COMMENT

R. v. Bauder: Seductive Children, Safe Rapists, and Other Justice Tales

ANNE McGILLIVRAY*

I. INTRODUCTION

THE COMPLAINANT WAS 12 and the defendant 29 when he first engaged her in sexual intercourse. His sentence of nine months with two years' supervised probation on one count of sexual assault embraced three such incidents between April and September of 1993. "The girl, of course, could not consent in the legal sense, but nonetheless was a willing participant," Twaddle J.A. stated orally for the Manitoba Court of Appeal in *R. v. Bauder*.[1] He went on to hold that,

> She was apparently more sophisticated than many of her age and was performing many household tasks including baby-sitting the defendant's children. The defendant and his wife were at the time somewhat estranged. The relationship which developed was entirely inappropriate and criminal, but the circumstances do distinguish the case from those in which a child has been interfered with by force or deception.[2]

---

* Associate Professor, Faculty of Law, University of Manitoba. Professor McGillivray's recent publications include "Governing Childhood" and "Therapies of Freedom: The Colonisation of Aboriginal Childhood" in A. McGillivray, ed., *Governing Childhood* (Aldershot: Dartmouth, 1997); "'He'll Learn it on His Body': Disciplining Childhood in Canadian Law" (1995) 5 Int'l J. Children's Rts. 193; [with B. Comasky] "'Everybody Had Black Eyes ... Nobody Don't Say Nothing': Intimate Violence, and Justice System Response" in K. Bonnycastle & G.S. Rigakos, eds., *Unsettled Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Vancouver Collective Press, 1998) c. 13; A. McGillivray, "'A Moral Vacuity in Her Which is Difficult, if Not Impossible to Explain'—Law, Psychiatry and the Remaking of Karla Homolka" (1998) Int.'l J. L. Prof. [forthcoming].

1 R. v. *Bauder* (23 May 1997), (Man. C.A.)[unreported], [hereinafter *Bauder*].

2 *Ibid.*

In his factum, the defendant was described as immature and the complainant "having taken over the household," is "bossy and manipulative." The adult was a child and a child led him on.

The sole ground of the appeal was the form of sentence. The trial court denied the defendant's request that sentence be served in the community under the conditional sentencing provisions of s. 742 of the *Criminal Code*.[3] The Court of Appeal granted the request. It also varied the conditions under which the defendant must serve his sentence to suit his circumstances, dropping curfew to accommodate his job as a long-distance trucker and, as he was moving in with a woman and her three year old child, dropping the ban on contact with children under 18. The child complainant was so far forgotten in this new scenario that the court also neglected to renew the non-contact order. It was not reinstated until 15 July 1997. Although even Bauder's lawyer argued that concern for deterrence could be met by the "penal elements" of a conditional sentence, there were none.[4]

The judgment was widely criticised in the media. Following an outburst of public sentiment, the Crown appealed to the Supreme Court of Canada, not on the illegitimate discourse of consent or the inadequate penalty of nine months for three rapes, but rather on the application of the test set out by the Manitoba Court of Appeal in R. v. *Arsiuta*[5] which rejected reconsideration of sentencing principles (and adequacy of sentence) at the "second stage" of decision making in conditional sentencing.[6] Leave to appeal was denied.[7]

Bauder discloses serious problems with case management, plea bargaining and conditional sentencing in intimate violence cases. Overarching these issues is the relationship of facts and law, empirical truth and legal truth, and how much slippage between the two the justice system should tolerate. Thresholds

---

3 R.S.C. 1985, c. C46.

4 The accused is to abstain from the use of alcohol, perform 120 hours of community service, observe a curfew when not on the road, and be assessed for a sex offender intervention program, conditions far more remedial than penal.

5 [1997] 3 W.W.R. 447; (1997), 117 Man. R. (2d) 105; (1997), 114 C.C.C. (3d) 286 (Man. C.A.) [hereinafter *Arsiuta*].

6 In a case decided the month preceding *Bauder*, R. v. *Sanderson* (25 April 1997), (Man. C.A.) [unreported], the Manitoba Court of Appeal was aware that *Criminal Code* amendments "may shortly be in force" which "may change the approach to be taken in cases like this, but we are bound to deal with the case on the basis of the law in effect at the time of hearing." This same line of reasoning is followed in *Bauder* after the amendment had come into force. In R. v. R.(R.A.) (22 October 1997), (Man. C.A.) [unreported], *infra*, heard the month following *Bauder*, the Court stated, "the so-called remedial amendment enacted in May of this year, at least in the circumstances of this case, neither changed nor added much to the legislation as initially enacted."

7 Application for leave to appeal was rejected 23 October 1997.

at each stage of the criminal process narrow and redefine the field. Police reports and the manner in which they are taken constitute the first formal engagement of the system and its definition of facts. Plea bargaining further narrows the field, by suppressing the wealth of detail conveyed by witnesses at trial which assists in sentencing decisions. These questions of fact become acute in conditional sentencing where violence is a central question. In child sexual assault, facts are first disclosed by the child to another child or to an adult,[8] often a parent. An adult may discover the assault, as the mother did when she came across Bauder's "love" letters to her child. These facts are reshaped by the criminal justice system, first in the terse language of police statements and later in the more expansive discourse of pre-sentence reports. The court at first instance finds the "legal" facts or adopts them where a guilty plea resulting from a plea bargain is tendered and binds them like fragments of living insects or plants in a legal amber. This amber is further carved to a desired shape by the appellate courts.[9] At each stage, subtleties and details are shaved away and, too often, central facts with them.

This comment focuses on fact slippage and judicial discourse. At the root of the problem lies the continued judicial adherence to the legally barred discourse of consent and the courts' authoring of scenarios. Relevant judgments are quoted more than is usual from the transcripts in order to convey the flavour of the Manitoba judicial discourse. I begin with the sentencing hearing, moving to a discussion of plea bargaining and the ethics of facts, discussing conditional sentencing and the new *Criminal Code* provisions. I conclude with a brief review of the law of consent in sexual contact with children.

II. Sentencing in the Shadow of a Plea Bargain

THERE WERE ALTOGETHER thirteen court appearances for Bauder, mostly due to adjournments. The pre-sentence report was misplaced by the Crown and five different prosecutors were involved. The case was finally heard by Devine P.C.J. on 4 March 1997—over a year after Bauder's arrest. Referring to pre-sentence report, the prosecutor stated that,

> [A]s comes clear from beginning to end, it would appear to be a situation in which Mr. Bauder effectively continues to see himself as a victim in all of this, viewing this 12-

---

8 Children tend to first test the waters with partial disclosures, recant when fear overtakes them, and sometimes speak in riddles. Disclosure is not a matter of simply "telling" or the sharp dichotomy of belief/ disbelief it is often made out to be. See C.A. Hooper, *Mothers Surviving Child Sexual Abuse* (London: Routledge, 1992).

9 Most famous for this is Judge Benjamin Cardozo. See R.A. Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990) and in particular the discussion of *Palsgraf* v. *Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. C.t. App. 1928).

> year-old baby-sitter as an individual who took a fair degree of control over the home of he and his wife during this period of time.[10]

Bauder, he said, "doesn't appear to truly appreciate the difficulty with what has taken place here." The prosecutor recommended a period of imprisonment of six to nine months. The defence disagreed, arguing that while Bauder understood his act and its consequences, his wife had not had sexual relations with him for three years and the child "began to assume, apparently virtually all the parental responsibilities." Bauder was, "in essence, all alone in his own home" and "the complainant began to discipline the children, she began doing shopping and cleaning ... ." Counsel concluded that

> [W]hat we have here, really, is a 12 year old who obviously didn't understand or perhaps was excited about taking responsibility of a household ... and, I suggest at the end of the day, really occupying the position of the wife in the home and in Mr. Bauder's eyes.

