



**THE LEGAL TREATMENT OF MARITAL RAPE AND WOMEN'S
EQUALITY: AN ANALYSIS OF THE CANADIAN EXPERIENCE**

**Professor Jennifer Koshan
September, 2010**

Table of Contents

I.	Introduction - The Legal Treatment of Marital Rape in Canada and Women’s Equality.....	3
II.	General Indicators of Women’s (In)equality and the Prevalence of Sexual Violence in Canada -- Setting the Stage for the Legal Treatment of Marital Rape	4
III.	The Background to the Legal Treatment of Marital Rape in Canada – Colonial Influences and Equality Responses.....	10
IV.	The Legal Framework for Addressing Marital Rape in Canada.....	14
V.	Additional Laws, Policies and Reforms Affecting the Legal Treatment of Marital Rape in Canada.....	17
A.	Sexual Assault: Definition and Elements	
B.	Consent	
C.	Mistaken Belief in Consent	
D.	Evidentiary Rules	
E.	Sentencing	
F.	Other Laws, Policies and Reforms in the Area of Domestic Violence	
G.	The Constitutional and International Frameworks for Marital Rape Laws in Canada	
VI.	The Judicial Treatment of Marital Rape in Canada.....	30
A.	Introduction	
B.	Sexual Assault: Definition and Elements	
C.	Consent	
D.	Mistaken Belief in Consent	
E.	Evidentiary Rules	
F.	Sentencing	
G.	Other Equality Issues	
H.	Concluding Observations on the Case Law	
I.	Towards Women’s Equality in Marital Rape Cases in Canada	
VII.	The Relevance of Legal Pluralism and Indigenous Law Perspectives.....	63
VIII.	Conclusion: Lessons Learned from the Legal Treatment of Marital Rape in Canada	65
	Appendix A.....	68

The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience

By Jennifer Koshan*

September, 2010

I. Introduction: The Legal Treatment of Marital Rape in Canada and Women's Equality

Marital rape is both a product of and a contributing factor to women's inequality in Canadian society and internationally. Nevertheless, before 1983 it was legally permissible for a man to rape his wife in Canada without criminal sanction.¹ A package of reforms to the *Criminal Code* was enacted in 1983,² and for the first time since confederation marital rape was categorized as a criminal offence. Contemporaneous and subsequent reforms to the sexual assault provisions in the *Criminal Code* also recognized women's equality and right to be free from sexual violence. However, the interpretation of these provisions by the courts, along with defence lawyer tactics and lingering assumptions about sex in spousal relationships, have made it difficult to obtain appropriate legal remedies for marital rape in light of issues related to consent, mistaken belief in consent, sexual history evidence and the production of personal records.³ Concerns also remain about low rates of reporting marital rape and the treatment of those cases that are reported by the police, Crown prosecutors and courts.⁴ Few statistics are available on the impact of sexual violence laws on marginalized men and women,⁵ and Indigenous peoples in Canada continue to be denied sovereignty to deal with interpersonal violence according to their own laws.⁶

This paper reviews the legal treatment of marital rape⁷ in Canada from the period when it was criminalized in 1983 until the present. This review identifies further reforms and strategies

* This paper was written for the equality effect (formerly the African and Canadian Women's Human Rights Project). Many thanks to Susan McDonald, Fiona Sampson and Vasanthi Venkatesh for research assistance and collaboration, and to the members of the ACWHRP marital rape subcommittee and participants in the Nairobi workshop for their insights and comments. Particular thanks to Sheila McIntyre and Melanie Randall for their detailed comments on the paper, and to Elizabeth Sheehy for sharing resources. Also, my deep appreciation goes out to the law students from across the country who reviewed hundreds of cases to find and summarize those dealing with marital rape: Antonio Giambardino, Miriam Gibbs, Brynne Harding, Michelle Johnston, Stephen Lajeunesse, Monica Lee, Nicole Ludwig, Charles McRoberts, Lindsay Merrifield, Gabrielle Motuz, Orlagh O'Kelly, Carolyn Stroz, Meghan Tonner, Elizabeth Whitsitt, and Miriam Yosowich.

¹ *Criminal Code of Canada*, R.S.C. 1970, c. C-34.

² Bill C-127, *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125.

³ See below section IIIB.

⁴ See below section II.

⁵ See below section II.

⁶ Of course, the denial of Indigenous peoples' sovereignty goes far beyond issues relating to interpersonal violence. See Mary Eberts and Patricia Monture, "Is 'Customary Law' a Solution or a Continuing Problem of Colonial Oppression: The Case of Aboriginal Women in Canada" (ACWHRP, 2010). I am also grateful for June McCue's contributions to my thinking on this issue.

⁷ The term "marital rape" will be used in this paper even though "rape" is no longer an explicit offence since the 1983 reforms. My use of this term is intended to describe the range of conduct that was subject to immunity prior to 1983 as well as rapes and other sexual assaults occurring in spousal (or ex-spousal) relationships, regardless of whether the parties are (or were) legally married. My review of case law reveals that "rape" is still a frequent form of sexual violence committed by husbands against their wives, so it seems appropriate to continue to use this term.

required to respond properly to marital rape in Canada, and analyzes the lessons learned from the Canadian experience in order to inform the reform of laws in Ghana, Kenya, and Malawi. In turn, similar analyses from Ghana, Kenya, and Malawi will inform the need and possibilities for reform and interpretation of the laws relating to marital rape in Canada. It is important to note that there has been little specific attention paid to the issue of marital rape in Canada since the period when it was criminalized in 1983 and a short time thereafter when the impact of the reforms were assessed.⁸

Section II of this paper provides the factual context for the legal analysis, including statistics on general indicators of women's (in)equality, the incidence and reporting of sexual violence in spousal relationships, and the harms of such violence. Section III details background to the criminalization of marital rape in Canada, and section IV examines the overall framework for the legal treatment of marital rape. Section V reviews other doctrinal factors influencing legal responses to marital rape and violence in intimate relationships more broadly. Section VI analyzes the judicial treatment of almost 300 reported cases of marital rape in Canada since 1983 as a foundation for assessing the need and possibilities for further reforms to the law. Section VII explores the relevance of legal pluralism and indigenous law perspectives. Section VIII concludes with lessons learned from the legal treatment of marital rape in Canada for reform of the law here and elsewhere.

II. General Indicators of Women's (In)equality and the Prevalence of Sexual Violence in Canada -- Setting the Stage for the Legal Treatment of Sexual Violence in Intimate Relationships

Numerous Canadian statistical and social science reports paint a picture of women's (in)equality, and the harms, incidence rates and reporting rates of sexual violence and marital rape, as well as services available (and gaps in services) to survivors of such violence. Viewed together, these data suggest the links among socio-economic inequality, being targeted for violence, and the failures of law and the state to respond effectively and meaningfully to such human rights breaches.

Statistics Canada's most recent *Gender-based Statistical Report* reveals that women account for just over half of the Canadian population (50.4%), with 19% of Canada's female population born outside the country, 14% identifying themselves as "visible minorities", and 3% identifying as Aboriginal.⁹ More women (13.3%) than men (11.5%) report having disabilities.¹⁰ The number of

⁸ For exceptions see Christine Boyle, "Sexual Assault as Foreplay: Does *Ewanchuk* Apply to Spouses?" (2004) 20 *Crim. Reports* 359 ("Boyle (2004)"); Melanie Randall, "Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest But Mistaken Judicial Beliefs" (2008) 32 *Manitoba Law Journal* 144 ("Randall (2008)"); Elaine Craig, "Ten Years After *Ewanchuk* The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence" (2009) 13(3) *Can. Crim. L. Rev.* 247; Ruthy Lazar, "Negotiating Sex – The Legal Construct of Consent in Cases of Wife Rape in Canada" (forthcoming, C.J.W.L).

⁹ Statistics Canada, *Women in Canada. A Gender-based Statistical Report* (5th ed.) (Ottawa: Statistics Canada, 2006), on-line: <http://www.statcan.gc.ca/pub/89-503-x/89-503-x2005001-eng.pdf> at 11.

¹⁰ *Ibid.* at 12, 54. This compares to World Health Organization statistics which state that "at least 10% of all women globally" have disabilities. See The World Bank, Disability and Development, Women with Disability, on-line: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contntMDK:20193528~menuPK:418895~pagePK:148956~piPK:216618~theSitePK:282699,00.html>.

women living in marriage relationships has declined over time, with 48% of women in this category in 2001 (down from 56% in 1981) and 9% of women living in common law relationships in 2001 (up from 4% in 1981).¹¹

In 2008, Canada placed 10th out of 93 countries on the UN's Gender Empowerment Measure, which measures women's activity in economic and political life, and 45th on the UN's Gender Development Index, which measures income equality and respect for human rights and freedoms.¹² More than half of Canadian women have some post-secondary educational training, but women are still slightly less likely to have a university degree, and far less likely to have graduate degrees than men.¹³ The proportion of women in Canada working for pay has risen over the years, from 42% in 1976 to 58% in 2001.¹⁴ However, women are much more often absent from work on account of family and personal responsibilities, and more likely to work part-time than their male counterparts.¹⁵ Women's choice of and participation in paid employment is often related to a lack of available or affordable child care.¹⁶ Women working full-time, full-year earn on average only 71.4% of what their male counterparts earn, and this number drops to 65.7% if the average earnings of all women workers are compared to their male counterparts.¹⁷ Women working in the paid workforce are also more likely to fall below the low-income cut off than men.¹⁸ Women are less likely than men to receive unemployment benefits, and make up 60% of minimum wage earners. Given that women account for 47% of the paid workforce, this means that 1 out of 16 women earn minimum wage compared to 1 out of 25 men.¹⁹ Visible minority women are better educated but less employed as well as more underemployed and underpaid than white women.²⁰ Aboriginal women are less likely to be employed than Aboriginal men or non-Aboriginal women, with higher unemployment rates and lower income.²¹ Similarly, women with disabilities are less likely to be employed than women without disabilities and men with disabilities, and those who are employed have relatively low incomes.²² Overall, women are much more likely to be poor than men -- in 2007, 1.22 million adult women lived below the poverty line, compared to 1.09 million men, and women are more likely to experience greater depth of poverty than men.²³ Women who experience intersecting forms of inequality will experience these social, political and economic disadvantages even more deeply.

¹¹ *Ibid.* at 11. The remainder of women were single (17%), lone parents (9%), living at home with their parents (14%), or living with extended family (3%). *Ibid.* at 33.

¹² Monica Townson, *Women's Poverty and the Recession* (Ottawa: Canadian Centre for Policy Alternatives, 2009) at 14-15, on-line:

http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2009/Womens_Poverty_in_the_Recession.pdf

¹³ Statistics Canada (2006), *supra* at 90. 16% of men hold university degrees compared to 15% of women, while women hold 44% of all masters degrees, and only 27% of all doctoral degrees.

¹⁴ *Ibid.* at 13.

¹⁵ *Ibid.* at 14. 7/10 of all part-time workers are women.

¹⁶ Monica Townson, *supra* at 24.

¹⁷ *Ibid.* at 16.

¹⁸ Statistics Canada (2006), *supra* at 14, reports that 31% of women fall below the LICO compared to 28% of men. For a discussion of the LICO as a measure of poverty see Townson, *ibid.* at 7.

¹⁹ Townson, *ibid.* at 24. 39% of women qualify for EI compared to 45% of men.

²⁰ Statistics Canada (2006), *supra* at 249-50; Townson, *ibid.* at 35.

²¹ Statistics Canada, *ibid.* at 198-9; Townson, *ibid.* at 33-4.

²² Statistics Canada, *ibid.* at 294-296, Townson, *ibid.* at 35-36.

²³ Townson, *ibid.* at 10-11.

Sexual violence is another indicator of women's inequality. Statistics Canada reports that women are 6 times more likely to be victims of sexual assault than men, and 3 times more likely to be victims of criminal harassment. Women who experience violence know their abusers 70% of the time, and 16% of women experiencing spousal abuse are sexually assaulted compared to a "statistically insignificant" proportion of males reporting spousal abuse.²⁴

Sexual violence is a serious intrusion of sexual and reproductive autonomy, bodily and psychological integrity, and when it occurs in intimate relationships, it is also a breach of trust and can be a serious risk factor for femicide. A recent report of the Ontario Chief Coroner's office describes "prior forced sexual acts and /or assaults during sex" as an indicator for domestic homicide.²⁵ Health Canada's 2002 report *The Family Violence Initiative* discusses the consequences of intimate violence (including sexual violence) for women, including physical injury, emotional harm, unwanted pregnancy, and exacerbation of other health conditions.²⁶ Women experiencing spousal violence are far more likely than men to be fearful, depressed, or suffer anxiety attacks.²⁷ For Indigenous women and perhaps other women as well, sexual violence may also be seen as "a threat to health and security of the entire community."²⁸ Poverty, social inequalities and the lack of available services may make it difficult for women to leave violent relationships, thus putting them at risk of further violence and harm.

Conversely, intimate sexual violence may displace women from their homes and communities when they do leave violent relationships. Statistics Canada biannually documents the usage of shelters in Canada generally, and on "snapshot days" when women in shelters are surveyed to gather information. A typical report shows that close to 80% of women in shelters on the snapshot day were fleeing spousal abuse of some form,²⁹ and between 30%³⁰ and 23%³¹ were escaping sexual abuse.³²

²⁴ Statistics Canada (2006), *supra* at 15, 161.

²⁵ Al J.C. O.Marra, *Domestic Violence Death Review Committee Annual Report to the Chief Coroner* (Ontario, 2005) at 86. See also *R. v. E.M.B.*, 2000 ABQB 46, where spousal sexual violence was noted as a risk factor relevant to the determination of judicial interim release. In 2004, 37% of all female homicide victims were killed by a spouse or former spouse. See Statistics Canada (2006), *supra* at 16, citing the 2004 General Social Survey. Ninety-seven per cent of victims of murder-suicides are women (*ibid.* at 165).

²⁶ Family Violence Initiative, *The Family Violence Initiative: Year five report* (Ottawa: Health Canada, 2002) at 10-12.

²⁷ Statistics Canada (2006), *supra* at 163.

²⁸ Native Women's Association of Canada, *Proposed Amendments to the Criminal Code Under Bill C-49: The Perspective of Aboriginal Women* (NWAC, 1992) at 3. This was recognized in *R. v. Betsidea, infra*.

²⁹ See for example Julie Sauvé and Mike Burns, *Residents of Canada's shelters for abused women, 2008* (Ottawa: Statistics Canada, 2009) at 8, on-line: <http://www.statcan.gc.ca/pub/85-002-x/2009002/article/10845-eng.pdf>. Other abusive relationships being escaped from were dating or family relationships (*ibid.* at 9). Also of note is that 25% of women in shelters had reported the incident(s) to the police, and that 15% had obtained a restraining or protection order against the offender (*ibid.* at 10).

³⁰ Daisy Locke and Ruth Code, *Canada's shelters for abused women, 1999/2000* (Ottawa: Statistics Canada, 2001) at 6, on-line: <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0010185-002-XIE.pdf> (reporting on statistics for April 17, 2000)

³¹ Andrea Taylor-Butts, *Canada's shelters for abused women, 2005/2006* (Ottawa: Statistics Canada, 2007) at 4, on-line: http://dsp-psd.pwgsc.gc.ca/collection_2007/statcan/85-002-X/85-002-XIE2007004.pdf (reporting on statistics for April 19, 2006).

³² While some of these reports indicate the number of shelters providing services for Aboriginal women, women with disabilities, lesbian women, and racialized women, the rates of sexual violence in intimate relationships are not broken down on this basis. Interestingly, the latest report (Sauvé and Burns, 2009, *supra*) does not include any

There are few specific statistics available on the incidence of sexual violence in intimate relationships. The Canadian Panel on Violence Against Women (1993) reported on findings from the Women's Safety Project,³³ where 81% of sexual assaults in the survey sample were perpetrated by men who knew their victims, and 38% were committed by husbands, common law partners or boyfriends. Although these statistics were not disaggregated, the Panel noted the unique vulnerability of some women to violence – poor women, racialized women, Aboriginal women, immigrant women, lesbian women, women with disabilities, older women, and rural women. This increased vulnerability was tied to marginalized women's systemic inequality and devalued humanity, in addition to dependency on men or isolation.³⁴ Health Canada's report *The Family Violence Initiative* confirms statistics about the vulnerability of marginalized women to family violence, including Aboriginal women, women living in rural and remote communities, women with disabilities and ethno-cultural minority women.³⁵

Although the 1999 General Social Survey found comparable self-reported rates for male (7%) and female (8%) spousal violence over a 5 year period,³⁶ it also found that women are more likely to be subject to serious forms of domestic violence, including sexual assault (20% of women and only 3% of men).³⁷ Women who survive domestic violence are more likely to seek medical attention than men (13% compared to 2%), and are 3 times more likely to fear for their lives.³⁸ According to the 2004 GSS, Aboriginal women are 3 times more likely to be victims of spousal abuse than non-Aboriginal women, and Aboriginal women are more likely to experience serious forms of spousal violence, including sexual assault (54% as compared to 37% of non-Aboriginal victims).³⁹ Visible minority and immigrant women were not found to be subject to a greater risk of spousal violence, and no specific findings were reported with respect to sexual violence in intimate relationships for these groups.⁴⁰ Another important statistic from the 1999 GSS is that post-separation, 35% of women who were assaulted by their ex-partners were sexually assaulted.⁴¹

information about services for marginalized women. The 2007 report includes a special focus on the needs of Aboriginal women, but does not deal specifically with sexual violence in intimate relationships.

³³ Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence ~ Achieving Equality* (Ottawa: Minister of Supply and Services, 1993) at 30, citing Lori Haskell and Melanie Randall, *The Women's Safety Project: A Community Based Study of Sexual Violence in Women's Lives* (Toronto: self-published, 1993). This project was based on interviews with 420 women in Toronto.

³⁴ *Ibid.* at 59.

³⁵ *The Family Violence Initiative*, *supra* at 10-12.

³⁶ Sandra Besserer, Jodi-Anne Brzozowski, Dianne Hendrick, Stacie Ogg, Catherine Trainor, *A Profile of Criminal Victimization: Results of the 1999 General Social Survey* (Ottawa: Statistics Canada, 2001) at 8 ("1999 GSS"), on-line: <http://www.statcan.gc.ca/pub/85-553-x/85-553-x1999001-eng.pdf>. For a critique of the GSS methodology as related to the finding of equal rates of spousal violence, see FREDa, *The 1999 General Social Survey on Spousal Violence: A Fact Sheet* (on-line: <http://www.harbour.sfu.ca/freda/reports/gss02.htm>)

³⁷ Rebecca Kong, Holly Johnson, Sara Beattie and Andrea Cardillo, *Sexual Offences in Canada* (Ottawa: Statistics Canada, 2003) at 6; on-line: <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0060385-002-XIE.pdf>.

³⁸ Statistics Canada (2006), *supra* at 162, citing the 2004 General Social Survey.

³⁹ Statistics Canada, *ibid.* at 163, citing the 2004 General Social Survey. See also NWAC (1992), *supra* at 3.

⁴⁰ 1999 GSS, *supra* at 11.

⁴¹ See Tina Hotton, *Spousal violence after marital separation* (Ottawa: Statistics Canada, 2001) at 5. This figure was down from 46% in 1993 (*ibid.*).

A 2008 study by Justice Canada examined links between the high rates of family violence and sexual assault in the Territories and offenders' past histories of abuse.⁴² It reports that in 2005, the rate of sexual assaults in Canada was 7.2 per 10,000 population, while in the Territories, which has a much higher Aboriginal population,⁴³ the rate ranged from 79.7 per 10,000 in Nunavut to 18.1 in the Yukon.⁴⁴ Data from Crown prosecutor files were analyzed in relation to separate categories of family violence and sexual assault cases, resulting in the finding that 4% of sexual assaults were committed against current spouses or partners.

In spite of these incidence rates, studies suggest that marital rape is vastly underreported to police. Once again, there are no statistics gathered specifically for this form of violence.⁴⁵ However, general statistics on reporting rates for sexual assault are most likely apt in the context of marital rape as well. Indeed, reporting rates are likely even lower for sexual violence in the context of spousal relationships, particularly if the parties remain together.⁴⁶

Statistics for reporting rates for sexual assault vary, but most studies show marked underreporting. For example, the 1999 GSS found that 78% of sexual assaults were not reported to police.⁴⁷ *Sexual Offences in Canada* (2003) found that reported sexual offences increased between 1983 (the year that reforms to the *Criminal Code* took effect)⁴⁸ and 1993, after which the number of reported sexual offences declined by 36% between 1993 and 2002. However, 2002 rates were still 47% higher than those in 1983.⁴⁹ While this seems encouraging, empirical research shows that it is difficult to isolate the actual impact of the reforms themselves from other factors that may have contributed to increased rates of reported sexual assaults.⁵⁰ This research confirms the results of a number of studies conducted by Justice Canada (Research and Statistics Division) in the mid-1980s examining the impact of sexual assault law reforms in 1983 in six Canadian cities. Researchers reviewed police, Crown and sexual assault centre files, undertook interviews with criminal justice personnel, service providers, and victims, and engaged in court monitoring. There were some contradictory findings amongst the studies, but for the most part, they found that the reforms had not met the objective of encouraging reporting or of increasing

⁴² Anna Paletta, *Understanding family violence and sexual assault in the Territories, First Nations, Inuit and Métis Peoples* (Ottawa: Department of Justice Canada, 2008). Amongst Aboriginal persons in the sample, 66% of those accused of sexual assault and 77% of those accused of family violence had abusive histories (at 25).

⁴³ Rates of Aboriginal peoples in the Territories range from 85% in Nunavut to 23% in the Yukon. *Ibid.*

⁴⁴ See also *Sexual Offences in Canada* (2003), *supra* at 4, showing markedly higher rates of police-reported sexual offences in the three Territories.

⁴⁵ This is based on a review of Statistics Canada's annual reports on family violence, other government reports on family, domestic and sexual violence, reports on violence against Aboriginal women, a review of the Canadian Panel on Violence Against Women report, and a review of Canadian women's shelter websites.

⁴⁶ See Randall (2008) at 144.

⁴⁷ 1999 GSS, *supra* at 39.

⁴⁸ The 1983 reforms will be discussed in the next section of this paper.

⁴⁹ *Sexual Offences in Canada* (2003), *supra* at 3. The actual figures are as follows: in 1983, 40 incidents of sexual assault per 100,000 population were reported to police; in 1993, 136 incidents per 100,000 were reported; in 2002, 86 incidents per 100,000 were reported. These data are not broken down on the basis of race, class, disability, or other factors related to women's marginalization. They are broken down by geographic region, showing great variation (*ibid.* at 4).

⁵⁰ *Sexual Offences in Canada* (2003), *ibid.* See also Bernard Schissel, "Law Reform and Social Change: A Time-Series analysis of Sexual Assault in Canada" (1996), 24(2) *Journal of Criminal Justice* 123, whose empirical research suggests that any changes in arrest and charging rates for sexual assault are attributable to general trends in social control rather than the impact of sexual assault law reforms.

convictions for sexual offences.⁵¹ Reporting rates may also be lower for particular groups of women. For example, the Native Women's Association of Canada indicates that fewer Aboriginal women report sexual violence to the police because of a lack of trust of and alienation from the Canadian justice system.⁵² Women with disabilities may also underreport sexual violence.⁵³

Those sexual offences that are reported are less likely than other violent offences to be considered "founded", and less likely to result in charges, prosecutions, or convictions. *Sexual Offences in Canada* (2003) reported that 16% of sexual offences were deemed unfounded in 2002, compared with a 7% unfounded rate for other violent crimes between 1991 and 2002. Further, only 44% of founded sexual offences were cleared by the laying of charges, compared to 50% of other founded violent offences.⁵⁴

A *Survey of sexual assault survivors* conducted by the Department of Justice in 2000 provides some context for why sexual assault survivors choose to report sexual violence (or not). This survey found a much higher reporting rate of sexual violence than the reports noted above, with 64 out of 102 survey respondents having reported to the police. Perpetrators were arrested in 43 out of 64 of the reported cases, charges were laid in 39 out of 64 cases, and convictions were obtained in 18 out of 30 cases.⁵⁵ Women indicated their reasons *for* reporting the sexual violence to the police, including a desire to expose or punish the perpetrator, to protect themselves, their children, or other women, and for personal healing. The women's reasons for *not* reporting

⁵¹ J. and J. Research Associates Ltd., *An Evaluation of the Sexual Assault Provisions of Bill C-127, Fredericton and Saint John, New Brunswick* (1988); Ekos Research Associates Inc., *Report of the Impact of the 1983 Sexual Assault Legislation in Vancouver, British Columbia* (1988); Ekos Research Associates Inc., *Report of the Impact of the 1983 Sexual Assault Legislation in Hamilton-Wentworth* (1988); University of Manitoba Research Ltd., Social Sciences Division, *Report of the Impact of the 1983 Sexual Assault Legislation in Lethbridge, Alberta* (1988); University of Manitoba Research Ltd., Social Sciences Division, *Report of the Impact of the 1983 Sexual Assault Legislation in Winnipeg, Manitoba* (1988). The need for public education and awareness, victim support services, and training of justice system personnel was identified in these evaluations.

⁵² NWAC (1992), *supra* at 4. Sheila McIntyre, "Second Wave Feminist Activism Against Sexual Assault: 1970-2010" (unpublished, on file with author) notes at 22 that Aboriginal women may also decline to report sexual assaults "because children born of the rape of a status Indian woman by a white man were denied Indian status", thus showing how colonial laws contributed to underreporting.

⁵³ Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 McGill L.J. 243 at 256, citing Deborah Tharinger, Connie Burows Horton & Susan Millea, "Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps" (1990) 14 Child Abuse and Neglect 301 at 304 (estimating a 1 in 30 reporting rate for women with disabilities, compared to 1 in 5 for women without disabilities).

⁵⁴ *Sexual Offences in Canada* (2003), *supra* at 9. Of all founded sexual offences, 37% were not cleared by charges or otherwise, compared to 28% of other violent offences (*ibid.*). For recent analyses of unfounding in sexual assault cases, see Teresa DuBois, "A Critical Analysis of Police Investigation: The "Wrongful Unfounding" of Sexual Assault Complaints" and A. Blair Crew, "Striking Back: The Viability of a Civil Action against the Police for the "Wrongful Unfounding" of Reported Rapes", both forthcoming in Elizabeth Sheehy, ed., *Sexual Assault Law, Practice & Activism in a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2011).

⁵⁵ Tina Hattem, *Survey of sexual assault survivors* (Ottawa: Department of Justice Canada, 2002) at 9-10. Surveys were conducted by telephone with women recruited by sexual assault centres in Ontario, B.C., Nova Scotia and Newfoundland. It is unclear how many of these cases involved sexual violence in spousal relationships, and responses were not disaggregated.

included fear of or previous negative experiences with the criminal justice system, fear of record disclosure, pressure from their family, and fear of the perpetrator.⁵⁶

Overall, the factual context highlighted in this section suggests that Canadian women continue to experience multiple forms of inequality, including vulnerability to sexual violence in spousal relationships. The incidence of this form of violence is belied by low reporting rates, more so than for other violent offences. Reforms to the law on sexual offences are clearly important as a way of responding to these issues, but so too are other measures. For example, the *Survey of sexual assault survivors* had several recommendations for broader reforms to the criminal justice system, including the need to change beliefs and attitudes of criminal justice personnel, training of such personnel, changes to court procedures (e.g. closed courtrooms, testifying away from the accused, disallowing cross-examination by self-represented accused, and more expeditious handling of their cases), denial of access to personal records, and the provision of more support, information, compensation and control over the process to victims.⁵⁷ In addition to reforms to the justice system, fundamental structural responses dealing with the compound socio-economic, physical, psychological, dignitary and spiritual harms of poverty, social and political inequality and colonization, must be implemented to combat the interlocking relations of oppression that enable abuse and underpin legal rules and practices favouring perpetrators. The next few sections of the paper, however, will focus more narrowly on the criminal law's response to marital rape and sexual assault and the ongoing need for reforms in this particular context.

