

## Abused Children in the Courts: Adjusting the Scales After Bill C-15

Anne McGillivray\*

### I. INTRODUCTION

#### A. Shifting Perceptions, Shifting Controls

Child abuse - the idiosyncratic injury of children by parents and caretakers<sup>1</sup> - is not new. History and anthropology, mythologies, folktales and literature: all disclose practices we would now identify as child abuse. What does change are beliefs about the harmfulness, propriety or inevitability of such acts. While shifts in childrearing beliefs and practices have not always benefitted children and there is little evidence of any 'evolution' in childrearing, public interest in child welfare has steadily risen over the last few centuries.<sup>2</sup>

Public accountability has also risen. Private charity and localized response gave way in the 19th century to the 'childsaving' entrepreneurs whose work forged more direct links between state, social and family interests. This contributed to increasing state intervention<sup>3</sup>

---

\* Assistant Professor of Law, University of Manitoba.

<sup>1</sup> I do not define 'child abuse' here, other than as the act or delict of an adult having care of a child which results in injury to the child (as opposed to injury caused by such environmental factors as racism or poverty). Dozens of definitions have been proposed in the professional literature and by special-interest groups; all are open to criticism as over-inclusive, narrow, politically motivated, etc. Child abuse is an umbrella term without specific legal or medical meaning.

<sup>2</sup> See generally Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, (New York: Harper and Row, 1977); and Nikolas Rose, "Beyond the Public/Private Division: Law, Power and the Family" (1987) 14 *J. L. and Soc.* 61.

<sup>3</sup> Pre-20th century child protection was justified as protecting society from children; the state exercised its protective and peacekeeping powers in the interests of maintaining social order through control of children rather than in the interests of the child. Children's interests were secondary and their legal remedies highly restricted.

and the bureaucratizing of child protection.<sup>4</sup> The legal mandate, power and prestige of child welfare bureaucracies were widely enhanced in this century and social workers became the designated experts in child abuse management.<sup>5</sup> As special-interest groups claiming lay or professional expertise (psychiatrists, psychologists, pediatricians, feminists, children's rights activists) became involved, child abuse was medicalized, legalized and politicized and in the process redefined.

Although some cases of severe child assault and murder have been criminally prosecuted in earlier centuries,<sup>6</sup> most were undetected or diverted from the justice system. Detection is itself a matter of social construction, as is choice of remedy. Parental privilege or right,<sup>7</sup> filial piety and the high value placed on family privacy<sup>8</sup> generally protected acts of parents from public and judicial scrutiny. There were other reasons for the failure of cases to reach the criminal courts. Children

---

<sup>4</sup> Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence: Boston 1880-1960*, (New York: Viking, 1988).

<sup>5</sup> *Ibid.*

<sup>6</sup> But not all cases. See, for example, Larry Wolff, *Postcards from the End of the World: Child Abuse in Freud's Vienna*, (New York: Atheneum, 1988); and Linda Pollock, *Forgotten Children: Parent-Child Relations from 1500 to 1900*, (Cambridge: Cambridge University Press, 1983).

<sup>7</sup> Derived from the Roman law of *patria potestas* which granted the *paterfamilias* life and death powers over children; the right to kill was abrogated by edict in the second century. English common law recognized a residual and limited power of corporal punishment and generally the right of parents to raise and control their children as they wish. The courts of equity (now fused with law) have long been entrusted with the exercise of the state's *parens patriae* powers but the threshold of intervention was high. In a case involving the custody rights of an abusive father, the Master of the Rolls stated: 'I am not prepared to say that the patience of the Court, in the case of its ward, might not be exhausted ... by cruelty to a great extent, or pitiless spitefulness to a great extent ... the Court could not interfere on such grounds as that except in the utmost need and in the most extreme case'. *In Re Agar-Ellis* (1883) 24 Ch. 317. These issues are now described as aspects of privacy.

<sup>8</sup> Privacy in the legal sense is strongly based in the liberal tradition as the balance of state power with personal liberty. Valued as providing the space necessary to form relationships, it conversely "provides the cover under which most human wrongdoing takes place, and then it protects the guilty from taking responsibility for their transgressions once committed." Ferdinand Schoeman (ed.), *Philosophical Dimensions of Privacy, an Anthology*, (Cambridge: Cambridge University Press, 1984).

under 14 were barred at common law from testifying, until the late 18th century. Much of what transpires between children and adults is unwitnessed. Many children lacked an adult friend to initiate or carry on prosecutions against parents or those *in loco parentis*.

Although children's sworn evidence could be received by the late 18th century, admissibility and credibility were restricted by common-law rules developed when capital offences were numerous and legal rights of accused persons few, in line with the general judicial trend to limit criminal liability. Canada enacted legislation in 1890 to permit receipt of the unsworn evidence of children who could not meet the high threshold requirements of the oath, but testimony had to be corroborated in a material particular by other real or sworn evidence. Children's evidence generally was regarded with mistrust and judges warned juries of its frailties; older girls complaining of sexual harms were considered prone to fantasy, mischief or hysteria. Despite the rise of the office of the public prosecutor, children remained effectively barred from the criminal process.

Child abuse as we now construct it was first discovered - that is, identified and promoted as a social problem - in the 1870s.<sup>9</sup> Although cast in terms of class and cultural inferiority by the charitable reformers or 'moral entrepreneurs' who identified and responded to it, the 1870s construction of child abuse clearly recognized the current classifications of sexual abuse and incest, physical abuse and neglect. In addition to home visits and some minor resource provision, workers in at least some jurisdictions initiated criminal prosecutions against parents and caretakers in the occasional case, on their own or on the mother's urging and usually on charges of assault or statutory rape.<sup>10</sup>

A major factor in the 20th-century decriminalization of child abuse was the linkage of family stress with child neglect and the consequent social work focus on hygiene, home management and improved economic conditions.<sup>11</sup> Abuse was recast in terms of family dysfunction and became a buried sub-category of neglect. Other factors in decrim-

---

<sup>9</sup> *Supra*, note 4, at 27 *et seq.*

<sup>10</sup> Sexual intercourse with a female under 14. See Gordon, *supra*, note 4. Her study involved Boston area agencies between 1860 and 1960. As the 'Prevention of Cruelty to Children' movement embraced the U.S., Canada and Great Britain, and in attitude and approach was relatively uniform, it is fairly safe to conclude that recourse to criminal law was, if not frequent, at least not viewed as 'wrong' as a matter of policy.

<sup>11</sup> *Supra*, note 4.

inalization were the 'psychiatrizing' of the sex offender;<sup>12</sup> and systemic failure to detect or recognize certain forms of abuse.<sup>13</sup> The discovery of the 'battered child syndrome' in the 1960s<sup>14</sup> sparked moral panic and resulted in comparatively massive funding and draconian mandates for social service agencies. It also raised questions about criminal sanctions, questions quickly resolved in favour of the family-centred therapeutic approach already in place.

But by the mid-1970s, it was apparent that social workers could not prevent child abuse. In too many cases, family-centred 'treatment' proved fatal to the child. Criticized for missed cases and over-intrusive intervention, overburdened and disillusioned, social workers began to look elsewhere for explanations and solutions. Disappointment with the agency model and discovery of the extent of child sexual abuse polarized opinion on the effectiveness and proper limits of state intervention. The public value of family privacy began to drop. With the 1970s discovery of sexual abuse,<sup>15</sup> professional, public and, lastly, state opinion began to shift to a definition of child abuse as crime.

### B. Criminalizing Child Abuse

Despite the applicability of *Criminal Code* sanctions to crimes committed against children, the criminal justice system was avoided in family situations as a matter of policy. The family-oriented therapeutic and tutelary focus of 20th century social work obviated a devisive criminal justice response. As workers are in the front line of

---

<sup>12</sup> D. Kelly Weisberg, "The 'Discovery' of Sexual Abuse: Expert's Role in Legal Policy Formulation" (1984), 18 U.C. Davis L.R. 1.

<sup>13</sup> For example, 19th century agencies identified sexual and emotional abuse, but the 20th century focus on neglect and delinquency together with the diversion of offenders into psychiatric therapy and a general refusal to 'believe' in incest, meant that victims were not treated and offenders not criminally prosecuted.

<sup>14</sup> C.H. Kempe et al., "The Battered Child Syndrome" (1962), 181 J. Am. Med. Assn. 17. To avoid criminalizing parents, the authors chose the medical terminology of 'syndrome' rather than 'abuse'.