Further, "the pair" had maintained a friendly relationship and prosecution was initiated only when the complainant's mother found his "love" letters to the child. Bauder's fantasies were, in a Freudian move, attributed to his child victim.[11]

Devine P.C.J. broke in with questions about the police report, stating: "it suggests there was an incident in December when he was jealous of her boyfriend and chasing them with a car and—." The report described Bauder's death threats, his attempt to run the complainant off the road, and his assault of the her boyfriend. But, he stated, "Mr. Bauder had a different version of events and of course he's not dealing with those matters before the court." The 15 year old boy was abusive to the complainant and the complainant had asked the defendant to set him straight; this passed without comment.

The trial judge tried once again to justify her consideration of lost facts, "I'm just raising these because if you read this report, which is the only version that has been put before me, it sounds like it was as a result of this behaviour that the police became involved." Defence counsel cut her off with "ultimately, ultimately."

After another brief exchange, the judge was silenced and counsel continued unopposed; "[a]nd the boyfriend had expedited some of the difficulties that oc-

---

[10] Transcript, sentencing hearing.

[11] Freud withdrew his "seduction theory" of child sexual abuse, based on his female patients' revelations of sexual assault by their fathers, when his findings were contested by a colleague (himself an abuser of his young son). Freud replaced this theory with an oedipal theory tailored to daughters. Girls ("hysterics") alleging sexual abuse by their fathers actually want to marry them, replacing their mothers. They fantasised the sex and even had hysterical pregnancies. On the politics, media treatment and psychoanalysis of child abuse at the close of the nineteenth century, see L. Wolff, *Postcards from the End of the World: Child Abuse in Freud's Vienna* (New York: Atheneum, 1988).

curred on that particular occasion." The relationship, counsel maintained, "was an extremely unusual sort of dynamic ... this was an entirely consensual matter except for the fact, of course, that the complainant could not have consented legally in relation to the intercourse." The accused "only maintained contact as a sort of friendly—." The Court persisted in her questioning and asked the child's age when the sex ended. Bauder answered, "[s]he was 16." This became part of the record. The complainant was in fact 13 when the last rape occurred, and the accused stalked her until she was 15.

Presented with a plea bargain and joint sentencing recommendation, and dissuaded from considering facts related to charges dropped—uttering threats, dangerous driving—the judge gave up. The sentence of nine months was, "reasonable and perhaps even on the generous side" but she refused conditional sentencing. A sentence served in the community would not fulfil the goal of deterrence and the aggravating factor of breach of trust. The judge stated:

> [H]igher courts of this province and other provinces have stressed that the breach of trust situation involved when adults are involved in sexual exploitation of children necessitates a period in jail for periods of both specific and general deterrence and certainly there's nothing in the facts before me that takes this out of that kind of precedent.

It was an aggravating circumstance, noted the judge. This was, "an instance of sexual encounters over a period of time" and not a single encounter with a twelve year old. The defendant interjected, "[b]ut she was 13." In the paper trail, including the application for leave to appeal to the Supreme Court of Canada, her age was given as "12 or 13" when "the relationship" began and 16 when it ended. The Court replied that he had made his choice; "[h]aving regard to the nature of this charge and the particular vulnerability of the victim, I am not prepared to permit this sentence to be served in the community."

Furthermore, the Court was not ready to "assume that there is no danger certainly not before there has been an appropriate assessment by experts from probation or from Native Clan." Defence counsel objected, claiming unopposed that it was "an entirely consensual matter." The Court rejected the discourse of consent. Addressing her remarks to the defendant, she found somewhat confusingly that "there's no suggestion that you used any force of violence" but that:

> [T]here is a suggestion in the pre-sentence report that you told her not to tell anyone, but nonetheless, certainly the facts that have been laid out in the submissions and in the pre-sentence report seem to suggest that the behaviour was what might be described as consensual were it not for the fact that in law a child of that age is not capable of consenting to this kind of behaviour ... . [T]he law says she's not old enough to make those kind of choices and the harm she sustained, and she did sustain harm, is not something that maybe is apparent to you ... .

In characterising the child as a sophisticated and willing participant, the Manitoba Court of Appeal adopted wholesale the defence position. On the trial court's stance on conditional sentencing, Twaddle J.A. stated,

> After imposing a nine-month prison term, the only question the sentencing judge should have asked was whether an order allowing the accused to serve his sentence in the community would endanger the safety of the community. The judge did not decide this question, stating she would make no assumption. The question should have been decided. It can be without assumption. What must be looked at is the naure of the offence and the accused's background. Is there a likelihood that the accused will conduct himself during the sentence in a manner which will endanger the community. On the facts of this case, the answer is obviously in the negative.

It is small wonder that Bauder was declared a safe rapist.

The reality is markedly different from these many-laundered tales. Crown prosecutor Rob Finlayson told the *Winnipeg Sun*,"[f]rom what we knew of the case, it was handled appropriately. Had we been advised of all the facts before sentencing, we may have taken a different approach."[12] For the prosecution, fact finding is not a passive activity. The police reports had contained some facts but statements were taken by ordinary duty officers rather than members of the child protection unit. The flat effect and lack of relevant detail in the reports is evidence of the need for children's statements to be taken by trained people. Bauder's "love" letters, turned over as evidence but never entered, tell another part of the story, but these were not introduced and disappeared into the bowels of evidence storage. Interviewing the child and her parents would have rectified falsehoods and introduced substantially dissimilar facts from those found by the courts.

The complainant was nine when she met the defendant and his wife.[13] Her father was helping Bauder to find employment, and she became a part-time babysitter for their two children when she was 12. This constitutes the whole of the "relationship" between them. Far from being street-wise and sophisticated (not that this should matter to the law), the girl was a 12 year old preadolescent living at home with her parents.

The assaults were straight forward. The defendant three times ordered her to lie down and take off her pants. Then he raped her. He promised once that it would not hurt. He promised each time that he would not do it again. He told her after the last rape that he loved her. There were no preliminaries, no discourse of love and beauty, no gentle lead-in—nothing. He told her not to tell anyone because his wife would be upset.

The first incident is typical. The complainant was preparing dinner for the two children, who were playing outside. Bauder's wife was still at work when he

---

12 14 June 1997.

13 Information is taken from police reports and telephone interviews with the complainant's mother.

returned. When she sat down to watch television, Bauder worked his way toward her on the couch and put his hand on her thigh. He ordered her to take off her clothes and lie down on the floor. He stripped off his clothing. The complainant later told police,

> I laid down on the rug on my back. Dean got on top of me and told me not to worry, that it wasn't going to hurt. He then had intercourse with me which lasted about 5–10 minutes. When he was finished I got dressed and Dean went into the bathroom and got dressed.

She then went home.

Similar incidents occurred twice more, in the spring and summer of 1993 when she was 13. The complainant stopped going to his house, invented excuses, and did not tell anyone about the incidents or relate the incidents to anyone. Bauder showed up at her school, followed her, telephoned on her private line (despite three changes of telephone numbers), sent "love" letters, and threatened to kill her family. When her mother discovered the letters in 1994, the child was not prepared to go to the police. Police Victim Services advised that there was no point entering a complaint until the child felt ready to proceed. In September 1995, Bauder telephoned her while her boyfriend was present. Jealous, he threatened to kill her and beat up her boyfriend. She finally agreed to contact police. Bauder called her again, some 10 to 15 times.