III. The Background to the Legal Treatment of Marital Rape in Canada – Colonial Influences and Equality Responses

From 1892, the time of Canada's first *Criminal Code*, until 1983, men were immune from criminal consequences for raping their wives.⁵⁸ The last codification of the English common law immunity for marital rape appeared in Canada's 1970 *Criminal Code*, and provided as follows:⁵⁹

- 143 A male person commits rape when he has sexual intercourse with a female person who is not his wife
- (a) without her consent, or
 - (b) with her consent if the consent
 - (i) is extorted by threats or fear of bodily harm,
 - (ii) is obtained by personating her husband, or

⁵⁶ *Ibid.* at 13, 15, 19. Of the 64 women whose cases were reported, 19 had been subjected to requests for disclosure of their personal records. See also *Sexual Offences in Canada* (2003), *supra* at 6, where reasons for not reporting sexual offences to the police included "because the incident was dealt with another way" (61%); "they felt it wasn't important enough" (50%); "they felt it was a personal matter" (50%); "they didn't want the police involved" (47%); "they did not think the police could do anything" (33%); they "felt that the police would not help them" (18%); they feared revenge (19%) and they wanted to avoid publicity (14%).

⁵⁷ Hattem, *supra* at 24-28.

⁵⁸ For early histories of the law of rape and sexual assault in Canada, see Constance Backhouse, "Nineteenth-Century Canadian Rape Law 1800-92", in David H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (Toronto: Osgoode Society / University of Toronto Press, 1983); Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984), chapter 1 ("Boyle (1984)"). For a history of the legal treatment of marital rape, see Rebecca M. Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption" (1996) 20 *Law & Soc. Inquiry* 941.

⁵⁹ *Criminal Code of Canada*, R.S.C. 1970, c. C-34. In Canada, the federal government has jurisdiction over the creation of criminal offences under section 91(27) of the *Constitution Act 1867*.

(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

Before its repeal as a separate offence in 1983, rape was punishable by life imprisonment,⁶⁰ and between 1921 and 1972, whipping was also a potential penalty.⁶¹

Several reasons have been put forward for men's historical criminal immunity for marital rape, most having their genesis in British colonial laws and attitudes. First, the implied consent theory held that women gave up their entitlement to resist sexual relations with their husbands upon marriage. According to Sir Matthew Hale, "the husband cannot be guilty of a rape committed by himself, upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."⁶² A second theory was based on the unity of the person, and provided that after marriage a woman was incorporated into the person of her husband, making marital rape impossible.⁶³ A third approach cast wives as the property of their husbands, conferring an entitlement on husbands to rape their wives with impunity.⁶⁴ Other rationales focused on the evidentiary problems inherent in proving lack of consent in an ongoing marriage relationship,⁶⁵ the alleged propensity of women to lie about rape to gain an advantage in divorce or matrimonial property proceedings,⁶⁶ the importance of maintaining marital privacy and harmony,⁶⁷ and the argument that marital rape was less serious than rape outside of marriage, and could in any event be sanctioned via criminal charges for assault and battery.⁶⁸

The statutory marital rape immunity in Canada was seen as virtually absolute, and resulted in no cases where the scope of the immunity was interpreted by the courts so as to reduce its impact.⁶⁹

⁶⁰ *Criminal Code of Canada* (1970), s.144.

⁶¹ Boyle (1984), *supra* at 13, citing S.C. 1921, c.25, s. 4 and S.C. 1972, c.13, s.70. For a case where the penalty of whipping for indecent assault was upheld on appeal, see *Regina v. Marion*, [1956] O.J. No. 578 (C.A.). The accused and victim do not appear to have been spouses.

⁶² Sir Matthew Hale, *The History of the Pleas of the Crown* (1763) at 629, as cited in Theresa Fus, "Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches" (2006) 39 *Vanderbilt Journal of Transnational Law* 481 at 483. Hale is also cited by Christine Boyle, "Married Women: Beyond the Pale of the Law of Rape" (1981) 1 *Windsor Yearbook of Access to Justice* 192 at 195-6 ("Boyle (1981)"); Constance Backhouse and Lorna Schoenroth, "A Comparative Survey of Canadian and American Rape Law" (1983) 6 *Canadian-US Law Journal* 48 at 49.

⁶³ Fus, *ibid.*, citing Sonya A. Adamo, Note, "The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries" (1989) 4 *Am. U. J. Int'l L. & Pol'y* 555 at 560.

⁶⁴ Boyle (1981), *supra* at 202; Backhouse and Schoenroth, *supra* at 48; Sheila McIntyre, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" (2000) 20(3) *Canadian Woman Studies* 72 at 73 ("McIntyre (2000)"); Elizabeth Sheehy, "Legal Responses to Violence against Women" (1999) 19 *Canadian Woman Studies* 62; Fus, *ibid.* See also *R. v. Park*, *infra*, para. 41. As Lauren Snider puts it, rape was seen as "a crime committed by men against men." See "Legal Reform and Social Control: The Dangers of Abolishing Rape" (1985), 13 *Int'l J. Soc. L.* 337 at 339 ("Snider (1985)").

⁶⁵ Boyle (1981), *ibid.* at 201-2; Backhouse and Schoenroth, *ibid.* at 54-55; Fus, *ibid.* at 484.

⁶⁶ Backhouse and Schoenroth, *ibid.* at 53; Fus, *ibid.* This rationale is similar to current allegations that women lie about the sexual abuse of their children to gain an upper hand in custody and access battles.

⁶⁷ Backhouse and Schoenroth, *ibid.* at 52; Fus, *ibid.*

⁶⁸ Backhouse and Schoenroth, *ibid.* at 53-54.

⁶⁹ Boyle (1981), *supra* at 196; Backhouse and Schoenroth, *ibid.* at 50. This is confirmed by the case law research conducted for this paper. Fus, *supra* at 497, notes one case where on appeal, it was argued that the Crown had failed to prove an element of rape by neglecting to prove the victim and accused were not married. See *King v. Faulkner*

This can be contrasted with the situation in Britain, where the marital rape immunity was not initially codified, and was eliminated over time by judicial interpretation.⁷⁰ It seemed to be well accepted amongst commentators that the immunity could only be abolished by legislative amendment in Canada.⁷¹

Reform efforts around sexual violence were led by feminist organizers and groups in Canada in the 1970s and 1980s.⁷² Snider notes that women were mobilized by studies showing police “suspicion and hostility” towards rape victims, as well as “relatively light sentences” for rape.⁷³ Women sought not only the abolition of the marital rape immunity, but also the repeal of laws requiring corroboration and recent complaint in the case of sexual offence prosecutions, protections against being questioned on their sexual history and reputation, and overall, a tighter response to sexual violence against women.

Women’s groups involved in lobbying efforts included the Advisory Council on the Status of Women (ACSW), the National Action Committee on the Status of Women (NAC), and the National Association of Women and the Law (NAWL).⁷⁴ The ACSW issued a report in 1976 recommending that “laws against sexual assault should apply to all persons regardless of their sex, age, marital status or previous sexual conduct.”⁷⁵ Similarly, in 1977 NAC released a position paper on rape prepared by Lorene Clark which, amongst other recommendations, called for rape to be treated as an offence against the person rather than a property offence, and to be “prohibited

(1911), 19 C.C.C. 47 (B.C.C.A). See also *California v. Skinner*, [1924] B.C.J. No. 126 (County Court), where an extradition for rape was found to be unavailable where the man had feigned marriage in order to obtain a woman’s consent to sexual relations.

⁷⁰ Boyle, *ibid.* at 196; Fus, *ibid.* at 485 – 496. For example, British courts held that if the parties were separated or in the process of divorce, the immunity did not apply. See *R. v. Clarke*, [1949] 2 All E.R. 448. The abolition of the immunity was eventually codified in Britain. See *Criminal Justice and Public Order Act, 1994*, as cited in Fus, *ibid.* at note 264. In the U.S.A., individual states took both the statutory and common law approach to the marital rape immunity. Only by 1997 had all states abolished the immunity. See Kelly C. Connerton, “The Resurgence of the Marital Rape Exception: The Victimization of Teens by their Statutory Rapists” (1997) 61 Alb. L. Rev. 237 for a list of the dates when each state made this reform.

⁷¹ Backhouse and Schoenroth, *ibid.* at 51, Fus, *ibid.* at 497.

⁷² See Marilyn Stanley, *The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127. Report No. 1* (Ottawa: Department of Justice, 1985). Stanley cites a number of studies conducted by women documenting low rates of reporting, founding, arrest and conviction for sex crimes prior to 1983 (see Lorene Clark and Debra Lewis, *Rape: The Coercive Price of Sexuality* (Toronto: Women’s Educational Press, 1977); Julie Brickman, “Winnipeg Rape Incidence Project: Final Results” (1980, unpublished)); Dianne Kinnon, *Report on Sexual Assault in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1980). Stanley’s report does not deal specifically with marital rape. One source that was noticeably silent on marital rape was the *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970). See Sheila McIntyre (unpublished, *supra*) at 2-3.

⁷³ Snider (1985), *supra* at 340. At the same time some women argued that the maximum sentences for rape were too high and should be aligned with penalties for offences like aggravated assault. See Leah Cohen and Connie Backhouse, “Desexualizing Rape: A Dissenting View on the Proposed Rape Amendments” (1980) 2(4) Canadian Woman Studies 99 at 100.

⁷⁴ Snider (1985), *ibid.* at 343, notes that NAC and NAWL had witnesses participate in the Standing Committee on Justice and Legal Affairs hearings on Bill C-53, the precursor to Bill C-127. The Canadian Nurses Association also participated (*ibid.*).

⁷⁵ Advisory Council on the Status of Women, *Rationalization of Sexual Offences in the Criminal Code* (Ottawa: ACSW, 1976) at 5.

and punished regardless of the age, marital status or socio-economic position of the victim.”⁷⁶ NAWL argued that the marital rape immunity was “one of the most serious deficiencies in the present offence of rape”, and that procedural difficulties in prosecuting marital rape should not be permitted to justify the continued immunity.⁷⁷ Rape crisis centres were also key players in advocating for systemic change to rape laws and their enforcement.⁷⁸

Although these efforts began before the *Charter*’s equality rights provisions came into effect,⁷⁹ arguments for reform were often framed in terms of women’s equality, sexual autonomy, self-determination, dignity and physical integrity.⁸⁰ Existing rape laws were seen as a male construct serving male interests. In the particular context of marital rape, it was contended that the immunity “[subordinates] ... wives to their husbands’ sexual demands [and perpetuates] sex-role dependency relationships.”⁸¹ At the same time, views of women as “sexually passive” and men as “sexually aggressive” were said to be based on stereotypes that were harmful to women as well as men.⁸² This thinking informed not only the argument for abolishing the marital rape immunity, but also for enacting a gender neutral scheme of sexual assault laws that was intended to focus on the violence rather than the sexual nature of the assault.⁸³

Rebuttals to the historical rationales for the marital rape immunity were also put forward, including the arguments that marital rape is actually more serious than rape outside of marriage given its context of trust relationships, dependencies and coercive potential,⁸⁴ and that the sanctity and preservation of the marriage is a fruitless concern in light of the relationship breakdown inherent in marital rape cases.⁸⁵ The marital rape immunity was called a “barbaric

⁷⁶ National Action Committee on the Status of Women, *Status of Women News* (November, 1977) at 14. A resolution recommending repeal of the marital rape exemption was passed by NAC in Ottawa in March 1978 (*Status of Women News* (June 1978) at 24.

⁷⁷ National Association of Women and the Law, *A New Image for Sexual Offences in the Criminal Code: A Brief in Response to Bill C-53* (Ottawa: NAWL, 1981) at 9.

⁷⁸ McIntyre (unpublished), *supra* at 11, 20. See also NAC (1977), *supra* at 15, stating that “[t]he long term goal of these centres was the bringing about of a system which would then cease to inflict secondary victimization on rape victims.”

⁷⁹ Section 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 (the *Charter*) took effect on April 15, 1985, three years after the rest of the *Charter*, in order to give the federal and provincial governments more time to ensure their laws complied with the equality guarantee. Sheila McIntyre argues that Bill C-127 was one of the few federal responses during this compliance period (unpublished, *supra* at 12).

⁸⁰ See e.g. Boyle (1981), *supra* at 196-7; Boyle (1984), *supra*, ch.2; Backhouse and Schoenroth, *supra* at 53-4; McIntyre (2000), *supra* at 2; Fus, *supra* at 497-498.

⁸¹ Fus, *ibid.* at 498, citing Joanna McFadyen, “Inter-Spousal Rape: The Need for Law Reform” in John M. Eekelaar and Sanford Katz, eds., *Family Violence: An International and Interdisciplinary Study* (Toronto: Butterworths, 1978) 193 at 194.

⁸² Fus, *ibid.*, citing McFadyen, *ibid.*

⁸³ Fus, *ibid.* at 498, citing Danette C. Cashman, “Negotiating Gender: A Comparison of Rape Laws in Canada, Finland, and Pakistan” (2000) 9 *Dalhousie J. Legal Studies* 120 at 128-9. Kwong-leung Tang, “Rape Law Reform in Canada: The Success and Limits of Legislation” (1998) 42(3) *Int’l J. of Offender Therapy and Comparative Criminology* 258 at 259, argues that “women’s sexuality was defined by men’s sexuality in that the requirement of vaginal penetration was the only standard with which a woman’s body could be sexually violated in rape.” The Law Reform Commission of Canada also supported this approach. See *Report on Sexual Offences* (Ottawa: Minister of Supply and Services, 1978) at 14-15.

⁸⁴ Boyle (1981), *supra* at 193, Backhouse and Schoenroth, *supra* at 54.

⁸⁵ Backhouse and Schoenroth, *ibid.* at 52-3; Boyle, *ibid.* at 200; NAWL, *supra* at 9.

anachronism' which 'has no place in a society which recognizes women as equal human beings and wives as more than the property of their husbands.'"⁸⁶ Women also cited the prevalence and severe consequences of spousal violence, including rape and other forms of sexual violence, as a justification for removing the immunity.⁸⁷

Sheila McIntyre notes that not all feminists supported the sexual assault reforms that were eventually passed in Bill C-127.⁸⁸ However (and predictably), there were no feminist critics of the abolition of the marital rape immunity. Others were more circumspect. In its *Working Paper on Sexual Offences*, the Law Reform Commission of Canada had recommended the repeal of the immunity where the husband and wife had separated, but did not achieve "definitive consensus" on the question of eliminating the immunity altogether.⁸⁹ After consultations, however, the Commission's final report recommended complete abolition of the marital rape immunity.⁹⁰ The Canadian Bar Association (CBA) and Criminal Lawyers' Association (CLA) also weighed in on the sexual offence reforms. The CBA was said to be "basically supportive", while the CLA "condemned the bill ... [as] poorly written, absurd, carelessly conceived, and much too severely flawed to be fixed up."⁹¹ NAWL's brief also referenced the "misguided attempts of certain right-wing campaigns" against the repeal of the marital rape immunity, which were based on upholding the institution of marriage.⁹²

IV. The Legal Framework for Addressing Marital Rape in Canada

On January 1, 1983, Bill C-127 came into effect. Jean Chrétien, Justice Minister at the time, spoke of the "inequity of the present law" and the "unfair burden on female victims of sexual assault."⁹³ Chrétien explicitly rejected arguments that the repeal of the marital rape immunity

⁸⁶ Backhouse and Schoenroth, *ibid.* at 57, quoting Dennis Drucker, "The Common Law Does Not Support a Marital Exception for Forcible Rape" (1979) 5 Women's Rights Law Reporter 181 at 200.

⁸⁷ Backhouse and Schoenroth, *ibid.* at 53, citing Lenore Walker, *The Battered Woman* (1979) at 108.

⁸⁸ McIntyre (2000), *supra* at 75. Snider (1985), *supra* at 350, argues that the success of Bill C-127 was due to support of law enforcement agencies in large part. The fact that women's interests in sexual assault reform coincided with the interests of the state meant that "this was not essentially a pluralist or feminist victory over patriarchy" (*ibid.*). Snider also notes that many of the liberalising reforms sought by gay rights groups were not won (at 347). See also Cohen and Backhouse, *supra*, who noted the "improbability of desexualizing rape" and questioned the value of trying to do so. They argued that the repeal of a separate offence of rape would make it difficult to gather statistics on the incidence of that practice, and argued that Bill C-127 did not sufficiently deal with the burden on complainants to prove lack of consent.

⁸⁹ *Working Paper on Sexual Offences* (Ottawa: Minister of Supply and Services, 1978) at 17. Many of the arguments canvassed by the Law Reform Commission in support of partial repeal are the same as those canvassed above in relation to men's historical criminal immunity for marital rape. The option of partial abolition of immunity for spouses living separate and apart was consistent with reforms in England and some U.S. states. See Backhouse and Schoenroth, *supra* at 57.

⁹⁰ *Report on Sexual Offences*, *ibid.* at 16-17. Overall, the Commission recommended that sexual offence reform be guided by the following principles: "(1) protecting the integrity of the person, (2) protecting children and special groups, (3) safeguarding public decency" (*ibid.* at 8). Women were not specifically defined as a "special group" under point (2).

⁹¹ Snider (1985), *supra* at 344. More specifically, the CLA was said to be critical of the removal of defences for persons accused of sexual assault, which would appear to include the removal of the marital rape immunity.

⁹² NAWL, *supra* at 9. See also Snider, *ibid.* at 347, who notes that while no opposition to the repeal of the immunity was made publicly during the government's hearings, "opposition from conservative and patriarchal forces undoubtedly existed."

⁹³ Snider *ibid.* at 347.

would undermine the institution of marriage.⁹⁴

In Bill C-127, the offences of rape and indecent assault⁹⁵ were replaced by a new, gender neutral scheme of offences in the *Criminal Code* dealing with “sexual assault”. The scheme grouped offences according to levels of seriousness: sexual assault was punishable by a maximum of 10 years imprisonment; sexual assault with a weapon or causing bodily harm by 14 years; and aggravated sexual assault (i.e. causing wounding or disfigurement) by life imprisonment.⁹⁶

Although not defined, “sexual assault” was not limited to conduct occurring outside a marriage relationship. Rather, a specific section was enacted to make it clear that sexual assaults were criminal within the context of marriage whether the parties were living together or not:

246.8 A husband or wife may be charged with an offence under section 246.1, 246.2 or 246.3 in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred.⁹⁷

The reforms to sexual assault laws generally had several benefits. They served as an example of the influence of the women’s movement over criminal law reform, and to recognize women as a “strong political lobby”.⁹⁸ Feminist activism also played an important role in encouraging the recognition of stereotypes regarding women and sexual assault.⁹⁹ The reforms paved the way for further changes to the criminal law regarding consent, sexual reputation and history, the production of personal records, and sentencing reforms, and for policies around domestic violence charging and prosecution.¹⁰⁰ More specifically with respect to marital rape, the reforms achieved formal equality of personhood between wives and non-wives, which, though insufficient, is an important starting point for women’s equality. As Christine Boyle noted, “since it is accepted that non-consensual intercourse can legitimately be defined as criminal, the distinction between wives and other rape victims is invidious and a denial of the full humanity of a wife in a sexual context.”¹⁰¹ Bill C-127 also served as an important symbolic change in terms of taking sexual assault and sexual violence in intimate relationships seriously.¹⁰² Further, compared to reforms achieved by progressive judicial interpretation, the legislative approach of abolishing the immunity for marital rape may have had the advantage of legitimacy in the eyes of

⁹⁴ Snider, *ibid.*

⁹⁵ Prior to 1983, separate offences for indecent assault of a male and female existed in the *Criminal Code*. Indecent assault of a male was punishable by a maximum of 10 years imprisonment; indecent assault of a female by only 5 years. See *Criminal Code* (1970), sections 149 and 156. A separate offence existed for male sexual intercourse with a female person who “is feeble-minded, insane, or is an idiot or imbecile”, punishable by 5 years imprisonment. This provision was also repealed in 1983. For a history of this offence see Benedet and Grant, *supra* at 246-250.

⁹⁶ Bill C-127, *supra*, enacting sections 246.1, 246.2 and 246.3 of the *Criminal Code* (now sections 271, 272 and 273).

⁹⁷ Bill C-127, *supra*. This section is now s. 278 of the *Criminal Code*, R.S.C. 1985, c.C-46. Backhouse and Schoenroth, *supra* at 56, advocated such a provision, which was missing from an earlier version of the legislative amendments.

⁹⁸ Tang, *supra* at 262.

⁹⁹ McIntyre (2000), *supra* at 74.

¹⁰⁰ Fus, *supra* at 501-502.

¹⁰¹ Boyle (1981), *supra* at 197.

¹⁰² Schissel, *supra* at 134, argues that this symbolic effect is Bill C-127’s primary impact, as it has had very little independent impact on sexual assault reporting, arrest and charging rates. See also Snider (1985), *supra* at 352.

the public, perhaps making it more difficult for police and prosecutors to resist than judicial change.¹⁰³

Not surprisingly, there are very few specific criticisms of the abolition of the marital rape immunity *per se*. However, several weaknesses have been noted with respect to the sexual assault reforms generally, and may serve as cautions for law reform efforts in other jurisdictions. For example, feminists have argued that the sexual assault reforms took a formal equality approach that failed to account for the pervasiveness of myths about women and sexual violence and women's broader inequalities in Canadian society.¹⁰⁴ As McIntyre notes, "formal rule changes will not alter the socialized reasoning processes by which lawyers and laypeople alike determine what constitutes criminal sexual coercion within a marriage."¹⁰⁵ Further, criminal law can only achieve change at the level of individual cases and not on a systemic, political level.¹⁰⁶ While changes to criminal law may be important as symbolic recognition of women's equality and right to bodily integrity, such reforms may also "symbolically [close] the issue and [make] it difficult for women to campaign against the conditions that generate rape".¹⁰⁷ Women's law reform efforts around male violence may also be co-opted or resisted by the state¹⁰⁸ and may cause backlash¹⁰⁹ or new strategies for undermining women's equality in the name of fair trial rights.¹¹⁰ Importantly, there is very little discussion in the literature and studies at the time of Bill C-127 about the impacts the reforms might have on women and men who are disadvantaged by racialization, culture, disability, poverty, or sexual orientation.¹¹¹ There was no discussion of the implications of the reforms for Indigenous peoples in Canada and their sovereignty over resolving issues of interpersonal violence.¹¹²

In 1981, Boyle wrote that "one does not need to be a pessimist to predict that the law, as reformed, will not effect significant change in a practical sense."¹¹³ True to this prediction, and as

¹⁰³ See Fus, *supra* at 503, 505, 507-8, who notes that the judicial approach is often criticized as judicial activism. At the same time, she acknowledges that not all legislatures may be open to abolition, and even if so legislative reforms may be slow to occur and provide a rationale for incremental judicial approaches in the meantime.

¹⁰⁴ See McIntyre (2000), *supra* at 74-5. See also Boyle (1981), *supra* at 203, arguing that "all acts of intercourse take place in a wider context of economic inequality... in which men ... [are] dominant at various levels". Sheehy (1999) attributes the formal equality model to the Royal Commission on the Status of Women's 1970 *Report*, *supra*.

¹⁰⁵ McIntyre (unpublished), *supra* at 16.

¹⁰⁶ Boyle (1981), *supra* at 194, 207; McIntyre (2000), *supra* at 78. See also Lauren Snider, "Feminism, Punishment and the Potential of Empowerment", (1994) 9 *Canadian Journal of Law and Society* 75.

¹⁰⁷ Tang, *supra* at 267.

¹⁰⁸ Dawn Currie, "Battered Women and the State: From the Failure of Theory to a Theory of Failure" (1990) 1(2) *Journal of Human Justice* 77.

¹⁰⁹ Tang, *supra* at 267; McIntyre (2000), *supra* at 72; April Girard, "Backlash or Equality? The Influence of Men's and Women's Rights Discourses on Domestic Violence Legislation in Ontario" (2009) 15 *Violence Against Women* 23.

¹¹⁰ For example, restrictions on sexual history evidence led to a new strategy around production of personal records. See McIntyre (2000), *ibid.* at 78; Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9 *Canadian Journal of Women and the Law* 148.

¹¹¹ For an exception see Snider (1985), *supra*.

¹¹² Writing and reports on intimate violence against Aboriginal women in Canada were first published in the late 1980s. For an account of the exclusion of Aboriginal women from feminist law reform efforts around intimate violence, see Jennifer Koshan, "Sounds of Silence: The Public/Private Dichotomy, Violence, and Aboriginal Women" in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) 87 at 97-101.

¹¹³ Boyle (1981), *supra* at 199.

outlined above, there are continuing problems with reporting rates for sexual assault.¹¹⁴ Further, it continues to be rare for men to be charged with sexually assaulting their wives or partners.¹¹⁵ The Canadian Panel on Violence Against Women's 1993 report attributed low reporting rates for sexual violence in spousal relationships to "systemic barriers" such as "moral obligations and dependency in marriages and families" and "the implicit and explicit assumption that women have a 'duty' to perform any sexual act their partners desire, whenever they so desire."¹¹⁶ Melanie Randall cites studies which show that "the closer the relationship between the sexual aggressor and the victim, the less likely it is that a female victim will elect to report her experience of sexual violation or intrusion, and the less likely she will be to seek legal intervention."¹¹⁷ There is a vast literature on "victim reluctance" to report or testify in sexual assault and domestic violence matters, and the ways in which such reluctance may be affected by factors of ethnicity, culture, Aboriginality, immigration status, class, disability, and sexual identity.¹¹⁸ Further, recent empirical research conducted by Ruthy Lazar shows that the practices of defence lawyers and Crown prosecutors in marital rape cases continue to be influenced by myths and stereotypes about women as wives and sexual partners.¹¹⁹ However, these problems of enforcement should not be permitted to justify maintaining an exemption for marital rape. As Boyle argues, such justifications would logically demand the repeal of other criminal prohibitions of violence against women which receive discriminatory enforcement and prosecution.¹²⁰ Other authors emphasize the need for specialized training of justice system personnel, victims' services, and public education and awareness campaigns to deal with these enforcement problems.¹²¹

V. Additional Laws, Policies and Reforms Affecting the Legal Treatment of Marital Rape in Canada

It is important to review some of the other elements of and reforms to sexual assault laws that were enacted in the 1980s and 1990s in order to grasp the range of issues that may arise in the judicial treatment of marital rape after the immunity was abolished. This overview also reinforces the point that abolition of the marital rape immunity is only one step in the process of responding to sexual violence in spousal relationships, and that other legal and social reforms may be necessary as well. Issues relating to consent, mistaken belief in consent, evidentiary issues and sentencing often overlap, and contribute to the continuing difficulties in reporting, charging,

¹¹⁴ See *supra* section II. NWAC has argued that criminal law reforms such as those in Bill C-49, *supra*, are unlikely to increase reporting rates for Aboriginal women. In this context, "an active policy to encourage Aboriginal women to come forward" is required (at 5).

¹¹⁵ See Nicholas Bala, *Protections for Victims of Spouse Abuse & Their Children: Responses in the Justice System & the Role of Health Care Professionals* (2004, unpublished, on file with author) at 1.

¹¹⁶ See Canadian Panel on Violence Against Women, *supra* at 30.

¹¹⁷ Randall (2008), *supra* at 144.

¹¹⁸ See e.g. Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1990) 43 *Stan. L. Rev.* 1241; Ellen Faulkner, "Lesbian Abuse: The Social and Legal Realities" (1991) 16 *Queen's L.J.* 261 at 265; NWAC (1992), *supra*; Dianne Martin and Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995), 8 *Canadian Journal of Women and the Law* 3; Koshan, "Sounds of Silence", *supra* at 97-99.