<sup>15</sup> Feminist consciousness-raising sessions disclosed a high incidence of sexual abuse, since confirmed by numerous studies including *The Report of the Committee on Sexual Offences Against Children and Youths (Canada)*, (Ottawa: Supply and Services Canada, 1984) [Hereinafter: The Badgley Report]. 19th century feminist recognition of sexual and physical violence (then equated with male vice rather than patriarchy) was a strong component of the childsaving movement, lost in the later focus on neglect and the temporary demise of feminism.

child welfare, case management and policy decisions determined the fate of the vast majority of abuse cases. The criminal law was not to be invoked. Complex legal rules and judicial presumptions about the testificatory capacity of children barred younger victims and the uncorroborated testimony of children in sexual assault complaints; the uncertainty of such cases due to these rules and to a general systemic prejudice against use of child witnesses influenced prosecutorial discretion. The cases simply were not brought before the courts.

How does criminal justice, with its concern for the interests of society, fit with child welfare and its concern for the best interests of the child?<sup>16</sup> Criminal sanctions and welfare intervention may both be used in a given case. Both are concerned with victim and public protection, but they serve different goals. In situations where criminal prosecution would further impair parent-child relations and stress a victim already vulnerable due to age as well as abuse, the goals may be competitive. Welfare legislation looks at harm to children from the perspective of the child within the family, whereas criminal law looks at harm to people, regardless of relationship or (in principle) status.<sup>17</sup> Welfare intervention aims at protecting victims primarily by reconciling victim and family interests, whereas criminal sanctions are a powerful and coercive iteration of state values intended to confirm certain norms and deter future misconduct.

Essential to criminalization is a shift away from the immediate value of criminal prosecution to the victim (a value often outweighed by the harm done to the victim by the process)<sup>18</sup> toward the value of the prosecution to the community. The shift is occurring: we are now prepared to recognize that the victim has already been harmed by the offender; the harm must be redressed by the criminal process; and any

---

<sup>16</sup> See, for example, Saskatchewan's *Child and Family Services Act*, S.S. 1989-90, c.C-7.2 (assented to 25 August 1989): "s.3. The purpose of this Act is to promote the well-being of children in need of protection by offering, wherever appropriate, services that are designed to maintain, support and preserve the family in the least disruptive manner."

<sup>17</sup> One status exception to the application of the criminal law is that of children under 12 who are deemed incapable of criminal intent. Such children fall under welfare legislation which deems them in need of protection.

<sup>18</sup> The importance of the family to the child inspired 20th-century family-oriented therapeutic intervention. Criticized as supporting inappropriate parental control, masking victim interests and artificially maintaining dysfunctional family units, it is now viewed as inappropriate in severe cases of abuse. One result is that the offender rather than the victim is removed from the home.

damage caused by the criminal process is outweighed by wider interests of this and future victims of this or another offender.

Whether or not an act is labelled 'criminal' affects the way that act is viewed. The criminalization of behaviour formerly labelled a 'medical' or 'economic' problem, or not recognized as a problem at all, influences the construct, or public ideology, of that behaviour. Support for corporal punishment, tolerance of violence, parental 'ownership' and the objectification of children for economic, emotional and sexual gratification have influenced childrearing for centuries. Ideological change is required to change behaviour.<sup>19</sup> Reconfiguring ideology on a public level may influence a potential offender's assessment of the conduct contemplated. It may also affect the recidivism of actual offenders, although this will depend on the type of sexual dysfunction, for example; or an appreciation of the likelihood of getting caught. It is likely to influence the victim's assessment of the harm, affecting disclosure and willingness to participate in the criminal process. And it certainly influences the exercise of police, prosecutorial and judicial discretion, affecting charging rates, prosecutorial vigour and sentencing patterns. Beyond doubt, it shapes and impels law reform.

Does it really matter that a few more sorry cases are brought before judges and disposed of in accordance with the limited palette of sentencing options? Given the current scepticism which surrounds the criminal process, why should something as important (or as insignificant) as injury to children be subjected to its scrutiny? If child abuse is viewed as a family problem subject at most to family-centred protective intervention, then it remains a private matter invoking relatively mild stigma and few sanctions. If viewed as criminal, it becomes a public matter to be dealt with in the most visible of forums and invoking the strongest of state sanctions. If child victims are barred from the criminal courts, whether the bars are fixed or discretionary, then children will be perceived as unequal not only in access to law but also in value and status. Labeling child abuse as a crime is a signal that the status of children is notionally equivalent to that of adults. If sexually or physically assaulting a child is criminal,

---

<sup>19</sup> It also requires the relief of economic and social stress on families. Historical, cross-cultural and biosocial studies demonstrate the profound impact of prevailing cultural conditions and beliefs on the valuation and socialization of children. See Stone, *supra*, note 2; Jill E. Korbin, ed., *Child Abuse and Neglect: Cross-Cultural Perspectives*, (Berkeley: University of California Press, 1981); Richard J. Gelles and Jane B. Lancaster, eds., *Child Abuse and Neglect: Biosocial Dimensions*, (New York: Aldine De Gruyter, 1987).

on par with assaults on adults, then the social value and legal status of children is raised to a level equal to that of adults.<sup>20</sup> Prosecution and conviction confirm the right of the injured child to corrective justice.<sup>21</sup> The criminalization of child abuse therefore has wide implications for how children are viewed by society and how children are treated by parents and other adults.

By 1984, the shift from family protection to victim protection, newly promoted by social workers and other professionals, had resulted in increased victim disclosure; police involvement in child protection cases had become the rule rather than the exception; and police capacity for appropriate response had greatly improved. Criminal charges in child-victim cases, primarily sexual assaults, had increased by a factor of 2 to 12 or more, depending on the jurisdiction.<sup>22</sup> Courts and prosecutors were beginning to become familiar with child victims and parent or quasi-parent offenders.

## II. THE INTENTION OF BILL C-15

### A. Federal Support and Legislative Solutions

The federal response to the criminalization movement was expressed in child-centred reforms to the *Criminal Code* and the *Canada Evidence Act*. The federal government was also an instigator of the movement. Having established a committee to study sexual offences against children in response to both the 1979 International Year of the Child and the anticipated reform of the rape laws, the federal

---

<sup>20</sup> But not necessarily specific legal rights or privileges. Recognition of children's rights to equal protection of the law would not mean a child could drive a car, vote, drink, or quit school at any age. This type of discrimination is justifiable on a capacity basis whereas discrimination against child witnesses or bias toward parental privilege at the child's cost is not.

<sup>21</sup> The fundamental notional equality of human beings is recognized in philosophy and natural law and the doctrine of the rule of law. See Ernest Weinrib, "The Intelligibility of the Rule of Law" in A.C. Hutchinson and P. Monaghan, eds., *The Rule of Law: Ideal or Ideology*, (Toronto: Carswell, 1987). It is the basis of the Canadian Charter of Rights and Freedoms.

<sup>22</sup> A Saskatoon lawyer recalled that in over 400 child protection files he handled prior to 1983, charges were laid in only seven cases. A Saskatoon prosecutor estimates he handled one such case a year; he now handles more than one a month. Between 1982 and 1984 in Metro Toronto, sexual abuse complaints increased 263% and charges were laid in almost half the cases.

government proceeded to ignore its recommendations. In the view of Justice Department and legislative committee lawyers, Badgley "went too far".<sup>23</sup> However, the Badgley Committee's cross-Canada studies and hearings involving child protection groups, social work agencies, police and medical practitioners encouraged interest in criminal controls and fanned grass-roots concern for child victims of sexual assaults. This concern was manifested in increased prosecution rates; the two in turn propelled legislative reform. Bill C-15, an effect of criminalization rather than the cause, came into force 1 January 1988.<sup>24</sup>

Criminal provisions restricting sexual activity with children have long been part of Canadian law. Bill C-15 replaced certain of these offences with child-specific gender-neutral offences not dependent upon proof of penile penetration: sexual interference, invitation to sexual touching, and sexual exploitation.<sup>25</sup> Provisions for control of juvenile prostitution were revised and statutory limitation periods abolished.

There were other, more controversial changes. The Bill abolished the corroboration requirement for unsworn testimony and simplified the wording of the test for receipt of unsworn evidence.<sup>26</sup> It provided for the child's evidence-in-chief to be given by way of a previously videotaped interview<sup>27</sup> and for screening devices, on a case-specific

---

<sup>23</sup> Interviews, 1988.

<sup>24</sup> *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c.C-24. (Assented to 30th June 1987; in force January 1 1988).

<sup>25</sup> *Criminal Code*, sections 151, 152, 153 respectively. The concept of touching (or inviting, counselling or inciting touching) for a sexual purpose is intended to extend the concept of sexual assault to situations which are not assaults in the narrower sense of the word. 'Sexual exploitation' deals with children between 14 and 17 where the offender is over 18 (the age of sexual emancipation in the Criminal Code) and 'in a position of trust or authority' (not defined). If the offender is 13 or 14 and is not in a position of trust or authority over the victim, and the victim is not in a relationship of dependency with the offender, there will be no prosecution. There is no defence of consent for an offender whose victim is under 14. For an offender over 14 but within two years of age of the victim, consent will be a defence unless the offender is in a position of trust or authority over the victim or the victim is in a relationship of dependency. Reasonable efforts to ascertain the person's age must be made.