In a badly-handled police interview which focused on the clothes worn by the complainant on each occasion of rape (jeans, shirt, socks, shoes, underpants, bra, and on one occasion, no socks), she revealed the sexual assaults and threats.[14] On 10 January 1996, the defendant tried to run the complainant and her friend off the road in a terrifying car chase. She pulled into a Robin's Donuts parking lot. Bauder followed, screamed at her friend, and tried to choke him; the boy's father pulled him off. The child made a second statement to police in which she reported these incidents and said, "I am very afraid of Dean and have seen how crazy he can be. I think he is capable of violence if he gets hold of me or L."[15] Bauder was arrested and charged with sexual interference, sexual assault, uttering threats, and dangerous driving. He was given judicial interim release the following day on the condition, among others, that he not contact or communicate with the complainant and not attend within a block of her house.

The defendant entered a guilty plea as a result of a charge bargain in which the counts of sexual interference and sexual assault were rolled into one count of sexual assault and the charges of dangerous driving and uttering threats were dropped. A sentence of nine months was agreed upon. The crown did not consult the complainant or her family at any time about the facts of the case or the

---

[14] Winnipeg Police Service Incident no. 95/2/233795.

[15] Winnipeg Police Services Incident no. 96/2/6063.

plea bargain. The family was advised that they need not attend, and did not. They were not advised of the possibility of entering a victim impact statement or the existence of the Criminal Injuries Compensation Board which would have paid for private counselling. The complainant instead attended group counselling sessions focused on intra-familial child sexual assault. She was not helped and refuses further counselling. The crown has since offered to charge Bauder with a related offence, presumably criminal harassment, but the complainant has refused to co-operate.

III. PLEA BARGAINING

THE CASE WAS NOT HEARD in Family Violence Court, a specialised provincial court which provides prosecutors trained to deal with intimate violence cases. Bauder was not "family" to the complainant. At least five Crown attorneys worked on the file, none specialising in intimate violence cases. Not one spoke with the complainant or her family about the events or the fact and nature of the plea bargain, nor was the complainant contacted for input into the presentence report or invited to prepare a victim impact statement. The paucity of facts is reflected in the judgments. While some prosecutors consult with complainants in plea bargaining, there is no ethical or policy requirement that they do so. Plea bargaining is a closed-door and often hasty process, unmediated by the judiciary.[16]

> Perhaps nowhere in the criminal justice system is the exercise of discretion subject to so little scrutiny as in the area of plea bargaining. Information is disclosed that may not be admissible in a court hearing, and commitments may be made regarding sentence submissions that have little bearing on the final outcome. The potential impact on the victim, particularly in the case of sexual assault, can be substantial. She may be angered that she was deprived of the chance to tell her story in court, or she may be relieved that a plea was entered without having to endure testifying in court.[17]

The importance of plea bargaining to the administration of justice is such that it cannot fundamentally be contested. Where it results in the suppression or eradication of relevant and potentially determinative information, then the deeply inadequate sentencing which may result brings the administration of justice into disrepute. The court knows that a bargain has been made only because a guilty plea is tendered; by lawyerly convention, neither the bargain nor its details are disclosed to the court. Where charges are dropped or stayed, the

---

16 R.V. Ericson & P.C. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Process* (Toronto: University of Toronto Press, 1982).

17 S. Clark & D. Hepworth, "Effects of Reform Legislation on the Processing of Sexual Assault Cases" in J. V. Roberts & R. M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 127–128.

facts supporting those charges are also suppressed. This is a shadowy and problematic area.

The Law Society of Manitoba *Code of Professional Conduct* requires prosecutors to place before the court all available credible evidence relevant to the alleged crime in order that justice may be done.[18] The *Code* governs plea bargaining as it governs every aspect of professional conduct, to be read as always speaking in dealings between lawyers *inter se*, lawyers and clients, and lawyers and the courts. It speaks here to the prosecutor's duty to the facts in any matter before the courts. Fact-bargaining is unethical. Suppressing information about the facts of a case prevents the court from making an informed decision, prevents justice from being done and being seen to be done, and defeats the purpose of the system. Further, a plea bargain is an undertaking between lawyers.[19] For defence counsel to "mess with" the facts or deny agreed-upon facts is a breach of undertaking.[20] Facts "lost" because a charge is dropped do not fall directly into the prohibited category, but where those incidents relate to the same victim, then failure to disclose is problematic, for it can be argued that the spirit of the Code is violated. Bauder's death threats and car chase were aggravating factors, whether charged or not. They were also evidence of community endangerment, a calculation central to the new provisions for conditional sentencing.

The Law Reform Commission of Canada expressed concern in 1975 that plea bargaining detracts from the "pursuit of the legitimate goals of the criminal justice system" and destroys "the appearance and reality of justice." In 1989, however, the Commission decided that plea negotiations were worthwhile.[21] Between 50 and 90 percent of all criminal cases are settled by way of plea bargain and the courts would grind to a standstill without this central tool of justice administration.

The Marshall Commission approved of plea bargains if governed "by the principles of openness, voluntariness, accuracy, appropriateness, and equality."[22]

---

18 Chapter 9, Commentary 9: "Duties of Prosecutor."

19 Chapter 9, Commentary 13: "Undertakings," states, "[a]n undertaking given by the lawyer to the court or to another lawyer in the course of litigation or other adversary proceeding must be strictly and scrupulously carried out."

20 The jurisprudence on disclosure of facts has centred on fairness to accused persons rather than on consequences for the administration of justice (or the victim). See *R.* v. *Stinchcombe* (1995), 96 C.C.C. (3d) 318 (S.C.C.) and *R.* v. *O'Connor* (1995), 44 C.R. (4th) 1 (S.C.C.) on Crown disclosure of all relevant facts including those favourable to the defence (and those not in possession of the Crown). There is no such onus on the defence.

21 Law Reform Commission of Canada, *Control of the Process*, working paper 15 (Ottawa: The Commission, 1975) at 45.

22 Royal Commission on the Donald Marshall, Jr. Prosecution (N.S.), *Royal Commission on the Donald Marshall, Jr. Prosecution: Commissioner's Report: finding and recommendations*, vol. 1 (Halifax: The Commission, 1989) at 244–247.

According to criminologists Cohen and Doob, plea bargains can include "a promise concerning the nature of any submissions to be made to the sentencing judge ... not to mention aggravating facts or circumstances when they are in dispute."[23] This is problematic. The 1993 Martin Report established ethical and procedural guidelines for plea negotiations in Ontario.[24] In a statement which applies equally to defence counsel and to the Crown, the Advisory Committee stated,

> [I]t is inappropriate for counsel, in private discussions, to tailor the facts of an event for purposes of achieving the plea or sentence that appears to counsel to be desirable. This is treating the Court with less than the full candour which counsel's professional obligations require, and may even be said to bear some resemblance to manipulating the Court.[25]

The Advisory Committee also stated that,

> [I]t is improper for the Crown to withhold from the Court any relevant information in order to facilitate a guilty plea. In cases where not all matters are admitted, the Crown should advise the Court of the allegations and then proceed upon the admitted facts. In such cases, the Court will sentence on the admitted facts only.[26]

Where facts are disputed, the court must inquire closely, and where it cannot satisfy itself that both sides admit to the facts, a *voir dire* must be held. Where disputed facts are central to the charge, the plea bargain must be rejected and the case set over for trial.

