

6. Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*

*Lucinda Vandervort**

Lucinda Vandervort's chapter takes a detailed look at the Edmondson, Kindrat, and Brown prosecutions, also discussed by Elder Campbell, Priscilla Campeau, and Tracey Lindberg in the previous chapter. These cases involved three non-Aboriginal men accused of sexually assaulting a twelve-year-old Aboriginal girl. This saga, like the Louise Nicholas trials presented earlier by Julia Tolmie, was fraught by many legal errors, resulting in long and complex proceedings, including two jury trials, several appeals, and two retrials. Lucinda argues that the failure to adhere to the applicable law governing the prosecution of sexual assault allows decision-makers to rely on racial and sexual biases, stereotypes, and irrelevant "facts," as also seen in the previous chapter. She highlights the unbearable burden placed on this young witness by a process that failed to adhere to the law of sexual assault and, in turn, reinforced the public impression that the race, sex, and age of complainants and accused can be used to subvert justice. Lucinda advocates a combination of innovative systemic remedies and incremental changes in police, prosecutorial, and judicial policy and practice to secure more effective enforcement of the sexual assault laws.

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R v Edmondson, *R v Kindrat*, and *R v Brown*¹ (2001–2008) provide disconcerting evidence that patterns of practice in sexual assault cases continue to be largely resistant to meaningful change at the grassroots level, at least in the province of Saskatchewan. Misunderstanding and confusion about the applicable substantive law appear to have shaped crucial decisions in handling these cases at key points throughout the proceedings, in both the trial and pretrial phases, and in the Court of Appeal. Police failed to use the tools available to record and preserve testimonial evidence by children and other fragile witnesses for subsequent use at trial. Some relevant evidence was not preserved, while effort appears to have been expended in investigating issues that had no bearing on the case. Preparation of the case may have been shaped by misunderstanding about which facts were material for proof of the essential elements of sexual assault and consent as defined in law. That may also explain why evidence of matters that had no bearing on the case and violated rules prohibiting the introduction of evidence of personal and sexual history was subsequently raised by counsel at trial, admitted into evidence, and referred to by the judge in summing up the case for the jury in 2003. Indeed, many aspects of the case show that some key participants lacked familiarity with sexual assault law and current legal standards for the conduct of sexual assault cases. Overall, the handling of the case stands as a stark indictment of the operation of the criminal justice system in sexual assault cases in Saskatchewan.

Current legal standards are based on the Supreme Court of Canada's interpretation of legal principles and rules within a human rights framework. Those standards require that all legal professionals working in the courts and other branches of the criminal justice system strive to avoid blinding themselves to the influence of racism, misogyny, and

1 *R v Edmondson*, [2005] SJ No 256; 2005 Sask CA 51; [2006] 6 WWR 74; 257 Sask R 270; 196 CCC (3d) 164; 65 WCB (2d) 178, Docket 673 and Docket 703 on appeal from QBC 1358/02 JC of Melfort. (The Crown's application to the Supreme Court of Canada for leave to appeal the Court of Appeal's decision to uphold Edmondson's sentence was filed on 6 June 2005 and dismissed without reasons on 20 October 2005; *R v Edmondson*, [2005] SCCA No 273). See *R v Brown*, [2005] SJ No 43; 2005 Sask CA 7, Docket 687 on appeal from QBC No 1357/02 JC of Melfort for the judgment on the appeal of Kindrat and Brown's acquittal. Dean Edmondson was tried by a jury in 2003 and convicted. Jeffery Lorne Brown and Jeffery Kindrat were tried together in 2003 and acquitted by the jury; a retrial was ordered in 2005. Those cases were severed in 2007. The *Kindrat* retrial by jury proceeded in 2007, leading to an acquittal that was not appealed. Brown's retrial was adjourned until May of 2008. The jury failed to reach a verdict and the matter was stayed by the Crown in early July of 2008: "Balancing justice in a difficult case", Editorial, *The [Regina] Leader-Post* (9 July 2008) B8.

outmoded cultural attitudes and norms on their own perceptions and conduct and those of everyone else who participates in the criminal justice process in any capacity. It is undeniable that these requirements may impose heavy demands on judges and counsel in sexual assault cases, that their performance will not always be perfect, and that when it falls short, they may often be unaware of this fact.

But it is also well recognized that interpretation and enforcement of the sexual assault laws is very easily confounded by error due to the strong influence of invalid generalizations about male and female gender roles and sexuality — myths and stereotypes, generalizations about the links between sexual activity, gender, race, consent, and a wide range of personal and social factors and characteristics. Legal deliberation about sexual assault is known to be easily distorted by attitudes that reflect gender and racial bias and prejudice. Some of that prejudice and attitudinal bias is conscious, but much of it is often outside ordinary conscious awareness. In an attempt to protect “truth-finding” in the legal process against distortion by unsound generalizations and assumptions, Canadian law has developed rules of evidence and procedure specifically designed to restrict the admission of extraneous evidence (not material in law to the issues to be determined), and to protect legal deliberation from the influence of invalid assumptions and generalizations. Adherence to these rules of law and related standards of judicial practice and rules of professional conduct is essential in sexual assault cases. When these rules are not assiduously followed at trial and are not strictly enforced by the appellate courts, the result can easily be an unsound verdict based on fallacious reasoning using invalid premises and evidence of facts not legally material to the issues to be determined.

These considerations may explain much of what went wrong—and was widely seen by the public to go wrong—in the cases of *Edmondson*, *Kindrat*, and *Brown*. When the practices used in these cases are measured against current legal standards, we certainly do see significant gaps between what was done and what those standards require. It is always the case that jurists who engage in an undisciplined use of discretion, and who rely on personal views and opinions, do justice no service. This is true whether they act in the belief that what they are doing must be “right” because they “mean well” or, in the case of counsel, because they believe, erroneously, that their duty to protect the client’s interests requires them to do so.² When discretion, unconstrained by law,

2 See, for example, *R v Murray* (2000), 186 DLR (4th) 125 (Ont Sup Ct J).

governs the conduct of a sexual assault case, the proceedings are vulnerable to capture by the very ideologies of prejudice and social ignorance that the law of sexual assault, and the rules of evidence and procedure, are designed to exclude. This is why the choice not to adhere strictly to legal standards in the prosecution and trial of a sexual assault case is so detrimental. The evidence of failure to adhere to current legal standards seen in the record in the *Edmondson*, *Kindrat*, and *Brown* cases suggests there are serious problems with aspects of the operation of the criminal justice system in sexual assault cases in Saskatchewan. Whatever the root causes of these deficiencies may be, they pose a challenge to the administration of justice in Saskatchewan and call for decisive action.³

The proceedings in this case extended over a period of almost seven years through two preliminary hearings, appeals, motions, two trials, and two retrials. The objective of this case study is to examine the evidence and extract and record deficiencies and other problems documented by that evidence. This preliminary report highlights selected issues and begins the process of reflecting on their significance and impact on the criminal justice process as it unfolded in the context of the social realities of Saskatchewan in the period 2001–2008. It is useful to begin with an overview of the facts of the assault and the subsequent legal proceedings.

THE ESSENTIAL FACTS OF THE CASE

On 30 September 2001, Edmondson, Kindrat, and Brown, all non-Aboriginal men in their twenties from the town of Tisdale, were on a Sunday afternoon “booze-cruise” in a pick-up truck, drinking beer and driving from small town to small town in the Saskatchewan countryside two hours northeast of Saskatoon. As the accused left the hotel bar in one of the small towns, after drinking alcohol and playing on the video machines, they saw the complainant sitting on the hotel steps. The complainant remembers that one of them immediately said, “I thought Pocahontas was a movie.” Quickly conferring with each other as they got back in the truck, they offered her a ride. She accepted. “You

3 This discussion refers to selected examples of procedural deficiencies and substantive legal errors. The conduct of the trials in 2003 has been aptly critiqued by others, including the Native Women’s Association of Canada; see Factum of the Intervener in the appeals in the Saskatchewan Court of Appeal in 2005, *supra* note 1. See also the factums filed by the Crown, *ibid*. Whether the criminal justice process in other provinces and territories is subject to similar deficiencies and legal errors in sexual assault cases is an obvious question but not one this chapter purports to answer.

can trust us,” said Edmondson, the driver, as Kindrat, who was sitting with her in the back seat, urged her to accept the first beer. The accused drove, drank, and talked. Under the influence of Kindrat’s persistent urging, the complainant finally drank one beer, and then three more within the first half hour. They stopped at a bar in yet another town, ate, drank, and bought more beer to go, bringing the total consumed in the truck that afternoon to about fifty-eight bottles. The accused also consumed alcohol in each bar they visited.⁴

As they approached the Tisdale area in the early evening, travelling on the back roads, the complainant, now quite drunk, was in the front seat kissing Edmondson, the driver, and pulling her pants up as Brown pulled them down. Edmondson stopped the vehicle and lifted the complainant out of the truck. The men took turns holding her down and having sex with her on the ground by the side of the road. Edmondson then carried the complainant to the front of the truck where, leaning back against the hood of the truck, he tried to have sexual intercourse with the complainant who was now naked from the waist down. He held her up with her arms and legs straddled around him. Soon the other two men each in turn came up behind her and attempted to have sexual intercourse with her from the rear as Edmondson continued to hold her. Afterwards none of the accused appeared completely sure whether they had or had not penetrated her, how (penis or finger), or whether it was anally or vaginally, but they all told the police they had tried. When the accused were finished with their sexual activity, the complainant was falling down, passing out, and helpless. They dressed her and put her back in the truck. She asked to be taken to a friend’s home in Tisdale. On arrival there, she could not walk unassisted and was screaming and crying about having been raped. The accused left her with the family and drove off.

The friend and his father promptly took her to the local hospital. She was seen in emergency and admitted. Rape kit tests were partially completed by a local doctor who was summoned to the hospital for that purpose. A blood sample was drawn from the complainant while the RCMP were in attendance at the Tisdale hospital, but it was not seized as evidence at that time and was never analyzed for its alcohol content.

4 This initial account of the facts is based primarily on the evidence as presented at the *Kindrat* retrial in 2007. Unsurprisingly, some evidence adduced in the other proceedings was not identical in matters of detail; the rulings on admissibility of the evidence were not identical; and the approaches taken by counsel differed somewhat. Some key differences are noted below.

(When the RCMP investigating officer attempted to obtain that blood sample in 2003 he was advised that it had been destroyed.) Two days later, the complainant was taken to the university hospital in Saskatoon for examination by a specialist. Diagrams were made of the location and size of the lacerations, bruises, and swollen areas on the complainant's body, but no photographs were taken. The complainant's evidence was never videotaped or audio taped for subsequent use in court.

The three men were arrested the day after the assault. Each of them, having first been warned, gave an incriminating statement to the investigating RCMP officers in Tisdale. Their statements included open admissions that they did not know how old she was, that they had given her alcohol in the form of a number of bottles of beer, and that they had engaged in sexual activity with her.

THE LEGAL PROCEEDINGS

Charges by indictment were laid against the three men under s 272(1)(d) of the *Criminal Code*, which provides that, "Every person commits an offence who, in committing a sexual assault, is a party to the offence with any other person." The maximum punishment following conviction under s 272(1)(d) is a sentence of fourteen years pursuant to s 272(2).⁵ The Crown prosecutor charged Edmondson separately so that he could be called as a Crown witness in the trial of the other two accused, and they could serve as witnesses in his trial. Preliminary inquiries were held. The two trials, presided over by Mr Justice Kovach, a Queen's Bench judge sitting with a jury, were held in Melfort, Saskatchewan, in the late spring and early summer of 2003. First the trial of Edmondson was held and then the trial of Kindrat and Brown.