<sup>26</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5, s.16.

<sup>27</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 715.1.



basis, to protect the more vulnerable victim from viewing the accused.<sup>28</sup>

Law reform is evidence of state concern for the social problem addressed. While sexual abuse is unquestionably the focus of reform, the new rules for child witnesses carry a deeper message about the place of children under the law. Cases can no longer be routinely diverted from the system. But the reforms, like the criminalization movement itself, have provoked strong reactions. Bill C-15 has been hailed as a victory for child protection and children's rights and a means of increasing conviction rates in hard to prosecute cases. It has been denounced as an infringement of the rights of accused persons under the Charter and an open invitation to malicious, lying or fantasizing children or their mothers to harass and humiliate men. As a Saskatchewan Queen's Bench judge noted in a recent case, "It means the gloves are off."

Lawyers and welfare workers as well as judges are challenged by the new victims and the 'new' crimes. Do the screening and videotaping provisions violate the right of the accused to face the accuser, empower the false witness and contradict 'common sense' evaluation of the veracity of children? What are the consequences for the child protection movement if too many cases are lost? What difference would Bill C-15 make to the criminalization of child abuse and, in the wider context, to the control of child abuse and to the status of children? Was it really needed? The teeth of this federal gift horse were minutely inspected at professional conferences across the country.

### **B. Intent of the substantive reforms**

For centuries, child abuse cycled between discovery and invisibility, indifference and moral panic. Despite speculation that sexual abuse is a recent phenomenon, part of a general moral decline,<sup>29</sup> these behaviours have unquestionably long been part of Western culture. What is new is the child-centred focus, more specific than the 'best

---

<sup>28</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 486(2).

<sup>29</sup> For example, adoption 'professionals' Bernard and Joan McNamara claim that the 'free love' ethic of the 1960s was responsible for "increasing" rates of sexual abuse in the 1980s. ["Free love ethic linked to child abuse", *Saskatoon Star-Phoenix*, 18 November 1989.] The link may have been the promotion, by some psychologists in the 1960s, of the idea that all sex was acceptable as long as it was non-violent and consensual; the problem, of course, is whether a three-year-old can 'consent'.

interests of the child' test which it may be slowly displacing; or the 'welfare' equity-based test which preceded it. The child-centred or 'children's rights' focus, sited in the liberalism of John Stuart Mill, began its slow evolution into law with the 1959 United Nations Declaration of the Rights of the Child, achieved urgency with each ensuing child abuse revelation, gained momentum with the 1979 International Year of the Child, and now challenges the last formal bastion of 'The Law', the criminal justice system.<sup>30</sup> The direct precipitant of reform was more practical: increasing knowledge of the prevalence and harm of adult sexual contact with children led to the promotion of stricter social controls by feminist, children's rights and child protection groups.

Criminal laws controlling sexual use of children have been in place since the 11th century. Unlike modern interpretations and reformulations, however, the mischief addressed was not harm to the child but interference with proprietary rights of the father in the virginity of the daughter. The exception to this is the offence of incest, which lay in the immorality of sexual intercourse within a proscribed range of blood relationship, irrespective of the ages of the offenders.<sup>31</sup> Never a crime at common law, it became an ecclesiastical offence in the 13th century when the church took control of marriage law and infused what had previously been a purely sectarian arrangement with morality. Penalties for infraction were lenient, outrage being focussed instead on the common law offences of sodomy and bestiality. Incest became part of Canadian federal criminal law in 1890 and has been retained in the reformulation of the sexual offences as an important instrument of child abuse control.<sup>32</sup>

---

<sup>30</sup> The effect of the 1989 U.N. *Convention on the Rights of the Child* - of which Canada (but not yet the provinces) is signatory - on the criminalization of child abuse in the West remains to be seen. Article 19, the most apropos, suggests that judicial involvement in child abuse cases should take place 'as appropriate', yet it requires ('shall take') legislative and administrative measures to prevent abuse. This reflects the continuing ambivalence in child abuse criminalization. Other relevant sections are 34 and 39.

<sup>31</sup> *Criminal Code*, R.S.C. 1970, section 150. Both parties may be convicted unless one was under 'restraint, duress or fear.'

<sup>32</sup> The Law Reform Commission of Canada recommended repeal of the criminal sanction on grounds of desuetude and the harmlessness of what it perceived as consensual conduct. On evidence provided by the Badgley Report of its use across Canada to control sexual exploitation of children by parents, the Commission changed its mind.

Incest differs in several important ways from sexual assault by a stepfather or other adult male.<sup>33</sup> But the root of sexual exploitation as now understood is breach of trust, whether by natural parents or by others to whom children are entrusted. The offences of sexual intercourse with a stepdaughter, foster daughter or female ward, and sexual intercourse by an employer with a female employee under 21 years, intended to cover such situations, originated in about the 11th century and became part of Canadian criminal law in 1892 and 1890 respectively. Neither applied to male children.

Nor did the offences of sexual intercourse with a female under the age of 14 and between 14 and 16, which extended the protection of the criminal law outside the legally-constituted family into common-law and extrafamilial relationships.<sup>34</sup> The age protected increased from nine or 10; penalty was reduced from death or mutilation to life imprisonment; justification changed from paternal interest in a

---

<sup>33</sup> Explanation differs according to relationship, frequency, nature and justification of the abuse. 'Learned behaviour' may explain families in which girls are sexually abused by all close male relatives and for subcultures in which the father dominates through physical and sexual abuse. Impairment of parenting capacities by disturbances in the bonding process such that an abused child may become an abusive adult (intergenerational transmission of abuse) may fit about 20% of cases (although in practice it is so common that the parent of an injured child was abused as a child that this has become an indicia of abuse). A third explanation is the failure of the psychological mechanism which discourages sexual interest in adulthood between children reared together, and between an adult having early care of a child and that child (the Westermarck effect). Pedophilia is a distinct psychosexual disorder in which sexual satisfaction comes only from contact with children and is extremely difficult to treat. The distinctions between pedophilia, incest and other sexual abuses have important therapeutic and sentencing implications.

<sup>34</sup> These provisions have been challenged on grounds of discrimination based on gender and age, with varying results across Canada. In a judgment handed down November 24, 1989, the Saskatchewan Court of Appeal dismissed the appeal of a man sentenced in 1985 to six years for acts of intercourse with a 7-year-old girl. The Court agreed the law denied equality but it did so without discrimination. To call such offenders "a disadvantaged group in need of society's protection or nurture borders on the alarming, if not the preposterous," the Court stated; nor can they be said to be suffering a disadvantage to be righted "so they can be and feel equal to the rest of society and in particular, equal to the 'advantaged' females". ("Statutory rape law upheld by court". *Saskatoon Star-Phoenix*, 27 November, 1989.) A 1990 judgment of the Supreme Court of Canada has now resolved that question; see below and note 36.

daughter's chastity, to prevention of juvenile pregnancy and disease,<sup>35</sup> to protection of girls from exploitation.<sup>36</sup> Since their legislative abrogation, the Supreme Court of Canada has declared statutory rape laws unconstitutional as an unreasonable and hence unjustifiable interference with the presumption of innocence.<sup>37</sup>

These offences and the offence of buggery were completed only by penile penetration. This ignored significant physical and psychological trauma to the victim caused by sexual acts other than intercourse. These acts (forced viewing of sexual acts, genital manipulation, non-penile penetration, forced masturbation, oral-genital contact) were controlled by the lesser offence of indecency and since 1982 sexual assault. All but sexual assault and incest have now been subsumed into the new child-specific gender-neutral offences (sexual interference, invitation to sexual touching, sexual exploitation) which reflect the ambiguity of adult-child sexual contact. The reformulation is intended to bring more cases to trial, improve conviction rates and inspire more meaningful sentences. They reflect a child-centred rather than proprietary or medical focus.

### **C. Intent of the Adjectival Reforms: Testimony, Screening and Videotapes**

Also intended to increase the numbers of cases brought to trial and to verdict are the evidentiary reforms abolishing archaic corroboration

---

<sup>35</sup> For example, *R. v. M.E.D.* (1985), 47 C.R. (3d) 382 (Ont. Prov. Ct.) in which the court decided that the offence of sexual intercourse with a female under 14 did not offend s. 15 of the *Charter*. The risks of pregnancy, disease and medical hazard pertinent only to female children justified the discrimination.

<sup>36</sup> For example *R. v. B.A.*, [1984] N.W.T.R. 201 (S.C.).