The question of placing before the judge aggravating facts not forming part of the offence charged was directly addressed in the plea bargain made with Karla Homolka.[27] Homolka's testimony was central to the conviction of Paul Bernardo in the murder of schoolgirls Leslie Mahaffy and Kristen French, but it had to be "bought" through plea negotiation and sentence discount. Two counts of manslaughter for her role in the murders and a joint recommendation of 12 years concurrent were justified by the duress suffered by Homolka as both a battered woman and the manipulated spouse of a serial rapist and killer.

---

23 S.A. Cohen & A.N. Doob, "Public Attitudes to Plea Bargaining" (1989–90), 32 Crim. L.Q., at 86–87.

24 G.A. Martin, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Attorney General of Ontario, 1993) [hereinafter the Martin Report].

25 *Ibid.* at 325.

26 *Ibid.* at 323.

27 P. Galligan, *Report to the Attorney General of Ontario on certain matters relating to Karla Homolka*, (Toronto: The Ministry, 1996) [hereinafter the Galligan Report]. See also, A. McGillivray, "'A Moral Vacuity in Her Which is Difficult, if Not Impossible to Explain'—Law, Psychiatry and the Remaking of Karla Homolka" (1998) Int.'l J. L. Prof. [forthcoming].

There was also a delicate allusion to her assistance to the crown in the Bernardo investigation. She was not charged in the death of Tammy Homolka but her role in it was introduced to the court as an aggravating factor in sentencing.

In the analysis of the Homolka plea bargain or "sentence resolution" for the Attorney General of Ontario, the Galligan Report relied on the Martin Report and concluded that its requirements were rigorously followed.

> Counsel disclosed to the Court that their recommended disposition came as a result of resolution discussions. Full disclosure of all the relevant circumstances of the case was made to the Trial Judge. The Trial Judge, after considered reasons, arrived at an independent conclusion that the proposed disposition satisfied the public interest and was proper to the administration of criminal justice.[28]

The Crown in the Homolka affair relied on *R.* v. *Garcia and Silva*[29] in introducing Tammy's death as part of the plea bargain while promising immunity from prosecution:

> [F]requently it is a sensible and proper thing for a Judge to take into consideration other convictions and on occasions and under proper safeguards other charges laid against a convicted person. If the other charges are taken into consideration it seems to us those safeguards should at least include conditions that they are charges with respect to which the accused will plead guilty or will otherwise be proved guilty and that the Crown commits itself not to proceed with those other charges in the event that they are taken into consideration in sentencing on the conviction before the Court.

Reaffirming its reasoning in *Garcia and Silva*, the Ontario Court of Appeal writes in *R.* v. *Robinson*[30] that "the Court should take into consideration offences of the same class as those for which the offender has been convicted." The Homolka court was "satisfied that the circumstances leading to the death of Tammy Homolka are of the same class" as those to which Homolka pleaded guilty. All were homicides with attendant circumstances of sexual assault.

Applying the *Robinson* test to *Bauder*, one must ask whether criminal harassment, uttering threats, trying to run the complainant off the road, and assaulting her boyfriend are of the same class of offences as sexual interference and sexual assault. The underlying issue is violence against the person and the continued assertion of continued control over the victim. The offences are clearly related. *Bauder* involves the serial victimisation of one person using different forms of violence, rather than serial victims using similar forms of violence. The answer must be yes.

A necessary step is the offender's admission of responsibility for related offences not charged. The Galligan Report cites *R.* v. *Nelson* on this issue.[31]

---

[28] *Supra* note 27.

[29] [1970] 3 C.C.C. 124 (Ont. C.A.).

[30] (1979), 49 C.C.C. (2d) 464 (Ont. C.A.).

[31] (1966), 51 Cr. App. R. 98 (Eng. C.A.).

> It is essential ... that in any such case the court should satisfy itself by explicit inquiry whether the accused before the Court does admit his guilt of those offences before they can be properly taken into consideration.[32]

The court, in turn, ought not to increase sentence. If related aggravating circumstances are introduced, however, there may well be an unexpected increase in sentence if the joint sentence recommendation has failed to accommodate these circumstances. Plea bargaining always involves a gamble. Although it significantly reduces the defendant's risk, as the Galligan Report emphasises, plea bargaining binds only the parties to it. A plea bargain only ensures that the Crown will not reinstate charges unless the defendant fails to comply with the terms of the bargain.

Overturning a joint sentencing recommendation by the court is rare,[33] but it does occur.[34] Judicial independence is such that judges are not bound by submissions of counsel, yet that independence is conditioned by what the judge knows of the case. If facts are compromised, true judicial independence is compromised and so is the reputation of the administration of justice. A trial ensures that facts and evidence will be challenged. A plea bargain may digest, obscure, or misrepresent the facts. The ethics of plea bargaining are of central concern to achieving fair dispositions upon all relevant information, including acts suggestive of community endangerment. This is acute when the issue is community endangerment or future safety of the victims.

The Martin Report recommends that the Attorney General "require his or her agents conducting resolution discussions to consult with any victims, where appropriate and feasible, prior to concluding [plea bargain] discussions."[35] The report also stated,

> In light of the importance of having victims understand the criminal justice process, particularly as it relates to resolution discussions, the Committee has emphasized not just the need to consider the victim's interest, but also the need to consult with the victim, and keep him or her apprised of developments in the case ... before it is a fait accompli. The victim in such circumstances should be permitted to understand the proceedings relating to his or her victimization, and be given the opportunity to have input, while such input can still be acted upon if it is appropriate to do so.[36]

---

32 *Supra* note 31

33 This has never happened in Canada according to the Galligan Report.

34 During my clerkship with Federal Justice, Saskatchewan Region, a fellow articling student entered into a plea bargain with defence counsel on a minor marijuana possession charge. The joint recommendation was a small fine as it was a second offence (otherwise the result would have been a discharge). The defendant was young and had no other record. The judge substituted 30 days in jail, to her horror.

35 The Martin Report, *supra* note 24 at 305.

36 *Ibid.* at 308.

The Report observes that the circumstances of the victim are "important to a wide variety of resolution discussions" and that prosecutors should "keep the victim's interests in mind throughout the conduct of such discussions."[37] The importance of consulting the victim increases with the seriousness of the offence. Most serious, according to the report, is any violence against the person.

The Martin Report advocates the use of victim impact statements to place before the court additional factors relevant to sentencing. Such statements provide more than a subjective assessment of the damage done by the offender—they may include facts about the conduct which had been screened out during the routine processing of cases or vitiated by a plea bargain, facts which it is not only proper but necessary for the court to hear. Without evidence to the contrary, courts continue to presume that the victim has not suffered damage even in cases where the victim is a child or there has been a brutal rape. In his letter to the Canadian Judicial Council, Twaddle J.A. wrote, "[w]e also noted that no victim impact statement had even been requested." This seems to have signalled to the court that no trauma was experienced and that the defendant's view of the facts was the right one.

The *Criminal Code* was amended in 1985 to permit the introduction of victim impact statements; it was again amended in 1995 to state in s. 722(1) that "the court shall consider any statement that may have been prepared ... describing the harm done to, or loss suffered by, the victim arising from the commission of the offence" when deciding on disposition. This is as strong a signal as the *Code* can send to the Crown to invite victims to prepare and submit statements, yet victim impact statements are rarely used in Manitoba courts.[38]

In short, the Martin Report and Code amendments strongly suggest that aggravating factors related to the primary offence charged should be introduced where charges are dropped or not laid with respect to these events. The defendant's agreement to admit these facts in court must be made part of the plea bargain, with the understanding that if the defendant does not do so, charges will be laid and the case will go to trial, or, in the alternative, a hearing will be conducted into the disputed facts. Victim impact statements should be used in all cases of violence against the person and victims should be included at an early stage in plea negotiations. The consequences of any such failing are plain. In his letter to the Canadian Judicial Council, Twaddle J.A. wrote,

---

37 *Supra* note 24 at 307.