¹¹⁹ Lazar, *supra*, interviewed 32 lawyers in Ontario (Crown and defence) who had litigated marital rape cases for their perceptions on consent in such cases.

¹²⁰ Boyle (1981), *supra* at 200.

¹²¹ See e.g. Tang, *supra* at 264, 268.

prosecuting and obtaining convictions in cases of marital rape.¹²² Other reforms in the area of criminal law, as well as non-criminal reforms, are also relevant to women's ability to seek redress for such violence, as are constitutional and international laws. This section deals mainly with the "law on the books"; Section VI will then explore the "law in action" in marital rape cases.¹²³

A. Sexual Assault: Definition and Elements

Subsequent to 1983 the relevant substantive sexual offences in Canada are those of sexual assault, sexual assault with a weapon or causing bodily harm, and aggravated sexual assault. Sexual assault was not defined in the *Criminal Code* reforms of 1983, but was judicially defined by the Supreme Court of Canada in *R. v. Chase* as follows:

Sexual assault is an assault ... committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer." The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant.¹²⁴

In *R. v. Park*, the Supreme Court explained that the *actus reus* of sexual assault consists of two elements: touching of a sexual nature and lack of consent to that touching. The *mens rea* requirement is intent to touch in a sexual manner, and knowledge of the complainant's lack of consent (or recklessness or willful blindness to her lack of consent).¹²⁵

B. Consent

Prior to 1983, lack of consent was an element of the offence of rape, unless the complainant's consent was a result of extortion by threats or fear of bodily harm, impersonation of her husband, or false and fraudulent representations as to the nature and quality of the act.¹²⁶ As noted by Boyle, it was inappropriate to define the latter circumstances as "consent" at all; rather they amounted to coercion that should have been defined as vitiating consent.¹²⁷

Between 1983 and 1992, consent was not defined in the *Criminal Code* in connection with the new sexual assault offences. In *R. v. Park*, Justice Claire L'Heureux Dubé critiqued the common

¹²² As Christine Boyle and Marilyn MacCrimmon note in "The Constitutionality of Bill C-49: Analyzing Sexual Assault if Equality Really Mattered" (1998) 41 *Criminal Law Quarterly* 198, these issues are interconnected in that the legal meaning of consent will affect the scope of what an accused can be mistaken about, and issues of consent and belief in consent will likely determine what evidence is sought and considered relevant.

¹²³ Melanie Randall, "Sexual Assault Law, Credibility and "Ideal Victims": Consent, Resistance, and Victim Blaming", forthcoming, *CJWL*, notes that "with regard to sexual assault in Canada, the law on the books and the law in action are two very different things" (at 2) ("Randall (2010)").

¹²⁴ [1987] 2 S.C.R. 293 at para. 11 (references omitted).

¹²⁵ [1995] 2 S.C.R. 836.

¹²⁶ Section 143 of the *Criminal Code* (1970), *supra*.

¹²⁷ Boyle (1981), *supra* at 201-2.

law approach to consent, stating that it “may perpetuate social stereotypes that have historically victimized women and undermined their equal right to bodily integrity and human dignity.”¹²⁸

This kind of thinking underpinned the 1992 reforms to the *Criminal Code*, which define consent to mean “the voluntary agreement of the complainant to engage in the sexual activity in question” in section 273.1.¹²⁹ This section also stipulates that consent cannot be obtained in certain circumstances, including where the complainant is incapable of consenting, the accused induces the sexual activity by abusing a position of power, or the complainant expresses a lack of agreement to engage in or continue in the activity. This reform should have categorically ended any notion of implied consent or mistake of fact arguments based on an ongoing spousal or intimate relationship. In other words, it should be read as a codification of a woman’s right to withhold and revoke consent, and not to be presumed to have consented because of a spousal relationship.

In *R. v. Ewanchuk*, the Supreme Court interpreted the consent provision to mean that courts must either find that the complainant consented or that she did not consent, confirming that there is no doctrine of implied consent recognized in Canadian sexual assault law.¹³⁰ Further, the Court elaborated that the consent element is an affirmative one which can be satisfied by evidence that the complainant did not say “yes”, as well as by evidence that she said “no”.¹³¹ As the Court earlier acknowledged in the *M.L.M.* case, it is erroneous to require the complainant to “offer some minimal word or gesture of objection” and to “[equate] lack of resistance ... with consent.”¹³²

While the implied consent doctrine was impugned in *Ewanchuk*, Boyle questioned the extent to which this ruling would hold in cases dealing with spousal sexual violence.¹³³ Her concerns were well founded, as the analysis of marital rape cases below will show.¹³⁴

C. Mistaken Belief in Consent

A related issue to consent is the defence of mistaken belief in consent. In the case of *R. v. Pappajohn*, the Supreme Court of Canada held that a mistaken belief in consent would negate the *mens rea* for the crime of rape.¹³⁵ The belief had to be honestly held but not necessarily reasonable; however if the accused was reckless or wilfully blind to the existence of consent, the defence would not succeed. In a subsequent case, *R. v. Sansregret*, the Supreme Court clarified

¹²⁸ *Park, supra* at para. 38, 47. See also *R. v. Esau*, [1997] 2 S.C.R. 777, where Justice L’Heureux Dubé again expressed her view that “the customary focus on the complainant’s communication of refusal or rejection of the sexual touching in question [should be rejected] in favour of an assessment of whether and how the accused ascertained that the complainant was consenting to such activity.” (at para. 31).

¹²⁹ Bill C-49, S.C. 1992, c.38.

¹³⁰ [1999] 1 S.C.R. 330 at para. 31 (per Major, J.). In a concurring opinion, Justice L’Heureux Dubé grounded her analysis in international norms supporting women’s equality.

¹³¹ *Ewanchuk, ibid.* at para. 45, citing *R. v. Park, supra* at para. 39.

¹³² *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3. The Court rendered this judgment in only one paragraph.

¹³³ Boyle (2004), *supra*. See also Craig, *supra*.

¹³⁴ For another comment on *Ewanchuk* see Rakhi Ruparelia “Does no “no” mean reasonable doubt? Assessing the impact of *Ewanchuk* on determinations of consent” (2006) 25 Canadian Woman Studies 167.

¹³⁵ [1980] 2 S.C.R. 120. *Pappajohn* involved the rape of a real estate saleswoman by a client. The Court rejected the defence of mistaken belief in consent because the accused claimed actual consent rather than a belief in consent.

that the *mens rea* for rape required knowledge (or recklessness) that the complainant was not consenting, or was consenting due to fear of violence. An “honest belief” on the part of the accused that consent was voluntary and not induced by threats would amount to a defence even if this belief was unreasonable.¹³⁶

The 1992 amendments to the *Criminal Code* enacted section 273.2, which provides that no defence lies for sexual assault where the accused believes that the complainant consented, if the accused’s belief arose from self-induced intoxication, recklessness or wilful blindness, or if the accused did not take reasonable steps to determine consent.¹³⁷ Lucinda Vandervort argues that section 273.2 codified the common law with respect to the availability of the defence of mistaken belief in consent, and contends that even the “reasonable steps” component of this section should be seen as affirming the common law rule against wilful blindness, rather than creating a new objective component of this defence.¹³⁸ However, the affirmative approach to consent post 1992 means that “. . . the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no”, but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes””.¹³⁹ Recent cases make it clear that in order for there to be an air of reality to the defence, there must be evidence that supports the accused’s claim that he mistakenly believed the complainant was consenting.¹⁴⁰ Where the accused “has subjectively adverted to the absence of consent”, a defence of mistaken belief in consent will not lie.¹⁴¹

While the 1992 reforms and their subsequent interpretation in cases like *Ewanchuk* were positive, section VI will illustrate that the defence of mistaken belief in consent is often raised in cases of marital rape, sometimes with success, and often without specific reference to the requirements of section 273.2 of the *Criminal Code*.

¹³⁶ [1985] 1 S.C.R. 570. *Sansregret* involved the rape of a woman by a former partner who broke into her house and raped her on two occasions, the second time while wielding a butcher knife. The woman expressed consent because she feared for her safety given the past violent history in the relationship. In the circumstances of the case, the Court held that the defence of mistaken belief in consent was not available to the accused, as he was willfully blind to the fact that the complainant’s “consent” was induced by fear of violence.

¹³⁷ Bill C-49, *supra*. See, however, *R. v. Daviault*, [1994] 3 S.C.R. 63, where a majority of the Supreme Court held that evidence of extreme intoxication akin to a state of insanity or automatism might negative the *mens rea* of general intent offences such as sexual assault. The ruling was overridden by *An Act to amend the Criminal Code* (dangerous intoxication) S.C. 1995, c.32 which is now s. 33.1 of the *Code*.

¹³⁸ Lucinda Vandervort, “Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault” (2004) 42 Osgoode Hall Law Journal 625 at 628, citing *Esau, supra*. In *Esau*, the majority held that the defence of mistaken belief is not precluded when the complainant is intoxicated. Justices McLachlin and L’Heureux Dubé dissented. Because the defence deals with a mistake of fact, Vandervort notes that appellate courts may be quite deferential to trial judges, which may in turn influence future decisions to lay charges and prosecute sexual offences. See *ibid.* at 638-9, citing the impact of *R. v. Weaver* (1990), 110 A.R. 396 (C.A.) on the police and Crown.

¹³⁹ *Park, supra* at para. 39.

¹⁴⁰ See *Esau, supra* at para. 63, *Ewanchuk, supra* at para. 56; *R. v. Davis*, [1999] 3 S.C.R. 759 at para. 86. In *R. v. Osolin*, [1993] 4 S.C.R. 595, the Supreme Court upheld the “air of reality” requirement in s. 265(4) of the *Criminal Code* as constitutional. It found that this requirement applies to the defence of honest but mistaken belief in consent for sexual offences in the same way that an air of reality is required before other defences will be put to the jury. However, the majority held that the defence was wrongly withheld from the jury by the trial judge in circumstances where kidnapping was used as the basis for rejecting the defence.

¹⁴¹ *Davis, supra* at para. 87.

D. Evidentiary Rules – Spousal Privilege, Corroboration, Recent Complaint, Sexual History / Reputation, and Production of Records

Prior to 1983, evidentiary rules made it even more difficult than it is now to obtain convictions for rape and other sexual offences. Under the *Canada Evidence Act*, wives were explicitly made competent and compellable witnesses for the prosecution in cases where their husbands were charged with rape (although by definition wives were excluded from the scope of this offence), yet they were not explicitly made competent and compellable in cases where their husbands were charged with indecent assault on a female, an offence which could cover wives.¹⁴² The *Criminal Code* and the common law also contained rules that adversely affected conviction rates. For instance, until 1983 the *Code* provided that if a complainant's evidence was not corroborated, the trial judge was obliged to instruct the jury that it was unsafe to convict. As another example, contrary to an evidentiary rule prohibiting the use of prior consistent statements to shore up a witness's credibility, the common law rule of recent complaint permitted a rape complaint made shortly following the assault to be entered into evidence to bolster the complainant's credibility on the sexist logic that virtuous women would raise a prompt "hue and cry" soon after the alleged event. In the absence of such an immediate complaint, the jury was to be instructed that it could draw an adverse inference as to the complainant's credibility. Finally, evidence of the complainant's sexual history and sexual reputation was also admissible under common law rules that equated lack of chastity with a propensity to consent to any and all sex, and a propensity to lie about prior consent.¹⁴³

In 1983, the abolition of the marital rape immunity was accompanied by an amendment to the *Canada Evidence Act* whereby wives (and husbands) were stipulated as "competent and compellable witness[es] for the prosecution without the consent of the person charged" in all cases of sexual assault.¹⁴⁴ In addition, the rules concerning corroboration and recent complaint were abrogated and new provisions to limit the admissibility of sexual history evidence, so called "rape shield" provisions, were enacted.¹⁴⁵ Evidence of the complainant's general and specific sexual reputation was now inadmissible in relation to her credibility, while evidence of her sexual activity with someone other than the accused was admissible only in certain limited circumstances: for use as rebuttal evidence, as evidence going to identity, and as evidence relating to consensual sexual activity on the same occasion as the alleged incident.¹⁴⁶ The 1983 rape shield provisions did

¹⁴² See section 4(2) of the *Canada Evidence Act*, R.S.C. 1970, c.E-10. At the same time, the Act provided in s.4(4) that "Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person." At common law, an exception to the rules around competence and compellability was recognized where the witness was the alleged victim of a personal injury offence charged against their spouse. In such cases, the spouse was competent and compellable without the consent of the other spouse. See *R. v. Singh and Amar*, [1970], 1 C.C.C. 299 (B.C.C.A.); *R. v. Lonsdale* (1973), 15 C.C.C. (2d) 201 (Alta. S.C. App. Div.).

¹⁴³ Marilyn Stanley provides an excellent overview of these rules in *The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127*, *supra*. See also Boyle (1984), *supra* at pp. 14-16.

¹⁴⁴ Bill C-127, *supra*, s.29, amending s. 4(2) of the *Canada Evidence Act*.

¹⁴⁵ Bill C-127, *supra*, s.19, enacting sections 246.4 and 246.5 of the *Criminal Code*.

¹⁴⁶ *Ibid.*, enacting sections 246.7 and 246.6 of the *Criminal Code*.

not exclude evidence of past sexual contact between the complainant and the accused, an important point in the context of marital rape.¹⁴⁷

In *R. v. Seaboyer*; *R. v. Gayme*, these sections of the *Criminal Code* were challenged as contrary to the fair trial rights of accused persons under the *Charter*.¹⁴⁸ The Supreme Court unanimously upheld the prohibition on sexual reputation evidence; however a majority struck down the sexual history provision on the basis that it was too restrictive in setting out the circumstances in which such evidence might be relevant.¹⁴⁹ Rather than revive the old common law rules, the Court established a new approach to the admission of sexual history evidence. Evidence of the complainant's past sexual conduct, including that with the accused, would not be admissible in relation to her credibility or consent.¹⁵⁰ This evidence would be admissible for other purposes where it possessed probative value on an issue in the trial that was not substantially outweighed by the danger of unfair prejudice flowing from the evidence. Justice L'Heureux Dubé wrote a strong dissent in the case, tying arguments about the relevance of sexual history evidence to myths and stereotypes about women and sexual violence.¹⁵¹

Subsequent reforms to the *Criminal Code* in 1992 were later said by the Supreme Court to have “essentially codifie[d]” the rules in *Seaboyer*.¹⁵² However, this is not doing justice to women’s law reform efforts.¹⁵³ In addition to strengthening the laws on consent and mistaken belief in consent, these efforts led to the establishment of certain procedural protections in sexual history applications, requiring the defence to file a written affidavit substantiating the relevance of the evidence he seeks to admit and a *voir dire* to determine its admissibility.¹⁵⁴

As a result of the restrictions the rape shield provisions created on sexual reputation and sexual history evidence, defence counsel adopted a new tactic – seeking production of complainants’ personal records from third parties.¹⁵⁵ In *R. v. O’Connor*, a majority of the Supreme Court established a procedure for the production of such records that was seen as largely favouring the accused.¹⁵⁶

¹⁴⁷ The first rape shield provisions, enacted in 1976, also permitted evidence of past sexual activity with the accused to be adduced. See the *Criminal Law Amendment Act*, S.C. 1975, c.93, enacting section 142 of the *Criminal Code*.

¹⁴⁸ [1991] 2 S.C.R. 577.

¹⁴⁹ As examples, the majority stated that evidence of past sexual contact may be relevant to a defence of mistaken belief in consent, to a motive to fabricate, or to establishing a pattern of similar conduct. *Ibid.* at paras 50-53.

¹⁵⁰ *Ibid.* at para 101.

¹⁵¹ See a discussion of her judgment *infra* at p. 26.

¹⁵² *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 1.

¹⁵³ See e.g. Women’s Legal Education and Action Fund, *Submission to the Legislative Committee of Parliament on Bill C-49, An Act Respecting Sexual Assault* (Toronto: LEAF, 1992); NWAC (1992), *supra*; McIntyre (2000), *supra*.

¹⁵⁴ Bill C-49, *supra*, enacting sections 276.1, 276.2 and 276.3 of the *Criminal Code*. Several factors must be considered in assessing the admissibility of the evidence, including: the interests of justice (including the accused’s right to make full answer and defence), society’s interest in encouraging sexual assault reporting, the need to remove discriminatory beliefs or biases from the trial process, the potential prejudice to the complainant’s personal dignity and privacy, and her rights to personal security and the full protection and benefit of the law. These provisions were upheld as constitutional in *Darrach*, *ibid.* For a marital rape case where the accused unsuccessfully argued that the requirement of a sexual history application violated his *Charter* rights, see *R. v. Mielke* [1994] O.J. No. 2826 (ONCtGD).

¹⁵⁵ See Busby, *supra*.

¹⁵⁶ [1995] 4 S.C.R. 411. At the first stage of the procedure, the accused had the burden of proving that the information in question was “likely to be relevant”; if so it was to be disclosed to the judge. In the second step, the

In the aftermath of *O'Connor*, Bill C-46¹⁵⁷ was enacted after intense lobbying by women's groups and government consultations with a wide range of stakeholders.¹⁵⁸ Bill C-46 enacted a legislative scheme for the production of records in sexual assault cases,¹⁵⁹ and in spite of its departure from the common law regime laid down by the majority in *O'Connor*, it was found to strike a constitutional balance between the rights of accused persons and the rights of sexual assault complainants in *R. v. Mills*.¹⁶⁰ While this was a positive outcome, *Mills* also reinforces the discretion of trial judges to order production, and commentators have questioned whether those judges are applying the spirit of the production provisions in subsequent cases.¹⁶¹

Both the rape shield provisions and the rules for production of personal records raise particular issues in the context of marital rape. Accused persons in this context will likely know the sexual history of their victims, and of the existence and location of their personal records. As noted above, the potential admission of this kind of evidence may deter women from reporting,¹⁶² and in those cases that are prosecuted, the provisions are not always strictly followed as the analysis of cases in section VI will show.

E. Sentencing

Sentencing is by its nature a discretionary exercise. Sentencing courts must seek to achieve the goals of denunciation, deterrence (general and specific), rehabilitation, and reparation; balance aggravating and mitigating factors; and ensure that the sentence is proportionate to the seriousness of the offence and the offender's degree of responsibility.¹⁶³

Prior to 1983, rape carried a maximum penalty of life imprisonment, although this sentence was rarely given.¹⁶⁴ Since 1983, the sexual assault provisions in the *Criminal Code* carry

judge would assess whether the records should be produced to the accused by considering a range of factors. These included "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias; and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question." *O'Connor*, *ibid.* at para. 31.

¹⁵⁷ S.C. 1997, c. 30.

¹⁵⁸ Diane Oleskiew and Nicole Tellier, *Submissions to the Standing Committee on Bill C-46, An Act to Amend the Criminal Code in Respect of Production of Records in Sexual Offence Proceedings* (Ottawa, National Association of Women and the Law, 1997); Jennifer Scott and Sheila McIntyre, *Submissions to the Standing Committee on Justice and Legal Affairs, Review of Bill C-46* (Toronto: Women's Legal Education and Action Fund, 1997).

¹⁵⁹ Bill C-46, *supra*, enacting sections 278.1 to 278.91 of the *Criminal Code*.

¹⁶⁰ [1999] 3 S.C.R. 668. Bill C-46 was closer to the regime accepted by Justice L'Heureux Dubé, dissenting in part, in *O'Connor*.

¹⁶¹ See e.g. Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall L. J. 251; Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*" (2002), 40(3) Alberta Law Rev. 655.

¹⁶² See section II above.

¹⁶³ *Criminal Code*, *supra*, sections 718, 718.1 and 718.2.

¹⁶⁴ Clark and Lewis found the average sentence to be 5 to 7 years. See Stanley, *supra* at 111-12.

progressively more serious maximum sentences where the assault causes bodily harm or is committed with a weapon, or results in wounding or maiming.¹⁶⁵

Some appellate courts have established sentencing ranges and guidelines for particular categories of offences, a practice that received some support from the Supreme Court of Canada in *R. v. Stone*.¹⁶⁶ While no courts have established sentencing guidelines for cases of marital rape, the Alberta Court of Appeal ruled that an appropriate starting point for cases of serious sexual assault would be three years imprisonment in *R. v. Sandercock*.¹⁶⁷

Section 718.2 of the *Criminal Code* is also relevant. First enacted in 1995 as part of an overhaul of the law of sentencing, section 718.2(a)(ii) requires “a court that imposes a sentence [to consider] ... evidence that the offender ... abused [his] spouse or common-law partner” as an aggravating factor.¹⁶⁸ Referencing this section in *Stone*, a case dealing with spousal homicide, the Supreme Court noted that “prevailing social values mandate that the moral responsibility of offenders be assessed in the context of equality between men and women in general, and spouses in particular.”¹⁶⁹ Even before this legislative reform, courts in some jurisdictions established guidelines whereby violence in the context of intimate relationships was to be treated as an aggravating factor at the stage of sentencing.¹⁷⁰ At the same time, section 718.2(e) of the *Criminal Code* provides that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”¹⁷¹ As noted in *R. v. Gladue*, this section is remedial in

¹⁶⁵ See Bill C-127, *supra*, sections 246.1, 246.2, and 246.3 (now sections 271, 272 and 273. Subsequent amendments have increased the penalties where a firearm was used in the commission of the offence (see S.C. 1995, c.39, s.145).

¹⁶⁶ *R. v. Stone*, [1999] 2 S.C.R. 290. The Court stated that such guidelines could be useful if they provide “a clear description of the category created and the logic behind the starting point appropriate to it.” (at para. 245).

¹⁶⁷ *R. v. Sandercock* (1985), 62 A.R. 382, [1985] A.J. No. 817 (C.A.). Serious sexual assaults – originally termed “major sexual assault” in *Sandercock* -- were defined as those “where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs. The injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two. This category ... includes not only what we suspect will continue to be called rape, but obviously also many cases of attempted rape, fellatio, cunnilingus, and buggery, where the foreseeable major harm ... is present.” (at para. 13). As noted in *R. v. D.W.G.*, 1999 ABCA 270, a marital rape case, the term “major sexual assault” was “called into question” in *R. v. McDonnell*, [1997] 1 S.C.R. 948, leading the Court of Appeal to replace it with the term “serious sexual assault” (at para. 3). The *Sandercock* starting point was recently reaffirmed by the Alberta Court of Appeal in *R. v. Law*, 2007 ABCA 203.

¹⁶⁸ *Criminal Code*, *supra*, s.718.2(a)(ii).

¹⁶⁹ *Stone*, *supra* at para. 240. In spite of this rhetoric, the Court upheld a sentence of only 7 years imprisonment for manslaughter, finding that the judge had taken the need to deter domestic violence into account. The accused had stabbed the victim 47 times in circumstances the Court characterized as provocation. The Court also rejected the argument that provocation could not be seen as a mitigating factor in the sentencing context when it had already been taken into account to reduce the conviction from murder to manslaughter.

¹⁷⁰ As noted in *Stone*, *ibid.* at para. 241, “there is ample authority for the proposition that courts considered a spousal connection between offender and victim to be an aggravating factor in sentencing at common law.” In support, the Court cited *R. v. Doyle* (1991), 108 N.S.R. (2d) 1 (C.A.); *R. v. Brown* (1992), 13 C.R. (4th) 346 (Alta. C.A.); *R. v. Pitkeathly* (1994), 29 C.R. (4th) 182 (Ont. C.A.); *R. v. Jackson* (1996), 106 C.C.C. (3d) 557 (Alta. C.A.); *R. v. Edwards* (1996), 28 O.R. (3d) 54 (C.A.).

¹⁷¹ *Criminal Code*, *supra*, section 718.2(e). In *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64, the Supreme Court recognized that section 718.2 was enacted to respond to the “drastic over-representation of Aboriginal peoples” in

nature and is in part intended to respond to the over-incarceration of Aboriginal peoples in Canada.¹⁷² However, “[i]t is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.”¹⁷³

Studies vary in their assessments of sentencing trends in cases of sexual and other forms of intimate violence. In *Sexual Offences in Canada* (2003), sexual offences were found to be more likely to result in prison sentences than other violent offences.¹⁷⁴ In contrast, a 2005 study conducted by Justice Canada reviewed differences in sentencing outcomes on various forms of spousal and non-spousal violence between 1997 and 2002 in 18 urban areas. Generally, those convicted of spousal violence were found to be less likely to be sentenced to jail terms than those convicted of non-spousal violence (19% vs. 29%). With respect to sexual assault, spouses were more likely (24%) to receive a conditional sentence -- i.e. one that is served in the community -- than non-spouses (15%),¹⁷⁵ calling into question the impact of section 718.2(a)(ii) of the *Criminal Code*. In another study, rates of conditional sentences for offenders in the Territories were found to be lower than the national averages: 18% of sexual assault convictions and 15% of family violence convictions resulted in conditional sentences.¹⁷⁶ This suggests that Aboriginal offenders may be treated more severely than non-Aboriginal offenders, contrary to the spirit of section 718.2(e) of the *Criminal Code*.

Recent reforms to the *Criminal Code* have eliminated the possibility of conditional sentences for sexual offences,¹⁷⁷ but the statistics noted above still suggest that violence in intimate relationships may be treated less seriously by sentencing courts. While none of these studies focus specifically on marital rape, the case review in section VI below substantiates some of these statistics.

F. Other Laws, Policies and Reforms in the Area of Domestic Violence

1. Domestic Violence Charging and Prosecution Policies

In the 1980s police forces and Attorneys General across Canada adopted policies that limited discretion to charge and prosecute cases of domestic violence.¹⁷⁸ These policies were supposed to

the Canadian criminal justice system, which it called a “a crisis”. While a number of “Gladue courts” have been established in Canada, these courts do not recognize the sovereignty of indigenous peoples over “justice”.

¹⁷² *R. v. Gladue*, [1999] 1 S.C.R. 688.

¹⁷³ *Ibid.* at para. 93. See also *R. v. Wells*, [2000] 1 S.C.R. 207.

¹⁷⁴ *Sexual Offences in Canada* (2003), *supra* at 9.

¹⁷⁵ Marie Gannon and Karen Mihorean, “Sentencing outcomes: A comparison of family violence and non-family violence cases” (2005) 12 *JustResearch*, 42 at 44, 45. The study does not disaggregate the data on the basis of race, culture, disability, class, or other factors.

¹⁷⁶ *Understanding family violence and sexual assault in the Territories, First Nations, Inuit and Métis Peoples*, *supra* at 8, 13, 22, 19.

¹⁷⁷ S.C. 2008, c. 6, amended section 752 of the *Criminal Code* such that “serious personal injury offences” (including sexual assaults) cannot be the subject of conditional sentences under section 742.1.

¹⁷⁸ Trevor Brown, *Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses* (Ottawa: Dept. of Justice, 2000).

remove the decision to charge and proceed with prosecution from the victim and give these powers to the state, which was obliged to proceed with charges and prosecution where there were reasonable and probable grounds to do so. However, there is some evidence that these policies have been disproportionately enforced (or not followed at all) against disadvantaged women and men.¹⁷⁹ While the policies would clearly apply to cases of marital rape, there is no specific evidence of how they have been applied in that context.