<sup>37</sup> *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 907 on appeal from the Courts of Appeal of Ontario and Manitoba. The former s. 146(1) of the Code expressly negated the defence that the accused believed the female to be 14 or older. An offence punishable by imprisonment which does not permit a due diligence mistake-of-fact defence, the Court found, is an infringement of the right to liberty enshrined in s. 7. The fact that the section has been replaced with a series of new offences which do permit the defence of due diligence is evidence that Parliament recognizes the objective of protecting young children from sexual contact with adults can be met with less restriction on the rights of the accused. The law was found not to be discriminatory as the offence involves an act which as a matter of biological fact can be committed only by males upon females. The Court noted that the offences of sodomy and buggery would have to be dealt with under different legislative heads; and that the issue of females having illicit sex with males under 14 was one of policy, to be left to Parliament.

requirements and permitting children capable of communicating the evidence to testify on promise to tell the truth. Whether this reformulation differs substantially is debatable: the Ontario Court of Appeal observed in *R. v. Khan*, discussed below, that the former standards "are in reality no different than those now set by the new provision" which "uses plainer language."<sup>38</sup> What the reformulation does achieve is the abolition of judicial prejudice against hearing young children.<sup>39</sup>

For many child victims of sexual offences, facing the accused in the courtroom and giving prolonged testimony is traumatic. Passive reception of their testimony was not enough to allow these cases to proceed to verdict. To equalize the courtroom balance, and recognize children as children while according them the protection of the law, other reforms were needed. This is the purpose of the most radical of the reforms: screening and the use of previously videotaped testimony.

Among practical problems with children's testimony are disclosure patterns different from the adult norm. Delayed and piecemeal disclosure, recanting, withholding and 'forgetting' are not uncommon, even on the witness stand, due to fear, guilt, humiliation and conflicting desires to protect the abuser or the family. Young children do not organize information in the same way as adults and may lack

---

<sup>38</sup> *R. v. Khan* (1988), 42 C.C.C. (3d) 197, 64 C.R. (3d) 281 27. The case dealt with charges laid prior to the enactment of Bill C-15 but the Court, in ordering a new trial of a doctor acquitted of oral intercourse with a four-year-old patient, decided that the lower court erred in declaring the child incompetent due to age. "The test is whether the child's intellectual attainments are such that he or she is capable of understanding the simple form of questions that it can be anticipated will be asked, and is able to communicate the answer in an understandable manner." The Court also overturned the finding of the trial court that the child's statement to her mother less than half an hour after the event did not fall within any exception to the rule against hearsay. A new trial was ordered. The accused appealed to the Supreme Court of Canada; the results are discussed below.

<sup>39</sup> In a 1986 Saskatoon case involving the sexual assault of a five-year-old boy by his father, the judge refused to hear the victim because he was too young, despite submissions from counsel respecting his intelligence and language skills and the boy's demonstrated ability to communicate. In a rather dramatic turnaround, the judge three years later was quoted in newspapers across Canada as saying "something had to be done about the epidemic of child sexual assault." The *Canada Evidence Act*, as the Court of Appeal noted in *Khan*, "[drew] no such distinction - an infant of any age may give unsworn evidence." But judges certainly did.

a conceptual framework for expressing what has happened.<sup>40</sup> In the words of one prosecutor, "Kids make damn poor witnesses."<sup>41</sup>

Child victims are subjected to numerous formal interviews: at disclosure, later with social workers, therapists, police and prosecutors; again in court, in examination-in-chief and in cross-examination, in the presence of the accused.<sup>42</sup> Repeated questioning can in appearance or fact distort the evidence. Videotaping evidence 'within a reasonable time after the commission of the alleged offence' is intended to preserve the evidence, reduce pretrial interviews and ease courtroom trauma so that testimony will be complete.<sup>43</sup>

Videotapes do not spare the child the courtroom experience: the child must attend, watch the videotape, adopt its contents and submit to cross-examination. The new legislation stopped well short of the recommendation of the Badgley Committee<sup>44</sup> that there be provision

---

<sup>40</sup> See Goodman and Helgeson, "Child Sexual Assault: Children's Memory and the Law" in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases: A Report of the American Bar Association Child Sexual Reform Project*, (Washington, D.C.: National Legal Resource Center for Child Advocacy and Protection, 1985).

<sup>41</sup> While it may be relatively easy for defence counsel, in the words of a senior police officer, to 'make mincemeat out of a little kid', the grosser brutalities of cross-examination are restrained by judges and the temptation resisted by many lawyers. Some counsel consider these cases very difficult. According to Manitoba lawyer Kerry Pearlman, 'You have to be very gentle' and restrict examination to issues of coaching, mistakes in time (which might place your client elsewhere) and mistakes in identification. Only in the case of older complainants in 'date-rape' cases where consent is an issue would he go into details of the assault itself. Interview, 1990.

<sup>42</sup> If the accused defends himself he has the right to cross-examine the complainant. In a Saskatoon case, a father nightly beat his 8-year-old daughter to exorcise a devil. She was placed in a foster home and he was charged with assault. He discharged his lawyer and, in cross-examining her, wept and asked why she didn't love him anymore. She said, "I love you but I just can't live with you anymore." He was convicted. But her self-composure is rare.

<sup>43</sup> The Badgley Report, *supra*, note 13, recommended modification of common law rules governing admissibility of hearsay, to permit the videotape and evidence of those who have treated or heard the child to stand in for the child in court. In view of the longstanding right of the accused to face the accuser, now guaranteed by the Charter, and the value of cross-examination in determining truth in the Western legal system, this was rejected by the legislative committee.

<sup>44</sup> The Bill C-15 legislative committee was advised that a hearsay exception would not withstand Charter challenge. Professor Nicholas Bala, interview, March 1988.

for children's evidence to be entered by way of a 'children's hearsay' exception, obviating the need for any appearance by the child. In order to reduce the inhibiting effect which might be caused by seeing the accused, Bill C-15 provides instead for screening devices which permit the accused to see the child. Screening is permitted only on a case-specific showing of necessity: the judge must be 'of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.'

These, then, are the intended results of Bill C-15. Are they working? Despite the increase in child sexual assault complaints since the early 1980s, the ratio of charge to conviction was unchanged: by 1986, only 1 in 5 of those charged were convicted.<sup>45</sup> This compared with a conviction rate of about 4 in 5 for other offences.<sup>46</sup> Has this changed? What real difference have the reforms made to prosecution?

### III. THE OPERATION OF BILL C-15

#### A. Prosecutorial Discretion

There is no formal state policy governing the prosecution of child abuse cases. The novelty and vigour of prosecution of what courts view as inherently weak cases led some judges and lawyers to conclude that a formal policy binding prosecutorial discretion exists.<sup>47</sup> Some prosecutors maintain that there is no discretion and no special policy for these cases: offences against children are prosecuted "like any other offence". This in itself was a substantial change from the pre-1984 wholesale dumping of all problematic cases, on grounds that sexual assault allegations could destroy a reputation so you had to be absolutely sure of winning. But special concessions are made to the age of the witnesses and the nature of the offence, in the form of oc-

---

<sup>45</sup> The Metropolitan Toronto Special Committee on Child Sexual Abuse.

<sup>46</sup> That is, a person accused of one or more offences is convicted of at least one of those offences or a related offence. The rate varies with the category of offence: for example, more than 9 out of 10 drunk driving charges result in conviction.

<sup>47</sup> An Ontario judge, in acquitting a man of the sexual assault of his daughter, complained of the "Crown policy" of prosecuting all sexual offence charges "without exception, right to verdict" including those with "no reasonable chance of conviction"; he blamed the 'policy' for causing needless expense to taxpayers and delaying trials of other accused persons. *The Globe and Mail* and *The Toronto Sun*, 10 August 1988. Some lawyers saw in this prosecutorial vigor the regrettable loss of prosecutorial independence.

casional revision of charges and withdrawal if there are doubts about the child's veracity or emotional stamina or testificatory capacity. By 1986, many prosecutors involved with child abuse cases took the position that all sexual assault cases should be vigorously prosecuted and only rarely withdrawn.

Prosecutorial discretion essentially consists of assessing the strength of the story to be laid before the judge. It is therefore influenced by the courts' reception of similar cases. What the courts say in acquitting or convicting child abusers both forms public opinion about the character of abuse and informs future case management decisions. A review of sentencing cases reported between 1985 and 1987 disclosed that, where conviction was obtained, the courts are for the most part responding to the need to satisfy deep norms for protecting the helpless and nurturing one's own children.<sup>48</sup> Courts went beyond punishment of the offender into denunciation of the class of conduct.<sup>49</sup>

Implicitly or explicitly, the relationship between adults and children is characterized as a trusteeship: the adult who breaches trust, like any trustee, is properly subject to greater penalty.<sup>50</sup> In adopting a breach of trust doctrine and using prison sentences to express denunciation, the courts express community abhorrence for the

---

<sup>48</sup> Ascertaining the outcome of criminal cases of child abuse is complicated by the fact that child abuse cases rarely appear in law reports and tracking cases through the system to ascertain disposition is difficult. This study was based on the *Canadian Sentencing Digest, 1985 to 1987*, (Toronto: Carswell, 1982).