38 In 1986, trial projects on victim impact statements were conducted in six Canadian cities, Winnipeg among them. Although 81 percent of participants supported their use, they are rarely used in Manitoba courts. See D. Pedlar, *Domestic Violence Review into the Administration of Justice in Manitoba* (Manitoba: Justice, 1991) and A. McGillivray & B. Comaskey, *Intimate Violence, Aboriginal Women and Justice System Response: A Winnipeg Study* (Winnipeg: July, 1996).

> The media have reported, and the complainants may have read, additional facts about this case. It appears that the victim's mother has made reference to other charges against the offender which, if proved, would undoubtedly have affected the outcome of the appeal. But the charges of uttering threats and dangerous driving—and perhaps some others—were not proceeded with by the Crown, were not admitted by the offender and in those circumstances were not matters the Court could properly consider.

This is a surprising statement, given the Martin Report and the fact-ethics governing prosecutors. In answering the question of whether Bauder posed a danger to the community, the Court of Appeal concluded, "[o]n the facts of this case, the answer is obviously in the negative." In granting a conditional sentence to a defendant whose behaviour is shown to be predatory and violent, *Bauder* demonstrates the consequences of case processing which results in incomplete facts that distort the legal meaning of the events.

IV. CONDITIONAL SENTENCING

BAUDER'S SOLE GROUND OF APPEAL was the service of his sentence. The sentencing court denied his request for a conditional sentence. *Criminal Code* amendments in 1995 set out principles of sentencing and permit the service of sentence in the community if the sentence is under two years and the defendant does not present a danger to the community. Section 742.1, "Conditional Sentence of Imprisonment," came into force 3 September 1996. The section lends support to diversion and community or circle sentencing in First Nations communities.[39] It is intended to reduce Canada's high rate of incarceration by permitting a sentence under two years to be served in the community if the offender is not dangerous. The wording was amended effective, 2 May 1997, by adding, "and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2." This wording invites reappraisal of the sentencing principles and factors applied to the calculation of a conditional sentence.

The Manitoba Court of Appeal declined to apply the amended version in *Bauder*.

> After imposing a nine-month prison term, the only remaining question the sentencing judge should have asked was whether an order allowing the accused to serve the sentence in the community would endanger the safety of the community. ... What must be looked at is the nature of the offence and the accused's background. Is there a likelihood that the accused will conduct himself during the sentence in a manner which will endanger the community?

---

39 See R.G. Green, "Aboriginal Community Sentencing and Mediation: Within and Without the Circle" (1997) 25 Man. L.J. 77. On s. 742.1 and circle sentencing, see *R. v. Manyfingers* [1996] A.J. No. 1025 (Q.L.) (Alta Prov. Ct).

It was solely on this basis that the Crown appealed to the Supreme Court of Canada.

Section 718 sets the record straight with respect to common law sentencing goals which had been questioned in recent decisions.[40] "Goals and purposes" include denunciation of the conduct, specific deterrence of the offender, general deterrence of others who might commit such an offence, and isolation. Section 718.2(e) directs the court to consider sanctions other than imprisonment which would be reasonable in the circumstances, "with particular attention to the circumstances of aboriginal offenders"—a nod of approval for sentencing circles. Section 718.2(a) sets out circumstances which aggravate sentence. These include the abuse of a position of trust or authority and evidence that an offender abused his or her spouse or child. In view of current knowledge of the impact and sequelae of child sexual abuse and the legal presumption that adults generally occupy a position of trust, the restriction to the child of the offender seems thoughtless. The injury of any child by any adult should be an aggravating factor in sentencing. Where the motive is sexual gratification of the adult, this should further aggravate penalty. That Bauder was in a position of authority over the complainant as her employer and in a position of trust toward her as a guest in his home did not aggravate sentence. The Manitoba Court of Appeal declined to look behind the sentencing court's reluctant approval of the joint plea-bargained nine month sentence and mechanistically applied its designation of the offence as "willing" and consensual.

The Alberta Court of Appeal ruled in *R* v. *S. (W.B.)*; *R.* v. *P.(M.)*[41] that a major sexual assault of a child by a parent or person in a position of control and trust constitutes a separate category of sexual assault, with a starting-point of four years in calculating sentence. The purpose of sentencing is general deterrence and denunciation, and the high risk of serious psychological harm to the child can be reliably presumed even where no evidence is called. It is strange that this Alberta precedent is not followed in child sexual assault cases, while the *Sandercock* tariff governing sexual assault generally was used in the case of a 15 year old victim, heard by the Manitoba Court of Appeal seven months after *Bauder*.[42] Principles of deterrence and denunciation in child sexual abuse and

---

[40] For example, see *R.* v. *Sweeney* (1992), 11 C.R. (4th) 1, 33 M.V.R, (2d) 1, 71 C.C.C. (3d) 82, 15 W.A.C. 1 (B.C. C.A.) rejecting denunciation and "just deserts" as retributive. But see *R.* v. *C.A.M.* (1996), 46 C.R. (4th) 269 (S.C.C.), endorsing denunciation as reflecting "society's condemnation of that particular offender's conduct," and retribution as "an objective, reasoned and measured determination of an appropriate punishment." "Vengeance," however, is to be avoided.

[41] (1992), 73 C.C.C. (3rd) 530, 15 C.R. (4th) 324, 127 A.R. 65 (Alta. C.A.).

[42] Why was the Alberta tariff not applied in *Bauder*? Another Alberta tariff was applied, that set in *R.* v. *Sandercock* (1985), 12 C.C.C. (3d) 79 (Alta. C.A.) which starts with three years, subtracts time for mitigating factors and adds time for aggravating factors including previ-

taking judicial notice of trauma have found wide support in the courts, including the *Bauder* sentencing court, and are reinforced by s. 718. The age of the child, the offender's position of trust and authority over her, the fact of major sexual assault, and the sentencing court's insistence on incarceration as a deterrent and as denunciation were all before the court.

The problem begins with s. 742.1. In deeming that a sentence not served in prison is a "sentence of imprisonment," this legal fiction fails to recognise the obvious. A sentence however conditioned in which one lives at home, goes to work, and generally continues on as before is a significantly lighter disposition than one served in a correctional centre. It neither carries the message to the offender or to the community of the degradation and stigma of incarceration, nor provides a period of absolute safety for victim and community promised, however temporary, by jail.[43] If facts which tend to prove future endangerment are barred by plea bargain and if courts continue to reject denunciation and deterrence in child sexual assault cases, conditional sentencing is inherently dangerous.