The conduct of the trials in 2003 failed to observe the letter and the spirit of s 276 and s 278. These provisions were enacted to protect complainants' privacy and curtail the admission of irrelevant evidence by restricting reference to evidence of a complainant's sexual history and personal records. The evidentiary rules that curtail the admission of evidence of collateral facts were also often disregarded. The trial judge repeatedly allowed questions and answers that put evidence before the jury that directly or indirectly invited speculation and made insinuations or offered conclusions about the significance of the personal and sexual history of the complainant for the matters in issue. The effect was to ignore the restrictions imposed by s 276 and s 278 and to permit the judge, the counsel, and the jury to distract themselves with issues

5 In the text and notes below, section numbers refer to the *Criminal Code*, RSC 1985, c C-46.

that were “red-herrings,” not material in law for the matters to be determined in the proceedings. Interest in irrelevant issues was further fuelled by obvious confusion on the part of the judge and counsel about the law of consent and its significance for proof of the elements of the offence of sexual assault in the specific circumstances of this case.

Edmondson was convicted by the jury and, on 4 September 2003, was sentenced to a conditional sentence of two years less a day to be served in the community. Kindrat and Brown were acquitted by their jury. On 19 January 2005, the Saskatchewan Court of Appeal heard and dismissed Edmondson’s appeals against conviction⁶ and sentence and, in a brief oral judgment, allowed the Crown’s appeal from the verdicts of acquittal for Kindrat and Brown on the ground of multiple errors of law in the trial proceedings.⁷

Cameron JA did not provide a detailed account of those errors, but did direct that on the retrial the instructions to the jury were to include reference to s 273.2. That *Code* provision specifies circumstances in which the defence of belief in consent is not available as a matter of law. In this latter matter the court may have seen itself to be adopting the position of the Crown on the appeal. The *factum* filed in the appeal on behalf of the Attorney General of Saskatchewan, appellant in the appeal from the acquittal of Kindrat and Brown, stated:

The court did not instruct the jury in accordance with s 273.2. To be fair none of the lawyers, including the prosecutor, thought there was a need to refer to the section. With respect there was no choice in the matter. The court was under a duty to instruct the jury in accordance with s 273.2 and the failure to do so was a fatal one.⁸

The authority given for this proposition was *R v Ewanchuk*⁹ per Major J. However, in *Ewanchuk*, Mr Justice Major observed that s 273.2(b) of the *Criminal Code* only applies to cases in which there is an “air of reality” to the defence of mistaken belief in consent.¹⁰ The same comment applies to s 273.2 as a whole. In the absence of evidence on the basis

6 The Court of Appeal substituted a conviction under s 271(a) for the conviction entered at trial under s 272(1)(d).

7 *Supra* note 1.

8 *R v Brown*, [2005] S J No 43, 2005 Sask CA 7, Docket 687 (Factum of the Appellant at para 50).

9 *R v Ewanchuk*, [1999] 1 SCR 330 at paras 50, 65.

10 *Ibid* at para 60; see also paras 58, 64. The comment was made in response to the assertion by LHeureux-Dubé, J at para 98 that the trial judge in *Ewanchuk* erred in law by not applying s 273.2(b).

of which a reasonable jury deliberating in a judicial manner *could* acquit on the ground that the accused may have believed the complainant consented, the defence is not available. The defence cannot be left with the jury because, as a matter of law, it cannot result in an acquittal.¹¹

To ask a jury to consider the defence in those circumstances would be to invite them to arrive at an unsound verdict based on speculation. By ordering that the jury at the *retrial* be instructed on the defence of mistaken belief in consent, Justice Cameron was prejudging the availability of the defence. This was improper and an error of law. The availability of the defence in law could only be determined on the basis of the evidence presented on the retrial. Only if the defence of mistaken belief in consent was available in law based on the evidence adduced at the retrial would it be proper to instruct the jury to consider the defence. The Crown did not seek variation or review of Mr Justice Cameron's order. The Crown may have believed the order to be proper.

The retrial of Kindrat in 2007 showed less flagrant disregard for the *Code* provisions that restrict the admission of evidence of the complainant's sexual and personal history. However, despite submissions to the contrary by the prosecutor on the *Kindrat* retrial, the judge regarded herself as bound by Mr Justice Cameron's direction that the jury was to be instructed on the provisions of s 273.2. The judge who presided over Brown's retrial in 2008 also took this view. Accordingly, in each retrial, the jury was instructed to consider the defence of mistaken belief in consent even though, in each case, as I explain below, this was arguably an error of law. The defence was not available to either Kindrat or Brown on the evidence as a matter of law and should not have been left with the jury.

As noted above, no attempt was made by the chief crown prosecutor to have those directions amended or struck by the Court of Appeal when the order for the retrial was issued in January of 2005. It appears that the chief crown prosecutor, who worked closely with the office of the provincial deputy director of prosecutions [DDP] and argued the appeals before the Court of Appeal, assumed the defence would be available. This likely explains why the deputy director concluded that there were no grounds for appeal from the acquittal rendered by the

11 This is an application of the common law test for availability of defences based on sufficiency of evidence. Applicable to all statutory and common law defences, the test was codified in 1983 in the first branch of s 265(4) of the *Criminal Code* with respect to the defence of belief in consent. In *R v Osolin*, [1993] 4 SCR 595, s 265(4) was held to impose only an evidentiary burden on the accused and not to violate either s 11(c) or (d) of the *Charter*.

jury at the *Kindrat* retrial in 2007, and explains why the charges against Brown were stayed by the Crown in 2008 following Brown's retrial. In my opinion, the deputy director's position on this issue was not defensible. In both cases, the decision to leave the defence of belief in consent to the jury was an error of law. Therefore, there actually were grounds for appeal from the verdict of acquittal rendered by the jury in the *Kindrat* retrial.

Following *Kindrat*'s acquittal by two juries, a further retrial likely would have been condemned by some as an "oppressive" use of prosecutorial authority rather than viewed as necessary due to legal errors in both the trial and the retrial. However, an appeal of the acquittal on the ground of misdirection of the jury at the retrial was needed to clarify interpretation and operation of the law on the availability of the defence of belief in consent and interpretation and application of s 150.1(4) of the *Criminal Code*.¹² If an appeal from the acquittal had been granted on the ground of error of law and an order for a retrial issued, the Crown would then have had an opportunity to decide whether to prosecute. The chief crown prosecutor's decision not to appeal the verdict denied the court the opportunity to rule on any issue. The decision not to appeal also precluded any possibility of a further appeal to the Supreme Court of Canada.

The approach the DDP took in this case suggests that exercise by the Attorney General of Saskatchewan of prosecutorial discretion in relation to the appeal function does not always reflect current legal standards. The decisions taken by the Attorney General in this case may be indicative of an overall pattern of conduct that has significant long-term implications for judicial practice in sexual assault cases in the province and warrants close scrutiny. Over time and in the aggregate, failure to appeal what are arguably erroneous and regressive interpretations of the sexual assault laws allows those laws to operate differently in the province of Saskatchewan than current legal standards prescribe. This is a grave problem. Consider the following:

An accused may appeal from a verdict of conviction as of right. Only the provincial Attorney General is authorized to appeal acquittals in proceedings initiated by the provincial Attorney General. If prosec-

12 Section 150.1(4) of the *Criminal Code* provides that the defence of belief in consent is not available where an accused failed to take "all reasonable steps" to ascertain the age of a complainant who is less than fourteen years of age. The provision preserves a mistake of fact defence while, at the same time, requiring a high standard of care to protect underage persons. The section imposes a tactical evidentiary burden on the accused. See *infra* at notes 18 and 19.

utorial discretion is not exercised to appeal: (1) acquittals that are unreasonable verdicts or are based on misdirection, and (2) decisions and orders of the Court of Appeal that are arguably incorrect in law, sexual assault jurisprudence and the conduct of many sexual assault trials in the province of Saskatchewan will be inconsistent with current law as interpreted by the Supreme Court of Canada. This is not the first time the Attorney General of Saskatchewan has elected not to appeal a decision by the Court of Appeal in which the court arguably erred in law when interpreting the sexual assault laws. The decisions by the court in *R v Ecker*¹³ — impliedly authorizing the admission of evidence oth-

13 *R v Ecker* (1995), 96 CCC (3d) 161, 128 Sask R 161, 37 CR (4th) 51, 85 WAC 161 (Sask CA) per Cameron JA, Vancise JA concurring; Lane JA dissenting. This was an appeal by the accused from conviction in a trial in which the judge ruled sexual history evidence inadmissible under s 276. The Court of Appeal granted the appeal and ordered a new trial on the ground that the trial judge should have held a *voir dire* under s 276.2. In dissent, Lane JA observed that the order granting a new trial, so that the *voir dire* could be held, implied that the evidence was admissible under s 276(2) on the ground that it could support a defence of belief in consent. Lane notes that the original application (dismissed at trial) actually sought admission of the evidence for a prohibited purpose, ie to attack the credibility of the complainant. As such the application was properly rejected. Lane observes that even if the reason for seeking admission of the evidence had instead been to provide evidence of probative value on the issue of belief in consent, it was difficult to see how the alleged sexual touching of the accused by the complainant some weeks before the offence had any probative value for belief in consent in relation to the offence with which the accused was charged. I suggest that the error underlying Cameron's judgment is best viewed as an error about the definition of consent, ie an error of law. *Ecker's* purported reliance on belief in consent on the basis contemplated here by Cameron J would be a mistake of law, exactly like those so squarely rejected by Major J in *Ewanchuk*, *supra* note 9 at para 51. The decision rendered by Cameron JA for the Court of Appeal in *Ecker* should have been appealed. It was not, and the decision continues to be the leading authority under Saskatchewan law on interpretation of s 276.1 and, indirectly, as Lane JA recognized, on the admissibility of sexual history evidence under s 276(2) of the *Criminal Code*. In ruling on the latter issue, other provincial appeal courts generally omit any reference to *Ecker* or distinguish it — as in *R v CEN*, [1998] AJ No 1001 (Alta CA). Post-*Ewanchuk*, it should be apparent that, on the facts in *Ecker*, an accused could only be acquitted on the ground that the disputed evidence may have led him to mistakenly believe the complainant consented if he were permitted to use a mistake about the law of consent as an excuse. But *Ewanchuk* precludes that; the reasons for judgment by Justice Major invoke established common law principles, long codified in s 19 of the *Code*, to hold that a belief in consent that relies on a mistake of law does not excuse an accused. Reliance on the defence of belief in consent that is based on ignorance of the law or a mistake about the legal definition of consent is barred as a matter of law. The disputed evidence therefore has no probative value and therefore no legal relevance in relation to a material fact in issue and is not admissible. This illustrates the value of *legal* relevance as a tool in assessing the admissibility of evidence under s 276. See also Hamish Stewart, *Sexual Offences in Canadian Law*, loose-leaf (consulted

erwise excluded under the rape shield provisions, and more recently in the instant case in its decision in *R v Brown*¹⁴ — directing that the jury be instructed on the defence of belief in consent before it could be known whether the defence would be available on the evidence at the retrial, seriously impede effective enforcement of the sexual assault laws in Saskatchewan. The effect is that of balkanization: the creation of an island within Canada where key aspects of the sexual laws as amended in 1992 are not correctly interpreted and applied by judges and regressive interpretations of the sexual assault laws go unchallenged by the provincial Attorney General. This pattern of inaction by the provincial Attorney General is an issue of leading importance. Further evidence of such a pattern is seen in the Crown's decision to stay the charges against Brown following the jury's failure to agree on a verdict at his retrial in 2008. The Attorney General may have failed to appreciate that the jury's difficulty was most likely a direct consequence of misdirection, not weakness in the case for the prosecution.