2. Civil Domestic Violence Legislation

Another important development has been the enactment of civil domestic violence legislation in several Canadian provinces and territories.¹⁸⁰ The legislation covers “family” or “domestic” violence, which is defined to include “sexual abuse” against intimate partners.¹⁸¹ Victims of domestic violence may apply on an *ex parte* basis for emergency protection orders, which typically proscribe the respondent’s contact with the victim. Emergency orders may then be extended for longer periods of time with notice to the respondent. Depending on the jurisdiction,¹⁸² other potential remedies include exclusive possession of the matrimonial home, temporary possession of personal property, weapons seizure and storage, and orders for the abuser to undertake counselling. Although this legislation was intended to supplement the criminal treatment of domestic violence, and in spite of the mandatory charging policies described above, research has shown that in many cases it is being used as an alternative to criminal proceedings.¹⁸³ Civil legislation may thus have an impact on the way that marital rape is reported and dealt with by the justice system. Research also suggests that there may be barriers for Aboriginal women, immigrant women and women with disabilities in accessing the legislation.¹⁸⁴

¹⁷⁹ Snider (1994), *supra* at 78; Sharon McIvor and Teresa Nahanee, “Aboriginal Women: Invisible Victims of Violence”, in Kevin Bonnycastle and George Rigakos, eds., *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) 63; Laureen Snider, “Making Change in Neo-Liberal Times”, in Gillian Balfour and Elizabeth Comack, eds., *Criminalizing Women* (Halifax: Fernwood Publishing, 2006) 323. The policies have also had the consequence of increasing rates of dual arrest and charging in the case of domestic assaults.

¹⁸⁰ *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27 (Alberta); *Victims of Domestic Violence Act*, S.S. 1994 c. V-6.02 (Saskatchewan); *Domestic Violence and Stalking Act*, C.C.S.M. 1998 c. 41 (Manitoba); *Domestic Violence Intervention Act*, S.N.S. 2001 c. 29 (Nova Scotia); *Victims of Family Violence Act*, R.S.P.E.I. 2002, c. 45 (P.E.I.); *Family Violence Protection Act* S.N.L. 2005 c. F-3.1 (Newfoundland and Labrador); *Family Violence Protection Act*, R.S.Y. 2002 c. 84 (Yukon); *Protection Against Family Violence Act*, S.N.W.T. 2003 c. 24 (Northwest Territories); *Family Abuse Prevention Act*, S.Nu. 2006, c. 18 (Nunavut). Ontario’s proposed legislation, the *Domestic Violence Protection Act*, S.O. 2000 c. 33, was never proclaimed. For an analysis of the legislation see The Ad-Hoc Federal-Provincial-Territorial Working Group, *Spousal abuse policies and legislation: Final report of the Ad Hoc Federal-Provincial-Territorial Working Group review spousal abuse policies and legislation*. (Ottawa: Department of Justice Canada, 2001) at 48-55.

¹⁸¹ See e.g. *Protection Against Family Violence Act* s.1(1)(e)(4); *Victims of Domestic Violence Act* s.2(d)(4); *Domestic Violence and Stalking Act* s.2(1.1)(e). Sexual abuse is typically not defined in the legislation.

¹⁸² Civil domestic violence legislation is within provincial jurisdiction in Canada. See *Baril v. Obelnicki*, 2007 MBCA 40.

¹⁸³ See e.g. Jennifer Koshan and Wanda Wiegiers, “Theorizing Civil Domestic Violence Legislation in the Context of Restructuring: A Tale of Two Provinces” (2007) 19(1) *Canadian Journal of Women and the Law* 145 at 170-171; Ad Hoc Federal-Provincial-Territorial Working Group, *supra* at 54.

¹⁸⁴ Koshan and Wiegiers, *ibid.* at 171.

3. Domestic Violence Courts

Domestic Violence Courts have been established in several Canadian jurisdictions.¹⁸⁵ Such courts are intended to provide specialized resources – police, prosecution, judges, and victim advocates – to deal with cases of domestic violence in the criminal context. Advantages of these specialized courts are said to include specialized knowledge, coordination between various services, victim support, expedited case handling, and access to treatment and monitoring of offenders.¹⁸⁶ They may also include higher arrest rates for spousal violence.¹⁸⁷ Challenges include defence counsel resistance, the difficulty of implementing such courts in small jurisdictions, and the implementation of coordination efforts.¹⁸⁸ There is little research documenting the incidence and treatment of marital rape cases in such courts,¹⁸⁹ and limited evidence on the usage and impact of such courts by marginalized women and men.¹⁹⁰ Nevertheless, these courts offer the possibility of a more contextualized and supportive approach for cases of sexual violence in spousal relationships.

G. The Constitutional and International Frameworks for Marital Rape Laws in Canada

This review of laws and policies on sexual and domestic violence make it clear that women’s rights to equality, sexual autonomy, security of the person and privacy have been key underpinnings of reforms to the law in Canada. This section sets out the relevant constitutional and international provisions grounding these rights.¹⁹¹

1. Domestic Law

¹⁸⁵ See Ad Hoc Federal-Provincial-Territorial Working Group, *ibid.* at 40, noting specialized courts in Winnipeg, Toronto, the Yukon Territory, and Calgary. Since the time of the report, such courts have also been set up in Edmonton and Regina. See Leslie M. Tutty, Jane Ursel, and Fiona Douglas, “Specialized Domestic Violence Courts: A Comparison of Models” in Jane Ursel, Leslie Tutty and Janice LeMaistre, eds., *What’s Law Got To Do with It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) 69.

¹⁸⁶ Ad Hoc Federal-Provincial-Territorial Working Group, *ibid.* at 47.

¹⁸⁷ See Jane Ursel and Christine Hagyard, “The Winnipeg Family Violence Court”, in Ursel, Tutty and LeMaistre, *supra*, 95 at 102.

¹⁸⁸ Ad Hoc Federal-Provincial-Territorial Working Group, *supra* at 47-48.

¹⁸⁹ Ursel and Hagyard, *supra*, report that between 1992 and 2002, only 1% of cases in Winnipeg’s Family Violence Court were for sexual assault. Nathalie Quann, *Offender profile and recidivism among domestic violence offenders in Ontario* (Ottawa: Department of Justice Canada, 2006) found that in 2001, 4 cases of sexual or aggravated sexual assault were heard in Ontario’s Domestic Violence Courts, and 8 such cases were heard in other Ontario courts (at 14).

¹⁹⁰ Ursel and Hagyard, *ibid.*, report the following demographics for Winnipeg’s Family Violence Court between 1992 and 2002 in the small percentage of cases where this could be determined: accused persons were 49% of European origin, 39% of Aboriginal origin and 12% other; victims were 46% of European origin, 36% of Aboriginal origin and 17% other. Leslie Tutty, Kevin McNichol and Janie Christensen, “Calgary’s HomeFront Specialized Domestic Violence Court”, in Ursel, Tutty and LeMaistre, *supra*, 152 at 161 report the following statistics for Calgary’s court: accused persons were 67.9% Caucasian, 10.2% Aboriginal and 21.9% visible minorities; victims were 67.1% Caucasian, 11% Aboriginal and 21.8% visible minorities.

¹⁹¹ For further discussion of equality based arguments under Canadian and international law, see Fiona Sampson and Vasanthi Vekantesh’s ACWHRP papers.

The *Canadian Charter of Rights and Freedoms* came into effect in 1982. Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 15 of the *Charter*, which came into effect in 1985, provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

These provisions have been raised in a number of cases involving sexual violence. One of the strongest statements of women's (in)equality in this context remains the dissenting judgement of Claire L'Heureux Dubé in *Seaboyer*. Speaking more specifically to the abolition of the marital rape exemption, Justice L'Heureux Dubé stated as follows:

Another significant step forward in respect of protecting the integrity of the person and the elimination of sexual discrimination is the change relating to the prosecution of husbands who sexually assault their wives. Section 246.8 provides that a husband or a wife may be charged with any of the sexual assault offences in respect of his or her spouse, regardless of whether or not they were living together at the time of the act. ... To give effect to the amendment, Parliament modified the *Canada Evidence Act* and removed spousal incompetence and spousal non-compellability impediments in respect of these offences. Ron Irwin, then Parliamentary Secretary to the Minister of Justice and Minister of State for Social Development, described this change as granting "[e]qual protection under the law. . . to all persons".¹⁹²

Other judicial statements acknowledging women's equality, security of the person and privacy interests in sexual violence cases can be found in *R. v. McCraw*,¹⁹³ *R. v. Ewanchuk*,¹⁹⁴ *R. v. Mills*,¹⁹⁵ and *R. v. Darrach*.¹⁹⁶

These judicial statements were unquestionably influenced by the advocacy of Canadian women. Feminist equality seeking groups have intervened in a number of sexual violence cases heard by

¹⁹² *Seaboyer, supra*, citing *House of Commons Debates*, July 7, 1981, at p. 11301.

¹⁹³ [1991] 3 S.C.R. 72

¹⁹⁴ *Ewanchuk, supra*.

¹⁹⁵ *Mills, supra*. See also the dissenting reasons of Justice L'Heureux Dubé in *R. v. O'Connor, supra*. In *Mills*, a majority of the Court focused on women's privacy interests in the context of production of personal records. For a caution against this approach see Gotell (2006), *supra*.

¹⁹⁶ *Darrach, supra*.

the Supreme Court since the 1980s.¹⁹⁷ These interventions typically assert that sexual violence is both a cause and effect of women's subordinate position in Canadian society, and indicate how some women are more vulnerable to sexual violence and may experience that violence in unique ways because of circumstances of colonization, poverty, racialization, disability, and heterosexism. The overarching theme of these arguments is that sexual assault laws must be enacted, interpreted and applied in ways that discount myths and stereotypes about women and sexual violence, and in ways that are cognizant of the multiple inequalities faced by women who are marginalized by gender, race, culture, Aboriginal status, poverty, disability, and sexual identity.

2. International Law

International norms are also relevant to the context of marital rape. Both treaties to which Canada is a party (e.g. the *International Covenant on Civil and Political Rights (ICCPR)* and *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*) and soft law (e.g. the Committee on the Elimination of Discrimination Against Women, *General Recommendation 19* and the *Declaration on the Elimination of Violence Against Women (DEVAW)*) may be pertinent. Although international treaties are only binding domestically if they have been incorporated into Canadian law, Canadian courts use both binding and non-binding norms of international law in the context of interpreting equality and other rights and freedoms under the *Charter*.¹⁹⁸

Rights based arguments for the further reform and application of laws dealing with marital rape using domestic and international law will be explored following an examination of cases involving marital rape in Canada.

¹⁹⁷ See for example Factum of the Legal Education and Action Fund, Ontario Coalition of Rape Crisis Centres, Barbra Schliker Commemorative Clinic, Women's College Hospital Sexual Assault Care Centre Team, Metropolitan Toronto Special Committee on Child Abuse, Metro Action Committee on Public Violence Against Women and Children, Broadside Communications, Ltd., and WomenHealthSharing, Inc. in *Canadian Newspapers Co. v. Canada (Attorney General)* (SCC 1988), online: [http://www.leaf.ca/legal/facta/1988-canadian-newspapers.pdf#target](http://www.leaf.ca/legal/facta/1988-canadian-newspapers.pdf#target;); Factum of The Women's Legal Education and Action Fund et al in *R. v. Seaboyer; R. v. Gayme* (SCC 1992), on-line: http://www.leaf.ca/legal/facta/1992-seaboyer_supreme-court-canada.pdf#target; Factum of the Aboriginal Women's Council, Disabled Women's Network of Canada, Canadian Association of Sexual Assault Centres, and Women's Legal Education and Action Fund in *R. v. O'Connor* (SCC 1995), on-line: http://www.leaf.ca/legal/facta/1995-oconnor_supreme-court-canada.pdf#target; Factum of The Women's Legal Education and Action Fund and Disabled Women's Network in *R. v. Ewanchuk* (SCC, 1998), on-line: <http://www.leaf.ca/legal/facta/1999-ewanchuk.pdf#target>; Factum of The Women's Legal Education and Action Fund in *R. v. Mills* (SCC 1999), on-line: <http://www.leaf.ca/legal/facta/1999-mills.pdf#target>; Factum of The Women's Legal Education and Action Fund, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network Canada, and the National Action Committee on the Status of Women in *R. v. Darrach* (SCC 2000), on-line: <http://www.leaf.ca/legal/facta/2000-darrach-supreme-court-canada.pdf#target>; Factum of The Women's Legal Education and Action Fund and Disabled Women's Network in *R. v. Shearing* (SCC 2002), on-line: <http://www.leaf.ca/legal/facta/2002-shearing.pdf#target>.

¹⁹⁸ Jennifer Koshan, "International Law as a Strategic Tool for Equality Rights Litigation: A Cautionary Tale", in Fay Faraday, Margaret Denike and Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 443. Some caution may be required, as international norms related to family have been used in previous cases to support traditional notions of family. See e.g. *Miron v. Trudel*, [1995] 2 S.C.R. 418 at paras. 44-45 (per Gonthier J.).

VI. The Judicial Treatment of Marital Rape in Canada

A. Introduction

As noted above, the literature suggests that the criminal immunity for marital rape was interpreted strictly, and that there were no cases of marital rape where the courts mitigated the immunity by interpretation prior to the 1983 reforms. This is confirmed by a search of case law undertaken for this paper. Although sexual violence against common law spouses was not subject to immunity before 1983, and husbands could be prosecuted for sexual violence against their wives other than rape, our search uncovered very few cases where such violence was prosecuted.¹⁹⁹ This review thus focuses primarily on the judicial treatment of cases of marital rape, broadly defined, after 1983.²⁰⁰

A few preliminary observations are in order. Out of 293 cases of spousal sexual violence analyzed for this paper, every single case involves a male accused person, and all victims are female.²⁰¹ There are, however, a couple of cases where the wife was found to be an “aggressor”, leading to acquittals for sexual assault in both cases.²⁰²

¹⁹⁹ See *R. v. P.T.M.*, [1977] A.J. No. 323 (ASCAD), (a case of rape against a common law wife; the accused was convicted and sentenced to four years in jail, reduced to one year on appeal); *R. v. A.R.T.*, [1982] O.J. No. 122 (a case of rape of a common law wife; similar fact evidence of the rape of another woman was rejected at trial and the accused was acquitted; this evidentiary ruling was overturned on appeal and a new trial was ordered, the outcome of which is not available); *R. v. Sansregret* (1983), 34 C.R. (3d) 162, 22 Man. R. (2d) 115 (a case of rape against a common law wife; the accused was acquitted at trial based on mistaken belief in consent, and the Crown’s appeal was successful; see (1983), 37 C.R. (3d) 45, 25 Man. R. (2d) 123, 10 C.C.C. (3d) 164, [1984] 1 W.W.R. 720 (C.A.), aff’d [1985] S.C.J. No. 23, [1985] 1 S.C.R. 570; *R. v. C. (M.H.)*, [1988] B.C.J. No. 2620, (C.A.) (a case of indecent assault and gross indecency involving bestiality against a wife; the offences were committed before 1983 but no complaint was filed until 1986. Similar fact evidence was admitted, and the accused’s conviction for gross indecency was upheld on appeal).

²⁰⁰ The case search was conducted by volunteer Vasanthi Vekantesh, to whom I am immensely grateful, using Quicklaw and the search terms “sexual assault” or “rape” in the same paragraph as one of the following words: “partner” OR “girlfriend” OR “boyfriend” OR “spous!” OR “wife” OR “relation!” or “consent”. A sample of approximately 6200 cases was produced, and was reviewed by student volunteers to find the relevant cases – i.e. those involving sexual violence in a spousal relationship (where the parties had cohabited and / or had children in an intimate relationship). Dating and other intimate relationships short of spousal relationships were not included in the final list of cases due to the large sample size and because of the unique nature of spousal (and former spousal) relationships. Given the large sample size and the sharing of various sub-samples amongst different students, the list of relevant cases produced for this paper should be seen as reasonably comprehensive (although the number of cases from Quebec is small given that English search terms were used, meaning that only cases reported in English were identified, and samples from Manitoba, Ontario and Quebec are incomplete). There were 293 relevant cases analyzed overall, and the list of cases is attached as Appendix A.

²⁰¹ It is interesting but perhaps not surprising that no reported cases of same sex spousal violence were identified. While there is literature which documents such violence (see e.g. Carolyn West, “Lesbian Intimate Partner Violence: Prevalence and Dynamics”, in Suzanna M. Rose, ed., *Lesbian Love and Relationships* (Binghamton, N.Y.: Harrington Park Press, 2002), 121 at 123, there is also literature that identifies the heightened difficulties in reporting it (see e.g. Ellen Faulkner, “Lesbian Abuse: The Social and Legal Realities” (1991) 16 *Queen’s L.J.* 261; Nancy Murphy, “Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence” (1995-1996) 30 *Val. U. L. Rev.* 335).

²⁰² See *R. v. J.T.D.*, 2002 SKPC 59, [2002] S.J. No. 525. In this case, the trial judge found that the accused’s common law wife had initiated an altercation over her keys, pulling the accused on top of herself as they fell, and then biting his genitals. He had a reasonable doubt as to whether the accused had told her to do so, and thus acquitted him of sexual assault. See also *R. v. S.A.W.*, [2002] N.S.J. No. 533, 2002 NSPC 40, 211 N.S.R. (2d) 85 (PC). In this

Several cases involve statements or conduct by the accused indicating that he views his spouse as his private property. For example, in *R. v. R.G.*, the accused told his wife that “he had the right, as her husband, to have sexual intercourse with her”.²⁰³ In *R. v. Lefebvre*, the accused was quoted in a pre-sentence report “deny[ing] society’s right to intervene in [his] private life” even though he had been convicted of assault, uttering a threat and sexual assault of his spouse.²⁰⁴ In *R. v. B.S.S.*, a man responded to his wife’s refusal to engage in sexual relations by stating that “she was his wife” and his “patriarchal and proprietary attitudes” were noted in a psychological evaluation.²⁰⁵ In other cases, men have forced their wives to work as prostitutes²⁰⁶ and have burned, cut and disfigured them “to stop other men from getting the impression that she was “available””.²⁰⁷

There are some cases where courts have explicitly denounced these kinds of attitudes. For example, in *R. v. Lefebvre*, Justice Spencer of the B.C. Supreme Court commented that “[a] man and woman's private life is their own, but when it involves violence from one spouse to another, make no mistake, that is society's business and the law will intervene as it has done now”.²⁰⁸ In *R. v. V.M.*, Justice Caswell of the Ontario Superior Court of Justice expressed disapproval of any defence suggestion that he should consider the cultural background of the accused as a mitigating circumstance “in that he may be of a view that his wife is his property”; the judge stated “that is never an acceptable way to consider any human being, anywhere; wife, children, anyone else. Basically, and, fundamentally in this country, one must respect every other person”.²⁰⁹ In spite of such comments, however, these cases indicate that although Canada criminalized marital rape in 1983, the colonial and patriarchal attitudes that underpinned impunity for marital rape persist, and must be addressed both within and outside of the law.²¹⁰

Another important observation is that in many cases, the sexual violence occurs in the context of an ongoing abusive relationship. Some cases also involve sexual violence against children.²¹¹ Cases where there is violence and physical injury in addition to the violence of forced sex are typically easier for the courts (at least at the stage of determining guilt) because defences related to consent and mistaken belief in consent are more difficult to mount in these cases.²¹² The harder cases seem to be those where the courts are faced with isolated incidents of sexual violence

case the accused was acquitted of assault and sexual assault against his estranged wife; she was found to have consented to the sexual activity in question and to have been the aggressor in relation to the assault.

²⁰³ *R. v. R.G.*, [2003] N.J. No. 82, 2003 NLSCTD 44; aff’d 2003 NLCA 73, [2003] N.J. No. 336 at para. 2.

²⁰⁴ *R. v. Lefebvre*, [1991] B.C.J. No. 2054 (S.C.) at p. 3.

²⁰⁵ *R. v. B.S.S.*, 2006 BCPC 135, [2006] B.C.J. No. 802 (Prov. Ct.) at paras. 6 and 18. The parties were Indo-Canadian and in an arranged marriage.

²⁰⁶ See e.g. *R. v. D.F.*, [2002] O.J. No. 5004 (S.C.J.), varied in part [2005] O.J. No. 2148, 198 O.A.C. 126, 197 C.C.C. (3d) 365 (C.A.) (sub nom *R. v. F.D.J.F.*), leave to appeal refused [2005] S.C.C.A. No. 477.

²⁰⁷ *R. v. J.J.C.*, [1997] B.C.J. No. 1817, 96 B.C.A.C. 1, 35 W.C.B. (2d) 425 at para. 2. See also *R. v. R.K.J.* [1998] N.B.J. No. 483, 207 N.B.R. (2d) 24, 40 W.C.B. (2d) 376 (C.A.).

²⁰⁸ *R. v. Lefebvre*, *supra* at 3.

²⁰⁹ *R. v. V.M.*, [1999] O.J. No. 3905, 105 O.T.C. 153, 44 W.C.B. (2d) 156 (S.C.J.) at para. 8. The accused was Peruvian.

²¹⁰ As noted by Randall (2010), it is important not to “overstate the power” of law reform efforts, which are only a “partial solution” to addressing sexual violence and women’s equality more broadly (at 3).

²¹¹ See for example *R. v. G.P.W.*, [1998] B.C.J. No. 838 (C.A.); *R. v. F.G.N.*, [1998] B.C.J. No. 2170, 112 B.C.A.C. 148, 39 W.C.B. (2d) 435 (C.A.); *R. v. W.R.B.* [1999] O.J. No. 1470, 94 O.T.C. 203, [1999] O.J. No. 1394.

²¹² See, however, the cases noted in section B where accused persons were convicted of assault but acquitted of sexual assault.

without evidence of physical injury, or where consent and mistaken belief in consent arise in circumstances where there has been previous “rough sex”. In these cases, evidentiary issues that undermine women’s equality are often at play. And even in cases where the accused’s guilt seems relatively easy to assess, sentencing judgments indicate wide variance in the degree of seriousness with which marital rape is taken by the courts.

A final preliminary observation is that it is relatively uncommon for judges to provide details about the ethnicity, culture, (dis)abilities, and class of the accused and victim. There is only one case where the accused was identified as HIV positive, which will be discussed in the section on consent.²¹³ Cultural considerations are typically said to be irrelevant by the courts, although there are cases where cultural biases and assumptions appear to influence judicial reasoning. Examples will be drawn out where relevant in this section of the paper, and returned to in Part VII.

This section of the paper is organized around the same legal issues discussed in Part IV, as interpreted and applied in the context of marital rape: the definition and elements of sexual assault, consent, mistaken belief in consent, evidentiary rules, and sentencing. The section concludes with observations on the implications of marital rape cases for women’s equality, and arguments for how to better achieve women’s equality in this context.

B. Sexual Assault: Definition and Elements

There are only a few cases where courts have been faced with issues related to the definition or elements of sexual assault in the context of marital rape. In *R. v. Rowsell*, the Newfoundland Court of Appeal considered the definition of sexual assault from *R. v. Chase*.²¹⁴ It found that there had been a sexual assault in circumstances where the accused admitted pulling down his estranged wife’s pants “with a view to determining if she had had sex with any other man that evening.”²¹⁵ While the Court agreed with the trial judge that the complainant’s “sexual integrity was transgressed” and that a sexual assault had been committed, it reduced the sentence on the basis that “many of the intrinsic features of a sexual assault are wanting or are absent altogether.” According to the Court, “the evidence shows that the contextual relations and atmosphere that night was devoid of any carnality or eroticism; none of the language, gestures or contact between the [parties] had any innuendo or insinuation of lewdness or sexuality; there was no touching or any attempt to touch a sexual organ; and finally, sexual gratification, to any degree, was not the intent nor the motive.”²¹⁶ This case is an example of over-reliance on the sexual rather than assaultive nature of sexual violence, and the Court seems to ignore the fact that the accused was treating his former wife as his sexual property. In other cases, courts have been prepared to find that sexual assaults have occurred in similar circumstances without minimizing the extent of the sexual violence.²¹⁷

²¹³ *R v. McGregor* [2008] O.J. No. 4939, 2008 ONCA 831, 240 C.C.C. (3d) 102 (C.A.).

²¹⁴ *R. v. Rowsell*, [1990] N.J. No. 364 (C.A.), citing *R. v. Chase*, *supra*.

²¹⁵ *Rowsell*, *ibid.* at 2.

²¹⁶ *Ibid.* at 3-4.

²¹⁷ See e.g. *R. v. C. (B.J.)*, [1991] N.B.J. No. 436, 116 N.B.R. (2d) 364 (N.B.C.A.) (the accused’s conviction for sexual assault was upheld where he pried apart the complainant’s legs and told her he was going to have sex with her); *R. v. M.S.W.*, [1995] B.C.J. No. 1445 (C.A.) (the accused’s conviction for sexual assault was upheld on appeal where he was found to have removed the complainant’s pants while she was unconscious and engaged in some sort of sexual activity); *R. v. D.A.R.C.*, [2002] P.E.I.J. No. 91, 2002 PESCAD 22; 218 Nfld. & P.E.I.R. 329 (S.C.A.D.)

However, there are also situations where courts have acquitted men of sexual assault and found them guilty of the included offence of assault, or of assaults that took place on other occasions. It is sometimes difficult to ascertain the reasons for these decisions, either because the decision was made by a jury,²¹⁸ because the trial judge gave minimal reasons for the decision,²¹⁹ or because there was a plea bargain between the Crown and defence.²²⁰ In at least some of these cases, it may be inferred that the evidence of physical injuries tipped the balance in finding the accused guilty of assault where there was no corresponding evidence of injuries for the alleged sexual assault.²²¹ These cases suggest that while it is no longer required, corroboration (or lack thereof) may still be a strong influence on the outcome of sexual assault cases.

Issues relating to what constitutes sexual assault causing bodily harm and sexual assault with a weapon have also arisen. In *R. v. C.K.*, the B.C. Court of Appeal considered the definition of bodily harm from the *Criminal Code*, which requires evidence of “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.”²²² The Court upheld the trial judge’s ruling that a small tear in the victim’s anus caused by a sexual assault, which took several days to heal and for which she sought medical attention, amounted to bodily harm.²²³ In *R. v. S.B.*, the Ontario Court of Justice considered the question of whether the offence of sexual assault “using a weapon” was made out.²²⁴ The Court reviewed a number of legal authorities and came to the conclusion that “there must be active employment of the weapon in committing the alleged sexual assault” in order for a conviction for this offence.²²⁵ Because the facts established that the accused had not actively used a knife placed under the sofa where he sexually assaulted his spouse to coerce her consent, the Court found the accused guilty of the included offence of sexual assault. While this ruling is troubling, the Court noted that if the Crown had charged the accused with *threatening* to use a weapon in the commission of a sexual assault, a conviction would have been appropriate.²²⁶ In other cases it is not apparent why the accused was convicted of sexual assault rather than one of the more serious offences. For example, in *R. v. G.S.G.*, the accused was convicted of sexual assault for raping his common law wife vaginally and anally with a broomstick. In this case, as in

(the accused’s conviction for sexual assault was upheld on appeal where he was found to have grabbed at and torn the complainant’s panties, even though the judge had a reasonable doubt about whether there had been digital penetration); *R. v. A.B.*, [2003] A.J. No. 1289, 2003 ABPC 180 (Prov. Ct.) (the court rejected the defence argument that ejaculation in the complainant’s face was a *de minimus* application of force that did not amount to assault; however the court accepted the defence argument regarding mistaken belief in consent (see *infra*)).

²¹⁸ *R. v. P.D.L.*, [1997] O.J. No. 3775, 40 O.T.C. 199, 36 W.C.B. (2d) 371 (Ont. C.J.).

²¹⁹ *R. v. Green*, [1997] O.J. No. 4082 (Ont. C.J.).

²²⁰ *R. v. D.B.*, [2000] O.J. No. 4699 (Ont. S.C.J.).

²²¹ See *Green* and *P.D.L.*, *supra*. See also *R. v. K.E.B.*, [2004] O.J. No. 3586 (S.C.J.) and *R. v. L.B.* [2005] O.J. No. 1798, 2005 ONCJ 143. In these cases, the accused was convicted of several incidents of domestic violence where there was corroborating evidence, but acquitted of sexually assaulting his spouse. Courts have said that trial judges cannot transfer positive findings of credibility on one count (e.g. of assault) to their findings of credibility on another count (e.g. sexual assault). See *R. v. R.A.G.*, [2008] O.J. No. 4925 (C.A.).

