>13.0</b>	<b>16.5</b>	<b>21.7</b>	<b>24.1</b>	<b>35.6</b>

*National Police Force Survey.* Non-accumulative totals based on the proportion of reports of lack of physical evidence to the number of charges not laid and by age group. The seven offences listed accounted for 97.1 per cent of the cases in which lack of evidence was cited as a reason charges were not laid.

## Lack of Corroboration

The seven offences listed in Table 24.21 accounted for 97.4 per cent of the uncharged cases in which lack of corroboration was cited as a reason why charges were not laid. The prominence of this reason in cases where the victim was under age 14 can be explained by the fact that the evidence of an unsworn child is required by statute to be corroborated, and that even the evidence of a young child who is sworn as a witness is subject to the common law "corroboration warning rule". Further, when these findings were collected, a mandatory corroboration requirement applied to the offence of incest. The findings indicate that the police were aware of these legal requirements, and tended to "screen out" cases which, due to lack of corroboration of the complainant's story, would be pointless to bring to trial.

What is surprising, however, is the extent to which "lack of corroboration" was a factor in non-charging with respect to victims in the 14-20 age category. With the exception of incest, none of the offences listed in Table 24.21 required corroboration as a matter of law. These findings can be interpreted in at least three different ways. Either the police are uninformed about when corroboration is required as a strict matter of law, or they make assessments that, without some kind of confirmatory evidence the likelihood of securing a conviction in the particular circumstances is slender. Alternatively, the lack of corroboration may have been the decisive factor where the complainant's credibility is otherwise doubted. Each of these considerations, or some combination of them and others, may have operated in any particular case.

## Complainant's Credibility Questioned

That the complainant's credibility was questioned in almost half (47.0 per cent) of the uncharged rape cases is the most significant of the findings given in Table 24.22. The findings suggest that in a significant proportion of cases the police seem to be sceptical about the veracity of all purported rape victims, whether children, young teenagers or older teenagers. Apart from the uncharged rape cases, the general trend is that the police are more doubtful of the veracity of older as opposed to younger sexual victims. This trend has been previously noted.

## Complainant Unwilling to Testify

This reason for not laying charges listed in Table 24.23 was most conspicuous in relation to the uncharged cases of rape, sexual intercourse with a female under 14, females 14 or 15, and incest. When viewed in relation to the victims' ages, it becomes apparent that the prospect of testifying is a greater inhibiting factor where the victim is older. It is unknown why almost half (44.4 per cent) of the 24 uncharged cases of sexual intercourse with girls 14 or 15 cited the reason that the complainant was unwilling to testify. The section

**Table 24.21**  
**Reasons that Police Charges Were Not Laid**  
**by Age of Complainant: Lack of Corroboration**

Age of Complainant	Type of Offence						
	Rape (n=46)	Attempted Rape (n=10)	Sexual Int. With Female Under Age 14 (n=11)	Indecent Assault Female (n=255)	Indecent Assault Male (n=93)	Gross Indecency (n=25)	Incest (n=17)
	Non Accumulative Per Cent						
Under age 7	—	25.0	66.7	30.4	29.5	26.1	100.0
7 – 11 years	11.1	—	16.7	18.5	21.9	29.6	55.6
12 – 13 years	16.7	20.0	27.2	15.6	28.6	35.7	33.3
14 – 15 years	29.9	33.3	—	17.3	23.5	28.6	25.0
16 – 17 years	20.0	13.3	—	8.9	25.0	42.9	50.0
18 – 20 years	15.4	16.7	—	2.1	25.0	20.0	—
TOTAL	21.0	18.9	32.4	17.4	25.8	30.1	37.8

*National Police Force Survey.* Non-accumulative totals based on the proportion of reports of lack of corroboration to the number of charges not laid and by age group. The seven offences listed accounted for 97.4 per cent of the cases in which lack of corroboration was cited as a reason charges were not laid.