At the *Brown* retrial, the evidence adduced by the Crown and ruled admissible by the judge provided a slightly different portrait of the facts of the case than had been presented to the juries in the earlier proceedings. Neither Kindrat nor Edmondson were called as witnesses for the Crown or for the defence. They were therefore not available for cross-examination. No sexual history evidence was admitted. *Voir dire*s were held to screen the witnesses' testimony for hearsay statements before they testified in the presence of the jury. Brown's warned statement, ruled admissible as a voluntary statement at the *voir dire* in March of 2009, was read into the record. In that statement, Brown admitted all elements of the offence; he stated that it happened because they had had "too much booze" and the complainant had "come onto them" by kissing them. Mr Brown did not testify in his own defence. In fact, the defence called no evidence.

Defence counsel (who had not represented any of the accused at the previous trials), tried to establish through cross-examination of the Crown witnesses that the complainant had appeared to be two or three years older than she actually was, was "strong-willed," and perhaps had

on 1 May 2009) (Aurora, ON: Canada Law Book, 2005). Stewart observes that *Ecker* "may come perilously close to permitting an accused ... to engage one of the 'twin myths' in order to assert a mistaken belief in consent" (8:200.20). In truth, this is precisely what it does.

14 *Supra* note 1.

not been as intoxicated as she now claimed. Under cross-examination by defence counsel, the complainant agreed that because she had “blacked-out” from time to time and could only remember portions of the trip from Chelan to Tisdale, she could not deny that she might have used words and engaged in conduct that the three men might have interpreted as communication of consent. This, which was not evidence but rather *speculation* about what she *might have said and done* that *might have been perceived* as communication of voluntary agreement or consent to the sexual activity that occurred, was then used by the defence to support the spurious argument that there was an *evidentiary* basis for the defence of belief in consent.

By contrast, the Crown pointed to the complete absence of evidence of words and conduct that constituted what the law would define as communication of consent by the twelve-year-old complainant to “group sex with three adult men in a ditch.” Similarly, the Crown found no basis in the evidence for the proposition that the accused actually believed she was at least fourteen years old and that they had taken reasonable steps to ascertain her age.

Availability of the defence of belief in consent as a matter of law was thus the crucial issue in the *Brown* retrial. The trial judge and counsel engaged in extended discussions about how the jury should be instructed. Defence counsel argued that the jury should be permitted to consider the possibility that the accused were mistaken about the child’s age and believed she consented. The Crown took the position that, on the evidence, there was no air of reality to these possibilities; the evidence did not provide a foundation for reasonable doubt on these issues and therefore the defence of belief in consent could not go to the jury. The defence objected that that approach would be tantamount to a directed verdict of guilty given that there was no basis for doubt about the identity of the parties, the complainant’s age, or the sexual nature of the physical touching. The options discussed ranged from the simple instructions required to put the elements of the offence to the jury to the complex and lengthy instructions the judge believed would be required to instruct the jury on the defence of belief in consent.

The trial judge expressed dismay and discomfort at the direction issued by the Saskatchewan Court of Appeal in 2005 and made it clear on the record that, although she would prefer to take the approach advocated by the Crown, she would not.¹⁵ She clearly saw herself to be

15 *R v Jeffrey Lorne Brown*, QBC 1 357/2002, JC of Melfort (Criminal jury); re-trial, Transcript of Proceedings, held: March 4, 2008, May 20, 21, 22, 23, 26, 27, 28, and 29. Volume IV, pp 594–767 at 692, 727, 735.

required to instruct the jury on s 273.2 as directed. So she did, stating, despite the Crown's objection that there was no evidence of consent as defined in law, that the jury would decide whether there was a basis for belief in consent.¹⁶ Closing addresses by counsel were brief; the jury instructions were long. The transcript shows, 120 pages later, that the jury was unable to arrive at a unanimous verdict. The trial was adjourned and the charges against Jeffery Lorne Brown were subsequently stayed by the Crown.¹⁷

The Crown was undoubtedly correct. It was an error of law to put the defence of belief in consent to the jury at the *Brown* retrial without a sufficient evidentiary foundation. In addition, the charge was arguably longer and more complex than was necessary and it is likely the jury was confused by the instructions. The charge included instructions on consent and belief in consent, and thus invited the jury to determine whether the complainant consented even though they were also told that she lacked legal capacity to consent because of her age. The question put to them should have been limited to whether the evidence showed that the accused could have believed the complainant communicated consent or voluntary agreement to the sexual activity that occurred and, if so, whether any of the grounds set out in s 150.1 or s 273.2 to preclude the accused from relying on a belief in consent as an excuse were proven. The phrase "honest belief" easily misleads even experienced jurists and should have been avoided in instructing the jury. The charge by the judge should have omitted the term "honest" and used only the statutory terms — "belief," "intoxication," "recklessness," and "wilful blindness" — in relation to s 150.1 and s 273.2. After *Esau* and *Ewanchuk*, there can be no question but that mistakes about consent that are reckless, wilfully blind, or due to intoxication, do not exculpate. Deliberate physical contact of a sexual nature entails culpability if the accused acts with awareness or suspicion that consent to that contact is absent, or relies on a mistake about the legal definition of consent. The instructions failed to make it clear that if the jury was satisfied that the evidence as a whole proved beyond a reasonable doubt that the accused

16 When the trial judge asked defence counsel to point to specific facts in evidence that showed communication of consent, he asserted that it was the "context" overall, not specific facts in evidence, that he relied on to provide the foundation for the defence. That is not what the law requires. In the end, the trial judge concluded (transcript, p 733) that the jury would decide whether the *evidence* that was available about the complainant's specific words and conduct supported the conclusion that the accused might have believed that she communicated consent to the sexual activity. Here we see a judge complying with an order that requires her to abdicate her role as arbiter of the law to the jury.

17 *Supra* note 1.

had been callously indifferent to the issues of age and consent, or had pursued his sexual activity with awareness that the complainant either was or might be younger than fourteen years of age, he was barred from using the possibility that he was mistaken about her age as an excuse, and could not rely on the defence of belief in consent.

UNREASONABLE VERDICT ON THE EVIDENCE?

The complainant was only twelve years of age at the end of September of 2001; therefore, as a matter of law, consent was not available as a defence.¹⁸ Testimony about her condition prior to and following the assault was available from numerous witnesses — the police officers, the physician who attended her at the Tisdale hospital, the specialist who documented her lacerations and bruises in Saskatoon, the Pierces who took her to the Tisdale hospital, and the bar-keeper in Mistatim. Other witnesses who saw her with the accused prior to the assault and in Tisdale following the assault undoubtedly could also have been subpoenaed. Evidence was adduced to prove that when she arrived in Tisdale shortly after the assault she was not only grossly intoxicated, but her clothes were covered with dirt and mud, and she was extremely distraught. Evidence from witnesses confirmed that it was impossible to communicate with her at the hospital, that she could not stand up, and that she was unable to co-operate or assist with any procedures. There were also incriminating statements from the three accused, obtained by the RCMP on 1 October 2001. Those statements, held to be admissible at trial, showed: (1) that each of them had engaged in sexual activity with the complainant, and (2) that they did not know how old she was. The evidence from these sources, all independent of the complainant, sufficed to show the nature and severity of the assault and, combined with a copy of the complainant's birth certificate to prove her age, provided admissible evidence of all the essential elements of the offence.

Evidence in the record shows the accused alleged that the complainant told them both that she was fifteen years of age and that she was almost fifteen years of age, and that the accused took no other steps to ascertain her age. One or more of the accused could have testified at trial in an attempt to show that he believed the complainant consented and that he should be allowed to rely on the defence of belief in consent because he took steps to ascertain her age and believed her to be fifteen

18 In 2001, the *Code* specified that valid consent to sexual activity could not be obtained from a person under the age of fourteen years. See s 150.1(1).

years old.¹⁹ But no accused testified in any of the proceedings other

19 In 2001, s 150.1 of the *Criminal Code* provided that where the complainant was under the statutory age of consent (fourteen years of age in 2001), no accused who was more than two years older than the complainant could rely on the defence of belief in consent *unless* the accused took “all reasonable steps to ascertain the complainant’s age.” Evidence of the steps taken is required to raise this issue. Ordinarily it will be necessary for the accused to testify to provide that evidence, but the accused may rely on any evidence before the court. For a few years the leading case on s 150.1(4) was *R v Osborne* (1992), 17 CR (4th) 350, a decision of Goodridge, CJN in the Appeal Division of the Newfoundland Supreme Court. Justice Goodridge stated: “It is more than a casual requirement. There must be an earnest inquiry or some other compelling factor that obviates the need for an inquiry. An accused person can only discharge the requirement by showing what steps he took and that these steps were all that could be reasonably required of him in the circumstances.” In *R v RAK*, [1996] NBJ No 104, [1996] ANB No 104, 175 NBR (2d) 225, 106 CCC (3d) 93, 30 WCB (2d) 213, No 293/95/CA (NBCA) per Hoyt CJNB, (Ryan and Turnbull JJA concurring), the court observed: “Almost without exception, the greater the disparity in ages, the more inquiry will be required.”

Since the mid-1990s, however, some provincial courts have moved beyond working with the provision as if it were a free-standing defence that merely requires a demonstration of “objective reasonableness” and instead now explicitly view it as a means of asking whether there is reasonable doubt about culpable awareness in relation to the age of the complainant. Thus *R v Westman*, [1995] BCJ No 2124, 65 BCAC 285, 28 WCB (2d) 440 (BCCA) per Southin, JA (Legg and Hinds, JJA concurring) construes s 150.1(4) as follows: “For the purposes of this section, a person who believes the complainant not to be under the age of fourteen years but who has failed to take all reasonable steps to ascertain the age of the complainant is recklessly indifferent.” In *R v P (LT)* (1997), 113 CCC (3d) 42 (BCCA) the court reviewed the authorities including *Westman* and concluded at para 19: “[W]here the defence of honest but mistaken belief in the complainant’s age arises in circumstances where s 150.1(4) applies, the Crown must prove beyond a reasonable doubt that the accused did not take all reasonable steps to ascertain the complainant’s age, or that he did not have an honest belief that her age was fourteen years or more. For the defence to succeed, it must point to evidence which gives rise to a reasonable doubt that the accused held the requisite belief, and in addition, evidence which gives rise to a reasonable doubt that the accused took all reasonable steps to ascertain the complainant’s age.” This approach, in which all reasonable steps are used to test the honesty of the belief, is explicitly approved in *R v Slater*, [2005] SJ No 412, 2005 Sask CA 87, [2006] 5 WWR 233, 269 Sask R 42, 201 CCC (3d) 85, 31 CR (6th) 112, 66 WCB (2d) 35 per Jackson JA, (Sherstobitoff and Lane JJA, concurring). The case law has, in effect, reaffirmed that at its root the issue is one of mistake of fact (in this case a mistake about age). Mistake of fact is a defence that operates by negating *mens rea* and therefore the ultimate issue has commonly been articulated as whether the accused “honestly” believed that the complainant was of the age of consent. Thus at paragraph 23 in *Slater*, discussing the companion provision, s 150.1(5), which is the same as s 150.1(4) in all material aspects, Jackson JA observes: “Section 150.1(5) was added so as to test the foundation of an honest belief, not to impose an additional burden on the Crown. The purpose of s 212(4) and s 150.1(5) is to protect minors from becoming involved in the sex trade by discouraging those who would, but for the provision, choose to exploit them.” These

than as a witness for the prosecution. Any accused who testified in his own defence would have been subject to cross-examination²⁰ by the prosecutor. The statements the accused gave to the RCMP on 1 October 2001 showed that the accused did not actually *know* her age and provided ample grounds to infer that their sexual conduct demonstrated callous indifference to her age, to her capacity to consent, and to the issue of consent.²¹ Had the accused testified, these issues might have been canvassed, along with the question of just how her words and conduct (allegedly kissing Edmondson, putting her arms around their necks) communicated agreement to the specific and highly invasive sexual assaults they performed on her body. But no such evidence was offered by the defence. Even when the evidence on the record is viewed in the light most favourable to the accused, there was no evidence to support the defence. On the evidence, any belief the accused may have had that the complainant consented to have sex with them could only have been based on a mistake about the law and, as the decision by the Supreme Court of Canada in *Ewanchuk*²² affirmed, that is not a lawful excuse.