²²² *R. v. C.K.*, 2001 BCCA 379, [2001] B.C.J. No. 1119 (B.C.C.A.); [2002] B.C.J. No. 735, 2002 BCCA 233 (sub nom *R. v. Kinde*).

²²³ For a similar ruling see *R. v. T.M.E.*, [2004] B.C.J. 844, aff’d 2005 BCCA 388, [2005] B.C.J. No. 1696.

²²⁴ *R. v. S.B.*, [1996] O.J. No. 5457; [1996] O.J. No. 1187 (Ont. C.J.).

²²⁵ *Ibid.* at para. 21.

²²⁶ However, it was seen as prejudicial to the accused to amend the indictment at that stage (*ibid.* at para. 27).

others, it is unclear whether the problem was with the charges laid, a plea bargain, or conviction for an included offence.²²⁷

C. Consent

It is not surprising that, as one of the essential elements of the charge of sexual assault, consent is a live issue in many marital rape cases. At one end of the spectrum lie cases where there is clearly no consent as defined in the *Criminal Code*. For example, in *R v. McGregor*, the accused was convicted of aggravated sexual assault for having unprotected sex with the victim, his long term intimate partner, to whom he did not disclose his HIV positive status.²²⁸ In *R. v. D.S.*, voluntary consent was found to be absent where the accused extorted sex from his former partner by threatening to disseminate nude photographs of her.²²⁹ A husband who administered a stupefying drug to his wife, and videotaped his act of forced intercourse with her, was also convicted.²³⁰ Violence and fear of violence may vitiate consent as well,²³¹ although fear of being thrown out of the home without one's children apparently does not.²³²

While violence will normally vitiate consent, there are some decisions where courts found that complainants consented to participation in sexual activities involving elements of bondage or forceful sex with their spouses. In the preponderance of cases involving so called "rough sex",²³³ evidence of the past sexual history of the parties was admitted as relevant to issues of consent (or mistaken belief in consent).²³⁴ One such case, *R. v. J.A.*, is currently before the Supreme Court of Canada, which will be called upon to determine whether a complainant can, as a matter of law,

²²⁷ *R. v. G.S.G.* [1993] O.J. No. 466, 63 O.A.C. 156, 19 W.C.B. (2d) 49 (C.A.). See below for a discussion of the sentencing judgment in this case. See also *R. v. Pastiwet*, [1993] N.J. No. 130 (S.C.T.D.), where the victim was raped with a flashlight on 2 occasions, causing injury to her vagina. The accused was convicted simply of sexual assault.

²²⁸ *R v. McGregor*, [2008] O.J. No. 4939, 2008 ONCA 831, 240 C.C.C. (3d) 102 (C.A.).

²²⁹ See *R. v. D.S.*, [2004] O.J. No. 3440 (C.A.), aff'd [2005] S.C.J. No. 36; [2005] O.J. No. 3928 (S.C.J.) (*sub nom R. v. Stender*). In *D.I.D.B. c. R.*, [2006] Q.J. No. 2958, 2006 QCCA 460, the accused was convicted of extortion for threatening to show nude photographs to the victim's family, friends and colleagues. This extortion did not, in the court's view, induce consent to sexual relations, and the accused was acquitted of sexual assault. See also *R. v. C.B.R.*, [1991] N.S.J. No. 663, 107 N.S.R. (2d) 317, 290 A.P.R. 317, where the accused's extortion of money from the victim in exchange for not distributing nude photos of her in their "small rural community" was seen as a relevant factor in sentencing.

²³⁰ *R v. S.B.G.* [2001] O.J. No. 3785 (S.C.J.).

²³¹ See for example *R. v. Payne*, [1996] N.W.T.J. No. 112 NTSC; *R. v. J.A.*, [2009] Nu. J. No. 2, 2009 NUCJ 3 (N.C.J.); *R. v. C.M.M.* 2002 NSPC 13 (Prov. Ct). However, the defence of mistaken belief in consent was successful in the latter case (see *infra*).

²³² See *R v. Mitchell*, [2007] O.J. No. 163, 46 C.R. (6th) 193, 73 W.C.B. (2d) 445 (S.C.J.).

²³³ Lazar's empirical research shows that "rough sex" is a common term used [by defence counsel] to refer to unique sex that should be introduced as part of the sexual history evidence due to its particular nature." (at 14).

²³⁴ See *R. v. R.K.J.* [1998] N.B.J. No. 483, 207 N.B.R. (2d) 24, 40 W.C.B. (2d) 376 (C.A.); *R. v. Went*, 2004 BCSC 1205, [2004] B.C.J. No. 1900; *R. v. Wilson*, [2008] O.J. No. 3583, 2008 ONCJ 418, 79 W.C.B. (2d) 427 (Ont. Ct. J.). For cases to the contrary see *R. v. Bone*, [2007] M.J. No. 270, 2007 MBCA 95, [2007] 9 W.W.R. 617, 225 C.C.C. (3d) 171, 51 C.R. (6th) 336 (C.A.), where the Manitoba Court of Appeal rejected the argument that mistaken belief in consent should have been considered at trial, noting that the defence was based on evidence inadmissible without a sexual history application; and *R. v. G.P.S.*, [2001] Y.J. No. 95, 2001 YKCA 10, where the Yukon Court of Appeal rejected the argument that defence counsel's failure to bring an application for evidence of previous instances of "rough sex" justified a new trial. The alleged sexual history was seen as irrelevant to whether the complainant had consented in the incident before the court.

consent in advance to sexual activity that is expected to occur while she is unconscious.²³⁵ A majority of the Ontario Court of Appeal answered that question in the affirmative, basing its decision on the wording of the consent provisions of the *Criminal Code* and on its view of personal dignity and autonomy. According to the majority, “[p]ermitting a person to consent in advance to sexual activity expected to occur while unconscious or asleep is entirely consistent” with the Supreme Court’s statement in *Ewanchuk* that “[h]aving control over who touches one’s body, and how, lies at the core of human dignity and autonomy”.²³⁶ It rejected the Crown’s argument that “prior consent is not effective as a matter of law because unconsciousness deprives the person consenting of the ability to experience consent or know whether they are consenting *at the time the sexual activity occurs*.”²³⁷ Similarly, it also rejected the argument that the inability of unconscious claimants to revoke consent meant that they could not legally consent in advance.²³⁸ The majority’s reference to dignity and autonomy is troubling, particularly because the trial judge found that the complainant had not actually consented to being anally penetrated with a dildo while unconscious, a finding that the Court of Appeal overturned.²³⁹ This case will be the Supreme Court’s first marital rape decision since 1999, and it is to be hoped that the Court will engage in a strong analysis of women’s equality interests.²⁴⁰

Interestingly, courts in marital rape cases seem to ignore section 273.1(2)(c) of the *Criminal Code*, which provides that no consent to sexual assault is obtained where “the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.”²⁴¹

²³⁵ *R. v. J.A.* [2010] O.J. No. 1202, 2010 ONCA 226. See also *R. v. Brunen*, [2007] M.J. No. 486, 2007 MBQB 320, 76 W.C.B. (2d) 574 (Q.B.), where the accused was acquitted of sexual assault in such circumstances. *Contra* see *R. v. G.A.L.*, 21 B.C.A.C. 81, [1992] B.C.J. No. 2529 (C.A.), where a jury rejected evidence suggesting consensual bondage between the accused and his wife and found him guilty of sexual assault; *R. v. R.K.J.* [1998] N.B.J. No. 483, 207 N.B.R. (2d) 24, 40 W.C.B. (2d) 376 (C.A.), where the accused was found to have “crossed the line” with a particularly vicious sexual assault on his spouse, even though they had participated in previous instances of “rough sex and physical bondage”; *R. v. G.O.G.*, 2000 BCPC 10, [2000] B.C.J. No. 804 (Prov. Ct.), where the Court found that the accused’s evidence that his wife fantasized about being “taken roughly” did not raise a reasonable doubt as to consent, and convicted the accused; *R. v. Bone*, [2007] M.J. No. 270, 2007 MBCA 95, [2007] 9 W.W.R. 617, 225 C.C.C. (3d) 171, 51 C.R. (6th) 336 (C.A.), where the trial judge rejected the accused’s evidence that choking during sex was consensual. For a broader discussion of cases involving rough sex see Craig, *supra*.

²³⁶ *R. v. J.A.*, *supra* at para. 78, citing *Ewanchuk*, *supra* at para. 28. For a case to the contrary see *R. v. Ashlee*, 2006 ABCA 244, 212 C.C.C. (3d) 477 (Alta. C.A.) leave to appeal refused 2006 S.C.C.A. 415 (a sexual assault case outside the marital rape context). *Ashlee* was relied on by the trial judge in *J.A.*, who convicted the accused of sexual assault.

²³⁷ *R. v. J.A.*, *ibid.* at para. 73 (emphasis in original).

²³⁸ *Ibid.* at para. 79. This argument was based on the dissent in *Esau*, *supra*.

²³⁹ The Court of Appeal was unanimous on this point. The trial also involved an application to introduce a video-taped statement of the complainant made to the police, where she has clearly indicated non-consent. That application was abandoned by the Crown part-way through the trial, with the Crown relying on the argument that the complainant could not consent as a matter of law. For a discussion of such “*K.G.B.*” applications see the section on evidentiary issues, *infra*.

²⁴⁰ The appeal in *J.A.* is as of right, as there was a dissent at the Court of Appeal by Justice Harry LaForme. See [2010] S.C.C.A. No. 147. The Court’s last marital rape decision was *R. v. W.(G.)*, [1999] 3 S.C.R. 597. This decision focused primarily on appellate jurisdiction over sentence appeals, but there is positive language about the importance of avoiding myths and stereotypes about sexual assault complainants in the concurring reasons of Justice Claire L’Heureux Dubé (albeit she does not deal specifically with the marital rape context). The Court’s only other decision in the marital rape context is *Sansregret*, *supra*.

²⁴¹ Similarly, Benedet and Grant found that this section was rarely cited in their survey of cases of sexual assault of women with disabilities. See *supra* at 284.

There are cases where this section may have been relevant, however. For example, in *R. v. W.F.*, the court heard evidence that the complainant's consent was obtained by a false promise to marry made by a man who was already married to someone else. The complainant was raised in the Philippines, and was described as devoutly religious. The accused was convicted of another incident of sexual assault where there was evidence of physical injuries against the complainant, so the court found that it did not have to decide whether the promise to marry vitiated consent in the circumstances.²⁴²

It could also be argued that this section of the *Criminal Code* – in addition to the holding in *Ewanchuk* – should effectively preclude the possibility that implied consent could ever be successfully raised in marital rape cases. However, there are a number of cases where the courts found consent to be implied. In *R. v. Bodnar*, the trial judge stated that “the cohabitational relationship permits of certain acts and conduct which would otherwise be criminal. For example, if a man walks up to a strange woman and cups her breast, he commits a sexual assault. Within a cohabitational context, such may not be the case. Likewise, a man (or woman) in a cohabitational relationship may choose to bring to an end a dispute between them in a passionate or sexual manner. His (or her) initial sexual advances would not necessarily constitute a sexual assault within the parameters of cohabitation. However, once apprised of the other partner's lack of consent, the advances must cease.”²⁴³ This case was decided before the 1992 reforms to the *Criminal Code* and *Ewanchuk*, which may explain the judge's thinking (and his formal equality analysis of sexual violence). At the same time, there are also marital rape cases subsequent to the Supreme Court's clear direction in *Ewanchuk* where courts nevertheless found implied consent.

For example, in *R. V.*, the accused was charged with two counts of sexual assault against his wife. In both instances the husband initiated sexual conduct, the wife declined to participate, and the husband persisted. At trial, the judge operated on the basis that marriage resulted in implied consent, stating that “... when parties get married, they, by the very nature of the relationship, are consenting to engaging in sexual intercourse and consummating the marriage. Even after consummation, a marriage continues to imply that parties have joined together for various purposes including that of retaining or continuing their sexual relationship.”²⁴⁴ He also found that *R. V.* had an honest belief that his wife was consenting. The acquittal was upheld on summary conviction appeal. At the Ontario Court of Appeal, the Court stated that “merely because there was a viable marriage does not itself give rise to a defence of mistaken belief in consent in the face of the complainant's unequivocal statements to the respondent that she was not consenting to further sexual relations... Nor could it be said that there could be any implied consent in those circumstances”.²⁴⁵ In spite of these errors, however, the Court dismissed the appeal from acquittal, finding that the trial judge had made inconsistent findings of fact and had not expressly

²⁴² *R. v. W.F.*, [1998] O.J. No. 5424; [1998] O.J. No. 5604 (Ont. C.J.). Strictly speaking, this is not a case of marital rape as the accused was already married and the parties did not cohabit. It is included here because of the unique facts relating to consent.

²⁴³ *R. v. Bodnar*, [1990] M.J. No. 418 (Prov. Ct.). The accused had pleaded guilty to sexually assaulting his spouse, but the offence was seen as minor and a suspended sentence was granted.

²⁴⁴ *R. v. R.V.*, [2001] O.J. No. 5143 at para. 10. He also found that *R.V.* had an honest belief that his wife was consenting.

²⁴⁵ [2004] O.J. No. 5136 at para. 1.

rejected the accused's version of events.²⁴⁶ In a more recent judgment, the Ontario Court of Appeal overturned a conviction for marital rape and allowed a new trial because, amongst other errors, "regarding the issue of consent to the ... sexual conduct, the trial judge did not address the incident in the context of the spousal relationship..."²⁴⁷

In many marital rape cases, consent is a matter of "she said / he said",²⁴⁸ and the key issue is credibility.²⁴⁹ There are several cases where courts assessed credibility in favour of the complainant, and were not otherwise left with a reasonable doubt as to the guilt of the accused.²⁵⁰ However, there are also cases where courts displayed discriminatory attitudes in their credibility assessments. In *R. v. S.C.*, the court's assessment of the complainant's credibility is prefaced by comments that she "had a history of hospitalization for nervous breakdowns", and on the date of the alleged incident, "she was depressed and her nerves were bad."²⁵¹ The accused was acquitted of sexual assault. In *R. v. Tait*, the court found the complainant's credibility problematic because she admitted to having consensual intercourse with the accused following the alleged incident of sexual assault. The accused was acquitted.²⁵² In *R. v. A.R.*, the court was "suspicious" that the complainant, who married the accused "by proxy" from Iran, "was perhaps more interested in securing a permanent home in Canada than anything else." As for her husband, "[a] selfish lover he may have been, but a person committing sexual assault has not been proven."²⁵³ Once again, the accused was acquitted. In *R. v. A.V.*, the court differentiated between reluctance and lack of consent, stating "I really believe this lady may have been reluctant to have sex with the accused at the time he wanted to have sex because of the presence of her children. I really believe that, but I also believe that her natural desires may have overridden that reluctance - and that's not unknown - and she gave in."²⁵⁴ The accused was acquitted.

It is difficult to see these cases as exemplifying the affirmative approach to consent mandated by section 273.1 of the *Criminal Code* and *Ewanchuk*. True to predictions, a different standard continues to be applied to the issue of consent in marital rape cases, whereby consent is often implied and courts look for proof of resistance or obvious lack of capacity to consent rather than the absence of voluntary, affirmative agreement.²⁵⁵ This misapplication of consent law also finds

²⁴⁶ *Ibid.* at para. 3. Randall, *supra* at 165, argues that the dispute as to the facts is not apparent on the face of the trial judgment.

²⁴⁷ *R. v. Wigle*, [2009] O.J. No. 3276, 2009 ONCA 604, 252 O.A.C. 209 at para. 45.

²⁴⁸ For an analysis of credibility determinations in he said / she said cases through the lens of women's equality see Christine Boyle, "Reasonable doubt in credibility contests: sexual assault and sexual equality" (2009) 13 Int'l J. Evidence & Proof 270.

²⁴⁹ The leading Supreme Court case on credibility assessments is *R. v. W.(D.)*, [1991] 1 S.C.R. 742, according to which the issue is not who the trier of fact believes in whole or in part, but whether, in light of all the evidence, there is a reasonable doubt as to the guilt of the accused. For a case of homicide where the court had a reasonable doubt about whether marital rape had occurred, see *R. v. Benham*, [2008] B.C.J. No. 2148, 2008 BCSC 1531. The accused was convicted of second degree murder.

²⁵⁰ See e.g. *R. v. J.A.*, [2001] O.J. 5956 (O.C.J.); *R. v. D.S.C.*, [2004] N.S.J. No. 432, 2004 NSCA 135, 228 N.S.R. (2d) 81 (C.A.). For cases where such findings were overturned on appeal, see e.g. *R. v. Dutchek*, [1995] A.J. No. 233, 162 A.R. 363 (C.A.); *R. v. Jackson* [2007] O.J. No. 3269 (ONSC); *R. v. T.T.*, [2009] O.J. No. 3388 (ONCA); *R. v. H.A.*, [2009] O.J. No. 2146 (C.A.), overturning *R. v. Ali*, [2007] O.J. No. 701.

²⁵¹ *R. v. S.C.*, [1992] Y.J. No. 93 (Terr. Ct.).

²⁵² *R. v. Tait* [2008] O.J. No. 4868, 2008 ONCJ 629.

²⁵³ *R. v. A.R.* [1996] O.J. No. 367 (ONCtGD).

²⁵⁴ *R. v. A.V.* [1995] O.J. No. 4012 (ONCtGD).

²⁵⁵ Boyle (2004), *supra*. See also Randall, *supra* at 145, 147, and 174.

its way into the issue of mistaken belief in consent. As the cases in the next section show, if courts do not apply proper standards of consent, this changes what the accused is entitled to be mistaken about in defence of his conduct.

D. Mistaken Belief in Consent

There are numerous marital rape cases where mistaken belief in consent was in issue. In some cases, the defence was accepted at trial but overturned on appeal, suggesting greater sensitivity amongst appellate judges to the requirements of this defence. For example, in *R. v. MacFie*, the trial judge held that although the accused had violently abducted his estranged wife and had sexual intercourse with her without her consent, he was not guilty of sexual assault because he honestly believed that she was consenting. The victim had left MacFie following a long history of physical and emotional abuse, and had provided the police with a written statement where she said she feared her husband would kill her and that she had not consented to the incident in question, but had “agreed” to have sexual intercourse because she feared bodily harm.²⁵⁶ She was later found murdered by MacFie. An all woman panel of the Alberta Court of Appeal overturned the acquittal, and found that the accused was wilfully blind to the existence of consent. According to the Court, “where the commencement of an encounter is characterized by violence or threats which would negative consent, ... [the accused] must ... have an honest belief that [the complainant] was [communicating consent] voluntarily and not as a result of the threats or violence...”.²⁵⁷ However, the Court stopped short of holding that a defence for mistaken belief in consent could never be successful in the case of kidnapping.²⁵⁸

A similar result obtained in *A.W.S.* The accused asked his spouse if she would have sexual relations following abdominal surgery, and although she replied in the negative, he removed her clothing and had sexual intercourse with her. The complainant testified that she did not physically resist because she was afraid of the accused. The accused denied having had sex with the complainant at all that day, and did not raise mistaken belief in consent at trial. However, the trial judge had a reasonable doubt about whether the complainant had adequately communicated her lack of consent to the accused, and acquitted him on that basis. The Crown’s argument that the trial judge had erred in law in considering the mistaken belief defence was accepted on appeal. However, the Manitoba Court of Appeal made several statements that are problematic. First, “there is no dispute that the parties’ relationship is a factor to be considered in determining whether the evidence for the accused may give rise to the mistaken belief defence”.²⁵⁹ Further, “the law cannot ignore the reality of normal human behaviour. ... it would be wrong to conclude that a person involved in an ongoing intimate relationship must secure the express consent of his or her partner prior to initiating any sexual act...” However, the Court also held that “it would be wrong to conclude that because the complainant and accused are involved in an ongoing intimate relationship passivity in all circumstances indicates consent.”²⁶⁰ Evidence is required to determine whether an air of reality exists, perhaps including “relevant evidence as to the past

²⁵⁶ *R. v. MacFie*, [2001] A.J. No. 152, 2001 ABCA 34 at para. 6.

²⁵⁷ *Ibid.* at para. 20.

²⁵⁸ *Ibid.* at para. 27.

²⁵⁹ *R. v. A.W.S.*, [1998] M.J. No. 26, [1998] 4 W.W.R. 364, 126 Man.R. (2d) 51, 122 C.C.C. (3d) 442, 37 W.C.B. (2d) 140 (C.A.) at para. 9.

²⁶⁰ *Ibid.* at para. 12.

sexual relationship of the parties.”²⁶¹ In this case, there was found to be little evidence to support the defence of mistaken belief in consent, and when considered in the context of the complainant's express rejection and her surgery, there was no air of reality to the defence.

In other cases, appellate courts upheld convictions for marital rape on the basis that the trial judge properly rejected the defence of mistaken belief in consent. For example, in *R. v. D.W.H.*, this defence was rejected at trial, on summary conviction appeal, and by the Ontario Court of Appeal where the accused vaginally penetrated his wife with a dildo while she was heavily medicated. Importantly, the Court of Appeal found that the evidence of past sexual history was properly given little weight by the trial judge, as the complainant had recently had “serious surgery and was in considerable pain.”²⁶²

However, there are also cases where appellate courts overturned convictions for marital rape on the basis that the trial judge did not give adequate consideration to the defence of mistaken belief in consent, or misapplied the defence to the detriment of the accused. For example, in *R. v. N.P.R.*, the trial judge rejected the defence and convicted the accused on the basis that he was wilfully blind, and should have made further inquiries into his wife's state of mind before he had sex with her. The B.C. Court of Appeal allowed the appeal and ordered a new trial. Based on the accused's evidence that “his wife consented by saying, “Get on with it. Get it over with.””, the Court of Appeal held that “this left no room for finding that the appellant was aware that his wife might not be consenting, but did not inquire because he did not to [sic] know the truth”. The Court found that the trial judge must have improperly concluded that the accused “was the type of person who was so eager for sex that he would likely blind himself to his wife's non-consent rather than determine whether she was consenting to sex with him or not.”²⁶³ Similarly, in *R. v. Went*, the trial judge found that the accused was reckless in failing to inquire as to the complainant's consent and was wilfully blind to her protests and body language indicating that he should stop the sexual activity in question. This judgment was overturned on appeal and an acquittal was entered. The B.C. Supreme Court found that the trial judge had been unable to decide whom to believe in respect of relevant and essential evidence as to whether Went's belief in consent was reckless or wilful. In these circumstances, he should have had a reasonable doubt as to *mens rea*. Of particular significance is the fact that the court distinguished *Ewanchuk* on the basis that it had been a case between strangers.²⁶⁴

At the trial level, there are some positive decisions where courts explicitly and properly applied the 1992 amendments to the *Criminal Code*. For example, in *R. v. Lemaigre*, the court rejected

²⁶¹ *Ibid.* at para. 13.

²⁶² *R. v. D.W.H.* [2006] O.J. No. 1009, 208 O.A.C. 109; 68 W.C.B. (2d) 691 (C.A.) at para. 6. See also *R. v. White*, [1986] B.C.J. No. 66, 24 C.C.C. (3d) 1 (C.A.); *R. v. R.G.*, [1994] B.C.J. No. 3094 (C.A.); *R. v. A.M.S.*, 2002 BCSC 857, [2002] B.C.J. No. 1443 (S.C.).

²⁶³ *R. v. N.P.R.*, [1998] B.C.J. No. 2908 (C.A.). For another example see *R. v. D.W.K.*, [1996] B.C.J. No. 1148, 31 W.C.B. (2d) 94 (C.A.) (where the trial judge improperly instructed the jury using the new provisions of the *Criminal Code* where the offence had taken place prior to their enactment).

²⁶⁴ *R. v. Went*, 2004 BCSC 1205, [2004] B.C.J. No. 1900 (S.C.). The court also found some support for its holding that the ongoing sexual relationship between the parties was relevant in *R. v. Park*, where Justice L'Heureux Dubé suggested that “some realistic showing of how earlier events could have influenced the accused's honest perceptions of the complainant's behaviour at the time of the actual assault” was relevant to mistaken belief in consent (at para. 24, citing *Park*, *supra* at p. 11).

the accused's defence of mistaken belief in consent where he had sexual intercourse with his spouse while he was drunk, "and was oblivious to whether she was consenting or not."²⁶⁵ However, there are few cases where courts dealt explicitly with the reasonable steps provision of section 273.2.²⁶⁶

One case in which one would have expected an analysis of this provision is *R. v. T.V.*²⁶⁷ In this case, the parties were married in India in 1991 and immigrated to Canada in 1996. The wife (N.S.) had an affair with her boss, and her relationship with T.V. thereafter was described by the trial judge as "a tale of betrayal and revenge."²⁶⁸ T.V. was charged with four offences against N.S., including one count of sexual assault that related to circumstances occurring on the anniversary of the couple's engagement. N.S. testified that T.V. asked her to "spend the night" with him and she said no.²⁶⁹ Following more discussion the accused lightly pinned N.S. to the bed, and she told him to get off. Because she was fearful and did not want to make a scene (her parents were visiting from India at the time), she just lay quietly until he finished. She left the bedroom on a pretext and reported that she had been raped to the police. The accused took the position that N.S. had consented, or alternatively, that he had mistakenly believed she was consenting. The trial judge acquitted T.V. of sexual assault based on mistaken belief in consent.²⁷⁰ In the course of the judgment, some very negative comments were made about N.S.: she was said to have "emotionally tortured" T.V.,²⁷¹ and to be "the author of her own misfortune" for being dishonest about her affair.²⁷² She was called "hysterical" while at the police station, and said to have "exaggerated and dramatized" the incident.²⁷³ Her claim of fearfulness was said to have no air of reality because her parents were present in the house, and the court rejected her explanation that her parents would not have supported her if she had complained.²⁷⁴ The trial judge also seemed to impose an exit requirement on N.S.: "there was nothing that prevented this complainant, who was economically independent, from simply leaving the home" before the

²⁶⁵ *R. v. Lemaigre*, 2003 SKPC 144, [2003] S.J. No. 686 (Prov. Ct.) at para. 35. There was also evidence that the accused had assaulted the complainant a short time before the sexual assault. See also *R. v. J.L.A.*, [1995] B.C.J. No. 2978 (Prov. Ct.).

²⁶⁶ In *N.P.R.*, *supra*, the B.C. Court of Appeal implicitly addressed the provision in reference to the trial judge's findings, but the trial decision is not available.

²⁶⁷ *R. v. T.V.* [2006] O.J. No. 4089, 2006 ONCJ 338 (O.C.J.). The Crown's application for an extension of time to appeal the acquittal for sexual assault was denied. See *R. v. Venkatesh* [2007] O.J. No. 1300 (ONSC). See also *R. v. A.B.*, *supra*, where the Alberta Provincial Court accepted the argument that the accused honestly believed that the complainant consented to him ejaculating in her face based on evidence of the accused's surprised reaction to the "vehement actions of the complainant" following the incident (at para. 32) and on "his perception of her physical reactions to his acts of love making" (at para. 36); *R. v. S.A.W.*, *supra*, where the Nova Scotia Provincial Court found an air of reality to the defence of mistaken in belief in consent, noting that the accused's testimony that he thought his wife was consenting to oral sex was "rational" (at para. 32) as compared to the testimony of the complainant, who was characterized as "shrewd" and "fanciful" (at paras. 29 and 32).

²⁶⁸ *R. v. T.V.*, *ibid.* at para. 19.

²⁶⁹ *Ibid.* at para. 75.

²⁷⁰ *Ibid.* He was convicted of common assault in relation to a separate incident, and acquitted on charges of assault with a weapon and harassment.

²⁷¹ *Ibid.* at para. 140.