It may have been the furor surrounding *Bauder* that prompted the Manitoba Court of Appeal to take the unusual step of ruling *per curiam* in a subsequent

---

ous convictions. The *Sandercock* tariff was applied in a case decided by the Manitoba Court of Appeal seven months after *Bauder*, *R. v. S.M.(E.)* (unreported, 10 November 1997). S.M. appealed his seven year sentence for the sexual assault a 15 year old girl on grounds that it was "harsh and excessive, given the nature of the offence." The trial court applied *Sandercock*. Twaddle J.A. for the Manitoba Court of Appeal approves of the approach. "Although the victim suffered no direct physical harm, she suffered psychologically to the extent that, while still in the accused's apartment, she attempted to slash her wrists. The accused was as uncaring then as he continued to be when he required her to relive her experience by testifying ... ." In 1988, the defendant had been sentenced to four years on seven counts of physical and sexual assault of this same victim. Aggravating factors in the present case were the planned nature of the assault, the use of a 14 year old accomplice, the fact that there was more than one attack; the victim was given drugs and alcohol; her "youth and lack of sophistication"; and "psychological harm as evidenced by her attempt to slash her wrists." Deterrence, denunciation and public protection justified the seven year sentence based on the accused's "disposition to abuse women, a disposition modern society will not tolerate." The language of the court is considerably more careful and sensitive than that employed in *Bauder*. But even this post- *Bauder* new wave in child sexual assault sentencing is contradicted by the dissent of the sole woman on the bench. Helper J.A. writes that "the sexual assault itself was not one that can be described as anywhere near a 'worst case scenario'." She would substitute a sentence of five years.

43 Whether any but the extremely dangerous should be incarcerated is a subject for another essay. Incarceration at present serves an important function. Of all available disposition alternatives, it is the only one seen as "real" punishment. For victims of intimate violence, it also provides a period of safety which no conditions or protection orders can equal. See A. McGillivray & B. Comaskey, "'Everybody Had Black Eyes ... Nobody Don't Say Nothing': Intimate Violence, and Justice System Response" in K. Bonnycastle & G.S. Rigakos, eds., *Unsettled Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Vancouver Collective Press, 1998) c. 13.

conditional sentencing case, R. v. R.(R.A.)[44]. Its 18 typewritten pages compare with a scant three pages in *Bauder*. One notable difference is that post-trial changes to "relevant facts" and the *Criminal Code* were admitted in *R.*, whereas additional facts and the forthcoming explanatory amendment to s. 741 were rejected in *Bauder*. R. was convicted on one count of sexual assault and two counts of common assault of a 19 year old woman he employed on his farm between November 1990 and September 1991. He had been acquitted by the Court of Appeal of two charges of sexual assault of another female farm worker shortly before this case came to appeal, for which he was to have served two concurrent 10 month sentences consecutive to the 12 month sentence for the charges in this case. The acquittal constituted the "new facts."

Sections 718 and 742.1 were retroactively applied and R. received a conditional sentence. The amendment to s. 742.1 "had little impact," according to the court. In *R.*, as in *Bauder*, the defendant was deemed unlikely to re-offend. The cases resonate oddly: the court in *R.* "would characterise the appellant's general conduct towards the complainant as mean-spirited and abusive" and the complainant as a "self-described shy and somewhat naive" woman living with her parents, while the court in *Bauder* characterised the appellant as immature and the child as willing, sophisticated, and consenting, even though she was legally unable to consent. The complainant in *R.* at age 19 was well within the legal compass of consent. Both victims were employed by the offender; R.'s victim as a worker on his "mixed dairy and P.M.U. operation" and Bauder's victim as a casual babysitter.

R. had ordered his victim to lie down. He then "proceeded to take off her pants and inserted his finger into her vagina, told her not to tell anyone and departed for breakfast." Bauder had similarly instructed his 12 year old victim, but he raped her and took a shower. The second and third incidents were charged as common assault: R. put his fingers up her nostrils and pulled, causing bleeding; he ordered his sons and a worker to carry her to the house; when she struggled, they dropped her, and R. dragged her across a gravel driveway saying she was fat and would eat when he told her to. Bauder raped a child twice more. R.'s victim was awarded $10 000 for gender discrimination by the Human Rights Commission. Bauder's victim was not eligible, nor was she told about the Criminal Injuries Compensation Board, which would have paid for private counselling. Marriage plays an odd role in the unique judicial mythology of sexual assault: R. "had a sound marriage" but Bauder's was failing—no sex for three years and a babysitter turned 12 tended to mitigate the rape. Sound or

---

[44] (1997), 118 Man. R. (2d) 37 [hereinafter *R.*]. The judgment is written by Lyon, Kroft, and Monnin JJ.A. I do not know why the name of the accused is protected by initials. He is not a relative, on these facts, of the victim. It is only her identity which needs to be protected. Although the case arose in a small community, it is an unusual step.

failing, marriage was considered an alleviating circumstance in Bauder's rapes and R.'s assaults.

R. had his supporters and they "are no doubt sincere but they only serve to show that there is an ugly side to the accused of which they were not aware," wrote the Manitoba Court of Appeal. But the only reason to incarcerate R. would have been, the court said,

> [T]o seek revenge or retribution for the totally unacceptable manner in which he has treated a young and vulnerable person. Such a motive might be understandable, but it flies in the face of legislation which we are bound to follow and apply.

Despite vast differences between the nature and degree of the offences and the victims' ages and capacity to consent, R. and Bauder were awarded the same sentence, nine months, a sentence which is "fit and proper whether the term is served in jail or in the community." The court was "convinced that this is the kind of situation which ought to invoke the application of s. 742.1," and stated,

> It is trite to say that the role of this Court is neither to agree nor disagree with the policy of Parliament as reflected in its legislation. Our task is to interpret the legislation as best we can and then to apply it accordingly. If the Canadian public is not pleased with the manner in which the legislation is being implemented, it should press Parliament to make modifications or clarifications so as to better reflect its wishes. Indeed, the amendment to s. 742.1(b) seems to have been an inadequate reaction to such pressure.

If you don't like what you get, don't blame us, blame Parliament. In an indirect reference to the public criticism of conditional sentencing in *Bauder* ("confusion and controversy"), the Court turned the spotlight on itself (or perhaps on its brother Twaddle, who was not an author of this decision) writing,

> From the vantage point of a judge who must sentence individuals in accordance with established sentencing principles, the enactment of conditional sentencing provisions brought a very significant change to the Canadian penal justice system. We are not, however, convinced that the concept of being incarcerated but serving that confinement in the community rather than inside a prison is either understood or welcome .... When judges impose sentences pursuant to such legislation, they are not pampering criminals—they are simply implementing the law that has been prescribed by a democratically elected Parliament.

The Court emphasised that "there are no offences and no offenders *per se* that are automatically precluded from the benefits of the new sentencing scheme, provided they meet the benchmark of time and non-danger to the community. If the intent of Parliament had been to exclude sexual or other violent offenders, the drafters of s. 742.1(b) could easily have said so."

This shift of burden is problematic. Inadequate sentencing at the first stage is now rewarded by a community sentence at the second stage of sentencing. Defining what is "in" and what is "out" is a fool's game. Saying that X is different from Y immediately draws dissenting opinions which split hairs over why X really is like Y. Sex offences against children are like sexual assault of women,

which is then similar to physical assault, as in the degrading circumstances of *R.*, which is then like defrauding the elderly, as all offences are breaches of trust, and so on.

If the goal of sentencing reform is first to reduce the prison population and support alternative justice resolutions, and second to recall the courts to the full panoply of sentencing principles in evaluating damage, disposition and the public interest, then the failure of Parliament to set offence-based limits cannot be the centre of the conditional sentencing problem. The problem lies elsewhere—with the courts, the prosecution, and the administration of justice. Where judges feel that they must artificially deafen their ears to facts raised in presentence reports but excised by plea bargaining, and this erosion of facts is compounded whether by system error, prosecutorial laxity, or lack of victim input, no act of Parliament can remedy the situation or restore public confidence in the administration of justice.