A judge, sitting alone and properly interpreting and applying the

developments are consistent with the jurisprudence in *R v Esau*, [1997] 2 SCR 777 and *Ewanchuk*, *supra* note 9, in which the Supreme Court of Canada held that an “honest” belief is never reckless or wilfully blind. As a consequence, whenever the availability of the defence of belief in consent depends on whether the accused took “all reasonable steps” to ascertain the complainant’s age, the trial judge must also determine whether there is sufficient evidence to raise a reasonable doubt that any belief about the complainant’s age was reckless or wilfully blind. If not, there is no “air of reality” to the accused’s claim to have believed that the complainant was old enough to give valid consent and the defence of belief in consent is therefore unavailable to the accused as a matter of law. In a jury trial, the trial judge must make this determination before instructing the jury. It is my contention that in the *Kindrat* and *Brown* retrials, there was insufficient evidence of steps taken to ascertain the complainant’s age to raise a reasonable doubt about either accused’s culpable awareness (recklessness, wilful blindness) with respect to the complainant’s age. Their statements contained open admissions that they did not know how old she was. Clearly they were aware that they did not *know* her age. The defence of belief in consent was not available in law in those circumstances and should not have left with the jury.

- 20 Because none of the accused testified in their own defence, but only as Crown witnesses, the Crown prosecutor had no opportunity to cross-examine any of them.
- 21 Compare *R v Whitely and Mowers*, [1992] OJ No 3076 (Ont Ct J Gen Div) (reasons for sentence per Locke J); [1993] OJ No 2970 (Ont CA); and [1994] 3 SCR 830. The case concerned the sexual assault of a mildly intoxicated young female university student by three young men indicted as principals under s 271(a), tried as co-accused in a jury trial, and convicted. Availability of the defence of belief in consent and alleged misdirection of the jury were the grounds relied on in the appeal from conviction (unsuccessful on both grounds) and sentence (reduced in part).
- 22 *Supra* note 9 at para 51. See also *supra* note 13 for discussion of the bar against reliance on mistakes of law.

law to the evidence, would have concluded without difficulty that the Crown had proven the essential elements of the offences beyond a reasonable doubt with respect to all three accused and that the defence of belief in consent was unavailable. The evidence was insufficient to provide an evidentiary foundation for the defence of belief in consent as defined in law and, in addition, not only showed that the accused failed to take “all reasonable steps” to ascertain the complainant’s age as required by s 150.1 but, more to the point, showed that they *knew* that they did not know how old she was. All three accused would therefore have been liable to be convicted under s 271(1).

Further findings of fact by the judge based on the evidence in the record might have included: (1) that the complainant was in a relationship of dependency on the accused at the time of the offences; (2) that the complainant was incapable of consenting to sexual activity due to gross intoxication at the time of the offences; and (3) that the accused were all aware of, recklessly indifferent, or wilfully blind with respect to the complainant’s age and her dependency and incapacity. They had, after all, supplied and encouraged her to drink multiple bottles of beer and had witnessed its impact on her. If the trial judge were alleged to have erred in law, an appeal on a question of law would have been available. The appeal judge or court would have been in a position to uphold the conviction of each accused as a principal to the offence of sexual assault by affirming that, on the facts as found at trial, any belief in consent could have only been a mistake about the law of consent and the defence was therefore unavailable. The conviction of each accused as a party to the offences committed by the other two would also have been possible as long as the trial judge made and recorded the findings of fact necessary to support convictions on these other counts.

TWO THEORIES AND ONE CONCLUSION

There are at least two theories to account for the handling of the *Edmondson*, *Kindrat*, and *Brown* cases. Both are generally consistent with the publicly known facts. One theory is that the case reflects the firm commitment of the provincial Attorney General to persevere with enforcement of the sexual assault laws without regard for the race and cultural backgrounds of the complainant or the accused, despite delays caused by multiple errors of law, retrials, and complexities arising from the fact that there were three rather than only one accused. Another theory is that the prosecution was undertaken reluctantly and was pursued only due to significant political pressure. But it is immaterial for my purposes which theory is preferred because my focus is on consequences, not on motive. Motive, good or bad, does not change effects;

and it is effects, results, consequences that matter in this context. The evidence suggests that the prosecution of this case was hindered from the beginning by strategic misjudgments, and by the loss and neglect of key evidence, and was ultimately undermined by serious legal errors in the conduct of the trials and the retrials. The effects of those errors include the ineffective prosecution of the criminal laws prohibiting sexual violence against a twelve-year-old Aboriginal girl, a complainant who is a member of at least three historically disadvantaged groups — females, Aboriginals, and children, and the creation of a bad precedent for the instruction of Saskatchewan juries in sexual assault cases. The effects remain the same whatever the motives may have been. In the end, one conclusion emerges: changes are required in the conduct of prosecutions of sexual offences against women and children in the province of Saskatchewan. Effective remedies must be found; there is no excuse for the flawed approach to enforcement of the sexual assault laws this case reveals.

INEQUALITIES BASED ON RACE, GENDER, AND AGE

Race, gender, and age, as well as the interlocking inequalities with which these factors are associated, were all significant in this case. At each stage of the proceedings, the judge and counsel should have been fully alert to the possible influence of these factors on the manner in which the accused and the complainant interacted. Failure to squarely name and acknowledge inequalities linked to race, gender, and age as potent factors in the social reality that formed the context for this case only made it more, not less, likely that those same factors would also distort the legal proceedings. When one of the accused first saw the complainant, he immediately referred to her as “Pocahontas,” invoking a well-recognized, sexualized, and racialized stereotype and script.²³ It was downhill from there. This small child’s considerable vulnerability to abuse by the three older, much larger, accused²⁴ appears to have been significantly amplified by their distorted and self-serving perceptions of the social significance of her age-race-gender, the very characterist-

23 See discussion of the history of the common stereotypes of “princess” and “squaw” and their relationship to the indifference in the dominant culture to violence against Native women in *Principles of Advocacy: A Guide for Sexual Assault Advocates* (Duluth, MN: Mending the Sacred Hoop Technical Assistance Project, 2004) at 6–9.

24 She weighed about eighty-seven pounds and was less than five feet tall; the combined weight of the three accused was well over five hundred pounds. The clothing she was wearing at the time of the assault shows how very tiny she was.

ics they associated with the name “Pocahontas.”²⁵ These same factors appear to have affected the choices made by some participants in the subsequent investigation and legal proceedings as well.

Treatment of the issues of age, race, and gender in the proceedings involved deficiencies of omission and commission. On the one hand, in instructing jurors, the presiding judges failed to draw attention to the differences in race, gender, and age between the complainant and the accused for the purpose of suggesting that the jurors needed to avoid being inappropriately influenced by stock stereotypes associated with those factors when assessing the evidence and deliberating on the issues. On the other hand, the record contains numerous examples of comments about the evidence by some counsel and at least one of the judges that invite inferences based on common racist and sexist stereotypes. Repeated questions and comments suggesting that irrelevant and collateral facts are relevant necessarily undermine any attempt to curtail the impact of prejudicial myths and stereotypes on a jury’s deliberation process.

In cases that appear to include racist elements, as this case undeniably does, it is not appropriate for judges to invite jurors to blind themselves and assume that the significance of the facts is invariably race-neutral, gender-neutral, and age-neutral, devoid of social context. To do so is to deny social reality and distort the truth-seeking process. It is likewise inappropriate for judges to permit and even encourage discourse in the courtroom that invokes discriminatory stereotypes and suggests that invalid inferences may be drawn from the evidence. Counsel, as officers of the court, need to examine their personal perceptions of the facts of cases for the influence of assumptions and stereotypes. Questions and comments that incorporate those assumptions and stereotypes should not be used; to use them is to imply that they are based on valid generalizations. Both judges and counsel need to re-examine how discourse and conduct in the courtroom detracts from conditions conducive to non-biased perception of the evidence and non-discriminatory deliberation that nonetheless remains alert to the realities of the social context within which the case arose. These issues are challenging and need to be examined and widely discussed by members of the judiciary, counsel, and by legal educators.

25 Similarly, in a written statement to the police the following day, Brown referred to the complainant they saw sitting on the hotel steps as “a native girl.”

REMEDIAL ACTION ON MULTIPLE LEVELS

The problems highlighted by the handling of this case require remedial action on a number of levels, from the practical to the political and back again. On the practical front, a few obvious steps can be taken. Better training and resources could improve the collection and preservation of evidence and ensure that prompt and appropriate health care is available to complainants. Prosecutorial and judicial discretion, exercised within the framework of current rules of practice and procedure, can be used to reduce delay and the number of times complainants and Crown witnesses are required to testify. Ideally, the decision in a sexual assault case should explain the law, develop the jurisprudence as necessary to arrive at a decision, and provide the accused and other members of the community with notice of what the law requires of them. Well-drafted and accessible decisions can serve all of these essential socio-legal functions.

However, this case also involved social ignorance and racial and gender inequality as factors in the offence itself, in the conduct of the legal proceedings, and in the “social meaning” and impact of this case on the parties, the community, and social relationships between individuals and groups in the community. In fact, most sexual assault cases incorporate one or more of these elements, and the eradication of the effects of racist and misogynist bias in social interactions related to sexual assault remains far more of a challenge than the practical issues mentioned above will ever be.

On all these levels, we can identify specific and general objectives for the handling of sexual assault cases by the criminal justice system that were not well-served in this case, and were instead frustrated or subverted. The nature of the socio-legal phenomena the sexual assault laws address and the magnitude of the attitudinal changes in the community and the legal profession that appear to be required to secure broad compliance with, and accurate interpretation and application of those laws, are unique. We need a set of remedies designed to ensure that the functioning of criminal legal process itself, as it is organized and operated, does not frustrate and ultimately subvert the objectives of the sexual assault laws as enacted by Parliament. Some may argue that further modifications in legal procedures, policies, practices, and institutions are necessary to prevent the very same beliefs and attitudinal factors that are implicated in the commission of the offence of sexual assault from the subverting of proper interpretation and application of the sexual assault laws. Such factors certainly had a significant role in both the offence and the legal process in the *Edmondson*,

Kindrat, and *Brown* cases. Others may assert that adequate legal tools are available, and the problem is simply failure to use them due to the lack of specialized training or lack of commitment to the rule of law.