²⁷² *Ibid.* at para. 164.

²⁷³ *Ibid.* at para. 168. For an analysis of the gendered nature of hysteria see Jonnette Watson Hamilton, "The Use of Metaphor and Narrative to Construct and Gender Hysteria in the Courts" (2002) 1 *Journal of Law & Equality* 155.

²⁷⁴ *Ibid.* at para. 166. N.S. had also testified that there had been several previous incidents where T.V. was violent towards her.

incident.²⁷⁵ These comments are difficult to reconcile with the judge’s concluding remark that “these reasons are not to be interpreted in any way as saying that a husband can have sex with his wife when she says that she does not want to. ... The findings in this case are based on the uniquely intimate and troubled relationship that existed between the parties in question.”²⁷⁶ In spite of the claim to have considered context, the judge did not take into account the history of violence between the parties as relevant to recklessness or wilful blindness as to consent, nor was the relevance of the cultural context in assessing the credibility of N.S. considered.

Overall many of these cases suggest that the presence of a spousal relationship between the parties is seen as clearly relevant to, and sometimes seems to lead to a finding of, mistaken belief in consent. As Randall notes, the “reasonable steps” element of mistaken belief in consent often seems to disappear in the spousal context, thus “normaliz[ing] males’ entitlement to access to their female partners”.²⁷⁷

E. Evidentiary Rules – Corroboration, Recent Complaint, Similar Fact Evidence, Evidence of Domestic Violence, Recanting Witnesses, Sexual History Evidence and Production of Records²⁷⁸

While the 1983 reforms to the *Criminal Code* dispensed with the requirements of corroboration and recent complaint in sexual violence cases, these issues continue to be raised in marital rape prosecutions. As noted above, lack of corroboration may still be an issue, even though courts often acknowledge that it is not required.²⁷⁹ Cases where there are no independent witnesses or physical injuries typically come down to an assessment of the credibility of the witnesses. As far as recent complaint is concerned, courts have rejected defence suggestions that the complainant’s failure to raise an immediate hue and cry should impugn her credibility,²⁸⁰ although there are also cases to the contrary.²⁸¹ For example, in *R. v. G.B.*, the court stated: “I do not find the fact of nondisclosure alone determinative of this issue ... However, when coupled with the fact that during the latter of the three police interviews, Ms. L.D. was asked if there were any prior sexual assaults and said nothing about these incidences, I am left in a state of uncertainty about her evidence on these allegations.”²⁸² This finding was made in spite of the fact that the victim was

²⁷⁵ *Ibid.* at para. 170. Randall (2010) draws a similar conclusion to mine (at 23), and discusses this case at length in her 2008 article.

²⁷⁶ *Ibid.* at paras. 175-6.

²⁷⁷ *Supra* at 145, 161, 179.

²⁷⁸ This section will focus on cases where evidentiary issues related to the interests of complainants are raised. There are several cases dealing with issues related to the admissibility of statements made by the accused that will not be reviewed in detail here. See e.g. *R. v. L.S.U.*, [1999] B.C.J. No. 2618; 2001 BCCA 529, [2001] B.C.J. No. 1875 (C.A.); *R. v. Nelson*, [2001] O.J. No. 2353, 2354, 2355 (Ont. S.C.J.); *R. v. McIsaac*, [2005] B.C.J. No. 946, 2005 BCSC 385, 29 C.R. (6th) 274 (S.C.); *R. v. T.C.J.* [2005] O.J. No. 4134 (OCJ), [2005] O.J. No. 5876; *R. v. Dahlman*, [2007] B.C.J. No. 2828, 2007 BCSC 1913, 77 W.C.B. (2d) 122 (S.C.).

²⁷⁹ See for example *R. v. G.D.M.*, [2000] A.J. No. 1456, 2000 ABCA 319; *R. v. A.S.B.*, 2006 BCPC 598, [2006] B.C.J. No. 3447 (Prov. Ct.).

²⁸⁰ See e.g. *R. v. A.F.L.*, [2005] A.J. No. 1897, 2005 ABPC 367.

²⁸¹ See *R. v. Q.M.J.*, [2003] O.J. No. 6012 (Ont. C.J.). The complainant was a police officer, and the court could not understand why she had not followed her own training with respect to dealing with victims of sexual assault. It also commented on the fact that she had not recorded the incident in her diary. The accused was acquitted of forced intercourse. See also *R. v. Singh* [2009] O.J. No. 840 (ONCJ), where the complainant’s failure to inform police of the sexual assault “was fatal to her credibility and raised a reasonable doubt” (at p. 2).

²⁸² [2000] O.J. No. 5513 (S.C.) at para. 12.

Fijian, did not speak English, lacked an education, was on social assistance, and was said to be “somewhat sheltered... from Canadian life.”²⁸³

There are various evidentiary tools available to courts in marital rape cases to assist them in making determinations as to credibility and other issues, including the admission of similar fact evidence and evidence related to a history of domestic violence between the parties. A leading case on the admissibility of similar fact evidence in the marital rape context is *R. v. C.P.K.*²⁸⁴ In this case, the Ontario Court of Appeal followed recent Supreme Court of Canada rulings on the admissibility of evidence of discreditable conduct, which provide that such evidence may be admitted where its probative value in relation to a particular issue outweighs its potential prejudice. These cases also provide a framework and factors for applying this test.²⁸⁵ In *C.P.K.*, the trial judge had admitted evidence of the accused’s conduct towards his previous spouse, both general and related to six incidents of domestic violence, as relevant to the credibility of the complainant (who alleged several instances of assault and sexual violence over a four day period). The Court of Appeal held that framing the issue to which the similar fact evidence was relevant as the credibility of the complainant was too broad, and the focus should have been on whether the alleged acts occurred.²⁸⁶ Further, even with this particular focus, the Court found that the evidence of the conduct against the previous spouse was not sufficiently similar to the alleged incidents, primarily because there were no reported incidents of sexual violence against the former spouse, nor was there anything particularly distinctive about the conduct of the accused.²⁸⁷ A new trial was ordered.

This case calls into question some earlier rulings where similar fact evidence was admitted in marital rape cases as relevant to the complainant’s credibility (or to respond to the accused’s assertion of good character).²⁸⁸ Further, the reasoning of the Court of Appeal on the sufficiency of the similarity is problematic. As the Crown argued in *C.P.K.*, assault and sexual assault could be seen as “just different forms of violence”, similar in the sense that “in the context of abusive domestic relationships in which the appellant used fear as a means of control, the sexual assaults described by the complainant were simply another method of asserting control.”²⁸⁹ Nevertheless, there are marital rape cases subsequent to *R. v. C.P.K* where similar fact evidence involving discreditable conduct towards other women was admitted in other circumstances. For example, in a 2004 decision of the Ontario Court of Appeal, *R. v. T.J.D.*, similar fact evidence was admitted on the issue of consent.²⁹⁰ Further, in that case and others, past violent conduct of the accused towards the complainant, sexual and otherwise, has been admitted as relevant to “the

²⁸³ *Ibid.* at paras. 4 and 5. The accused was convicted of other sexual assaults against the complainant where there was corroborating evidence. The accused was eventually sentenced as a long term offender.

²⁸⁴ *R. v. C.P.K.*, [2002] O.J. No. 4929, 62 O.R. (3d) 487 (C.A.).

²⁸⁵ *R. v. Handy*, 2002 SCC 56 at para. 55; see also *R. v. Shearing* 2002 SCC 58.

²⁸⁶ *R. v. C.P.K.*, *supra* at paras. 34 -39.

²⁸⁷ *Ibid.* at paras. 46, 51.

²⁸⁸ See e.g. *R. v. A.R.T.*, [1982] O.J. No. 122; *R. v. C. (M.H.)*, [1988] B.C.J. No. 2620, (C.A.); *R. v. L.W.G.*, [1996] A.J. No. 653, 187 A.R. 21 (C.A.), [1996] S.C.C.A. No. 410 (appeal to SCC abandoned).

²⁸⁹ *R. v. C.P.K.*, *supra* at para. 20.

²⁹⁰ See e.g. *R. v. T.J.D.* [2002] O.J. No. 2992, [2002] O.T.C. 552 (S.C.), *aff’d* [2004] O.J. No. 1444 (C.A.). At trial, the judge had admitted the similar fact evidence as relevant to the complainant’s credibility. While the Court of Appeal found that this ruling was contrary to *Handy*, it held that the evidence was relevant to the issue of consent, and was thus admissible on that basis.

narrative or context of events” and “to show animus or motive” on the part of the accused,²⁹¹ as well as to explain the complainant’s actions in not reporting the violence and in continuing to reside with the accused.²⁹² Expert evidence may also be admissible for these same purposes.²⁹³ There are a number of marital rape cases where judges made negative credibility rulings regarding complainants that would have benefited from the admission of this sort of evidence, as they exhibit a lack of understanding about the dynamics of abusive relationships.²⁹⁴

A related issue is that of recanting witnesses. Where victims of marital rape recant or refuse to testify at trial, courts may allow their previous statements into evidence if they meet the criteria of necessity and reliability.²⁹⁵ Crown applications to admit fresh evidence that complainants have recanted due to threats from the accused have also been permitted.²⁹⁶ On the other hand, defence applications to introduce fresh evidence on appeal that victims have recanted their allegations of marital rape have sometimes been allowed as well.²⁹⁷ In a recent case, the Ontario Court of Appeal allowed a defence application to introduce fresh evidence that may have supported his argument at trial that the complainant had fabricated her allegations of sexual assault to gain an upper hand in a custody dispute. The fresh evidence was an allegation of sexual abuse against the daughter. The Court stated that only in “exceptional cases” will an accused be able to re-cross-examine the complainant in a new trial based on fresh evidence, so as not to “repeat the stress and trauma of the legal process.”²⁹⁸ Moreover, the defence should not be permitted to “rehash ground covered at trial” or to undertake a “fishing expedition” to uncover new evidence.²⁹⁹ However, it was seen to be in the interests of justice to allow the defence to cross-examine the complainant on the allegations, and the Court made an order to this effect.

²⁹¹ *R. v. T.J.D.* (C.A.), *ibid.* at para. 4. See also *R. v. B.R.*, [2004] O.J. No. 5969, *aff’d* [2006] O.J. No. 3404, 81 O.R. (3d) 641 (C.A.), where evidence of previous violence was admitted as relevant to rebut the defence of fabrication, to explain the nature of the relationship, and to show the animus of the accused towards his wife (at para. 38); *R. v. D.A.R.C.*, *supra*, where evidence of past assaultive behaviour of the accused was admitted as relevant to his animus towards the complainant.

²⁹² See e.g. *R. v. S.B.*, [1996] O.J. No. 5457; [1996] O.J. No. 1187 (Ont. C.J.) at para. 44; *R. v. D.S.F.*, [1999] O.J. No. 688, 43 O.R. (3d) 609, 169 D.L.R. (4th) 639 (C.A.) at paras. 13-35; *R. v. Chapman* [2006] O.J. No. 185, 207 O.A.C. 216, 204 C.C.C. (3d) 449 (C.A.). For a case to the contrary see *R. v. McDowell*, [1995] B.C.J. No. 929 (Prov. Ct.).

²⁹³ See *R. v. D.S.F.*, *ibid.* at paras. 36 – 67. For a case to the contrary, see *R. v. Nelson*, [2001] O.J. No. 2354, where the Court held that expert evidence of the context of domestic violence was inadmissible where the complainant herself had given such evidence.

²⁹⁴ See for example *R. v. G.E.M.*, 2004 BCSC 668, [2004] B.C.J. No. 1856 (S.C.) (although the accused was nevertheless convicted of several offences); *R. v. J.M.*, [2004] O.J. No. 5976 (Ont. S.C.J.); *R. v. Tait* [2008] O.J. No. 4868, 2008 ONCJ 629.

²⁹⁵ See e.g. *R. v. C.C.B.*, [1999] S.J. No. 672, 185 Sask.R. 102, *aff’d* [2000] S.J. No. 423, 2000 SKCA 72 (sub nom *R. v. Bird*); *R. v. M.A.L.*, [2000] N.W.T.J. No. 84, 2000 NWTSC 61; *R. v. D.J.S.*, [2002] B.C.J. No. 1198, 2002 BCSC 612, 54 W.C.B. (2d) 399. The leading case on this issue is *R. v. K.G.B.*, [1993] 1 S.C.R. 740, a case of wife assault. Admission of a *K.G.B.* statement does not necessarily save the case, however. For acquittals in the marital rape context after the admission of such statements, see *R. v. Samuel* [2001] O.J. No. 895, 49 W.C.B. (2d) 268 (O.C.J.); *R. v. M.S.* [2004] O.J. No. 5673, 2004 ONCJ 397; 64 W.C.B. (2d) 257.

²⁹⁶ See *R. v. F.D.J.F.* [2005] O.J. No. 2148, 198 O.A.C. 126, 197 C.C.C. (3d) 365 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 477.

²⁹⁷ See e.g. *R. v. L.G.P.*, [2008] A.J. No. 1488, 2009 ABCA 1. In this case, the Court of Appeal ordered a new trial where the wife had recanted her allegations of sexual assault in two statutory declarations. For a case to the contrary, see *R. v. R.S.D.L.* [2009] N.S.J. No. 289, 2009 NSCA 74, 279 N.S.R. (2d) 301

²⁹⁸ See *R. v. Sihota*, [2009] O.J. No. 4590 (C.A.) at para 14.

²⁹⁹ *Sihota*, *ibid.* at para 14.

This case calls to mind one of the traditional rationales for maintaining the marital rape immunity – that women would fabricate claims to gain an advantage in family law proceedings.³⁰⁰ Hopefully defence applications to introduce fresh evidence are not a new trend in defence strategies in sexual assault cases similar to sexual history and records production applications.

Sexual history evidence was considered by the courts in a great number of marital rape cases. One such case pre-dates *Seaboyer* and the 1992 reforms to the *Criminal Code*, before which an accused person did not have to make an application to elicit evidence of the complainant’s sexual history with him (as opposed to other persons).³⁰¹ Since the 1992 reforms an application is required before an accused can adduce such evidence,³⁰² but it appears that these applications are not always a precursor to the consideration of sexual history evidence by the courts in marital rape cases.³⁰³ As Randall suggests, judges may be subverting the rape shield provisions by allowing sexual history evidence to “creep in” without making a formal application under the *Criminal Code*.³⁰⁴

There are some marital rape cases where sexual history applications were rejected by the courts. For example, in *R. v. T.E.P.*,³⁰⁵ the Ontario Court of Appeal confirmed that an application was required in circumstances where the accused wished to cross-examine the complainant as to whether they had slept in the same bed on a particular occasion, agreeing with the trial judge that this “raised an inference of sexual activity”.³⁰⁶ The Court also confirmed the trial judge’s holding that this line of questioning should not be permitted, as it had little probative value and, to the extent that it may have suggested that sexual activity took place, it had significant potential for prejudicial effect.³⁰⁷ However, in the vast majority of marital rape cases, applications to adduce evidence of sexual activity were allowed, at least in part.³⁰⁸ Most cases involved evidence of past

³⁰⁰ See *supra* at p. 10. For a marital rape case where a similar allegation of abuse against a child resulted in an acquittal, see *R. v. K.F.L.* [1999] O.J. No. 2623 (S.C.J.).

³⁰¹ See *R. v. White*, [1986] B.C.J. No. 66, 24 C.C.C. (3d) 1 (C.A.).

³⁰² An application is not required where the evidence is introduced by the Crown. See e.g. *R. v. N.P.R.*, [1998] B.C.J. No. 2908 (C.A.), where the Crown led evidence of the sexual relationship between the complainant and her husband “to provide context for the manner in which the assault took place, and to rebut a defence of honest but mistaken belief” (at para. 3).

³⁰³ See e.g. *R. v. R.G.*, [1994] N.W.T.J. No. 20 (S.C.); *R. v. R.G.*, [1994] B.C.J. No. 3094 (C.A.); *R. v. J.L.A.*, [1995] B.C.J. No. 2978 (Prov. Ct.); *R. v. B.A.*, [1996] B.C.J. No. 268, 71 B.C.A.C. 231, 30 W.C.B. (2d) 155 (C.A.); *R. v. R.K.J.* [1998] N.B.J. No. 483, 207 N.B.R. (2d) 24, 40 W.C.B. (2d) 376 (C.A.); *R. v. D.I.A.*, [1999] N.B.J. No. 303, 215 N.B.R. (2d) 330, 43 W.C.B. (2d) 121 (C.A.).

³⁰⁴ See Randall, *supra* at 158.

³⁰⁵ *R. v. T.E.P.*, [2004] O.J. No. 1904, 61 W.C.B. (2d) 654 (C.A.). See also *R. v. R.D.D.*, [2001] S.J. No. 354 (Prov. Ct.), where a preliminary inquiry judge declined to admit evidence of previous consensual sexual activity between a husband and his estranged wife, and *R. v. Allan*, [2009] M.J. No. 427, 2009 MBQB 323; [2010] M.J. No. 183 (QB), a very brief decision where an application to introduce evidence of sexual history between the parties as relevant to mistaken belief in consent was denied.

³⁰⁶ *R. v. T.E.P.*, *ibid.* at para. 3.

³⁰⁷ *Ibid.* at paras 4-5.

³⁰⁸ See *R. v. Maher*, [1992] N.W.T.J. No. 148; [1993] N.W.T.R. 33 (S.C.); *R. v. T.J.*, [1994] O.J. No. 4167, 28 C.R. (4th) 195, 23 W.C.B. (2d) 152 (Ont. C.J.); *R. v. A.R.C.*, [2002] O.J. No. 5364, [2002] O.T.C. 1068 (S.C.J.); *R. v. Went*, 2004 BCSC 1205, [2004] B.C.J. No. 1900 (S.C.); *R. v. Latreille* [2005] O.J. No. 4845, [2005] O.T.C. 976, 67 W.C.B. (2d) 748 (O.C.J.); *R. v. K.O.* [2008] O.J. No. 4193 (S.C.J.); *R. v. Wilson*, [2008] O.J. No. 3583, 2008 ONCJ 418, 79 W.C.B. (2d) 427 (O.C.J.); *R. v. M.J.T.*, [2008] B.C.J. No. 900, 2008 BCPC 131; *R. v. B.B.* [2009] O.J. No. 864; [2009] O.J. No. 862 (S.C.J.).

sexual activity with the accused, although evidence of sexual activity with others has also been admitted.³⁰⁹

Regardless of whether an application was made or not, in marital rape cases where sexual history evidence was considered, it was typically found to be relevant to issues regarding consent, mistaken belief in consent, and fabrication.³¹⁰ In some cases, courts have stated that sexual history applications should not be subject to a lesser standard where there is a spousal relationship between the parties. For example, in *R. v. B.J.S.*, Allen J. of the Alberta Provincial Court noted that “‘The rape shield provisions’ do not differentiate between married couples and others. Had Parliament meant to make any of these sections to be applied differently based upon marital status it would have done so.”³¹¹ Nevertheless, the judge went on to admit evidence of two previous instances of sexual activity between the accused and complainant. The first instance was seen as relevant to the issue of mistaken belief in consent, as “the applicant testified he believed that the complainant had given him permission to touch her for the purpose of inspecting her fidelity”, which had allegedly happened on a previous occasion as well.³¹² The second instance was seen as relevant to credibility and involved a previous alleged incident of fabrication by the complainant following consensual intercourse. The court accepted the defence argument that this evidence “would tend to prove that the complainant is motivated to lie because she wanted him out of her life and wanted sole possession of their joint residence.”³¹³ This case and others suggest that the courts are failing to apply the rape shield provisions with rigour where spouses are involved.³¹⁴ Indeed, the judge in *B.J.S.* relied on two of the historic (and supposedly discredited) rationales for the marital rape immunity – wives are the property of their husbands, and are prone to fabricate rape complaints for advantage in family law proceedings.

Relatively speaking, there are few reported marital rape cases involving applications for production of personal records under the *Criminal Code*, suggesting that these records are “creeping in” just as evidence of sexual history does.³¹⁵ This is perhaps not surprising, given that the accused will often have knowledge of the existence of such records and the means to acquire them.³¹⁶

³⁰⁹ See *R. v. Munn*, [1993] N.B.J. No. 418, 138 N.B.R. (2d) 207 (QB), where the Court allowed evidence of the wife’s adultery. It is unclear from the decision how this evidence was relevant to an issue at trial. For a decision to the contrary, see *R. v. B.B.*, *ibid.*

³¹⁰ See e.g. *R. v. Maher*, *supra* (fabrication); *R. v. T.J.*, *supra* (consent); *R. v. D.I.A.*, *supra* (mistaken belief in consent); *R. v. A.R.C.*, *supra* (fabrication); *R. v. Latreille*, *supra* (consent); *R. v. K.O.*, *supra* (consent); *R. v. Wilson*, *supra* (consent); *R. v. M.J.T.*, *supra* (consent); *R. v. B.B.*, *supra* (consent), *R. v. A.W.S.*, *supra* (mistaken belief in consent).

³¹¹ *R. v. B.J.S.*, [2005] A.J. No. 883, 2005 ABPC 158 (at para. 41).

³¹² *Ibid.* at para. 55. This evidence was seen as irrelevant to consent, however.

³¹³ *Ibid.* at para. 57.

³¹⁴ This is not to say that the rape shield provisions are being applied with rigour in cases involving non-spouses.

³¹⁵ Interestingly, all the reported marital rape cases involving issues related to personal records (whether they involve production applications or not) are from Ontario. It may be that other jurisdictions do not report production applications to the same extent. For comments on the underreporting of such applications, see Busby, *supra*, and Koshan (2002), *supra*.

³¹⁶ This is true outside the marital rape context as well, as the accused commonly has a relationship with the complainant in sexual assault cases (see Busby, *ibid.*). However, where the parties reside together in an intimate relationship it is safe to assume that there will be increased opportunities to know of and acquire such records. This may also operate to the advantage of the complainant and Crown in some cases. See e.g. *R. v. T.C.J.*, [2005] O.J. No. 5876 (S.C.J.), where counselling records of the accused seized via a search warrant were found to be admissible. The

The cases where the courts referred to complainants' personal records without evidence of a production application typically involved scenarios similar to that in *R. v. Shearing*, where the accused was already in possession of the records through his own means. In *Shearing*, a majority of the Supreme Court found that a production application is not required in these circumstances. However, the Court also held that the probative value of the record must be weighed against its prejudicial effects to determine whether the record is admissible.³¹⁷ *Shearing* was not referenced in any of the reported marital rape cases involving personal records in the hands of the accused, suggesting that the judges in these cases did not even turn their minds to whether it was appropriate to receive and consider the records in question.³¹⁸ For example, in *R v. R.A.G.*, the Ontario Court of Appeal remarked upon the evidentiary weight (but not admissibility) of a letter taken from the complainant's purse by the accused, in which she wrote to a former lover about the paternity of a child for which she had an abortion. The Court found the letter to be "a critical piece of evidence that the trial judge appears to have ignored", and ordered a new trial.³¹⁹ The Court did not evaluate the prejudicial effects to the complainant's equality interests in making this determination.

In the marital rape cases where production applications were considered, the results are more encouraging. In *R. v. R.C.*, the Ontario Court of Appeal found that the production provisions of the *Criminal Code* applied to "joint records" involving the accused and complainant – in this case, records relating to counselling sessions of the complainant where the accused was present.³²⁰ Although there might be a "somewhat reduced expectation of privacy" for such records, a production application was still required. Further, because the accused would know the content of the records in such a case, "he should be in a position to provide specific details of the information sought." The Court upheld the trial judge's decision not to order production of the records in this case, as the application consisted of "largely nothing more than vague assertions" related to the complainant's credibility.³²¹ Similarly, in *R. v. A.A.M.*, Justice R.A. Clark of the

accused's claim of privilege in relation to these records (which the wife claimed contained an admission of the alleged offences) was dismissed. The court concluded that the accused "failed to establish that his rights to protecting the records in question from disclosure outweigh the interests in disclosing them" (at para. 15).

³¹⁷ *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58. In this case the accused cult leader was charged with 20 counts of sexual offences and was in possession of the diary of one of the complainants, which she had left behind when she moved out of his house. The defence was permitted to cross-examine the complainant on her diary and its omission of reference to any sexual assaults without going through a production application. Justices L'Heureux Dubé and Gonthier dissented, holding that a production application was required in the circumstances. They would not have permitted cross-examination on the diary, finding that the prejudicial effects of allowing cross-examination on the complainant's constitutional rights would outweigh the probative value of the evidence.

³¹⁸ See for example *R. v. Q.M.J.*, *supra*, where the court accepted the complainant's diary as an exhibit and queried why she had not recorded the sexual assault in it; this was seen as detrimental to her credibility; *R. v. T.V.*, *supra*, where the court accepted into evidence the complainant's journal and two "love letters" written to her by a man with whom she was having an affair; the letters and journal had been stolen by the accused from his wife's briefcase and suitcase; see also *R v. R.A.G.*, [2008] O.J. No. 4925 (C.A.).

³¹⁹ *R v. R.A.G.*, *ibid.* at para. 18. The evidence was seen as relevant because "the complainant's position at trial was that the non-consensual sexual intercourse" that was the subject matter of the charge against the accused "had resulted in a pregnancy that she aborted" (*ibid.*).

³²⁰ *R. v. R.C.*, [2002] O.J. No. 865 (Ont. C.A.). The term "joint records" is really a misnomer in this case, as the accused was simply present at the counselling sessions.

³²¹ *Ibid.* at para. 68. However, the Court ordered a new trial based on misapprehensions of other evidence by the trial judge.

Ontario Superior Court of Justice declined to order production of the complainant's medical and counselling records to the accused.³²² According to the Court, the records were of limited to no probative value, were not necessary to the accused to make full answer and defence, and had a high expectation of privacy associated with them, particularly the medical records which related to "matters of a sexual or reproductive nature."³²³ In a third case, *R. v. J.G.C.*, the court ordered the accused to pay costs of \$1500 to the Children's Aid Society related to his application for production of records in its possession.³²⁴

While the cases involving actual applications for production are promising, and inroads have been made in admitting evidence about the presence of a history of domestic violence, overall the cases reviewed in this section reveal that evidentiary issues continue to be a place where discriminatory myths and stereotypes about marital rape are employed by judges.

F. Sentencing

In cases of marital rape that actually result in conviction, sentencing of the offender may also raise issues related to the equality, autonomy and security concerns of the victim. As noted earlier, appellate courts have not established specific sentencing guidelines for marital rape, but it is interesting to keep in mind the guideline of three years for serious sexual assaults adopted by some jurisdictions.³²⁵

At one end of the spectrum are marital rape cases involving convictions for sexual assault with a weapon, sexual assault causing bodily harm or aggravated sexual assault. As one would expect, sentences in these cases tend to be higher, in light of the fact that the maximum sentences are higher in order to reflect of the gravity of these offences. In *R. v. D.K.*, the Ontario Court of Appeal upheld a sentence of 10 years imprisonment for 5 counts of sexual assault with a weapon, committed over a period of 12 years by the accused against his former wife. The Court of Appeal emphasized both the brutality of the crimes and the relationship between the parties as aggravating factors.³²⁶ In *R. v. McGregor*, the accused was convicted of 1 count of aggravated

³²² *R. v. A.A.M.*, [2004] O.J. No. 5306 (Ont. S.C.J.). In this case, the Crown and complainant agreed to allow the records to be produced to the court for it to determine whether production to the accused was warranted. Normally production to the court requires that the accused satisfy particular criteria under s.278.5 of the *Criminal Code*.

³²³ *R. v. A.A.M.*, *ibid.* at paras. 14-15. The court also referenced other factors noted in s.278.5, including the likelihood of prejudice to the personal dignity and right to privacy of the complainant, society's interest in encouraging the reporting of sexual offences, and society's interest in encouraging the obtaining of treatment by complainants of sexual offences. In addition, the court denied the accused's application to cross-examine the complainant on her sexual history with him.