<sup>49</sup> 151 cases reviewed included 33 cases from assault to manslaughter and 118 cases ranging from indecency to sexual assault and incest. Judgments referred to the need to express the revulsion of society toward child abuse. General deterrence was often given priority over retribution and rehabilitation. Courts looked to a special subset of aggravating and mitigating factors. Remorse is an important mitigant in any case but in child abuse cases, where offender and victim may be involved in a continuing relationship or other children may be at risk, it is particularly significant. Guilty pleas were accepted in 50% of the sexual offence cases and 25% of the other cases, leading to greatly reduced sentences (most under 2 years). Threats, violence, degree of injury, withholding medical care and repetition increased sentence.

<sup>50</sup> For an excellent theoretical formulation of a trust relationship in this context, see Robert Dingwall and John Eekelaar, 'Rethinking Child Protection' in M.D.A. Freeman, ed., *The State, The Law, and the Family: Critical Perspectives*, (New York: Taristock Publications, 1984).



exploitation and brutalization of children.<sup>51</sup> The message accompanying sentence is the right one; the message borne by the sentence itself is another matter.

Despite continuing public concern over adequacy of sentences in child sexual abuse cases - generally perceived as far too lenient<sup>52</sup> - it appears that by 1986, the courts had developed sentencing standards which should encourage prosecution of child abusers in like circumstances.<sup>53</sup> The problem lay with the other cases: those not charged, those stayed or withdrawn, those resulting in acquittal. Have the new charges and the 'equalization provisions' for screening and videotaping increased conviction rates?

### B. Using the New Charges

Although the Bill C-15 charges of invitation to sexual touching, sexual interference and sexual exploitation have been routinely laid from the time of proclamation in some jurisdictions,<sup>54</sup> interviews with Saskatchewan prosecutors disclosed reluctance to use or require the new charges. Some felt that judges do not understand the changes and hand down lighter sentences in consequence.<sup>55</sup> The new offences require proof of sexual purpose; the concepts of direct and indirect

---

<sup>51</sup> Criminal justice combines formal and instrumental goals for prosecution and punishment. The intricate - some would say incoherent - balancing of rehabilitation and deterrence interests in sentencing and in the exercise of police and prosecutorial discretion limits the utility of the criminal justice system for both behaviour control and the full satisfaction of social norms. The judge is not free to impose 'any' sentence, nor is sentencing at the disposal of the reformer.

<sup>52</sup> Judges are also concerned with the adequacy - and the appropriate goals - of sentencing. The Western Provincial Court Judges' Workshop, second in a series of three, held in May 1988 devoted a day to sentencing issues in child sexual assault and domestic violence cases, presented by law teachers, researchers and prosecutors.

<sup>53</sup> A recent review of sentencing cases disclosed that these standards continue to be applied; length of sentence continues to be highly variable but sentences which are clearly too low tend to be raised by appeal courts.

<sup>54</sup> As shown in case reports from Ontario and British Columbia.

<sup>55</sup> *R. v. Anderson*, 13 December 1989, Regina, Q.B., was the first Saskatchewan Queen's Bench case involving sexual interference and sexual touching. The defendant, a next-door neighbour known as 'Grampa', was convicted. The Charter requires charges to be based on offences existing at the time and many pre-Bill C-15 cases are still before the courts, another reason for the rarity of the new charges.

touching are confusing to the courts. Sexual assault is "much easier" to prosecute. This may represent a transitional stage comparable to that following the reformulation of the rape laws as sexual assault, a stage which seems to have taken a couple of years. For some prosecutors, the substantive provisions had never been a problem: what was not caught by sexual assault and the age-specific offences could be dealt with as gross indecency.

Some judges do not believe children alleging sexual abuse however the charges are framed.<sup>56</sup> Most prosecutors have experienced the failure of strong cases, in part because of judicial mistrust of children's testimony; in part because the judge did not believe adults capable of such acts. Some judges are out of touch with children; as one prosecutor put it, "They haven't changed a diaper for forty years." While prosecutors recognize the ideological importance of the evidentiary reforms, corroboration remains crucial to conviction. Because child sexual assault is by nature private and coercive, corroborative evidence is frequently unconvincing or unavailable.<sup>57</sup> The types of cases selected for trial have not dramatically changed: recent Manitoba figures suggest that, while 80% of cases investigated by police involve children under the age of 12, the majority of prosecutions involve children over 12.<sup>58</sup> Many of the provisions and the underlying rationale of Bill C-15 were not being used, particularly with respect to younger children.

### C. Using Videotapes in the Courtroom

Screening and videotapes reduce the impact of the child witness and thus the strength of the evidence; for this reason, according to many prosecutors, they should rarely be used. Judges need demonstration

---

<sup>56</sup> Trials at the Queen's Bench level are assigned on the basis of 'variety', according to the Registrar, who ensures that every judge gets every type of case. Court dates are set months in advance but judicial schedules are posted weekly. 'Judge-shopping' for a sympathetic court is impossible in Saskatchewan.

<sup>57</sup> "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie* (1987), 480 U.S. 39. As one mother facing a Criminal Injuries Compensation Board noted, in response to the Chairman's observation that her child's case was difficult because no witnesses were present, "Why would there be?"

<sup>58</sup> The figures are based on the time period of 1 January and 30 June 1989 in four Manitoba centres. Interview, Cynthia Devine, former Co-ordinator, Child Abuse Videotaping Project, Department of the Attorney-General for Manitoba.

that children can testify on par with adults, so some prosecutors prefer to have children sworn wherever possible and to present evidence directly. However, because videotapes have a number of uses in addition to their evidentiary use at trial, they are routinely made.<sup>59</sup> In Saskatchewan, for example, videotapes have been used at a number of preliminary hearings; none had been used at trial as of December 1989.<sup>60</sup> Manitoba's videotaping project has been in place since 1986, two years before the proclamation of Bill C-15; by the end of 1988, 250 tapes had been produced but only one was used in a criminal trial. By June 1989, videotapes had been used in five preliminary hearings and at two trials. In each case in which videotapes were introduced, they were admitted.

But Canadian courts are split on the issue of the constitutionality of videotapes. In a 1989 case, the Alberta Court of Queen's Bench ruled the tape inadmissible as a violation of the constitutional right of the accused to a fair trial.<sup>61</sup> Although trial court decisions are not binding, they are suggestive, and the precedent has prosecutors concerned. A more recent decision of the Manitoba Queen's Bench, in a case involving repeated sexual assaults of three children over a three-year period, upheld the use of videotapes. In ruling against a

---

<sup>59</sup> Saskatchewan's protocol leaves the decision to the investigating officer. Controlled sites at police headquarters in Regina and Saskatoon (where two-thirds of Saskatchewan child abuse trials take place) consist of special 'soft rooms' with concealed cameras. The child knows the interview is being taped. The police officer interviews the child; a social worker is present. A joint federal-provincial videotaping project is in place in Saskatchewan. [Brian Hendrickson, "The New Provisions of the *Criminal Code* Dealing with the Use of Video Tape Evidence and Screens in Child Sexual Abuse Trials." Western Crown Counsel Seminar, [unpublished].

<sup>60</sup> The first case in which the Crown attempted to introduce videotaped evidence was *R. v. Anderson*, *supra*, note 46. Defence intended to challenge both screen and tape; but the child testified successfully without either and the accused was convicted.

<sup>61</sup> *R. v. Thompson* (1989), 68 C.R. (3d) 328 (Alta. Q.B.). The court heard the *viva voce* evidence of the child and convicted the defendant. Grounds for the decision were that an accused should not be convicted on prior unsworn evidence; the high and arbitrary age limit is a fatal flaw which would cause the section to fail; and the accused is in a comparatively disadvantaged position in cross-examining the witness on the contents of the tape. The court appears to have confused the issues of form of evidence and reliability of evidence. Prior written statements are admissible and it is for the trier of fact to determine weight. Furthermore, legislation need not be discarded as overreaching; it may be 'read down'. The case is to be appealed but the issue of the constitutionality of videotaped evidence is unlikely to be argued.

motion by the defence to have the tape excluded on constitutional grounds, Justice Scollin stated: The Charter has "become a silly game" and "is being used in a very destructive way in many of these cases"; the provision is a 'humane, decent, sensible way for the law to go, and yet without prejudice to the accused'.<sup>62</sup>

The judgment has been appealed on constitutional grounds: the videotape is manufactured evidence which the accused is powerless to control; it is used automatically against the accused, yet is made without judicial safeguards; it falls into no known category of exception to the rule against hearsay as there is no requirement that it be necessary and trustworthy; its use in court derives from the idea that children do not lie, a premise without empirical underpinning.<sup>63</sup> In essence, it is evidence designed to convict. Therefore, the defence argued, the videotape provisions abandon principles of fundamental justice and the presumption of innocence guaranteed by sections 7 and 11(d) of the Charter. The Manitoba Court of Appeal has reserved judgment. Its decision, expected in March 1991, will be the first appeal court judgment on point in Canada.