No one, in any event, should underestimate the significance of practical issues for both *outcomes* and *attitudes*. The effort and commitment required from investigators, health care providers, and legal professionals first to imagine and then to make the choices required to address practical matters — delays, multiple proceedings imposing a burden on complainants, acquittals attributable to poor investigation and file preparation, questions about legally extraneous issues used in defiance of the rape shield and personal records provisions, errors due to lack of a sound working knowledge of the sexual laws, etc. — will undoubtedly produce changes that affect outcomes. That same personal effort and commitment will, I predict, support gradual changes in the attitudes of these professionals towards sexual assault complainants and the legal process in sexual assault cases. At the same time, the overall improvement in the handling of the practical aspects of sexual assault cases will, in turn, have a positive impact on the self-esteem and social profile of complainants, individually and as a group. The combination of these effects, working in tandem, will contribute to re-shaping widely held beliefs and attitudes that presently marginalize complainants in society and in the legal process. However, the process of designing incremental and systemic remedies to address the weaknesses in police, prosecutorial, and judicial policy and practice of the types highlighted by the handling of this case needs to be open-ended and subject to ongoing review and modification based on experience within specific social and practice contexts. All participants need to remain alert to the diverse and ever-emerging new ways in which the principle of equal protection of the law can be hijacked in a sexual assault case.

COLLECT AND PRESERVE EVIDENCE

Proper investigation and timely collection and preservation of evidence are essential for the effective prosecution of sexual assault cases. In *Edmondson*, *Kindrat*, and *Brown*, police did not formally interview the complainant until October of 2002, more than twelve months after the assault. Even then the interview was in connection with another file, not this case. An officer from the local RCMP post attended at the Tisdale Hospital emergency department on 30 September 2001, but the complainant was not capable of being interviewed at that time. A videotaped statement by the complainant, made as soon as reasonably

possible after the assault, would not only have preserved her evidence at a time close to the events in question, but would also have preserved a record of her image and demeanour as the twelve-year-old child she then was. The complainant would have been spared the trauma of testifying in court again and again. Sensitive judicial practice encourages the use of videotaped statements by children.²⁶ This omission, like the failure to seize the complainant's blood sample at the hospital for testing, remains unexplained. The accused were all residents of Tisdale. The investigating officers knew them and may have believed that the case against the "boys," as one officer described them in evidence at the *Brown* retrial in 2008, would not proceed.

On the other hand, the RCMP did take steps to obtain evidence that, in law, had no bearing on the case. Better police training might have not only ensured the preservation of relevant evidence, but also prevented the investigation in this case from being polluted and tainted with irrelevant information from other open files. There clearly are questions about the approach taken to investigation of the case by the police. Was the investigation and decision-making in this case shaped by police preoccupation with one or more *other* cases? Police obtained DNA evidence from persons other than the accused for comparison with a stain on the complainant's underwear. That evidence was immaterial to this case because the identity of the accused and the sexual nature of the assault were not in question. To bring that evidence into the public forum for consideration at trial, as was done in this case, constituted a clear invasion of the complainant's privacy rights and an overt attack on her dignity. The evidence was subject to the restrictions under s 276 of the *Criminal Code* and should have been excluded at the trials as it later was at the retrials.²⁷ Instead, it was seized on by defence counsel and the media in 2003 and made the focus of widespread comment and discussion in the community. The members of the media and the community appeared not to understand that whether there was or was not a DNA match between the stain and persons *other than* the accused had no bearing on the case.

When the complainant arrived at the Tisdale hospital, no one on

26 *R v F (CC)* (1997), 120 CCC(3d) 225 at 243–44 (SCC) per Justice Cory. See also *supra* notes 34, 35, and the accompanying text. It is surprising that none was prepared for use in this case.

27 The trial judge failed to appreciate this issue; the judges who presided over the retrials were alert to it. No application was ever actually brought under s 276 by defence counsel in either trial or retrial. Both trials were presided over by the same judge; the retrials had different judges. One prosecutor represented the Crown at both trials; a second Crown prosecutor handled the case at the two retrials.

duty had the specialized skills and experience required to care for her and collect the standard forensic evidence. Even the physician called to the hospital to attend to her lacked the training and experience required to complete all aspects of the rape kit, especially with a patient who could not stand up or otherwise co-operate due to her gross intoxication and distress. The next day, arrangements were made for the complainant to be seen by a child abuse specialist in Saskatoon.

In this case, current standards for the provision of health services following sexual assault were not met. The physical and psychological healthcare needs of complainants are best assessed and addressed without delay by providers who have specialized training and experience. A Sexual Assault Nurse Examiner [SANE] trained and certified in accord with current protocols, and supplied with all necessary equipment, should be available in a hospital or clinic in every community. Forensic evidence that is not collected and preserved in accordance with strict protocols is not admissible in subsequent legal proceedings, civil or criminal. Potential complainants should have the opportunity to secure and preserve forensic evidence without being required to make an immediate decision about criminal or civil action.

AVOID DELAY, STREAMLINE PROCESS

This case extended over almost seven years, involved appeals and retrials, and led to largely inconclusive results. The one accused who was convicted received a sentence of two years less a day, only marginally longer than the maximum sentence of eighteen months available on conviction in summary conviction proceedings. There is no one — the accused, the complainant, their families, and the affected communities — who would not have benefited from a prompt disposition of the case. The delays and indecision experienced in the case, as prosecuted, only exacerbated social strain and conflict between the Aboriginal and non-Aboriginal communities, heightened public exasperation with the criminal justice process, and further eroded general public trust in the justice process in the province. All these effects were socially divisive and harmful. In addition, awareness of the course of these legal proceedings will inevitably deter many individuals who are sexually assaulted in Saskatchewan from filing complaints with the police. Given a choice, no complainant would wish to be required to participate in legal proceedings even half as long, personally intrusive, and frustrating as the proceedings were in this case. Cases like this are one of the reasons such a small proportion of sexual assaults are reported to the police.

Courts and counsel can work together to expedite or “fast-track” the trial process in sexual assault cases. Courts can give priority to these cases when allocating use of resources such as courtrooms and judges.

When proceeding by indictment, prosecutors can ask the provincial Attorney General to issue a direct indictment and proceed to trial without a preliminary hearing. Prior to the ruling in the *Stinchcombe* case,²⁸ which requires the Crown to provide the defence with full disclosure of the case for the prosecution, the preliminary inquiry served a disclosure function. Post-*Stinchcombe*, disclosure is available by other means. In addition, insofar as the purpose of the preliminary inquiry is to prevent weak cases from going to trial, this function is served within the trial itself in that the judge may withdraw the case from the jury and issue a directed verdict of acquittal in those cases in which a properly instructed jury could not convict on the admissible evidence in the case.²⁹ The use of direct indictments in sexual assault cases therefore appears highly desirable. It is not inconsistent with maintaining procedural protections for the accused and would both alleviate some stress for complainants and other Crown witnesses and expedite the legal process by eliminating the need to schedule both a preliminary hearing and a trial when proceeding by indictment.

When a direct indictment is not issued and a preliminary inquiry is held, the burden imposed on the complainant and other Crown witnesses can be reduced by submitting evidence at the preliminary inquiry by means of a written statement under the authority of s 540(7) or, in some cases, in the form of a videotaped statement. At the conclusion of the preliminary inquiry, the judge either discharges or commits the accused to trial. The decision to commit to trial or discharge is reviewable. The standard for committal to trial is the same as that applied to directed verdicts of acquittal.³⁰

In cases with more than one accused, the prosecutor must also decide whether to charge the accused jointly or separately. Separate charges require separate preliminary hearings and separate trials and thus multiply the number of times Crown witnesses will be required to testify. By charging Edmondson separately from Kindrat and Brown, the Crown was able to call Edmondson as a witness at the others' trial and vice versa. This appears to have been the Crown's reason for wanting to sever Edmondson's case. But the rules governing joinder and severance of the trials of co-accused favour the joint trial of co-accused even where there are mutually incriminating statements by the co-accused, as was the case here. This is in accord with the general rule that

28 *R v Stinchcombe*, [1991] 3 SCR 326.

29 *R v Rowbotham*, [1994] 2 SCR 463; *R v Charmenski*, [1998] 1 SCR 679.

30 *Criminal Code*, s 548(1); *R v Arcuri*, [2001] 2 SCR 828; *R v Fontaine*, [2004] 1 SCR 702.

those charged with offences based on an enterprise or transaction, in which each is alleged to have played a part, ought to be tried together. The statement of each is only evidence against the party who made the statement and is not to be used as evidence against any co-accused implicated in the statement. The jury is to be carefully instructed on the use they may and may not make of the evidence with respect to each accused. Defence counsel for each co-accused has full rights to cross-examine other co-accused.³¹ In this case, it would appear that under the rules there should have been only one trial and, at most, one preliminary inquiry.

But the complainant had some difficulty talking about the assault, especially in a formal interrogation setting. Therefore, even though all the key elements of the offence were contained in the incriminating statements the accused gave to the RCMP in 2001, the Crown prosecutor may have believed the case could not be presented at trial without a narrative account of the offence by one or more of the accused. The Crown's dilemma over how to present the case to a jury in these circumstances underscores the importance of obtaining a videotaped statement from the complainant as soon after the offence as is reasonably possible. In *Edmondson*, *Kindrat*, and *Brown*, the time and equipment required to record that one videotaped statement could have resulted in the saving of significant public and private legal resources — courtrooms, judges, court-reporters, counsel fees, lives on hold, etc. In addition, by eliminating most of the uncertainty about what the complainant would say in evidence at trial, the existence of a videotaped statement by the complainant might well have had the effect of changing the advice defence counsel gave their clients, leading to guilty pleas.

The case is striking in another respect as well. It dramatically illustrates the link, common to all cases tried by jury, between: (1) trial by a jury, (2) the fact that juries render verdicts but do not issue reasons for their decisions or otherwise record their findings of fact, and (3) the re-

31 *Criminal Code*, RS, c C-34, s 591(3)(b); *R v McLeod* (1983), 6 CCC (3d) 29, per Zuber, Goodman, Grange JJA (Ont CA); affirmed [1986] 1 SCR 703, (sub nom *Farquharson v R*) 27 CCC (3d) 383, per Beetz, McIntyre, Chouinard, Lamer, Wilson, Le Dain, La Forest JJ; *R v Lapointe* (1981), 64 CCC (2d) 562, Graburn Co Ct J (Ont Gen Sess Peace); reversed on other grounds (1983), 9 CCC (3d) 366, Lacourcière, Cory, Tarnopolsky JJA (Ont CA); affirmed [1987] 1 SCR 1253, 35 CCC (3d) 287, Dickson CJC, Beetz, Lamer, Wilson, Le Dain, La Forest, L'Heureux-Dubé JJ; and *R v Quiring* (1974), 27 CRNS 367, 19 CCC (2d) 337, Culliton CJS, Woods, Brownridge, Maguire, Hall JJA (Sask CA); leave to appeal to SCC refused (1974), 28 CRNS 128n, Judson, Ritchie, de Grand-pré JJ (SCC) — Approving the trial judge's refusal to try two jointly indicted parties separately.

quirement that there be a retrial following a successful Crown appeal from an acquittal by jury.