³²⁴ *R. v. J.G.C.*, [2003] O.J. No. 2275, 57 W.C.B. (2d) 646 (S.C.J.). While the court notes that the accused was eventually convicted of sexually assaulting his former intimate partner (in addition to other offences against her, collectively referred to as "domestic terrorism" in the sentencing judgment at [2003] O.J. No. 2275 (para. 2)), it is unclear whether the production application itself was successful. It is also unclear whether the complainant was represented by counsel at the production hearing.

³²⁵ The Alberta Court of Appeal's decision in *Sandercock* has been followed in Saskatchewan (see *R. v. Cappo*, [1993] S.J. 571 (C.A.)), Manitoba (*R. v. E.L.D.*, [1992] M.J. 445, 81 Man. R.(2d) 264 (C.A.) – a marital rape case), Quebec (see *R. c. Bonnier*, [1992] J.Q. 2061 (C.A.Q.)), New Brunswick (see *R. v. Savoie*, [1993] N.B.J. No. 319 (Q.B.)), and the Northwest Territories (*R. v. Adams*, [1988] N.W.T.J. No. 141 (C.A.)). The Ontario Court of Appeal declined to follow *Sandercock* in *R. v. Glassford*, [1988] O.J. 359 (C.A.).

³²⁶ *R. v. D.K.* [2003] O.J. No. 562 (C.A.) (at para. 7). See also *R. v. D.F.* [2002] O.J. No. 5004 (S.C.J.), where the accused was sentenced to a global period of 16 years for a series of offences including sexual assault with a weapon

sexual assault for 2 instances of unprotected sex over a 1.5 year period with his intimate partner without disclosing that he was HIV positive. The Ontario Court of Appeal allowed the Crown's appeal of a conditional sentence, finding that the trial judge failed to take into account the breach of trust inherent in the case, and substituted a jail term of 18 months.³²⁷ Even in cases of "simple" sexual assault, however, there is authority that the *absence* of "gratuitous", "extraneous" or "additional" violence should not be seen as a mitigating factor.³²⁸ Further, while the question of "whether an assault is for sexual gratification is sometimes a factor in determining if there has been a sexual assault... [i]t has ...no place in determining sentence."³²⁹

One might also expect sentences to be relatively higher in marital rape cases in light of section 718.2(a)(ii) of the *Criminal Code* and the earlier common law position that abuse of a spouse or common-law partner was an aggravating factor (as noted in *Stone*). However, before the 1990s there was little such recognition. In a case before the sexual assault reforms of 1983, *R. v. P.T.M.*, the accused was convicted of raping his common law wife of 4 years. He was sentenced to 4 years jail at trial, but this was reduced to 1 year on appeal. In doing so, the Alberta Supreme Court (Appellate Division) stated: "In a matter of rape there of course is violence, but in this case there was no undue violence. I think it is relevant in considering the length of a sentence to consider the effect on the victim. Here, although the complainant did not consent the effect on her could not be as traumatic as it is on the victim in the usual case of rape."³³⁰ Assuming the "usual case" involved a non-wife, it appears the Court found the spousal context to be mitigating. Similarly, in *R. v. C. (H.L.)*, the B.C. County Court considered an appropriate sentence in a case of forced sexual intercourse by a man on his wife of 19 years. According to the Court, "[w]ith respect to the fact that this occurred during marriage in my view it is most difficult to assess this with respect to mitigation and aggravation. In my view I think it is a balance of both."³³¹ On the mitigating side, "the act of sexual intercourse, while I have characterized it here as an act of degradation, is an act that was certainly a familiar act to these parties and that takes away from it, in my view, the feeling of trauma and shock to some extent that an unrelated victim would have."³³² On the aggravating side, "this was an act perpetrated upon his own wife, a person whom at least at one time he was supposed to protect and, notwithstanding the separation, because of their years of marriage and all the things they shared, including a family, should not be a person on whom such a demeaning act should be imposed."³³³ A sentence of only 9 months imprisonment was given.

In later cases, courts in marital rape cases more commonly referenced the aggravating nature of the spousal context in their sentencing reasons. For example in *R. v. T.V.G.*, Justice Bateman of

(scissors). The convictions and sentence were upheld on appeal, with the exception of the period of parole ineligibility. See *R. v. F.D.J.F.* [2005] O.J. No. 2148, 198 O.A.C. 126, 197 C.C.C. (3d) 365 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 477.

³²⁷ *R. v. McGregor*, *supra*.

³²⁸ *R. v. B.M.*, [2008] O.J. No. 3653 (ONCA) at para. 7.

³²⁹ *R. v. R.G.*, 2003 NLCA 73, [2003] N.J. No. 336 (at para. 8), affirming [2003] N.J. No. 82, 2003 NLSCTD 44.

³³⁰ *R. v. P.T.M.*, [1977] A.J. No. 323 (ASCAD) (at para. 5).

³³¹ *R. v. C. (H.L.)*, [1988] B.C.J. No. 1299 (Co. Ct.) at p. 2.

³³² *Ibid.*

³³³ *Ibid.*. See also *R. v. Boliantz*, [1987] S.J. No. 189, 56 Sask.R. 78 (Sask. C.A.); *R. v. Eisan*, [1988] N.J. No. 241, 71 Nfld. & P.E.I.R. 338 (SC). Both cases involved very low sentences and a suggestion that sexual assault of a spouse was less serious than sexual assault of a stranger.

the Nova Scotia Supreme Court, speaking to the accused at the sentencing hearing, stated: “the fact that you committed this assault on your former common-law wife, someone with whom you had had a longstanding intimate relationship and had fathered a child, is aggravating. Surely this is of a more serious nature than an assault on a stranger.”³³⁴ In *R. v. O.A.P.*, the same court confirmed that consideration of abuse of trust continues to apply when the parties’ relationship is breaking down, perhaps even more so given the prevalence of violence in this context.³³⁵ In *R. v. L.S.U.*, the accused was convicted of a number of violent offences against his wife, including 2 sexual assaults. The parties had an arranged marriage and the wife was from the Punjab. Justice Stromberg-Stein of the B.C. Supreme Court cited section 718.2 and noted the particular vulnerability of the victim, whom the accused had attempted to isolate from contact with her family, amounting to “an extreme abuse of his position of trust.”³³⁶ Denunciation of the violence was seen to override the rehabilitation of the accused, and he was sentenced to 4 years imprisonment for the sexual assaults. In *R. v. B.M.*, the Ontario Court of Appeal overturned a sentence of 9 months jail and substituted a jail term of 2 years less a day for an accused who had forced anal intercourse on his wife, who was described as developmentally delayed. In the words of the Court, “Individuals such as the respondent, who victimize their partners within the context of the marital relationship, in this case a spouse with particular vulnerabilities, must know that serious consequences will follow.”³³⁷ The Court also held that it was appropriate to consider previous abusive behaviour by the accused against his wife, even if no charges were laid for those instances: “prior abusive conduct may nonetheless be relevant at the sentencing stage to show the character and background of the offender as it relates to the principles of sentencing.”³³⁸

While many of these cases are framed in terms of the victim’s vulnerability and dependency on the accused, some decisions use the language of equality and autonomy.³³⁹ For example, in *R. v. O.F.B.*, Justice Sheila Greckol, sitting as an *ad hoc* member of the Alberta Court of Appeal, stated that “Sexual assault committed by a domestic partner or former domestic partner violates the victim’s emotional, psychological and physical autonomy in a way that may permanently harm her intimate and trust relationships; relationships that most view as integral to a fulfilled life.”³⁴⁰ Courts have also referenced the prevalence of myths and stereotypes around marital rape. In *R. v. H.V.*, Ontario Provincial Court Judge MacDonnell recognized that “One of the myths

³³⁴ *R. v. T.V.G.*, [1994] N.S.J. No. 348, 133 N.S.R. (2d) 299, 31 C.R. (4th) 32 (S.C.).

³³⁵ *R. v. O.A.P.*, [2008] N.S.J. No. 534, 2008 NSSC 365 at para. 38.

³³⁶ *R. v. L.S.U.*, [1999] B.C.J. No. 2618 at para. 36. The accused’s conviction appeal was dismissed; see 2001 BCCA 529, [2001] B.C.J. No. 1875. He was sentenced to a total of eight years imprisonment (in addition to credit for 28 months served pre-trial) for a range of offences including attempted murder.

³³⁷ *R. v. B.M.*, [2008] O.J. No. 3653 (C.A.). See also *R. v. D.G.K.*, [1999] O.J. No. 5239 (S.C.), where the vulnerability of a Deaf victim was discussed.

³³⁸ *Ibid.* at para. 11.

³³⁹ For a discussion of the interplay between protection and autonomy in the context of sexual assault against women with mental disabilities, see Benedet and Grant, *supra*.

³⁴⁰ *R. v. O.F.B.*, [2006] A.J. No. 788, 2006 ABCA 207, 391 A.R. 215, 70 W.C.B. (2d) 292 (A.B.C.A.) (at para. 12). The accused was sentenced to a global term of 5 years imprisonment for 3 counts of sexual assault against his former partner. See also *R. v. Woods*, [2008] S.J. No. 200, 2008 SKCA 40, where the Saskatchewan Court of Appeal stated that the victim “did not give up her rights to physical and sexual integrity by entering a relationship” with the accused. The Court allowed the Crown appeal of a conditional sentence in that case, substituting a term of imprisonment of 22 months. And see *R. v. Schmidt*, [1991] Y.J. No. 84 (S.C.); *R. v. Pastiwet*, [1993] N.J. No. 130 (S.C.T.D.); *R. v. G.W.P.*, 2006 NLTD 136, [2006] N.J. No. 242; and *R. v. J.A.*, [2009] Nu. J. No. 2, 2009 NUCJ 3, where the courts speak of the victims’ physical and sexual integrity, dignity and self-respect.

associated with sexual offences has been that rape by an acquaintance - a husband, for example - is less serious than rape by a stranger. Part of that myth, of course, was until recently no myth at all, in that until 1983 husbands enjoyed immunity from prosecution for raping their wives. While it is now clear, surely, that the fact that the rapist is the husband of the complainant is not a mitigating circumstance, our long history of characterizing spousal rape as a non-criminal act gives rise to a legitimate concern that its gravity may not be properly appreciated.”³⁴¹ However, there are other cases where attention to equality and sexual autonomy are altogether absent. For example, some judges have taken into account the occurrence of consensual sex following the sexual assault³⁴² and “poor choices” made by the victim (such as use of drugs and alcohol)³⁴³ in mitigation of sentence.

A related issue is the extent to which courts should consider an ongoing relationship or the possibility of reconciliation between the accused and victim as a mitigating factor. This is an area that raises complicated issues in terms of women’s autonomy, agency and equality. In some cases, courts have taken into account the fact that the parties remained together following the sexual assault as mitigating.³⁴⁴ Sometimes, the issue was framed in terms of women’s (and children’s) financial dependency on their partners.³⁴⁵ Although this may have been a factual reality in some cases, this kind of thinking perpetuates dependency relationships and ignores the role of the state in addressing women’s financial inequality.

In other cases, courts have found general deterrence to be an overarching consideration, and have not allowed the victim’s wishes for a lenient sentence to prevail.³⁴⁶ The prevalence of domestic violence in the community has also been a consideration in some cases.³⁴⁷ One might see these cases as ignoring women’s agency; however courts have also expressed concern about putting too much weight on the victim’s wishes given the potential for fear and dependency to influence requests for leniency.³⁴⁸

³⁴¹ *R. v. H.V.* [1998] O.J. No. 4694 (O.C.J.). While the Court rejected a conditional sentence based on these considerations, it handed down a jail term of only 6 months for forced sexual intercourse of the accused on his wife of 26 years.

³⁴² See *R. v. Woods*, [2008] S.J. No. 200. As noted, the sentence was overturned on appeal, when the Court called into question the trial judge’s finding that the victim and accused had “consensual” sexual relations after the sexual assault, but it was not prepared to overturn that finding (at para. 31).

³⁴³ See *R. v. C.S.* [2005] O.J. No. 3785, 2005 ONCJ 391, where the court stated that the accused “cannot be used as the scapegoat for the complainant’s voluntary choices.” (at para. 18). This was in reference to a victim impact statement where the victim described the effects of a series of violent offences committed by the accused against her. The court seemed to attribute her “downward spiral” to drugs more than the violence.

³⁴⁴ See for example *R. v. N. (K.)*, [1988] N.B.J. No. 137, 90 N.B.R. (2d) 271 (QB); [1988] N.B.J. No. 516 (C.A.). The Court of Appeal reduced the sentence of 10 months imprisonment for forced sexual intercourse to time served, followed by 2 years probation.

³⁴⁵ See for example *R. v. B.J.S.*, 2000 BCCA 117, [2000] B.C.J. No. 321 (C.A.). This case is discussed below in the context of conditional sentences.

³⁴⁶ See for example *R. v. R.H.*, [1994] A.J. No. 124, 149 A.R. 230 (C.A.). This is the position taken by the Alberta Court of Appeal more broadly in domestic violence cases; see *R. v. Brown*, *supra*. In *R. v. D.W.G.*, 1999 ABCA 270, the Court expressly noted the application of *Brown* to marital rape cases. See also *R. v. L.R.F.*, [1997] N.W.T.J. No. 103 (S.C.).

³⁴⁷ See *R. v. Betsidea*, [2007] N.W.T.J. No. 90, 2007 NWTSC 85 (S.C.).

³⁴⁸ See for example *R. v. G.S.G.* [1993] O.J. No. 466, 63 O.A.C. 156, 19 W.C.B. (2d) 49 (C.A.) at p. 2. However, on a Crown sentence appeal the Ontario Court of Appeal imposed a sentence of only 18 months jail for vaginal and anal rape with a broomstick, and that was considering previous abusive conduct on the part of the accused.

Some courts have given more priority to factors such as the rehabilitation of the offender or the lack of need for specific deterrence, often resulting in conditional sentences. As noted earlier, Parliament has now eliminated conditional sentences for sexual offences, but there are several cases where such sentences were granted in the marital rape context prior to this time.³⁴⁹ In some of these cases, conditional sentences were sanctioned by appellate courts. In a recent egregious example, the Ontario Court of Appeal in *R. v. Nolan* allowed a Crown appeal of a 100 day sentence, but substituted a conditional sentence of 21 months plus 1 year probation for sexual assault and forced confinement. This was in relation to a scenario where the accused tied down his wife, duct taped her mouth, punched her in the face, cut off her underwear with an exacto knife, threatened to cut her vagina, and eventually cut her loose and raped her.³⁵⁰ Although the Court's decision came after conditional sentences were eliminated for sexual offences, the Court held that such a sentence was still available for the respondent as his offence had taken place prior to the amendments. In support of a conditional sentence, the Court relied upon the accused's "willingness to respect court orders", the facts that he had already served 100 days in jail and was "doing well in the community", his employment and his financial support of his adult children.³⁵¹ Overall, "There is no evidence to support a conclusion that the respondent would be a danger to society."³⁵² Apparently the Court did not consider Nolan's wife to be a member of society to whom he was a danger – perhaps because their marriage of 19 years had broken down. Nor was the Court deterred by the fact that the accused committed the offence against his wife while out on bail for charges of assault with a weapon and threatening bodily harm (against a victim who was not identified in the judgment, but was presumably a member of society as well). The Court's statement that "Individuals, even first offenders such as the respondent, who victimize their partners within the context of the marital relationship, must know that serious consequences will follow" therefore rings hollow in this case.³⁵³

A similar decision is that of the B.C. Court of Appeal in *R. v. B.J.S.* In this case, the trial judge imposed a conditional sentence of 20 months, including a no contact order in respect of the victim (the accused's wife), for charges of sexual assault, forcible confinement, uttering threats, and careless use of a firearm. Three months later, the accused breached the no contact order by going to the wife's home and "verbally assault[ing] and frighten[ing] her in an ill-considered attempt to persuade her to become reconciled with him."³⁵⁴ The Crown sought to have the accused serve the balance of his sentence in jail, but a majority of the Court of Appeal refused to make this order. It relied on the facts that the breach did not involve physical violence, the original offences were committed during the deterioration of the relationship, the accused was

³⁴⁹ In *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, the Supreme Court held that sentencing starting points did not preclude the possibility of conditional sentences.

³⁵⁰ *R. v. Nolan*, [2009] O.J. No. 4237 (ONCA) at para. 2. The actual words of the Court in relation to the last aspect of the assault were that "the respondent and his victim *had sexual intercourse*." This is highly objectionable language, as are references to "lovemaking" in other cases (see e.g. *R. v. A.B.*, [2003] A.J. No. 1289, 2003 ABPC 180; and *R. v. A.R.* [1996] O.J. No. 367, where the accused was called a "selfish lover" (at para. 42).

³⁵¹ *Nolan*, *ibid.* at paras. 11 and 12.

³⁵² *Ibid.* at para. 12.

³⁵³ *Ibid.* at para. 6. For other marital rape cases where conditional sentences were given in spite of serious violence against the victim, see *R. v. J.C.T.* [1998] O.J. No. 1688, 39 O.R. (3d) 26, 124 C.C.C. (3d) 385 (C.A.); *R. v. L.E.R.*, [2000] N.B.J. No. 407 (QB); *R. v. G.A.M.*, [2001] A.J. No. 1711, 2001 ABPC 252.

³⁵⁴ *R. v. B.J.S.*, 2000 BCCA 117, [2000] B.C.J. No. 321 (C.A.) at para. 3. Justice Southin wrote a dissenting judgment, and would have revoked the conditional sentence.

employed and supporting his ex-wife and children, and he had the support of his extended family. In the words of the majority, “this accused had made some very foolish errors of judgment, but was not a criminal in the usual sense, and ... for the economic good of the family, he should be allowed to continue with the best employment he had ever had so that he could provide for his family.”³⁵⁵ This decision was made in spite of the prior Supreme Court decision in *R. v. Proulx* that it is presumptive that breach of a conditional sentence will require the accused to serve the remainder of his time in jail.³⁵⁶

In terms of other factors seen as mitigating, the accused’s youth and prospects for rehabilitation may serve to reduce his sentence.³⁵⁷ The potential for deportation may have some weight, although “it cannot be a controlling factor when the objective and subjective gravity of the offence and the other factors that are applicable are also taken into account.”³⁵⁸ Mental health issues on the part of the accused may also be seen as relevant sentencing considerations. In *R. v. Enever*, the accused was given an intermittent sentence for sexually assaulting his former intimate partner to allow him to obtain treatment during the week for his mental health issues.³⁵⁹ In *R. v. R.W.V.*, the accused was given a conditional sentence of 2 years less a day, with house arrest for the first year, for break, enter and commit sexual assault against his estranged wife. The accused had served as a peacekeeper in the former Yugoslavia, and had been diagnosed with post traumatic stress disorder (PTSD).³⁶⁰ Stress experienced by the accused as a result of marriage breakdown has also been treated as mitigating where the court viewed it as an explanation for the marital rape.³⁶¹ The accused’s own victimization by sexual abuse has also been considered, but will not necessarily be seen as mitigating.³⁶²

³⁵⁵ *Ibid.* at para. 14.

³⁵⁶ *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 39.

³⁵⁷ *R. v. E.L.D.*, [1992] M.J. 445, 81 Man. R.(2d) 264 (C.A.). The Court termed this a major sexual assault as per *Sandercock*, but sentenced the accused to 2 years less a day and probation for 2 years based on his young age (18) and prospects for rehabilitation.

³⁵⁸ *F.J. c. R.*, [2007] Q.J. No. 3027 (CA), aff’d on other grounds, [2008] S.C.J. No. 21. It is unclear from the case where the accused and his wife had immigrated from. See also *R. v. B.S.S.*, 2006 BCPC 135, [2006] B.C.J. No. 802 (Prov. Ct.), where the court crafted a sentence that would not “trigger immigration scrutiny.” (at para. 50). The accused and victim were immigrants from India.

³⁵⁹ *R. v. Enever*, [2009] O.J. No. 648, 2009 ONCJ 49. The accused had manic depressive disorder and possible panic disorder. See also *R. v. R.S.R.*, [1993] N.S.J. No. 42, 118 N.S.R. (2d) 95, 18 W.C.B. (2d) 556 (C.A.), where the accused’s “mental condition” (bipolar affective disorder) was seen as a mitigating factor, resulting in a sentence of 2 years less a day in circumstances that would otherwise have warranted a longer jail term. *Contra* see *R. v. D.C.*, [2005] Y.J. No. 54, 2005 YKSC 30, where the accused’s diagnosis with FASD was seen to be a neutral factor.

³⁶⁰ *R. v. R.W.V.*, [2003] B.C.J. No. 2751, 2003 BCSC 1806, 60 W.C.B. (2d) 63, (S.C.). For a case to the contrary, see *R. v. Ward* [2007] O.J. No. 444 (S.C.), where the court found that there was no evidence of PTSD, and that it had not contributed to the conduct of the accused that was subject to charges. The accused was sentenced to a global term of 15 years jail for 11 offences against his former partner, including sexual assault with a weapon.

³⁶¹ See for example *R. v. Eisan*, [1988] N.J. No. 241, 71 Nfld. & P.E.I.R. 338 (S.C.); *R. v. Gulliver*, [1991] N.J. No. 145 (C.A.).

³⁶² See *R. v. R.K.J.* [1998] N.B.J. No. 483, 207 N.B.R. (2d) 24, 40 W.C.B. (2d) 376 (C.A.). The trial court found the accused’s “personal tragedy” as a victim of sexual abuse at Kingsclear to be “moving”; the New Brunswick Court of Appeal disagreed that this should be viewed as a mitigating factor (at paras. 14, 18). There were other mitigating factors present in the case, including the potential for rehabilitation and the accused’s willingness to seek treatment for substance abuse. See also *R. v. J.A.*, [2009] Nu.J. No. 2 2009 NUCJ 3 at para. 33, where the court recommended that the accused receive treatment for his “childhood sexual victimization” after being sentenced to 4 years in a federal institution for raping his wife. This is the only reported marital rape decision from Nunavut, and it is unclear from the decision whether the accused and victim were Inuit.

Another factor for sentencing courts to consider is whether the offender is Aboriginal. In such cases, section 718.2(e) of the *Criminal Code* provides that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.”³⁶³ In the marital rape context, several courts have addressed this section and its interpretation by the Supreme Court in *Gladue*.³⁶⁴ In some cases, courts held that the offence was too serious to consider sanctions other than imprisonment. For example, in *R. v. Betsidea*, the accused, a member of the Deliné First Nation, was convicted of sexual assault with a weapon against J.N., his wife to be. He had a previous conviction for assaulting J.N. with a weapon. Community elders testified at the sentencing hearing about resources in the community to support Betsidea if he were granted a conditional sentence. Justice Ducharme of the NWT Supreme Court found that there were systemic background factors that contributed to Betsidea’s criminal behaviour.³⁶⁵ The accused was also noted to suffer from a degree of cognitive disabilities, and to be a talented artist. However, the Court remarked that “The aboriginal women in the north, indeed all women, have the right to live in safety in their community. Violence of this nature is not only a violation of the relationship between the offender and the victim. Especially in a smaller community such as Deliné, violence of this nature is a violation of the relationship between the offender and the entire community.”³⁶⁶ Overall, the court found that an appropriate sentence would be 30 months, which took it outside the range permitted for a conditional sentence. In contrast, in *R. v. T.C.*, the Saskatchewan Court of Appeal upheld a short custodial sentence followed by a long period of probation for an Aboriginal man who was convicted of sexually assaulting his former common law wife. T.C. was a member of the Muskoday First Nation, and was said to be a role model in his community and an exceptional father.³⁶⁷ He had no criminal record, and the sexual assault was an isolated incident for which he expressed deep remorse.³⁶⁸ The Court noted that *Gladue* factors were present in the case, namely T.C.’s troubled upbringing and his status as a victim of abuse. Members of the Muskoday Restorative Justice program were willing to work with T.C., and his wife had “cautiously” forgiven him, leading to their reconciliation. Calling the case “highly unusual”, the Court of appeal dismissed the Crown’s sentence appeal.³⁶⁹

Overall, and as one might expect given the discretionary nature of sentencing and the competing factors a court must balance, sentencing decisions in marital rape cases show great diversity in their range. What is not a matter of discretion, however, and what continues to be downplayed by some courts, is the aggravating nature of the spousal context and its underlying connection to women’s equality, security, and autonomy interests. Women’s dependency on their spouses should aggravate rather than mitigate sentences, and this should be seen as a constitutional imperative based on women’s human rights.

³⁶³ *Criminal Code* s.718.2(e).

³⁶⁴ In other cases, courts have noted that although the accused was Aboriginal, they were not presented with arguments in relation to the application of *Gladue*. See for example *R. v. D.D.H.*, 2002 SKPC 7, [2002] S.J. No. 72, where the court rejected a joint submission for 2 years less a day and sentenced the accused to 4.5 years imprisonment. See also *R. v. Vermillion*, [2003] N.W.T.J. No. 94, 2003 NWTSC 59 (S.C.); *R. v. D.B.*, [2005] N.W.T.J. No. 93, 2005 NWTSC 89.

³⁶⁵ *R. v. Betsidea*, [2007] N.W.T.J. No. 90, 2007 NWTSC 85 (at para. 34).

³⁶⁶ *Ibid.* at para. 17. See also *R. v. J.F.*, [2001] N.B.J. No. 286, 2001 NBCA 81.

³⁶⁷ *R. v. T.C.*, [2009] S.J. No. 665, 2009 SKCA 124 at para. 10).

³⁶⁸ The accused called the police himself, confessed to his actions, and then “had an immediate mental health breakdown” (*ibid.* at para. 8). The sexual assault consisted of attempted forced intercourse and vaginal touching, with some associated physical assaults.

³⁶⁹ *Ibid.* at para. 18.

G. Other Equality Issues

In the majority of marital rape cases surveyed, the courts did not make reference to the ethnicity, culture, religion, dis(abilities), socio-economic position, or other identity features of the accused and victim.³⁷⁰ In other cases, these features were mentioned in passing, and were apparently not seen as having any relevance to issues in the case.³⁷¹ In the cases where the identities of the accused or victim were discussed as relevant, this was typically with respect to issues relating to credibility, trial fairness and sentencing. So called “cultural-defences” were only referred to in two marital rape cases, and will be discussed in section VII below.

One issue that recurred in several cases was the connection between culture, credibility, and the victim’s lack of timely or full disclosure of marital rape. In some cases, courts accepted evidence about the difficulty of reporting marital rape in a particular cultural context, and did not allow non-disclosure to adversely influence their credibility assessments. For example, in *R. v. Ali*, the court accepted the complainant’s explanation for why she had not fully disclosed the extent of the marital rape to the police: “as a Muslim girl she could not discuss such matters.”³⁷² This ruling is in line with the abrogation of the rules respecting recent complaint in 1983 and case law interpreting the impact of that reform. In *R. v. D.D.*, the Supreme Court held that the timing of a complaint of sexual assault was now “simply one circumstance to consider in the factual mosaic of a particular case”, and warned that “[t]he significance of the complainant’s failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons ... react to acts of sexual abuse.”³⁷³

However, there are other cases where courts made negative credibility findings that seem to have been based on exactly this type of stereotypical thinking. The case of *T.V.*, described above, is one such case.³⁷⁴ The complainant N.S.’s credibility was seen as negatively affected by the fact that she did not leave or cry out during the alleged rape when her parents were visiting with them from India at the time. N.S. had testified that her parents would have taken the side of the accused if she had complained to them. The trial judge arguably engaged in presumptive, stereotypical

³⁷⁰ In some cases, the parties’ names or geographic location suggest they may belong to cultural minority groups, but there is no reference to culture by the courts. See e.g. *R. v. Singh* [2006] O.J. No. 4415, 71 W.C.B. (2d) 688 (O.S.C.); *R. v. J.A.*, [2008] Nu.J. No. 7, 2008 NUCJ 8; [2009] Nu.J. No. 2, 2009 NUCJ 3; *R. v. Sihota*, [2009] O.J. No. 4590 (C.A.).