Lower courts have considered the issue of 'reasonable time' after the event, a condition of admissibility. In one Ontario case, a tape made prior to Bill C-15 was admitted;<sup>64</sup> in another, a tape made four months after the event was admitted: only through therapy could the statement have been obtained and 'reasonable time' depends on all the circumstances.<sup>65</sup> In an Alberta case involving a two-day delay, defence argued that all who might have had an opportunity to influence the child must be called as witnesses to prove the videotaped information was not obtained by leading or intimidation. The Court

---

<sup>62</sup> *R. v. Laramée* [Transcript, constitutional argument, Manitoba Court of Queen's Bench, 15 November 1989]. "Videotaped evidence challenge dismissed." *Saskatoon Star-Phoenix*, 17 November, 1989.

<sup>63</sup> Interview, defence counsel Rocky Pollack, 4 February 1991.

<sup>64</sup> *R. v. Knight*, (14 April, 1988), Windsor, (Ont. Prov. Ct.).

<sup>65</sup> *R. v. Scott*, (14 June, 1988), Barrie, (Ont. Dist. Ct.).

ruled that the the circumstances surrounding videotaping did not go to admissibility but to weight; two days' delay was reasonable.<sup>66</sup>

Where disclosure has been delayed for years rather than days, the tape would be clearly inadmissible as Crown evidence and of minimal use in therapy. Routine videotaping in such cases must be questioned. In a recent Saskatchewan case, a three-year-old boy was subjected to, and forced to observe, buggery and oral-genital sex by a close family friend and his male partner. The fact of the assault was ascertained through the child's behaviour: explicit sexual assaults of other children, attempts at self-mutilation, behavioural problems, depression, suicide threats and severe nightmares.

After three years of therapy, the child named the offenders, who were then charged with sexual assault. During videotaping, he named the offenders, discussed children he had involved in sex play and mentioned a neighbour who looked like one of the accused, whose name he had trouble remembering. The tape was disclosed to counsel prior to the preliminary hearing, as required. Counsel decided to enter the tape as evidence for the defence in order to discredit the child's testimony. The tape would be admissible for this purpose regardless of the time elapsed. Where two days' delay is challengeable when the tape is entered by the Crown, a three year delay when entered by the defence is not. As a result, the charges were stayed on the basis of the child's frailty as a witness. Had charges not been stayed, this would have been the first use of a videotape in a Saskatchewan trial - for exactly the opposite reason intended by the legislation.<sup>67</sup>

This may not be such a rarity: of three videotapes used in Manitoba trials prior to June 1989, one was entered by the defence for the purpose of attacking the child's credibility. Here the issue was discrepancy in time rather than identity. The accused was convicted.<sup>68</sup>

---

<sup>66</sup> *R. v. Meddoui*, (1 November 1988), (Alta. Q.B.). Counsel for the defence also argued that the child could not be said to have adopted the contents of the videotape as she was distracted by children seated in the courtroom gallery (placed there by counsel for the purpose); this was rejected by the Court.

<sup>67</sup> The child was awarded \$4,500.00 by the Criminal Injuries Compensation Board for pain and suffering.

<sup>68</sup> Interview, Devine, *supra*, note 50.

#### D. Using Screening Devices

By the end of 1989, screening devices had been used about 20 times in Saskatchewan, in preliminary hearings and three Queen's Bench trials, without objection by defence counsel.<sup>69</sup> In Manitoba, in the first six months of 1989, screens were used at two preliminary hearings, one request having been denied by the judge; and at three trials. Other modifications, such as seating the accused at the back of the courtroom, seating the child with back turned to the accused and letting a parent or support person sit with the child, were made in Manitoba; this was done twice as often at preliminary hearings as at trial. Screening devices provide a visual barrier between child and accused while giving a full view of the child to both court and accused. The accused must be able to consult counsel at all times during the child's testimony. The Saskatchewan version is a video camera focussed on the child and linked to a monitor placed beside the accused; an opaque screen between the child and the accused permits the judge to see both.<sup>70</sup> Some jurisdictions use separate rooms linked by video monitor, or wood-framed portable screens using solar fabric; both of these systems are employed in Manitoba.

The majority of challenges to the constitutionality of screening have failed, primarily because a case-specific finding of necessity, involving weighing the interests of the accused with the interests of society, is required by the legislation.<sup>71</sup> The challenge here essentially lies in

---

<sup>69</sup> A joint federal-provincial one-year trial project to develop systems and a protocol is in place in Saskatchewan. Equipment was acquired in the spring of 1989, over a year after the enactment of Bill C-15. No screening devices were used in the province prior to this. The Department of Justice also has video playback equipment but this has never been requested. (Interview, Les Ell, project co-ordinator, Saskatchewan Justice, November 1989, Regina).

<sup>70</sup> The simplicity and portability of the Saskatchewan system - any kind of screen will do - and the fact the child remains in the courtroom visible to the judge are major advantages as far as the judges are concerned. The first B.C. case using the separate room system, *R. v. Dick* [1984] (B.C. S.C.) involved a woman who allegedly sexually assaulted two girls and three boys ages 6 to 12. The equipment took over three hours to set up; the many technical problems included the collapse of the defence counsel's chair while the court watched on a monitor. The judge told the jury, 'If one more thing goes wrong today, I'm going to start to cry.' (*Saskatoon Star-Phoenix*, 9 March, 1989.)

<sup>71</sup> The U.S. Supreme Court decided that a one-way mirror placed between 13-year-old victims and accused at trial violated the right of confrontation. Justice O'Connor, while concurring that rights were violated in this case, would permit use of such a device on a case-specific finding of necessity: "I wish to make clear that nothing in today's decision

the long-established right of the accused to face the accuser.<sup>72</sup> But this can be outweighed: "The objective to obtain a full and candid account is of sufficient importance to warrant overriding a constitutionally protected right and freedom."<sup>73</sup> According to the Ontario District Court, while the right is an element of cross-examination, it is not an essential element and is not enshrined in the *Charter*.<sup>74</sup> According to the P.E.I. Supreme Court:

While ss. 7 and 11 of the *Charter* ensure a fair trial to the accused, they also, by corollary, ensure a fair trial to the Crown which can only be effected by a full disclosure of all of the circumstances surrounding the offence charged.<sup>75</sup>

As the Nova Scotia Court of Appeal noted:

The right to face one's accusers is not in this day and age to be taken in the literal sense... [but] is merely the right of an accused person to hear the case against him and to make answer and defence to it.<sup>76</sup>

It would appear that the use of screens is defensible because it does not seriously threaten a constitutional right. Although it limits section 7 rights, the limitation is reasonable. This is due to the balancing requirement embedded in the legislation: the court must decide that the evidence will not be available without the screening and therefore the infringement, minimal at best, is justifiable. There is no such

---

necessarily dooms such efforts by state legislatures to protect child witnesses." *Coy v. Iowa* (1988), 108 S. Ct. 2798. The decision has influenced Canadian courts in both directions. See C. F. Graham, "Sequestration Screens for Young Complainants in Criminal Prosecutions: Early Developments in Canada" (1990) 32 C.L.Q. 227; Rachel I. Wollitzer, "Sixth Amendment - Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases" (1988) 79 *The Journal of Criminal Law & Criminology* 759.

<sup>72</sup> See generally, C.F. Graham, *supra*, note 70.

<sup>73</sup> *R. v. B.(A.)* (1989), 7 W.C.B. (2d) 406 (Ont. Dist. Ct.).

<sup>74</sup> *R. v. P.R.* [*The Lawyers Weekly*, October 5, 1990].

<sup>75</sup> *R. v. B.N.A.*, [cited in *The Lawyers Weekly*, October 5, 1990 at 7] following *R. v. Levogiannis* (1989), 53 C.C.C.(3d) 492 (Ont. Dist. Ct.).

<sup>76</sup> *R. v. Ross*, (6 July, 1989), (N.S.C.A.).

requirement for videotaped evidence. Consequently, this is the most vulnerable of the new provisions to constitutional challenge.