All judges who try cases *without* a jury are now required, pursuant to a series of decisions by the Supreme Court of Canada, to provide reasons that record their findings of fact, the basis for those findings of fact, and the rationale for their decision in the case. The reasons must be sufficiently detailed and complete to permit meaningful review by an appellate court, which must be able to determine whether the decision is reasonable and sustainable in law on the evidence in the record.³² When an appeal court overturns a verdict of acquittal or conviction rendered by a judge alone on the ground that the trial judge misdirected herself on the law, the appeal court is often able to correct the error and substitute the proper verdict by applying the law to the findings of fact recorded in the reasons for decision by the trial judge. Only when the trial process itself was conducted in an unlawful manner is it generally necessary to order a retrial.

When a jury arrives at a verdict because they have misunderstood or misapplied the law to the facts, no remedy is available unless the verdict is unreasonable or the record shows that the trial judge misdirected the jury on the law. In the latter circumstances, the appeal court may order a retrial, but cannot substitute a conviction for a verdict of acquittal rendered by the jury even in those cases in which the evidence in the record cannot reasonably support any verdict but conviction. In such cases, a retrial is ordered.³³

These differences between proceedings by a judge alone and proceedings by a judge and jury suggest that prosecutors would be well advised to use summary conviction proceedings, whenever it is feasible to do so, rather than proceeding by indictment, unless they are confident that the accused will elect trial by judge alone. The decision to lay summary conviction charges ensures that there is no preliminary inquiry,

32 *R v Sheppard*, [2002] 1 SCR 869, 2002 SCC 26; *R v Gagnon*, [2006] 1 SCR 621, 2006 SCC 17.

33 When an accused is charged by indictment under s 271(a), he or she may elect to be tried by a jury or by a judge sitting alone without a jury. The same range of dispositions available on appeal from summary conviction proceedings are also available on an appeal from a verdict of acquittal by a judge sitting without a jury on an indictable offence: see *Criminal Code*, ss 686 and 822(1). On an appeal from a verdict of acquittal by a jury, appellate courts do not have the power to substitute a conviction: see *Criminal Code*, s 686(4)(b)(ii). An order for a jury retrial may be issued on the ground that, but for errors of law, the verdict might have been different: see *Criminal Code*, s 686(4)(b)(i).

any trial will be by a judge sitting alone without a jury and, as a direct consequence, as long as the verdict is reasonable and the legal process is conducted in a lawful manner, there will be no retrial. When an appeal is granted on the ground that the trial judge erred in instructing herself on the law, the appeal court will often be able to substitute a verdict based on the findings of fact at trial. A retrial will not be necessary and, absent a further appeal, the decision of the appeal court will conclude the proceedings in the case.

Had the accused in this case been jointly charged and tried in summary conviction proceedings, the verdict and reasons for the decision could have been reviewed on appeal by a superior court judge (in Saskatchewan, a Queen's Bench Judge) on the basis of the record, including oral or written reasons, to determine whether errors of law were made by the trial judge or whether the verdict was unreasonable given the evidence adduced at trial. In limited circumstances, such as a deficiency in the transcript of the trial, the appeal would have proceeded as a trial *de novo*, a new trial. Two further levels of appeal, to the provincial Court of Appeal and to the Supreme Court of Canada, would have been possible on those grounds. At each level of appeal, the judge or appellate court would have had the power to substitute a conviction or acquittal for the trial verdict, based on the findings of fact at trial, or order a new trial if necessary. In proceedings by indictment tried by a judge sitting without a jury, the appeal court also has those powers.

In this case, the use of either summary conviction proceedings or direct indictment followed by trial by a judge sitting alone without a jury would have reduced the number of proceedings in which the complainant was required to appear as a witness from *six* to *one* (assuming her testimony was indeed *required* — as, strictly speaking, it actually may not have been in the circumstances of this case).³⁴ If a videotaped statement of her evidence had been prepared in advance of trial, and the Crown chose to call her as a Crown witness, her testimony at tri-

34 *R v Cook*, [1997] 1 SCR 1113. There is no need for testimony from the victim of an offence where it is not required to prove the Crown's case. The defence or even the judge may call a witness who the Crown does not call. In some circumstances (eg, the complainant who is unconscious when the offence takes place as in *R v Ashlee*, [2006] ABCA 244, [2006] AWLD 2841, [2006] AWLD 2851, 61 Alta LR (4th) 226, [2006] 10 WWR 193, 40 CR (6th) 125, 212 CCC (3d) 477, 391 AR 62, 377 WAC 62) the complainant may simply have no evidence of any probative value in relation to the legal issues before the court. If so, nothing they could say would be admissible and there is no reason to call on them to testify.

al would have been brief; she would have been asked whether she adopted the videotaped statement as her evidence and she would have been subject to cross-examination by defence counsel on the content of her videotaped statement and any additional evidence she might have provided for the Crown at trial.³⁵ The trauma the proceedings caused the complainant could have been significantly reduced as a direct consequence of eliminating both preliminary inquiries and holding one trial instead of two trials and two retrials.

Further support for an expedited process is found in studies of deterrence that show that the comparative efficacy of any penalty or punishment is greatest where it is swift and certain. A grave punishment that is unlikely to be imposed is a far less effective deterrent than a lesser punishment that is almost certain to be swiftly imposed.³⁶ The observation that a swift response is more efficacious applies with equal force to the denunciation component of conviction. Swift discharge or conviction on grounds that are clearly articulated in the reasons for judgment educates the parties, the public, and the legal profession about the law. Jury trials produce verdicts, but not reasons for decision. All of these considerations suggest that in sexual assault cases prosecutors should prefer trial by judge alone, not trial by a judge sitting with a jury; to that end, they should be prepared to use summary conviction proceedings whenever it is feasible to do so rather than proceeding by indictment.

SUBVERSIVE IMPACT OF THE CASE

Established patterns of racist and misogynist conflict are reinforced by trials in which counsel and judges invoke racist and sexist stereo-

35 This procedure is authorized by s 715.1 of the *Criminal Code* and was upheld as constitutional in *R v L(D)* (1993), 25 CR (4th) 285 (SCC). The use of video statements by children is not new, nor was it new in 2001.

36 Had each accused been charged as a principal with one count of the summary conviction offence under s 271(b) and with two summary convictions counts as a party under s 271(b) and s 21, convicted on all three, and given consecutive sentences, the aggregate sentences could have been as long as fifty-four months, rather than the two years less a day imposed on Edmondson, the only accused actually convicted of the indictable offence under s 271(a) as prosecuted. Of course, Parliament could also increase the maximum sentence, now eighteen months, for conviction of the summary conviction offence under s 271(b) without triggering the right to trial by jury. Under section 11(f) of the *Charter*, the right to trial by jury is only protected where the maximum sentence is five years or more. It is arguable, however, that the present maximum sentence of eighteen months is fully adequate, on the assumption that only the truly incorrigible will reoffend and tools (long-term and dangerous offender designations) are already available to deal with such cases as they arise.

types. Such spectacles lead members of the community to interpret the proceedings as evidence of ongoing racial and cultural conflict and the continuing persistence of systemic and historic racism and misogyny.

The conduct of the case of *Edmondson, Kindrat*, and *Brown* must be seen as “subversive” for these reasons and on other grounds. The overall effect of the case was to undermine or subvert the policy objectives set out in the preambles to the 1992 and 1997 bills amending the sexual assault provisions of the *Criminal Code*.³⁷ The handling and disposition of the trials and retrials of these accused suggest that legal consciousness in Saskatchewan continues to function in accord with pre-1992 norms in the area of sexual assault, as if the legislative and judicial developments of the last two decades had not taken place.³⁸ Certainly, complainants in Saskatchewan are on notice that the criminal justice process may not protect their privacy rights and that the disposition of any sexual assault complaint might take many years. The inevitable effect will be to silence many complainants who may legitimately fear being made the subject of an extended public spectacle. The implications of the case for the conduct of legal professionals in sexual assault cases are equally regressive.

This case may, for example, leave Saskatchewan judges, prosecutors, and defence counsel with the understanding that instructions to the jury in sexual assault cases must always include reference to s 273.2 of the *Criminal Code*, even when the trial judge finds the defence is unavailable as a matter of law. The *Criminal Code* bars the defence of belief in consent under two circumstances: (1) when there is insufficient evidence that the accused had a “belief in consent” to make the defence available under s 273.2; and (2) when the accused’s “mistake” is based on ignorance of the law or a mistake about the law and is therefore barred by s 19. In either case, pursuant to s 265(4), the jury is not to be instructed with respect to the defence of “mistaken belief in consent” because, as a matter of law, the defence could not result in a valid verdict of acquittal. The decision taken by the provincial director of public prosecutions not to appeal the acquittal in the *Kindrat* retrial on the ground of errors of law in the instructions to the jury does leave trial

37 *An Act to Amend the Criminal Code (sexual assault)*, SC 1992, c 38; *An Act to Amend the Criminal Code (production of records in sexual offence proceedings)*, SC 1997, c 30.

38 Many counsel may be unfamiliar with the preambles to the 1992 and 1997 bills because the preambles do not form part of the *Code* itself and are not routinely published along with it for easy reference.

judges in Saskatchewan in a quandary. Judges may either apply current legal standards on the availability of the defence of belief in consent as legislated in the *Criminal Code* and construed in a series of decisions by the Supreme Court of Canada, and risk appeal by the accused, or follow the precedent set by the direction issued by Cameron J in 2005 and instruct the jury on the defence in all sexual assault cases, even those in which the defence is unavailable in law.

Mr. Justice Cameron appeared to believe that in Saskatchewan triers of fact, whether a judge sitting alone or a jury, have unique talents and, in a sexual assault case, are able to deliberate about a defence that is not available in law, without there being any risk that a perverse verdict may be the result. Such confidence in the trier of fact echoes Dickson J's observation in *Pappajohn* that the common sense of the jury can be relied on to detect and reject a "cock-and-bull" story told by an accused who claims "mistaken belief in consent."³⁹ But since that case was decided in 1979, legal standards have been more fully articulated and codified in an effort to remind trial judges that the trier of fact may only consider defences *that are actually available in law*.⁴⁰ The Crown should have challenged Mr Justice Cameron's order when it was issued in 2005 or appealed the acquittal in the *Kindrat* retrial on the ground of misdirection of the jury on this very point.

The assumption that the defence of mistaken belief in consent was available affected not only the terms of the order for the retrial, but also appears to have influenced other aspects of the case from the very beginning. This is a flagrant example of the preference for, and the tendency to revert to, "local common sense" and "local social norms" in legal interpretation, in defiance of decades-long efforts by the Supreme Court of Canada to clarify the law on the point at issue. It is not the first example of the phenomenon of amnesia among jurists about decisions at the Supreme Court of Canada, nor is it likely to be the last, but it is profoundly troubling. A decision not to limit the defences that the trier of fact is asked to consider to those actually available in law, is a recipe for suspension or subversion of the rule of law.

ACCESSIBLE REASONS FOR DECISION

Reasons for decision that provide a reviewable record of the deliberation process are essential if the law is to provide guidance for the choices individuals make. Reasons are also essential to ensure that the legal process can be subjected to scrutiny. A bare decision does not cla-

39 *Pappajohn v R*, [1980] 2 SCR 120, 155–56.