Sex offences against children almost always draw sentences of under two years.[45] This permits the court to attach further probation conditions including counselling. Alternatively, it may reflect perceptions of sex offences as minor and sex offenders as casual rather than committed, thus explaining why marriage plays such a strong mitigating role. It potentially reflects massive discrimination against children under 10 or 12, who are widely regarded by the system as being too young to testify. Thus, adolescent children are more often the victims in cases heard by the courts and damage to them is seen as less severe. Another explanation for short sentencing is plea bargaining. A guilty plea mitigates sentence as evidence of remorse even where, as in *Bauder*, denial of the seriousness of the conduct and lack of remorse are evident.[46] In sexual assault and

---

[45] A study of over 1000 Halifax-area sexual assault cases disclosed that a sentence of under two years was awarded in four of five cases. By comparison, sentences of over two years were awarded in one in two cases of robbery. The victim in 87 percent of sexual assault cases was a woman or girl, compared with 34 percent of robbery victims. Adults who sexually assault children received lighter sentences than those who assault women: 13 percent of those whose victims are children receive a sentence of over two years, compared with 30 percent of those whose victims are women. Violence accompanies 80 per cent of adult sexual assault cases compared with 30 percent of child sexual assault cases. E. Renner, *Psychology Today* (June 1997). Children are for obvious reasons easier to control and little physical violence is required. The inference is that the child was willing and unharmed. This flies in the face of decades of study of the impact of child sexual abuse.

[46] Bauder showed no evidence of remorse. His interjections at trial show his denial of the fact that he raped an underage child, lying to the court about her age against the pleaded facts (see above).

particularly child sexual assault, a guilty plea has even greater mitigating power because it spares the trauma of victim testimony.[47]

These are practical considerations, but there are deeper questions. Does reduced sentence reflect the trivialising of child sexual assault by the courts in the complex contemporary politics of discovery, sensationalism, and backlash?[48] Does it reflect the failure of the justice system to adequately evaluate the harm of child sexual assault? Is there a systemic intrusion of a discourse of consent even where consent is barred by law?

V. THE DISCOURSE OF CONSENT

"THE GIRL, OF COURSE, COULD NOT CONSENT in the legal sense, but nonetheless was a willing participant ... more sophisticated than many of her age," Twaddle J.A. wrote in *Bauder*. In his response to the request of the Canadian Judicial Council for an explanation, he apologised for his choice of words:

> Unfortunately, when I came to express the reasons of the Court, I did so poorly and used language which invited misrepresentation. Based on the sentencing judge's acceptance of the victim's behaviour as consensual, I referred to her as "a willing participant." Like the sentencing judge, however, I recognised that consent could not be given by an under-age child. The essence of Mr. Bauder's offence was the advantage he took of the child, for which he received an appropriate sentence of nine months' imprisonment. In referring to the victim's participation in the sexual activity, I did not intend to minimise the offender's culpability, but only to indicate a circumstance favouring the view that his service of the sentence in the community would not pose a safety risk.
>
> My reference to the victim's degree of sophistication and the tasks which she performed was an inadequate attempt to explain the extraordinary relationship which we were told had developed between the victim and the offender, a relationship which lasted for two years after the girl reached the age of consent. As I pointed out in my judgment, this relationship was "entirely inappropriate and criminal." It was referred to only to distinguish the case from those in which "a child has been interfered with by force or deception." I might have added "or by intimidation." This distinction, like her consent, was relevant only to the issue of community safety and, even then, only to the extent that the circumstances in which the relationship developed were unlikely to recur.

Yet the trivialising of sexual assault and inappropriate discourses of consent in the Manitoba courts and most notable in the Court of Appeal is not unique to

---

47 A. McGillivray, "Abused Children in the Courts: Adjusting the Scales after Bill C-15" (1990) 19 Man. L.J. 549; *The Criminalization of Child Abuse* (LL.M. Thesis, University of Toronto, 1988) [unpublished].

48 *Ibid.* See also A. McGillivray, "Governing Childhood" in A. McGillivray, ed., *Governing Childhood* (Aldershot: Dartmouth, 1997).

Bauder.[49] It is part of a longstanding pattern. The Manitoba Court of Appeal wrote in a 1987 judgment involving the "fellating" of a girl of seven, that "[t]he evidence indicates that the victim in this case was the instigator of the sexual act. There was no evidence the accused encouraged or invited her participation."[50] Although on the facts the offender denied any need for counselling and showed no remorse, a three month intermittent sentence was ordered. O'Sullivan J.A. dissented, opting for a suspended sentence on grounds that the offender was not "inclined to molest children."[51] "I think that their record is an embarrassment," child abuse specialist Dr. Ferguson told the *Winnipeg Free Press*.[52] "They seem to feel that children really author these scenarios and therefore are not victims."

A three tier age and capacity based regime for the control of sex offences against children focused on sexual exploitation and capacity to consent was proclaimed in force January 1988.[53] Children under 12 are a prohibited category, based on empirical evidence that young children cannot evaluate the dimensions of consent to sexual activity and are particularly vulnerable to adult control. A partial prohibition exists for children between 12 and 14 who can consent to sexual activity with a person within two years of their age, if both are over 12. Children between 14 and 16 cannot consent to sexual activity with

---

49 M. Jensen, *An Analysis of Manitoba Court of Appeal Decisions in Cases Heard in the Winnipeg Family Violence Court, 1990–1992* (M.S.W. Thesis, forthcoming, University of Manitoba, 1998). See also A. McGillivray, "R. v. K.(M.): Legitimating Brutality" (1993), 16 C.R. (4th) 125 and "R. v. *Laramee*: Forgetting Children, Forgetting Truth" (1991) 6 C.R. (4th) 325. commenting on other decisions of the Manitoba Court of Appeal in child assault cases.

50 The sentence of nine months for committing "fellatio" on a seven year old girl was reduced to three months intermittent. The act is cunnilingus, not fellatio, comparatively passive in criminal assault terms. If a child somehow "invited" such an assault, the child is "acting out" an agenda set by earlier sexual abuse. Not only is the criminal law clear about its prohibition of such contact, but also requires that anyone who takes advantage of such a child be punished more, not less, severely. In these child sex cases, the Manitoba Court of Appeal seems strangely naïve.

51 O'Sullivan J.A. came under massive media fire for his comments in a child physical assault case in which he praised the accused, blamed the child and the mother for the assault and ruled prosecutorial policy in spousal assault to be an illegal limit on prosecutorial discretion (although the case had nothing to do with the "no-drop" policy. See A. McGillivray, *supra* note 50.) Leave to appeal to the Supreme Court of Canada was denied, as the defendant died shortly after of a heart attack at age 36. O'Sullivan J.A. went supernumerary shortly after this decision.

52 R. Teichrob, "Sexually abused child often ends up scapegoat," *Winnipeg Free Press* (30 June 1997) A7.

53 *Criminal Code* ss. 150–153. On the reforms generally, see *supra* note 32.

anyone in a position of trust or authority over them,[54] but after age 16 children can freely consent.[55]

This regime, set out in Bill C-15, replaced replacing statutory rape provisions which applied only to girls and left no defence of mistake of fact in consent, a problem under ss. 15 and 7 of the *Charter*. The regime is now gender-neutral and recognises the multiple forms of child sexual assault. Offenders may force children to sexually touch one another and the defendant, which is not technically assault. By establishing a limited defence of mistake of fact, the reforms accord with *Charter* requirements of fundamental justice. The age-based consent provisions recognise the developing autonomy interests of children.[56]

In the debates of the House of Commons Committee on Bill C-15, Senior General Counsel for the Department of Justice Richard Mosely stated, "[c]onsent is not pertinent to the offences that are being created by this bill in relation to child sexual abuse."[57] Professor Nick Bala also told the Committee,[58]

> I think there are a lot of situations going on right now, and I am not talking about hundreds or dozens but literally thousands, in this country over the years where people in a position of authority have had sexual relations with adolescents under the age of 18. Although there has been nominal consent, or indeed perhaps there was true consent, *whatever that is*, it is the exploitative nature of the relationship that causes concern. [Emphasis added.]