#### IV. PROBLEMS AND POSSIBILITIES: SYSTEMIC AND EVIDENTIARY REFINEMENTS

CASES OF SEX OFFENCES AGAINST CHILDREN continue to have by far the lowest conviction rate. The ratio is unchanged from that of 1986: guilty pleas are entered in about 1 in 5 cases; of those tried, 1 in 5 result in conviction.<sup>77</sup> Some prosecutors feel they are losing more cases than ever before. The case selection threshold is rising. Cases involving traumatized children and very young children - rarely heard at the best of times - are the first to go.

The missionary vigor of prosecution has abated and some prosecutors are 'backing off.' They fear setting bad precedents and are waiting for certain questions to be settled by higher courts in other jurisdictions. They fear losing too many more cases and further weakening the credibility of children. In Saskatchewan, for example, the Regina office has recently dismantled its special child abuse unit of four prosecutors and Saskatoon cases, formerly routed to two 'specialists', are now shared by the entire department. "It was just too draining and depressing." This is bad news for child victims: special prosecutors are approachable to children and sympathetic to the issues. Other prosecutors may be less familiar with subtle aspects of dealing with children and encouraging frank disclosure; and readier to dump charges as a result. For those provinces relatively isolated from highly activist and visible feminist and child protection movements and with comparatively fewer cases and personnel, Bill C-15 seems less a political or ideological issue than it is a bag of legal problems.

---

<sup>77</sup> Estimates by Saskatoon prosecutors, not borne out by preliminary information from the Manitoba pilot study. This may be due to more formal case selection guidelines in Winnipeg: the Child Abuse Unit submits all 'borderline' cases - those involving younger victims or older cases and generally those involving potentially weak witnesses or a paucity of evidence - for bimonthly review by the Crown prosecutor. The Unit, part of the larger Youth Division, deals with in-family abuse. (Interview, Sgt. Doug Lofto, Winnipeg Child Abuse Unit, 1990).



Bill C-15 is to be reviewed by a Parliamentary Committee beginning in 1992.<sup>78</sup> Although half the pre-review life of the provisions has elapsed, many provinces have no program to monitor the use of Bill C-15 provisions. The Manitoba Attorney-General's office undertook a six-month pilot study but the sheer number of variables and the short-term nature of the project point to the drawbacks of short-term observational studies; longer-term monitoring and further analysis is needed.<sup>79</sup> Empirical study provides information on whether criminal justice is in fact or perception an effective tool for child abuse control and whether the reforms have made any difference. Without provincial monitoring programs, the information will be unavailable.

It would appear that law reform and good will are not sufficient to overcome ancient barriers to the participation of child victims in the criminal process, whether these are based in a general bias against the credibility of children or in procedural or evidentiary rules which militate against a child's testimony. Without strong systemic and public support, and without further relaxation of evidentiary rules to accommodate the evidence of the very young and the very traumatized, discretion too readily swings toward staying rather than prosecuting charges. Bill C-15 was not enough to ensure the even and equitable use of discretion.

In September 1990, two very promising developments in the criminalization of child abuse occurred. The first, the establishment of the Family Violence Court, is systemic and localized; the second, the clarification of the rules against hearsay by the Supreme Court of Canada is evidentiary and affects all Canadian jurisdictions.

### **A. The Family Violence Court**

A systemic change which holds promise for ensuring the continued access of children to criminal justice is Manitoba's comprehensive

---

<sup>78</sup> s.s. 19(2) provides that: "The committee designated or established ... shall, as soon as practicable, undertake a comprehensive review of the provisions and operation of this Act and shall, within one year after the review is undertaken ... submit a report to Parliament thereon including such recommendations pertaining to the continuation of those sections and changes required therein as the committee may wish to make."

<sup>79</sup> See, Devine, *supra*, note 58. The information is now being processed and should yield some interesting observations about the early implementation of Bill C-15.

Family Violence Court, the first in Canada.<sup>80</sup> The Court handles all cases involving child victims, irrespective of the child-offender relationship, from first appearance to final disposition. The Court also deals with spouse abuse, widely defined to include physical and sexual assaults by acquaintances as well as spouses; and elder abuse, an emergent social problem. Excepted are cases in which the accused is a young offender.<sup>81</sup> The arrangement is intended to reduce damaging delays to less than three months rather than the six months cases may take in the ordinary courts; ameliorate anxiety through concentrated victim support programs; increase the visibility of a group of victims and offenders in particular need of counselling; facilitate the monitoring of cases and dispositions; and, most important, permit specialization of personnel. A core group of three prosecutors handles all cases, although this number may increase: burnout remains a concern. Judges are chosen on the basis of interest and suitability and rotation patterns will make 'judge-shopping' more difficult.<sup>82</sup>

The Manitoba Family Violence Court represents a victim-centred crystallization of system response. Oscillations in the exercise of prosecutorial discretion are likely to be dampened by its inception and potential for sensitivity to vulnerable victims. Challenge by the defence bar on grounds of perception of bias is anticipated.<sup>83</sup> Such a

---

<sup>80</sup> The Court was preceded by a special trial court established in 1983 to deal with the overload of spousal assault cases caused by the 'no-drop' prosecutorial policy. The court sat two days a week, dealt only with spouse abuse and did not deal with charges or guilty pleas. The nearest parallel is a Toronto court dealing with guilty pleas and sentencing in spousal abuse cases. The Court is situated in Winnipeg but there are plans to extend some of its services outside the city, where feasible. Interviews, Judge Ron Meyers and Candace Minch, Research and Development, Manitoba Justice, October 1990. For a discussion of the no-drop policy, see Anne McGillivray, "Battered Women: Definition, Models and Prosecutorial Policy", (1987) 6 Can. J. Fam. L. 15.

<sup>81</sup> These must, as a matter of federal law, be dealt with in Youth Court. *Young Offenders Act*, R.S.C. 1985, c. Y-1.

<sup>82</sup> Some 10 provincial court judges have expressed interest in sitting. 'Loose cannon', however interested, will not be invited to preside; final decisions are left to Chief Judge Stephenson. Judge Ronald Meyers is assigned to a permanent Monday docket, handling first appearances, remands and guilty pleas.

<sup>83</sup> The presentation of the Trial Lawyers' Association is expected to be directed more specifically at the speaking engagements promoting the court undertaken by Judge Meyers; the concern lies in the potential for public confusion of court access and a sensitized judiciary with conviction.

specialized Court, however, is not without precedent. The Youth Courts established by J.J. Kelso in the late 19th century, for example, have received federal legislative blessing and continue to this day.<sup>84</sup> In some jurisdictions, Unified Family Courts dealing with divorce, custody and child welfare have also dealt with all spousal assault prosecutions. Moreover, Manitoba has already experimented with courts dealing only with impaired driving and shoplifting.<sup>85</sup> The functional inequality of child victims, and the special needs of victims of family violence generally, provide reasonable justification for such a court. The establishment of the Court, like Bill C-15 itself, is a strong signal of support for the criminalization of family violence and, more particularly, of recognition of the special needs of child victims.

### B. Clarifying the Rule Against Hearsay

The second, an evidentiary reform, has taken the reception of hearsay evidence where the federal government dared not go. In its decision in *R. v. Khan*,<sup>86</sup> handed down September 13 1990, the Supreme Court of Canada relaxed the strictures of the hearsay rule. The case revolved on the issues of competence to testify and reception of out-of-court statements of a highly articulate and composed four-year-old child.<sup>87</sup> The Court stated:

The issue is one of great importance in view of the increasing number of prosecutions for sexual offences against children and the hardships that often attend requiring children to retell and relive the frequently traumatic events surrounding the episode ...

Furthermore, the fact that the age of the child appeared to be an automatic bar to her testimony concerned the Court: "Were that a determinative consideration, there would be danger that offences against very young children could never be prosecuted."

---

<sup>84</sup> See Leonard Rutman, 'J.J. Kelso and the Development of Child Welfare' in *The Benevolent State: the Growth of Welfare in Canada*, Moscovitch and Albert, eds., (Toronto: Garamond, 1987), at 68.

<sup>85</sup> There, the perception of bias was better-founded, in that only one judge heard the cases. (Interview, Kerry Pearlman, Manitoba trial lawyer, 1990).

<sup>86</sup> *Supra*, note 35.

<sup>87</sup> *R. v. Khan*, [1990] 2 S.C.R. 530. The judgment was delivered by Mme. Justice McLachlin and concurred in by Justices Lamer, Wilson, Sopinka and Gonthier.