40 See *supra* note 11.

rify the law, lacks any educational value for the affected community, and frustrates any attempt by the public, social critics, and academics to assess the quality of the decision-making process. Judges, counsel, affected parties, and members of the community do not obtain direction from it. A bare decision issued following trial by a judge sitting alone without a jury, can be set aside on the ground that it fails to disclose the reasoning process on which it is based. But many decisions issued by judges are accompanied by oral reasons recorded on audio tape and never transcribed or published. For most practical purposes, these decisions are indistinguishable from “bare” decisions because they are not generally accessible; few members of the community actually know the reasons for any specific decision and can only speculate. In speculating, members of the public and the legal professions fill in the blanks with what they assume were the most likely reasons for the decision. These are some of the ways in which the failure to issue and publish written reasons for decision undermines the social utility of a legal system governed by the rule of law.

In sexual assault cases, prosecutors should therefore routinely request that judges sitting alone without a jury issue reasons for decision in written form. Oral reasons should be transcribed and in either case the reasons should be reported. The public has a right to know the basis for the decisions judges make in the public’s name. Without disclosure of that information, the criminal justice process escapes public scrutiny and accountability. The absence of mechanisms to ensure accountability is anomalous in a system of self-government based on the rule of law. Everyone vulnerable to being sexually assaulted has an interest in the public disclosure of information about the actual interpretation and application of the sexual assault laws. In addition, the lack of ready access to that same information makes it more difficult for the federal government to fulfill the responsibilities with respect to criminal law assigned to the federal government under s 91(27) of the *Constitution Act* or to fulfill its obligations under international law.⁴¹

41 See, for example, the *Convention on the Elimination of All Forms of Discrimination Against Women*, Can TS 1982 No 31, (entered into force 3 September 1981), to which Canada is a party, and the *Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women: Canada*, 42nd Sess. (20 October–7 November 2008). In its answers to questions from the committee, Canada has repeatedly excused its non-compliance with the convention by asserting that the provinces, rather than the federal government, have jurisdiction over a number of areas that affect the equality rights of women and children, including enforcement of the criminal laws prohibiting violence, and the development of programs and policies to address the social causes of violence.

JURY TRIALS AND PUBLIC LEGAL EDUCATION

Unlike trial judges, juries do not prepare and release reasons for their verdicts. Nonetheless the manner in which jury trials are conducted inevitably serves as an exercise in public and professional legal education. The lessons about the law which the public and the legal profession derive from any individual trial may be either accurate or misleading. This is certainly true in the case of sexual assault trials.

For example, consider the following extremely basic issue. For some time, it has been recognized that the legal and social definitions of sexual assault in Canada are often not identical.⁴² Widespread compliance with the law is unlikely to come about until the social and legal definitions converge in public and professional legal consciousness. The fact that the reasons for decision produced in the vast majority of sexual assault cases are oral reasons by judges and not generally available for public scrutiny or academic critique, only increases the probability that in an indeterminate number of cases the judge's decision will be based on a non-legal or social definition of sexual assault, entangled as it has long been with an array of myths and stereotypes, not on the legal definition.⁴³ The record from the jury trials in *Edmondson*, *Kindrat*, and *Brown* shows that the judge and counsel, all experienced legal professionals, relied heavily on non-legal social conceptions about consent and sexual assault, not the legal definitions, and they all invited the jury to do likewise. In the retrials, the defence counsel did the same thing. The use of outmoded social definitions by these legal professionals in these proceedings undoubtedly undermined achievement of the objectives set out in the preamble to the 1992 amendments to the sexual assault provisions of the *Criminal Code*.

Whether a trial is by judge alone or by judge and jury, the judge and counsel perform their professional roles on the basis of their understanding of the law. That appears to be what occurred in these cases. But at the same time, members of the public and other lawyers and judges were aware of media reports about the questions and arguments by counsel during the trials. Based on the premise that what law is, is to be seen in its application, some of these observers likely concluded that there really have not been any significant changes in the sexual assault

42 Lucinda Vandervort, "Enforcing the Sexual Assault Laws: An Agenda for Action" (1985) 13 RFR 44; Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-88) 2 CJWL 233.

43 The legal definition of consent to sexual activity was codified in 1992. See s 273.1 of the *Criminal Code*.

laws in Canada. Members of the community can only speculate about a jury's reasons for its verdict on the basis of what is publicly known about the conduct of the proceedings, just as they must speculate in cases where a judge, sitting alone, issues oral reasons that are unreported or not easily accessible. But the words and conduct of the presiding judge and counsel in open court are public and are the subject of media reports. The combined net effect of the conduct of the judge and counsel in the trial proceedings in the *Edmondson*, *Kindrat*, and *Brown* cases on community beliefs and assumptions about the legal definition of sexual consent, sexual assault, and the operation and effect of the sexual assault laws was racist and misogynist. The trial proceedings did not provide accurate lessons about current legal standards for the handling of sexual assault cases. The conduct of sexual assault cases, from beginning to end, should be recognized as an exercise in public legal education and handled in a manner that provides the public and professionals who work in the criminal justice system with reliable information about current law and legal standards, not misinformation.

SYSTEMIC REMEDIES

Sexual violence violates the human rights of the persons it targets and has a significant negative impact on their health status and well-being. In turn, such violence has multiple serious secondary impacts on Canadian society and the social fabric, on families, on relationships, and on communities, including how they do or do not function and how their resources are and can be used. The federal government has constitutional responsibility for criminal law in Canada under s 91(27) of the *Constitution Act* and has assumed obligations under international law to promote and advance the equality rights of women in Canada and to protect them against violence. Those responsibilities and obligations have not been fulfilled. If anything, in recent years, there has been a retrenchment in support and funding for women's equality. What is required is a fundamental change, a sea-change in perspective, not simply a few more workshops for legal counsel and police supported by limited federal and provincial grants. The new approach must be multi-pronged and designed to provide expertise, organized, resourced, and allocated in a manner that makes effective enforcement of the laws prohibiting violence against women and other vulnerable people a realistic objective. The familiar excuses for the *status quo* are old and stale.

In this discussion, I proposed a series of remedial steps to improve adherence to the rule of law in the handling of sexual assault cases by the criminal justice system, and to make its operation more transparent and open to public scrutiny. These are modest steps that can be taken by

the police, prosecutors, and the judiciary acting within their respective spheres of authority, using legal powers that each already possesses. In addition, below I propose three initiatives that require Parliamentary action. These recommendations flow from my reflections to date on issues seen in the *Edmondson*, *Kindrat*, and *Brown* cases as discussed above. Further research and consultation may show that some of the objectives of these proposals can be achieved or supported by means other than, or in addition to, those proposed here.

Recommendation 1

Parliament should amend the Criminal Code to provide concurrent federal-provincial jurisdiction over the initiation and conduct of legal proceedings in sexual assault cases and all other Criminal Code offences involving violence against women and children, including the conduct of appeals and all motions and applications related to the proceedings.

Parliament should grant the Attorney General of Canada concurrent jurisdiction over the prosecution of all sexual offences and all other *Criminal Code* offences involving violence and other forms of coercion against women and children. There is no constitutional impediment to the assertion of federal jurisdiction in this area. In 1983, in reasons by Chief Justice Laskin, the Supreme Court of Canada affirmed that the Attorney General of Canada has exclusive jurisdiction under s 91(27) of the *Constitution Act* to prosecute all federal offences.⁴⁴ The Court observed that provision for prosecution of *Criminal Code* offences by the provincial Attorneys General was statutory, not constitutional, and, as such, subject to amendment by Parliament. In recent years, s 2 of the *Criminal Code* has been amended to provide for concurrent federal-provincial jurisdiction in the prosecution of terrorist offences.⁴⁵ Clearly, Parliament is not reluctant to use the federal criminal law power under s 91(27) of the *Constitutional Act* to assert a role for the federal government in selected circumstances.

Recently, others have argued that the merely statutory basis for the prosecutorial authority of the provincial Attorneys General permits the latter to operate in relation to the criminal laws of Canada only as a matter of grace, not “right,” pursuant to agreements that have evolved over more than 140 years. Some argue that under these arrangements

44 *AG Canada v CN Transportation*, [1983] 2 SCR 206, and *R v Wetmore*, [1983] 2 SCR 284.

45 See also *Criminal Code*, ss 696 and 830(4) dealing with authority in relation to the conduct of appeals.

the provincial Attorneys General may not be “obliged” to prosecute *Code* offences; that as a matter of law, they remain free to determine when and how prosecutorial resources shall be deployed.⁴⁶ Others may hold contrary views.⁴⁷ It is well-known, however, that regardless of which view is preferred from a strictly legal perspective, the general experience of women and children in Canada under the current arrangement is one of violation of their rights to security of the person and equal protection, benefit, and enjoyment of the law under ss 7, 15, and 28 of the *Charter of Rights and Freedoms*, as well as a violation of their human rights under international law, contrary to the obligations the government of Canada has assumed under international covenants and conventions.⁴⁸ In these circumstances, it is incumbent on the federal government to take concrete steps to assume its responsibilities for enforcement of the criminal laws prohibiting all forms of criminal violence, exploitation, and coercion against women and children.⁴⁹

46 For a recent discussion of the constitutional issues, see Mark Carter, “Recognizing Original (Non-Delegated) Provincial Jurisdiction to Prosecute Criminal Offences” (2007) 38 *Ottawa L Rev* 163. As an example of a province’s assertion of a non-enforcement option, Carter discusses the announcement by the Attorney General of Saskatchewan that the province would not enforce fire-arms legislation (at 165–68, 180–82). Carter examines the tension between the expectation that prosecutorial authority will be exercised in a quasi-judicial and hence apolitical manner and “indications from the provinces that prosecutorial resources will not be invested in certain federal criminal law initiatives which are ‘politically’ unpopular” (at 168).

47 See, for example, *R v Catagas* (1978), 38 CCC (2d) 296 (Man CA), concluding that an explicit policy of non-prosecution of Aboriginals hunting on Crown land in violation of the federal *Migratory Birds Convention Act*, RSC 1970, c M 12 was “a clear case of the exercise of a purported dispensing power by executive action in favour of a particular group” and, as such, was null and void on the ground that “the Crown may not by executive action dispense with the laws” (at 301). By contrast, decisions to stay and withdraw charges in *individual* cases, absent abuse of power or clear impropriety, are presumed to be within the scope of prosecutorial discretion because they do not purport to suspend a law enacted by Parliament. This distinction merits critical examination.