Children give consent to adults because children must trust adults for life and nurture. We train children to obey adults, we cause children to fear them, and children fear us. We are larger and able to control every aspect of children's lives. An adult who is a relative or a trusted family friend and an employer is in a particularly strong control situation. Bauder, an adult, employer and family friend known to his victim for three years gave a 12 year old child orders, and she obeyed them. Raping 12 year olds is easy. What is difficult to understand is the belief of the judicial system in children's complicity in or even instigation of rape.

---

54 The oath requirement was relaxed; child victims could be examined behind a screen or via television link so they would not have to see the defendant and children can give evidence-in-chief by way of videotape. On the constitutionality of videotaped evidence, see *supra* note 50, McGillivray, "R. v. *Laramee*: Forgetting Children, Forgetting Truth."

55 An exception is made for anal intercourse, which is prohibited absolutely under age 18.

56 See T. Sullivan, *Sexual Abuse and the Rights of Children: Reforming Canadian Law* (Toronto: University of Toronto Press, 1992).

57 *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15* (17 March 1987) at 10:11.

58 *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15* (11 December 1986) at 3:23.

The abundance of child sexual assault cases[59] in the judicial system does not justify the ennui apparent in the Manitoba Court of Appeal with respect to intimate violence cases,[60] nor can it justify the system failure exemplified in the prosecution of Dean James Bauder. Even those sympathetic to the general purpose of conditional sentencing—"to keep people out of jail when there are better alternatives" as the Court put it—are sorely tried by case mismanagement, lack of victim input, systemic discrimination against children, and the application of dead doctrine by the courts. Myths abound. Sexual abuse does not hurt; children are not believable; children should be spared the trauma of testifying at whatever the cost to the administration of justice and to their own sense of justice; and sophisticated little girls ensnare innocent men, jail-bait to the last: "willing," "sophisticated" and consenting, leading men on, playing grown-up, bullying them. That the law says they cannot consent factually or legally is a minor problem in myth-making.

Raising the spectre of consent subverts the reforms to the *Criminal Code* and flies in the face of empirical knowledge gained over the past three decades. Blithe assumptions of complainant complicity and lack of injury continue the discounted discourses of "good" children—those of "previously chaste character" validated in statutory rape provisions—and "bad" children, the Lolitas still lurking in the popular and judicial imagination. If these Lolitas exist, they prefer children of their own age (as Nabokov's character Humbert Humbert sadly discovers). If children under 12 are "sexually aggressive" (always female in the case law), they have been made so by premature sexual victimisation. If a small child displays sexual behaviours (emphatically not the case in *Bauder*), this is evidence that the child has been sexually pre-activated by a previous abuser.[61] Acting-out cannot mitigate further exploitation and abuse of such injured chil-

---

59 One in eight girls and one in 23 boys are sexually abused. Girls are three times more likely than boys to be sexually abused (12.8 percent of girls, 4.3 percent of boys). A greater percentage of girls are severely sexually abused (11.1 percent) than boys (3.9 percent). H.L. MacMillan *et al.*, "Prevalence of Child Physical and Sexual Abuse in the Community: Results from the Ontario Health Supplement" (1997) 273 J. Am. Med. Assoc. 131–135.

60 See cases discussed in M. Jensen, *supra* note 50.

61 No words can describe the experience of holding a three year old child anally raped in a male sex romp who attempts to "tongue-kiss" and simulate sex, and must be carried backwards. Or the years of therapy with slow revelation of death threats and disappointed promises of extra candy at Halloween. Or the disappointment with the system's powerlessness to prosecute where the child is "too young" or too destroyed to give evidence. The Bill C-15 reforms have not solved, even theoretically, all of the problems of criminal prosecution of child sexual assault. Children testify with their bodies but this hearsay is not admissible. Physical traces left on the body, ruptures and emissions, are rare. Psychological traces seem to be a language the courts cannot read or refuse to read as translation is required.

dren, as it may have done in the infamous Manitoba Court of Appeal ruling in the "fellatio" case.[62]

To read into the sequelae of sexual abuse or a child's slow harmonious self-discovery of sexuality a sexual invitation is to doubly abuse, taking advantage of a child who has been victimised, taking advantage of a child on the edge of her own awareness; taking advantage because she is ultimately a child and disabled from complaint.[63] If we value children and their choices, we do not take advantage of their vulnerability. As adults, we are privileged in our privacy with children, both our own children and our guests. They are in our houses, fed, maintained, and sometimes employed by us as babysitters or otherwise; and we, fulfilling our part of the social compact with respect to children, are seldom scrutinised. The complicity of the courts in the charade of consent is obnoxious.

The abuse of a position of trust or authority over children invites aggravated penalties in law. This is now codified in s. 718 of the *Criminal Code*. We do not expect our courts of law to fall back into the dead discourse of seduction and consent. If children are legally unable to consent and factually unable to consent, there is no room for any judicial discussion of consent, willingness, sophistication, or anything else. To speak of consent where consent is impossible and use consent to mitigate sentencing where consent is barred, courts act outside their sphere of competence; they act unlawfully. *Bauder* is not the most extreme example. If we are to take seriously Parliamentary reforms to the *Criminal Code*, we cannot pick and choose. Children can consent only in limited circumstances under the age of 16, and where they cannot, aggravating factors set out is s. 718 apply. The Manitoba Court of Appeal has doggedly applied conditional sentencing provisions introduced in 1996, but child sexual assault reforms have been in place since 1988. Why can the court not take the same dogged approach to child sexual assault provisions as it has to conditional sentencing?

There were deep inadequacies in Bauder's investigation and prosecution.. The failure of Winnipeg Police Services to ensure that a trained interviewer took the child's statement resulted in a misdirected description of the events. The crown's failure to interview the victim left these gaping holes. There were other failures in prosecution and case management—the crown neglected to include the victim in plea bargaining decisions, request a victim impact statement, ensure that the plea bargain fully and accurately reflected the facts including aggravating circumstances with respect to the victim and facts pointing to community endangerment, and object to defence counsel claims of consent

---

62 *Supra* note 48.

63 "Child sexual abuse typically occurs over a fairly long period of time, often does not involve physical violence, but is experienced by the child as coercive and assaultive." R. Gunn & R. Linden, "The Processing of Child Sexual Abuse Cases" in *Confronting Sexual Assault: A Decade of Legal and Social Change*, J.V. Roberts & R.M. Mohr, eds., (Toronto: University of Toronto Press, 1994) at 85.

and introduction of false and unexamined "facts." The crown failed to ensure case control, with the result that five different prosecutors were involved in 12 appearances, including some four adjournments necessitated by misplacement of the pre-sentence report. Lax prosecution and wrist-tap sentences abuse both the criminal process and the trust of child victims, that same abuse of trust at the heart of assaults against children.

Only time will tell whether this case brings to an end the judicial intransigence which insists on children's "willing participation" in their own assault, as authors, as Dr. Ferguson put it, of their own abuse.[64] While such scenarios may make enticing reading, they are entirely delusive. As the *Bauder* case shows, the judiciary as well as the Crown have much to answer for in the prosecution of offences against children in Manitoba.

---

[64] *Supra* note 52 at A7.