Recent judgments dealing with the rule against hearsay and other evidentiary issues have shown a more flexible approach based on the policy behind the rule rather than the complex and contradictory traditional categories of application and exception. In *R. v. B.(G.)*,<sup>88</sup> a case which arose prior to Bill C-15 involving a sexual assault complaint by a five-year-old against a young offender, the Supreme Court considered the meaning of corroboration of a material particular. At issue was whether the evidence had to implicate the accused or merely corroborate some material point in the child's testimony. In adopting a 'liberal interpretation', the Court stated:<sup>89</sup>

Also in favour of the liberal interpretation are the presumptions that the law does not require the impossible and the legislator intends only what is just and reasonable. Since the only evidence implicating the accused in many sexual offences against children will be the evidence of the child, imposing too restrictive a standard on their testimony may permit serious offences to go unpunished and perhaps to continue. Moreover, it is reasonable to assume that the legislator did not intend an accused to benefit from the youthful age of his victim by placing unnecessary impediments in the way of prosecuting offences against small children.

Civil courts have long relaxed the rules for receiving the hearsay evidence of children, extending grounds of necessity and reliability,<sup>90</sup> but this is usually justified on the basis of the 'special character' of child custody and protection proceedings<sup>91</sup> and the statutes or equita-

---

<sup>88</sup> [1990] 2 S.C.R. 3.

<sup>89</sup> *R. v. B.(G.)* [1990], 2 S.C.R. 3 at 28.

<sup>90</sup> The Appeal Court in *M.(W.) v. Dir. of Child Welfare for P.E.I.* (1986), 3 R.F.L. (3d) 181 (P.E.I. S.C. [App. Div.]), considering the admission of hearsay evidence of a sexually abused child, noted that such evidence rarely fit within established categories of exception and stated at 185 that the rule 'has never been regarded as absolute by the courts. Over the years the common law has recognized numerous exceptions ... The list of exceptions has never been closed. Just because certain hearsay evidence is not admissible according to any of the traditional exceptions to the exclusionary rule does not mean that a court would not be justified in admitting it if circumstances warranted the making of a new exception.' The hearsay evidence in that case, however, was received by the trial judge 'without first hearing any evidence to justify receiving it on the basis of its necessity or reliability'.

<sup>91</sup> See generally D.A. Rollie Thompson, 'Taking Children and Facts Seriously: Evidence Laws in Child Protection Proceedings' [Parts I and II] (1988) 7 Can. J. Fam. L. 11.

ble jurisdictions which govern them.<sup>92</sup> The notorious *Hamilton* case, for example, ran for 150 days without the children who were the subject of the child protection hearing ever appearing in the courtroom.<sup>93</sup>

In importing this approach into the criminal courts, *Khan* recognizes a residual judicial discretion to admit hearsay where it is both necessary and reliable.<sup>94</sup> The reasoning is not restricted to children's evidence. The Court has not fashioned a special 'children's hearsay' exception but rather has emphasized the rule's rationale. But the judgment is focused on children and in particular on the traumatized and the very young.

Necessity, according to the Supreme Court, is to be interpreted as 'reasonably necessary.' One basis for determining the necessity of admission is the inadmissibility of the child's direct evidence. If the child is unable to communicate the evidence or to understand the duty of telling the truth - or to communicate this understanding - direct evidence would be inadmissible and hearsay could then be introduced.<sup>95</sup>

---

<sup>92</sup> For example, *E.C. et al. v. Catholic Children's Aid Society of Metropolitan Toronto* (1982), 37 O.R. (2d) 82 (Co. Ct.) at 90: the mandate of the Child Welfare Act justifies the tempering of the rules of evidence; relaxing evidentiary rules in custody proceedings 'is appropriate to the special character of those proceedings'. The House of Lords in *Official Solicitor to the Supreme Court v. K. and Another*, [1965] A.C. 201 (Lord Devlin), a wardship proceeding, characterized the rule as one of convenience rather than principle, designed to aid in the administration of justice and to regulate procedure: 'An inflexible rule against hearsay is quite unsuited to the exercise of a paternal and administrative jurisdiction. The jurisdiction itself is more ancient than the rule against hearsay. No one would suggest that it is contrary to natural justice to act upon hearsay.'

<sup>93</sup> *Children's Aid Society of Hamilton-Wentworth v. C. (D.)*, (30 March, 1987) Hamilton-Wentworth Judicial District, (Ont. U.F.C.). Hearsay from the foster mother, therapists, social workers, police officers and 25 hours of videotapes of the children was entered; the children were found to be too severely traumatized to appear. See also Kevin Marron, *Ritual Abuse: Canada's Most Infamous Trial on Child Abuse*. Toronto: Seal Books, 1988.

<sup>94</sup> Comparable to the U.S. Federal Rules of Evidence ss. 803(24) and 804 (b)(5) and in line with Wigmore's classic commentary. I am indebted to Professors Lee Steusser and David Deutscher for their comments here. In some U.S. states, the doctrine of *res ipsa loquiter* has been invoked to deal with child abuse cases but this may be inappropriate in criminal law with its emphasis on the presumption of innocence.

<sup>95</sup> The problem, of course, is that if the child is not permitted to testify because she or he does not understand the duty to tell the truth, how can a hearsay statement from the same child meet the test of reliability?

A second ground of necessity is the trauma or harm to the child that testifying would cause: if psychological assessments show that such harm would be too severe, the child would be precluded from testifying and hearsay introduced instead.

Reliability or trustworthiness of the evidence will vary with the child and the facts of each case. The decision is left to the trial judge, who might consider such factors as timing; the demeanour, personality, intelligence and understanding of the child; and absence of any reason to suspect fabrication. As the Court points out, "the evidence of a child of tender years on such matters may bear its own special stamp of reliability." The ingenuousness of the wording, the lack of familiarity with the type of activity described, the degree of trauma or even the lack of apparent concern: all of these have endowed child sexual assault cases with such a stamp.

Cross-examination is an important aspect of the constitutional right to a fair hearing.<sup>96</sup> Where the child's direct evidence is inadmissible, as the Supreme Court noted, a right of cross-examination consequently is not available. Where the issue is trauma to the child, 'there would be little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination' - a problem with videotaped evidence. However, there may be situations in which the trial judge 'thinks it possible and fair in all the circumstances' to allow cross-examination as the condition placed on admitting a hearsay statement. The Court does not define the scope of such examination but it may be that it would be restricted to the adoption of the statement and the circumstances in which the statement was made rather than focus on the complaint itself.<sup>97</sup> In the majority of cases, concerns about credibility will go to the weight to be given to the evidence

---

<sup>96</sup> Although it is not an absolute right: see for example *R. v. Potvin* (1989), 47 C.C.C. (3d) 289, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193.

<sup>97</sup> The P.E.I. Supreme Court, Appeal Division outlined the rules for admitting hearsay in a civil child protection case, *M.(W). v. Dir. of Child Welfare for P.E.I.*, *supra*, note 79; "[T]he court may admit the third party's evidence as proof of the facts contained in the child's statement, even though that evidence be hearsay, provided that, as groundwork for its admission, sufficient evidence is first led to establish the reliability of the out-of-court statement, and of the circumstances which establish the need to introduce the contents of the child's statement through hearsay. In such cases, the court must always proceed with great caution both with regard to satisfying itself on the question of the reliability of the child's statements, as well as with respect to those circumstances which justify the need for the admissibility of the out-of-court statements."

and to the quality of any corroborating evidence. It is here that protection of the interests of the accused will reside.

The requirement of necessity, as the Court notes, means that most children will still be required to give *viva voce* evidence.<sup>98</sup> *Khan* is by no means the blanket dispensation some reformers sought. Still, it is a startling innovation and a very important one. On a practical level, it permits prosecution of cases now almost automatically dropped: those involving very young or very damaged children. On an ideological level, it represents a major step toward recognition of both the distinctiveness of children and their right to criminal justice.

## V. CONCLUSION

THE QUESTION of whether child abuse should be criminalized is a moral issue which transcends empirical data. There is no justification in law for barring offenders against children from criminal justice, or children from equal access to the law. If protecting children is a serious issue, the criminal law cannot be bypassed in the search for effective controls. Public reaction and system response will decide whether criminal prosecution becomes fact or merely footnote to the long and varied history of child abuse control. For now, it would appear that child victims are a fixture in the criminal courts. Bill C-15 has not settled the criminalization debate, nor has it resolved prosecution problems. Hard choices must still be made based on the educated exercise of discretion.

The advent of the Family Violence Court and the clarification of the hearsay rule demonstrate clear systemic and judicial recognition of the equality of children by redressing their inequality, adjusting judicial scales to accommodate the childishness of children. Whatever the measures taken in future systemic, evidentiary, law and policy reform, children remain children in a system designed for adults.

---

<sup>98</sup> Because the Court ruled that the trial judge erred in refusing to find the child competent, its judgment with respect to the hearsay evidence of the mother is, technically, *obiter dicta* and not binding upon the courts. But this is hairsplitting: although the Court found that the trial judge erred 'in letting himself be swayed by the young age of the child', there were arguably other reasons for his finding.