48 See *supra* note 43, for example.

49 Given that the Supreme Court has held that the provincial Attorneys General exercise a statutory authority granted to them by the federal Parliament, the courts (federal and provincial) may be persuaded that judicial review of the reasonableness and propriety of the exercise of that statutory authority is available and appropriate in cases where the issues include failure to act. In the past, the courts have declined to supervise the exercise of prosecutorial discretion unless abuse of prosecutorial power threatened to oppress individual rights. Hence most of the limited case law related to review of prosecutorial discretion concerns itself with staying prosecutions. Traditionally, the Courts have been loath to curtail prosecutorial discretion in the absence of “flagrant impropriety.” See Philip Stenning, *Appearing for the Crown: A Legal and Historical Review of Criminal Prosecutorial Authority in Canada* (Cowansville, Quebec: Brown Legal Publications, 1986) at 197–281. See also *R v Power*, [1994] 1 SCR 601,

The federal Attorney General, acting through the office of the director of public prosecutions,⁵⁰ is already responsible for the prosecution of *Criminal Code* offences in the territories. Initially, the proposed concurrent federal statutory powers under s 2 of the *Criminal Code* should be primarily exercised to consult with the provincial Attorneys General about the functioning of the sexual assault laws in the various provinces rather than to prosecute individual cases. The provincial Attorneys General would continue to carry responsibility for the ordinary operation of provincial prosecutions, just as the federal Attorney General, acting through the federal director of public prosecutions, does with respect to prosecutions in the territories. The federal Attorney General would direct its resources primarily towards monitoring performance and evaluating policy. Only when there was evidence of prosecutorial nonfeasance or malfeasance that was not addressed and appropriately resolved as a result of discussions with the provincial Attorney General or the director of public prosecutions, or that involved criminal activity with inter-provincial or international elements, such as trafficking persons across borders, would federal prosecutors initiate or assert authority to take responsibility for individual prosecutions in the provinces pursuant to federal statutory powers under section 2 of the *Criminal Code*. Under this concurrency model, consultation with provincial and territorial prosecutors should, in due course, result in the develop-

for discussion of the rationale for judicial reticence. David Layton, “The Prosecutorial Charging Decision” (2002) 46 *Crim LQ* 447 at 457, reports that a faulty or suspect decision *not* to prosecute will almost never be challenged and when it will be subject to a strict abuse of process standard (at 457). *Kostuch v Alta A G*, [1995] AJ No 866 Alta CA provides an example of a case in which the Crown’s decision to stay a private prosecution was upheld.

A quite different analytic approach may be available if the Attorney General of Canada, as the applicant, seeks review of the exercise of what are now understood to be *statutory powers* granted by the federal Parliament to the Attorney General of Saskatchewan, for example. This is an especially promising approach in relation to sexual violence against women and children because deference to regional differences (and to local conceptions of the “public interest” as referenced in the *Public Prosecutions Policy Manual*, Department of Justice, Saskatchewan, 1 June 1998, for example), commonly raised in discussions about federal and provincial jurisdiction in defence of the *status quo*, is overtly offensive when the human rights of women and children in the various provinces and territories are at stake. It should be noted in connection with sensitivities related to “regional values,” that action to enforce and clarify interpretation and application of the substantive and procedural criminal laws does not affect the sentencing process or impinge upon provincial jurisdiction over corrections in cases in which the sentence is less than two years.

50 *Director of Public Prosecutions Act*, Part 3 of the *Federal Accountability Act*, *Statutes of Canada 2006*, c 9. In force 12 December 2006.

ment of policies, training programs, and reference manuals that would facilitate bringing the rule of law to the handling of sexual assault cases throughout the criminal justice system.

Recommendation 2

Parliament should create a federal Office of the Sexual Exploitation Auditor to monitor the operation and efficacy of programs and actions taken in relation to sexual assault and exploitation pursuant to the federal government's constitutional responsibilities for criminal law under s 91(27) of the *Constitution Act*. The auditor would exercise powers analogous to those of the Auditor General, function at arms length from the Attorney General of Canada, and report directly to Parliament and the public.

Systematic review of how federal and provincial prosecutors and judges handle individual cases and categories of cases is needed to ensure that necessary legislative reforms or policy changes can be made in a timely way by Parliament or the appropriate authority. This model contemplates the creation of a system of ongoing review and the issuance of regular reports to Parliament and the public, on the operation and efficacy of federal and provincial prosecution of sexual assault offences under the *Criminal Code* and offences involving sexual exploitation under federal legislation other than the *Criminal Code*, such as legislation dealing with human trafficking and criminal organizations, by a federal officer exercising powers analogous to those of the federal Auditor General and operating at arms length from the office of the Attorney General of Canada. This modification to the design of the institutions by which Canada secures the benefits of responsible government for its citizens is overdue.

Recommendation 3

Parliament should create a federal Office of the Sexual Assault Legal Representative [SALR] to provide legal representation to women and children who are complainants in sexual assault cases in any of the provinces and territories of Canada, from the time of the initial contact between the complainant and health care providers or criminal justice system personnel until final disposition of the case.

Empirical research on service and treatment delivery options shows that the well-being of complainants is enhanced when rape crisis advocates participate in intake service delivery.⁵¹ Such services need to be

51 For example, Rebecca Campbell, "Rape Survivors' Experiences with the Legal and Medical Systems" (2006) 12 *Violence Against Women* 30; Lee D Preston, "The Sexual

far more generally available to complainants in urban, rural, and under-served areas than they are at present. In addition, specialized legal counsel — autonomous and fully independent from police, victim services, and the Crown — should be available to complainants at point of first intake, whether that is a police station or a health-care setting, with ample arrangements for follow-up. A number of objectives would be served by this arrangement: timely protection of complainant rights, preservation of evidence, and timely identification of sources of evidence, amongst others. Legal services should continue until such time as the case is closed or disposed of in legal proceedings and should encompass representation of the complainant throughout both the pre-trial and trial proceedings. In the investigative stage and at trial, a SALR would be in a position to advise the complainant about how to respond to questions that explore issues that: (1) are not relevant because they have no legally probative value in relation to the material facts at issue, or (2) disregard the complainant's privacy.

A SALR could also take steps, as appropriate, to obtain standing and make submissions in relation to specific issues before the court. The case law suggests, as seen in *Edmondson*, *Kindrat*, and *Brown*, that the rape shield and personal records provisions in the *Code* are easily circumvented by counsel's choice of witnesses and use of questions that refer to aspects of a complainant's personal history or invite responses that may refer to aspects of the complainant's personal history. A SALR, based in a properly funded and resourced federal Office of the Sexual Assault Legal Representative, could take steps to secure greater compliance with the rule of law in the investigation and trial proceedings. Complainants should not be placed in the position of needing to vet the legal relevance and propriety of the questions they are asked when giving testimony in court or in the course of a police interview. In both contexts, the SALR could provide the justice process with a much-needed prophylactic against distortion of the truth-seeking process by the time-consuming, distracting, and potentially prejudicial exploration of irrelevant or personally invasive matters.⁵² In time, judges and

Assault Nurse Examiner and the Rape Crisis Center Advocate" (2003) 25 *Top Emerg Med* 242. There are now a significant number of empirical studies and a growing body of literature dealing with these issues.

52 When an application is made under either the rape shield or personal records provisions of the *Criminal Code*, the trial judge should order that legal representation be provided for the complainant on the ground that disposition of the application will affect the complainant's rights. Section 278.4 provides that the complainant, the

prosecutors alike will come to view this development in the criminal justice process as long overdue.⁵³

record holder, and “any other person to whom the record relates,” have standing to make submissions at the hearing of an application for production. In Manitoba, those rights, in the case of a “victim,” are supplemented by s 4(2) of *The Victims’ Rights Act*, SM 1998, c V55, which provides: “Victims are entitled to be given access to free, independent counsel when access to personal information about them is sought under section 278.3 of the *Criminal Code* (Canada).” Some but not all other provinces have made equivalent provision for representation of the complainant by independent, funded counsel in connection with personal records applications. But even that is arguably too little, too late. Widespread use of informal means to circumvent the procedures in the *Criminal Code* that govern production of records and admission of sexual history shows that legal representation is required from the point of initial contact with health and criminal justice personnel. At minimum, the *Criminal Code* should be amended to provide standing for the complainant in relation to any application or appeal brought under s 276.1–276.6 on the grounds that the complainant’s dignity and privacy and security rights are affected by all attempts to introduce sexual history in any legal proceedings related to a sexual assault charge. In the absence of such an amendment to the *Criminal Code*, standing can be sought on a case-by-case basis on grounds of the *Charter* and the common law.

In *R v Morgentaler*, [1988] 1 SCR 30 Dickson CJC held that “state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person” (at 56), thereby triggering the protections available under section 7 of the *Charter*. Similarly, Claire L’Heureux-Dubé, Justice of the Supreme Court of Canada, 1987–2002, addressing Ontario prosecutors in 2003, urged them to assume the challenge of developing the equality rights jurisprudence under s 15 of the *Charter* in relation to the privacy and security interest of complainants and other witnesses. However, noting that both prosecutors and judges, hoping to avoid appeals, may be tempted to defer to the defence on issues affecting the complainant’s privacy and security interests, she opined that it “will take some time before all levels of court give ... [the personal records and sexual history] ... provisions their full effect,” in “The *Charter* and the Administration of Criminal Justice in Canada — Where Have We Been and Where Shall We Go?” (2006) 3 Ohio St J Crim L 487. These observations, coming as they do from someone who has had ample opportunity to observe jurists in action, provide significant support for the conclusion that complainants, whose interests and knowledge of the matters at issue are unique, require independent counsel. Ironically, although fuller protection for the unique interests of complainants arguably is required under the *Charter* and at common law, legal argument to that effect will rarely be heard in court unless complainants are represented by independent publicly-funded legal counsel.

53 Others recognize the need for legal representation of sexual assault complainants, eg, Wendy J Murphy, “The Victim Advocacy and Research Group: Serving a Growing Need to Provide Rape Victims with Personal Legal Representation to Protect Privacy Rights and to Fight Gender Bias in the Criminal Justice System” (2001) 10:1 Journal of Social Distress & the Homeless 123. A few jurisdictions have experience with legal services models that provide some protection for complainants’ rights in the legal process. See the multi-national survey information in Jennifer Temkin, *Rape and the Legal Process*, 2d ed (New York: Oxford University Press, 2002). In due course, expansion of the jurisdiction of the Office of the SALR to encompass representation of women and children who are subjected to criminal violence, coercion, and exploitation

In addition, the Office of the SALR, as a fully autonomous institution, federally funded, and at arms length from the federal Department of Justice, would be well-positioned to observe and report directly to Parliament, from time to time, on the overall functioning of the criminal process in relation to enforcement of the federal laws prohibiting sexual assault and sexual exploitation, from the unique perspective of complainants.⁵⁴ This arrangement would complement but not replace the functions to be undertaken, as proposed above, by the Office of the Sexual Exploitation Auditor and the Attorney General of Canada.

CONCLUSION

The cases of *Edmondson*, *Kindrat*, and *Brown* provide compelling evidence that reliance by the federal government on the provincial Attorney General to prosecute offences of sexual and non-sexual violence against women and children in the province of Saskatchewan is not justified. Failure by the federal government to take steps to fulfill its constitutional responsibilities for the proper interpretation, application, and enforcement of laws prohibiting violence against women and children in Saskatchewan, in the face of evidence of nonfeasance and serious errors by provincial actors in the criminal process, is a betrayal of the trust of some of the most vulnerable members of Canadian society.⁵⁵ History shows that the negative spiritual and social effects of betrayals of trust are corrosive, and may often do as much damage to individuals and the threads and texture of the social fabric as the underlying acts of violence.

that is not specifically sexual, should be considered.

- 54 This, like the two other systemic recommendations, can be seen as an application of the principle of “functional effectiveness” to the profound challenges encountered in implementation of the sexual assault laws within the context of Canadian federalism. For discussion of “functional effectiveness” as a rationale for the assertion of federal paramountcy, see John Leclair, “The Supreme Court of Canada Understanding of Federalism: Efficiency at the Expense of Diversity” (2003) 28 *Queen’s LJ* 411. See also Carter *supra* note 43 at 186–89, discussing Leclair’s article.
- 55 Consider the situation of Aboriginal women in Canada as documented in *Stolen Sisters: A Human Rights Response to Violence Against Indigenous Women in Canada* (Ottawa: Amnesty International, 2004).