**Table 24.22**  
**Reasons that Police Charges Were Not Laid**  
**by Age of Complainant: Complainant's Credibility Questioned**

Age of Complainant	Type of Offence								
	Rape (n=103)	Attempted Rape (n=9)	Sexual Int. With Female Under 14 (n=6)	Sexual Int. With Female 14 or 15 (n=8)	Indecent Assault Female (n=157)	Indecent Assault Male (n=39)	Gross Indecency (n=9)	Buggery (n=5)	Incest (n=9)
	Non Accumulative Per Cent								
Under age 7	—	—	16.7	—	4.3	9.1	—	—	—
7 - 11 years	44.4	—	—	—	7.8	7.8	3.7	—	22.2
12 - 13 years	50.0	40.0	29.4	—	14.2	14.3	28.6	—	33.3
14 - 15 years	40.3	11.1	—	14.8	15.6	17.6	28.6	75.0	15.0
16 - 17 years	53.8	33.3	—	—	16.6	16.7	14.3	100.0	25.0
18 - 20 years	47.7	5.6	—	—	8.5	25.0	20.0	100.0	—
<b>TOTAL</b>	<b>47.0</b>	<b>17.0</b>	<b>17.6</b>	<b>14.8</b>	<b>10.7</b>	<b>10.8</b>	<b>10.8</b>	<b>31.3</b>	<b>20.0</b>

*National Police Force Survey.* Non-accumulative totals based on the proportion of reports of the complainant's credibility being questioned to the number of charges not laid and by age group. The nine offences listed accounted for 99.1 per cent of the cases in which the complainant's credibility was cited as a reason why charges were not laid.

**Table 24.23**  
**Reasons that Police Charges Were Not Laid**  
**by Age of Complainant: Complainant Unwilling to Testify**

Age of Complainant	Type of Offence							
	Rape (n=62)	Attempted Rape (n=5)	Sexual Int. With Female Under Age 14 (n=10)	Sexual Int. With Female 14 or 15 (n=24)	Indecent Assault Female (n=135)	Indecent Assault Male (n=21)	Gross Indecency (n=5)	Incest (n=15)
	Non Accumulative Per Cent							
Under age 7	—	—	16.7	—	2.9	2.3	4.3	—
7 - 11 years	—	—	16.7	—	4.0	3.1	—	22.2
12 - 13 years	16.7	—	36.4	—	10.4	7.1	14.3	16.7
14 - 15 years	19.4	—	—	44.4	15.0	11.8	14.2	35.0
16 - 17 years	32.3	13.3	—	—	14.8	25.0	—	62.5
18 - 20 years	40.0	16.7	—	—	14.9	33.3	20.0	—
<b>TOTAL</b>	<b>28.3</b>	<b>9.4</b>	<b>29.4</b>	<b>44.4</b>	<b>9.2</b>	<b>5.8</b>	<b>6.0</b>	<b>33.3</b>

*National Police Force Survey.* Non-accumulative totals based on the proportion of victims who were unwilling to testify to the number of charges not laid and by age group. The eight offences listed accounted for 99.3 per cent of the cases in which the victim was unwilling to testify.

146(2) offence is one where the complainant's lack of consent need not be proved, but she must be shown to have been "of previously chaste character". Although the number of uncharged incest cases was small, that one in three cited the complainant's unwillingness to testify as a reason why charges were not laid is scarcely surprising, given the painful circumstances inherent in an incest trial.

### Spouse of Suspect Unwilling to Testify

This was only a factor in relation to four sexual offences. When the findings were collected, the spouse of an offender charged with indecent assault female or indecent assault male could not be compelled to testify against him; it is not surprising, therefore, that these two offences are virtually not represented in these findings. With respect to the offences of incest and gross indecency, it is probable that, in the uncharged cases in which this reason was cited, the police considered that compelling the offender's spouse to testify against him would do more harm than good. It is also possible that the wife of the offender claimed the "interspousal communications" privilege (considered in Chapter 19, *Evidence of an Accused's Spouse*).

### Details of Offence Vague

This reason was cited most often in uncharged cases involving sexual offences to which considerable social stigma attaches: rape (27.9 per cent) and incest (24.4 per cent). A breakdown by ages of victims is presented in Table 24.24. As noted previously, it is apparent from these findings that young children are no more prone to giving vague accounts to the police than are older children.

### Social Agency Intervention

That charges were sometimes not laid because of the intervention of a social service agency was particularly notable in cases of incest: in three of five uncharged incest cases (60.0 per cent), no criminal charges were laid against the offender because of an agency's intervention on the child's behalf (Table 24.25). Overall, this reason was a factor in about one in seven uncharged cases (14.8 per cent), and was especially apparent in cases involving victims under the age of 16.

### Suspect Cautioned by the Police

The importance of the victim's age in influencing whether the police caution instead of charge is suggested by the findings given in Table 24.26. As noted earlier, the use of informal police "cautions" happened most often where the victim was under 14, and particularly where the victim was under seven years-old. It is evident that the police were aware of the practical realities of

Table 24.24

Reasons that Police Charges Were Not Laid  
by Age of Complainant: Details of Offence Vague

Age of Complainant	Type of Offence								
	Rape (n=61)	Attempted Rape (n=7)	Sexual Int. With Female Under 14 (n=6)	Sexual Int. With Female 14 or 15 (n=3)	Indecent Assault Female (n=135)	Indecent Assault Male (n=27)	Gross Indecency (n=8)	Buggery (n=3)	Incest (n=11)
Under age 7	—	—	50.0	—	8.0	6.8	17.9	—	—
7 - 11 years	33.3	—	16.7	—	8.3	7.8	7.4	—	33.3
12 - 13 years	33.3	20.0	9.1	—	10.9	9.5	7.1	—	16.7
14 - 15 years	22.4	22.2	—	5.6	12.2	5.9	14.2	75.0	20.0
16 - 17 years	36.9	20.0	—	—	11.2	8.3	—	—	37.5
18 - 20 years	23.1	5.6	—	—	2.8	8.3	—	—	—
TOTAL	27.9	13.2	—	5.6	9.2	7.5	9.6	18.8	24.4

Non Accumulative Per Cent

National Police Force Survey. Non-accumulative totals based on the proportion of cases in which the details of the offence were vague to the number of charges not laid and by age group. The nine offences listed accounted for 99.2 per cent of the cases in which the details of the offence were listed as being vague.

**Table 24.25**  
**Reasons that Police Charges Were Not Laid**  
**by Age of Complainant: Involvement of Agency**

Age of Complainant	Type of Offense						
	Rape (n = 12)	Indecent Assault Female (n = 207)	Indecent Assault Male (n = 68)	Gross Indecency (n = 16)	Incest (n = 27)	Sexual Int. With Female Under Age 14 (n = 2)	Sexual Int. With Feeble-Minded (n = 2)
	Non Accumulative Per Cent						
Under age 7	100.0	21.4	22.7	13.0	—	—	—
7 - 11 years	—	13.7	18.8	25.9	67.7	—	—
12 - 13 years	8.3	15.6	23.8	28.6	16.7	—	—
14 - 15 years	6.0	15.0	5.9	28.6	70.0	100.0	—
16 - 17 years	3.1	8.3	8.3	—	62.5	—	66.7
18 - 20 years	6.2	4.3	8.3	—	100.0	—	—
<b>TOTAL</b>	<b>5.5</b>	<b>14.1</b>	<b>18.9</b>	<b>19.3</b>	<b>60.0</b>	<b>100.0</b>	<b>66.7</b>

*National Police Force Survey.* Non-accumulative totals based on the proportion of cases in which either a child protection agency or other community agency recommended charges not be laid to the total number of cases in which charges were not laid and by age group. The seven offences listed accounted for 96.0 per cent of the cases in which agencies recommended charges not be laid.

Table 24.26  
Reasons that Police Charges Were Not Laid  
by Age of Complainant: Suspect Cautioned by the Police

Age of Complainant	Type of Offense								Contributing To Juvenile Delinquency* (n=4)
	Rape (n=8)	Sexual Int. With Female Under 14 (n=13)	Sexual Int. With Female 14 or 15 (n=19)	Indecent Assault Female (n=367)	Indecent Assault Male (n=93)	Gross Indecency (n=13)	Beggary (n=7)	Incest (n=7)	
	Non Accumulative Per Cent								
Under age 7	—	33.3	—	33.0	30.3	30.4	33.3	—	—
7-11 years	—	16.7	—	30.8	25.0	7.4	33.3	33.3	—
12-13 years	—	45.5	—	32.2	23.8	14.3	50.0	—	100.0
14-15 years	4.5	—	35.2	22.8	17.6	14.3	100.0	10.0	37.5
16-17 years	3.1	—	—	11.8	25.0	14.3	100.0	12.5	—
18-20 years	4.6	—	—	4.3	16.7	—	—	100.0	—
TOTAL	3.7	38.2	35.2	25.1	25.8	15.7	43.8	15.5	22.2

National Police Force Survey. Non-accumulative totals based on the proportion of cases in which the police cautioned the suspected offender to the total number of cases in which charges were not laid by the police and by age group. The listing is inclusive.

\* Under Juvenile Delinquents Act

successfully prosecuting sexual offenders against young victims, and accordingly, gave "cautions" proportionately more often where the child victim was very young. It is significant, for example, that in about one in three uncharged indecent assault cases (female victims, 33.0 per cent; male victims, 30.3 per cent) where the victim was under seven years of age, the suspect was cautioned but not charged. That the suspect was cautioned but not charged in eight rape cases and seven buggery cases is difficult to account for. With respect to the uncharged incest cases, it is likely that each of the seven suspects who were cautioned but not criminally charged was nonetheless made a party to child protection proceedings instituted on the child's behalf.

## Summary

1. Most offences were reported to the police within 24 hours (65.3 per cent); more than three quarters were reported within one week of their occurrence (76.4 per cent). The findings indicate that the time taken by a young victim or someone on the victim's behalf was not a critical factor in the police decision to lay a criminal charge.
2. For pre-adolescent victims, sexual offences against them were brought to police attention predominantly by persons other than the victims themselves. The likelihood that victims themselves reported the offence to the police increased sharply with older victims.
3. Nine in 10 occurrences (92.3 per cent) were considered to be 'founded' by the police; the trends in this regard in relation to the age of the victims were statistically insignificant. For children under 14 years-old, the proportion of 'founded' occurrences was in the 95 per cent range. The findings indicate that the police believed that the vast majority of the reported incidents had actually occurred.
4. Charges were laid in two in five cases (40.3 per cent) investigated by the police. Whether charges were laid did not vary appreciably with the sex of the victim but the proportion of charges laid was greater in cases involving children under age 16 than that for older victims. The police were no more reluctant to act on the allegations of young children than on those of older adolescents.
5. The reasons why charges were not laid varied by the age and sex of the victims and in relation to the types of sexual offences committed. Proportionately more of the younger victims knew the identity of the suspected offender than did older children and adolescents.
6. The 'age of the child' was the main reason cited in decisions not to lay charges in cases in which the victim was under seven years-old.
7. The findings do not support the assumption that younger victims are less credible than older victims. On average, victims under age 12 were considered more credible than adolescents; victims between 16 and 20 years-old were perceived to be the least credible.
8. Proportionately more older victims than younger victims were unwilling to testify.

9. A similar trend occurred in relation to the details of the offences being reported to be too vague to permit the laying of charges. This factor increased with the age of victims.
10. The intervention of a social service agency was a factor in the police not laying charges mainly with respect to children under age 16.
11. The use of informal 'cautions' against suspected offenders occurred most often when the victim was under age 14, and particularly, where the victim was under age seven.