³⁷¹ See for example *R. v. G.D.*, [2005] A.J. No. 1208, 2005 ABQB 163 (the accused and victims were identified as immigrants); *R. v. S.G.B.*, 2005 SKQB 510, [2005] S.J. No. 759 (the accused and victim were Aboriginal); *R. v. Owjee*, [2008] O.J. No. 2038, 2008 ONCA 409 (ONCA) (the accused and victim were Iranian); *R. v. Sandhu*, [2009] O.J. No. 374 (ONCA) (the accused and victim were Indo-Canadian).

³⁷² *R. v. Ali*, [2007] O.J. No. 701 (O.C.J.) at para. 76. The victim had not disclosed to the police that the accused had insisted on anal sex, or that he had forced his penis into her mouth. The accused was convicted of sexual assault at trial, but the Ontario Court of Appeal ordered a new trial based on the inadequacy of the trial judge’s reasons. See *R. v. H.A.*, [2009] O.J. No. 2146 (C.A.). For other cases where the court refers to the difficulty of reporting marital rape, see *R. v. B.S.S.*, 2006 BCPC 135, [2006] B.C.J. No. 802 (Prov. Ct.) and *R. v. H.S.H.*, [1995] B.C.J. No. 2855 (Prov. Ct.) (both involving Indo-Canadian parties).

³⁷³ *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275 at paras. 63 and 65 (emphasis in original).

³⁷⁴ See discussion *supra* at p. 38. The Crown sought to appeal the acquittal for sexual assault, based in part on the trial judge’s problematic treatment of the complainant’s evidence, but it filed late and an extension was not granted. See *R. v. Venkatesh* [2007] O.J. No. 1300 (ONSC),

thinking by refusing to consider how the cultural context may have affected N.S.'s lack of disclosure of the sexual assault to her parents. The trial judge also had particular expectations about how N.S. should perform as a witness: "her strong demeanour in the witness stand [was] inconsistent with her evidence that she just lay there on the bed because she was fearful of the accused."³⁷⁵ Unfortunately, T.V. is not an isolated case in terms of negative credibility findings courts have made against cultural minority women alleging marital rape.³⁷⁶

Turning to the issue of trial fairness, *R. v. R.S.M.* involved a defence appeal of a conviction for sexual assault on the basis that the complainant's evidence at trial had been inconsistently interpreted by the sign language interpreter assigned to the case. The complainant, the accused's common-law wife, was Deaf. The B.C. Court of Appeal rejected this argument, finding that there had been no objection to the interpretation at trial, nor had the trial judge considered that trial fairness was affected. According to the Court of Appeal, any problems "were no greater than those frequently encountered in the interpretation of evidence given in various foreign languages", and the appeal was dismissed.³⁷⁷

This case also exemplifies a category of decisions where the victim's disability was seen as relevant to sentencing. *R.S.M.* involved a separate Crown appeal of sentence, where it was argued that the trial court failed to take into account the victim's vulnerability and the gravity of the offence in handing down a sentence of 8 months imprisonment for forced sexual intercourse and punching in the vaginal area. The Court of Appeal acknowledged that the sentence was very low, but because the accused had been released, and his and the complainant's whereabouts were unknown, the Court decided not to return him to jail.³⁷⁸ In other cases, the victim's vulnerability as a woman with disabilities was given more weight. For example, in *R. v. B.T.*, the fact that the accused had sexually assaulted his wife several times while she was unconscious from diabetic seizures was seen as aggravating. The court rejected the joint submission for a conditional sentence, which was supported by the victim because of her "fears for her family's ability to sustain themselves financially."³⁷⁹ The accused was sentenced to 4 years imprisonment for the series of sexual assaults.³⁸⁰

³⁷⁵ *R. v. T.V.*, *supra* at para. 165.

³⁷⁶ See also *R. v. G.B.*, *supra*, involving a Fijian complainant who failed to make full disclosure to the police; *R. v. J.S.*, [2004] O.J. No. 5637 (O.C.J.), where an Indo-Canadian complainant's credibility was seen to be negatively affected by her failure to tell her family about the sexual assault; *R. v. Singh*, [2009] O.J. No. 840 (O.C.J.), where the failure of the complainant to disclose full details of the sexual assault to the police was seen as "fatal to her reliability and credibility" even though she required a Punjabi interpreter at trial (at para. 140). See also *R. v. E.D.* [1999] O.J. No. 1502 (O.C.J.), where the judge called the Latin American complainant "irritating" and thus credible – i.e. he had "little difficulty in accepting her evidence" that the accused assaulted her "if she was as irritating in her arguments with him as she was on the witness stand." (at para. 13). The decision is replete with other objectionable characterizations of the complainant, which appear to be those of the accused, but are put forward by the trial judge as if he or she agrees. For a discussion of the ideal victim as witness, see Randall (2010).

³⁷⁷ *R. v. R.S.M.*, [1999] B.C.J. No. 798, 1999 BCCA 218 at para. 14.

³⁷⁸ *R. v. R.S.M.*, 1999 BCCA 376, [1999] B.C.J. No. 1495 (C.A.).

³⁷⁹ *R. v. B.T.*, 2007 BCPC 268, [2007] B.C.J. No. 1836 (Prov. Ct.).

³⁸⁰ *Ibid.* at para. 42. The accused was also convicted of invitation to sexual touching in relation to his daughter, who was under 14, and received a sentence of 18 months concurrent for that offence. See also *R. v. F.N.*, [2005] O.J. No. 3153, [2005] O.J. No. 3594, 66 W.C.B. (2d) 558 (Ont. C.J.), *aff'd* 2007 ONCA 276 (sub nom *R. v. Norman*), where the sentencing court found it aggravating that the victim had a physical disability, and noted how the offence "was characterized by violence, sarcasm and humiliation." The accused was sentenced to 3.5 years for the sexual assault.

Culture and religion are sometimes mentioned as creating vulnerability relevant to sentencing as well. In a number of cases, courts spoke of the victim's isolation, sometimes as part of a pattern of domestic violence including marital rape. For example, in *R. v. G.R.*, the accused and victim were refugees from Sri Lanka, and the accused was convicted of having forced sex with her approximately 200 times over a 5 year period in addition to other acts of domestic violence. The court accepted as aggravating the fact that the accused "systematically created a situation where he was entirely responsible for his wife... where his wife had to come to him for food, for money, for clothing, for communication, for company, for anything."³⁸¹ The accused was sentenced to 4 years in jail for the sexual assault charge, and a total of 5 years overall. In *R. v. Hussain*, the court found it "particularly egregious" that the accused committed repeated acts of sexual and physical assault against his wife when she was "an extremely vulnerable, single mother without significant roots in the community or support in the community to which she could turn for assistance."³⁸² The court sentenced the accused to 5.5 years in jail (minus credit for time served) overall.³⁸³ In another case, the court noted that the victim would not be "viewed as an appropriate candidate for marriage" in her East Indian community after divorcing her husband for raping her. It was also seen as aggravating that the rape had such a "colossal impact" on the victim, "characterized by fear of loneliness, ... distrust of men generally and a fear of ever entering into another marriage relationship." The accused was sentenced to 4 years in jail.³⁸⁴

While it is positive that courts are willing to take the impact of marital rape on victims into account during sentencing, including impacts that may relate to their disability, culture, or religion, the legal reasoning would be stronger if the aggravating features were framed in terms of women's equality, security and autonomy. Women's freedom from marital rape, and freedom from the adverse impacts that marital rape may have on them because of their disabilities, culture, financial disadvantage, or intersection of these and other factors, must be seen as constitutional and human rights-based entitlements imposing obligations on their spouses and the state.

H. Concluding Observations on the Case Law

Overall, this review of the judicial treatment of marital rape shows mixed success in terms of how the courts have applied the sexual assault law reforms and whether they have fully taken into account women's rights to equality, security of the person, and autonomy. Some courts appear to understand the importance of applying sexual assault laws through the lens of women's equality in the marital rape context. However, there are other cases where the courts' rhetoric does not dovetail with their actual treatment of the issues. A particular concern is the persistence of myths and stereotypes about women and sexual assault. In marital rape cases, these myths and stereotypes are often interconnected with assumptions about how women should react to domestic violence, for example by leaving their abuser.³⁸⁵ Also of concern is the persistent influence on judicial reasoning of the historic discriminatory rationales for the marital rape

³⁸¹ *R. v. G.R.*, [2000] O.J. No. 4096 (O.C.J.) at para. 66.

³⁸² *R. v. Hussain*, [1999] O.J. No. 4728 (S.C.J.) at para. 3.

³⁸³ Because the trial judge had failed to sign the back of the indictment and there was some confusion about, the sentence for sexual assault was reduced from 3 years 9 months to 3 years by the Court of Appeal (see *R. v. S.H.* [2001] O.J. No. 118 (C.A.)).

³⁸⁴ *R. v. M.C.*, [1994] O.J. No. 4348 (O.C.J.) at paras. 8 and 10.

³⁸⁵ For a discussion of some of the myths and stereotypes at play in domestic violence cases, see *R. v. Lavallee*, [1990] 1 S.C.R. 852. See also Randall (2010) at pp. 34-36.

immunity. Wives may be seen as prone to fabrication, particularly where there is a family law dispute at play. Similarly, the importance of maintaining marital privacy and harmony may also influence judges, particularly at the stage of sentencing. Further, as Randall observes, wives are often assumed to be “continuously consenting” as per Sir Matthew Hale unless they actively resist.³⁸⁶ And unless such resistance results in physical injuries and the incident is observed by or reported to a third party, the ensuing credibility battle may defeat the chances of a conviction.

In the context of credibility assessments, an ideal victim of marital rape appears to emerge.³⁸⁷ While she must resist, at the same time, she cannot be too aggressive³⁸⁸ and she should never agree to rough sex for fear that this will undermine her credibility or buttress a defence allegation of mistaken belief in consent.³⁸⁹ She cannot abuse drugs or alcohol³⁹⁰ and she must be faithful to her husband.³⁹¹ After she is sexually assaulted, particularly if it was a violent rape, she should not continue to reside with the accused, and she should never again have consensual sex with him.³⁹² But if she does, this may be taken into account in mitigation of sentence, particularly if the accused financially supports his wife.³⁹³ She must also properly present as a witness at trial.³⁹⁴

The cases cry out for an equality analysis of women’s interests in the marital rape context, which the next section will explore. It will also examine equality based arguments to influence the treatment of marital rape cases by the police, Crown and defence lawyers, and the need for and possibility of further reforms to the *Criminal Code*.

I. Towards Women’s Equality in Marital Rape Cases in Canada³⁹⁵

It is important to begin by noting that the *Charter* binds government rather than private actors.³⁹⁶ There are thus no *Charter* remedies available against men who rape their wives.³⁹⁷ However, if government actors fail to take proper steps to protect women from marital rape, or discriminate in failing to do so, they may be liable for a breach of the *Charter*. Courts must also interpret the law in accordance with *Charter* rights.³⁹⁸

³⁸⁶ Randall, *ibid.* at pp. 14 and 21.

³⁸⁷ For an excellent discussion of ideal sexual victims more broadly, see Randall, *ibid.*

³⁸⁸ See e.g. *R. v. J.T.D.*, *supra*.

³⁸⁹ See e.g. *R. v. J.A.*, *supra*.

³⁹⁰ See e.g. *R. v. C.S.*, *supra*, and see Randall (2010) at pp. 16 and 20.

³⁹¹ See e.g. *R. v. T.V.*, *supra*.

³⁹² See e.g. *R. v. Woods*, *supra*.

³⁹³ See e.g. *R. v. B.J.S.*, *supra*.

³⁹⁴ See e.g. *R. v. T.V.* and *R. v. E.D.*, *supra*.

³⁹⁵ For further discussion of equality arguments in the marital rape context, see Fiona Sampson, “The Legal Treatment of Marital Rape in Canada, Ghana, Kenya and Malawi – A Barometer of Women’s Human Rights” (ACWHRP, September 2010).

³⁹⁶ Section 32 of the *Charter* indicates that it applies to federal and provincial governments, and has been interpreted to preclude application to non-government actors unless they are implementing government policies. See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

³⁹⁷ A small number of marital rape cases in the sample involved civil actions for damages by women against their ex-partners. See *B.W. v. P.M.M.*, [1994] O.J. No. 2241 (Ont. C.J.); *N.C. v. W.R.B.*, [1999] O.J. No. 3633, 105 O.T.C. 81 (S.C.); *Pilon v. Nahri*, [2006] O.J. No. 2640, 149 A.C.W.S. (3d) 717 (Ont. S.C.J.).

³⁹⁸ See *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. In the sexual assault context, see *R. v. Daviault*, [1994] 3 S.C.R. 63, where the Supreme Court modified the law defence of drunkenness in accordance with the *Charter*.

A leading case in the area of police inaction and sexual assault is *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*. In *Jane Doe*, the Toronto police force was found to have breached section 15 of the *Charter* in circumstances where it failed to warn women at risk of attack by a serial rapist in their neighbourhood. This failure was found to be “motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women, and about women who are raped.”³⁹⁹ Further, the police were found to have violated Jane Doe’s security of the person under section 7 of the *Charter* “by subjecting her to the very real risk of attack by a serial rapist” when, although they were aware of the risk, they deliberately failed to inform her about it.⁴⁰⁰ Jane Doe was granted a declaration that her rights under the *Charter* had been violated, and was awarded damages for breach of the *Charter* and negligence.⁴⁰¹

Not all cases seeking to hold the government accountable for failure to respond to male violence have been as successful, however. In *Mooney v. British Columbia (Attorney General)*, Bonnie Mooney’s claim in negligence against the RCMP for failing to investigate domestic violence was dismissed. Mooney had complained to the RCMP about threatening actions by her estranged and abusive common law husband, and was told to contact a lawyer to get a restraining order. A few weeks later, the ex-husband broke into her home, shot and killed her best friend, wounded one of her daughters, and fatally shot himself. The B.C. Supreme Court dismissed Mooney’s action in negligence, finding that although the RCMP had a duty of care, “there was no clear connection between the officer’s failure to act and the fateful incident”, nor did the officer’s inaction “materially increase the risk of harm.”⁴⁰² The action was dismissed even though the officer was aware of and failed to comply with investigative policies for relationship violence in B.C. The police were said to be “guardians, not guarantors, of public safety.”⁴⁰³

It is unfortunate that the *Mooney* case was not mounted as a *Charter* claim in the alternative. Elizabeth Sheehy has noted that equality based arguments were raised on appeal by an intervener, Vancouver Rape Relief and Women’s Shelter, yet these arguments did not adequately influence the Court of Appeal’s reasoning on causation at that stage of the case. Sheehy argues that if raised at the outset, a claim under section 15 of the *Charter* may have made a difference in the

³⁹⁹ [1998] O.J. No. 2681 (Div. Ct). Leave to appeal to the Ontario Court of Appeal was dismissed with costs. See [1991] O.J. No. 3673 (C.A.). For analyses of this case see Melanie Randall, “Sex Discrimination, Accountability of Public Authorities and the Public/Private Divide in Tort Law: An Analysis of *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*” (2000) 26 Queen’s Law Journal 451; Elizabeth Sheehy, “Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know About Male Violence Against Women or from *Jane Doe* to *Bonnie Mooney*” (2006) 17 Canadian Journal of Women and the Law 97 (“Sheehy (2006)”). See also Elizabeth Sheehy, ed., *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era* (forthcoming, University of Ottawa Press 2010).

⁴⁰⁰ Quotes are taken from the headnote.

⁴⁰¹ The Supreme Court recently affirmed damages as a constitutional remedy in *Vancouver (City) v. Ward*, 2010 SCC 27. That case involved excessive police action, which might also arise in the marital rape context (for example if a woman was improperly charged for using force in defending herself against sexual violence).

⁴⁰² [2001] B.C.J. No. 1160 (S.C.) at 1. An appeal to the B.C. Court of Appeal was dismissed, as was leave to appeal to the Supreme Court of Canada. See *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402; *Mooney v. Canada (Attorney General)*, [2004] S.C.C.A. No. 428.

⁴⁰³ *Ibid.* at 2.

outcome by contextualizing the causation analysis, and because discrimination is a stand-alone wrong apart from the causation issue.⁴⁰⁴

What are the implications of these cases in the context of marital rape? *Jane Doe* is important for its recognition of the myths and stereotypes that may underlie police responses to sexual violence against women. If police failure to adequately respond to marital rape (for example by failing to investigate or lay charges) could be attributed to discriminatory understandings of sexual relations within a spousal context, then a section 15 *Charter* claim may have some chance of success. Arguments could include attention to gender inequality as well as other inequalities based on race, culture, immigration / refugee status, Aboriginal status, religion, disability, and class where police (in)action was grounded in myths and stereotypes about marginalized women and marital rape. Similarly, the failure to protect women from marital rape could be seen as a violation of their rights to security of the person and liberty (including sexual and reproductive autonomy) under section 7 of the *Charter*. Failure to follow domestic violence charging policies might be sufficient to find a violation of the principles of fundamental justice, as required by section 7.⁴⁰⁵ Further, the statistics cited above showing continued underreporting of sexual violence could be used to support the impact of police failure on women more broadly.

By extension, a prosecutor's failure to proceed to trial might similarly be found to violate sections 7 and 15 of the *Charter* if this decision was based on discriminatory myths and stereotypes about marital rape. State actors exercising their powers – for example in terms of whether to proceed with a prosecution, accept a plea bargain or disclose records – must do so in accordance with the *Charter*.⁴⁰⁶ Similarly, the conduct of trials is governed by *Charter* rights, not only those of the accused but also those of the complainant. The Supreme Court has made it clear that a fair trial implicates the rights of both accused persons and complainants, and that the right of an accused to make full answer and defence must be balanced with the rights of a complainant to equality, security of the person, and privacy.⁴⁰⁷ Parliament has made the same point in the preambles to Bills C-49 and C-46.⁴⁰⁸ Trial judges are obliged to ensure that marital rape trials maintain a proper balancing of these rights, whether dealing with sexual history and production applications (which actually mandate this balancing explicitly), or in rejecting arguments that seek to reintroduce discriminatory myths and stereotypes about marital rape in relation to matters

⁴⁰⁴ Sheehy (2006), *supra*.

⁴⁰⁵ In *Jane Doe*, *supra*, the police officers' discriminatory and negligent exercise of discretion in the investigation was found contrary to the principles of fundamental justice.

⁴⁰⁶ See e.g. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. For a case discussing the Crown's duties in the sexual assault context, see *R. v. O'Connor*, [1995] 4 S.C.R. 411. In this case, the accused's *Charter* application for a stay of proceedings for non-disclosure of third party records was denied in circumstances where the Crown prosecutor had resisted an overbroad disclosure order.

⁴⁰⁷ See e.g. *R. v. Osolin*, [1993] 4 S.C.R. 595 at paras 165-6; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 90. For another decision that mandates avoidance of a hierarchical approach to rights, see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

⁴⁰⁸ Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3rd Session, 34th Parliament, 40 Elizabeth II, 1991; Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2nd Session, 35th Parliament, 45 Elizabeth II, 1996. Both preambles speak of the need to "provide for the prosecution of offenders within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons." Consistent with common legislative practice, the preambles do not appear in the amended versions of the *Criminal Code*.

such as credibility. Where judges are faced with arguments based on such myths and stereotypes, they should not hesitate to name those arguments as discriminatory.

As seen in the review of cases above, however, judges themselves sometimes introduce discriminatory myths and stereotypes into marital rape cases. While the *Charter* cannot be used to directly challenge judicial decisions, *Charter* values must inform judicial decision making. As Christine Boyle puts it, “[a]n impartial judge cannot have a mind closed to the possibility of inequality in the law relating to ... sexual assault trials.”⁴⁰⁹ Judicial decisions where findings related to consent, mistaken belief in consent, evidentiary issues and sentence are imbued with discriminatory myths about sexual violence in spousal relationships should be appealed or subjected to complaints to the relevant judicial council.⁴¹⁰ Further, while judges are sometimes resistant to “social context education” as a perceived threat to their independence, recent efforts to provide context on issues of domestic violence should be broadened to include material on marital rape.⁴¹¹ It appears that many judges also need specific training on the legal meaning of consent subsequent to the 1992 reforms. Judges must interpret the law so as to require affirmative conduct manifesting consent on every occasion, allow revocation of earlier consent at any time, and foreclose a finding of consent where the complainant was asleep, unconscious or incapable of consent by reason of extreme intoxication.

A related strategy would be to train prosecutors to rely on *Charter* based arguments as a matter of course in marital rape cases, whether at trial or on appeal. This might include, for example, the introduction of evidence relating to a history of domestic violence between the parties and any relevant cultural context as a lens through which to assess the credibility of the complainant’s actions.

In 2009 Boyle argued that “Canadian judges and lawyers conducting criminal trials have not yet developed what might be termed an equality *habit*.”⁴¹² One might actually go further and argue that what lawyers and judges have, yet fail to consistently act upon in sexual assault trials, is an

⁴⁰⁹ Boyle (2009), *supra* at 290. Boyle was speaking specifically about judicial impartiality in the context of burden of proof, but her argument applies more broadly.

⁴¹⁰ For example, the discriminatory myths and stereotypes underlying comments about the sexual assault complainant made by Justice John W. “Buzz” McClung of the Alberta Court of Appeal in *Ewanchuk*, 1998 ABCA 52, were the backdrop to a complaint made to the Canadian Judicial Council. The complaint focused on Justice McClung’s reaction to the concurring decision of Madam Justice Claire L’Heureux Dubé in *Ewanchuk* at the Supreme Court, where she critiqued his decision as discriminatory. Following the Supreme Court judgment, Justice McClung wrote a letter to the National Post personally attacking Justice L’Heureux Dubé. Justice McClung was reprimanded by the Council for writing the letter. For discussions of this incident see Hester Lessard, “Farce or Tragedy? Judicial Backlash and Justice McClung” (1999) 10 *Constitutional Forum* 65; Constance Backhouse, “The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case” (2003) 15 *Canadian Journal of Women and the Law* 167.

⁴¹¹ See Linda C. Neilson, *Domestic Violence and Family Law in Canada: A Handbook for Judges* (Ottawa: National Judicial Institute, 2009). Unfortunately the Handbook appears to be unavailable without a password to the NJI website. However, the Table of Contents (on file with the author) indicates that topics covered include a range of issues arising in civil and criminal cases concerning domestic violence, along with issues pertaining to Aboriginal peoples, persons with disabilities, immigrants and cultural minorities, and (mis)uses of cultural evidence. It is unclear from the Table of Contents whether the Handbook includes reference to marital rape.

⁴¹² Boyle (2009), *supra* at 290.

equality *obligation*. Professional Codes of Conduct for lawyers⁴¹³ and judges⁴¹⁴ include duties of non-discrimination, and should be interpreted to prevent trial tactics that rely on discriminatory myths and stereotypes (such as the reintroduction of requirements of corroboration and recent complaint). Law schools should also provide instruction in sexual offence law so that future lawyers understand the affirmative consent provisions and their professional duties in sexual assault matters, including marital rape.

Charter challenges may also be raised more directly in sexual violence cases by way of defence arguments that particular legislative provisions violate their *Charter* rights. As noted above, the fair trial rights of accused persons must be interpreted in light of women's rights to equality, security of the person, sexual autonomy and privacy.⁴¹⁵ Women's rights may come into play as principles of fundamental justice under section 7 of the *Charter*, or as part of the government's arguments justifying the law under section 1.⁴¹⁶ These arguments have had some success in the case of defence challenges to sexual assault law reforms in decisions such as *Ewanchuk*, *Mills* and *Darrach*, although some commentators have suggested that fair trial rights are still likely to trump women's *Charter* rights in the event of a conflict.⁴¹⁷ They have also had success in a more proactive sense in crafting sexual assault laws that respond to women's equality, security of the person and privacy rights, as seen with Bill C-49 and Bill C-46.⁴¹⁸ These Bills include both preambles and substantive provisions referencing women's rights to equality and security of the person.

A defence attack on the *Criminal Code* reforms that abolished the marital rape immunity does not seem likely at this point, nor would such an attack have any reasonable prospect of success. Attacks on related provisions dealing with consent, mistaken belief in consent and evidentiary rules have been largely dismissed, as noted above. Another significant way in which women's equality arguments around marital rape could be mounted in Canada at present would be to advocate for reforms to the *Criminal Code* that create particular provisions dealing with such violence. For example, provisions might be added to sections dealing with consent, mistaken belief in consent and evidentiary rules to provide that if sexual violence occurs in a spousal context, this should not be a basis for diminishing standards in relation to these rules. As seen in the analysis of the cases of marital rape in the previous section, the spousal context of the

⁴¹³ See for example Law Society of Alberta, *Code of Professional Conduct*, Ch. 1, R.9, on-line: <http://www.lawsocietyalberta.com/files/regulations/Code.pdf>; Law Society of Manitoba, *Code of Professional Conduct*, Ch. 21, on-line: http://www.lawsociety.mb.ca/for-lawyers/professional-conduct/code-of-professional-conduct/english-version/Code_ful_eng.pdf/view; Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 5.04, on-line: <http://www.lsuc.on.ca/media/rpc.pdf>.

⁴¹⁴ Canadian Judicial Council, *Ethical Principles for Judges*, on-line: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_1998_en.pdf. Chapter 5, Principle 4 states: "Judges, in the course of proceedings before them, should disassociate themselves from and disapprove of clearly irrelevant comments or conduct by court staff, counsel or any other person subject to the judge's direction which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law."

⁴¹⁵ See the factums listed *supra*.

⁴¹⁶ Section 1 of the *Charter* allows governments to impose reasonable limits on *Charter* rights that are demonstrably justified in a free and democratic society.

⁴¹⁷ See e.g. Gotell, "When Privacy is Not Enough", *supra*; Margaret Denike, "Sexual violence and "fundamental justice": On the failure of equality reforms to criminal proceedings" (2000), 20(3) *Canadian Woman Studies* 151.

⁴¹⁸ See Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49", in Julian Roberts and Renate Mohr., eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto, Uof T Press, 2004) 293.

violence is often used by judges to imply consent, to find in favour of mistaken belief in consent, and to allow admission of sexual history evidence. Provisions stipulating that the spousal context should not adversely influence the interpretation of sexual assault laws might go some way towards dealing with these problems. This kind of reform would have to be grounded in arguments about the need to dispel discriminatory myths and stereotypes about marital rape, as well as the need to encourage reporting of sexual violence in spousal relationships.

It may be that such a provision would never be adopted by Parliament. The Conservative government currently in power is hostile to women's equality issues, but also advocates a strong law and order approach. Whether women's groups would want to engage with this government is questionable. Further, even if a provision like the one suggested was enacted, it would inevitably be challenged as contrary to the *Charter* rights of accused men. Arguments related to women's equality, security of the person and sexual autonomy would have to be mounted in support of the provisions. Rather than initiate a battle that would likely take years to fight, strategies focused on judges and lawyers and their equality-based obligations in marital rape trials might be more fruitful. There is extensive literature in Canada framing sexual violence as a women's equality issue which could be drawn upon in such arguments,⁴¹⁹ some of which examines particular issues faced by marginalized women.⁴²⁰

International law could be used to buttress the arguments made above in relation to the application of laws relating to marital rape in Canada.⁴²¹ For example, provisions guaranteeing women's security of the person and equality generally and during marriage⁴²² could support arguments that police and prosecutor inaction on marital rape is a breach of the *Charter*. Provisions of *CEDAW*,⁴²³ taken together with *General Recommendation 19*⁴²⁴ and relevant case law⁴²⁵ requiring states to take action against sexual violence would provide support for such arguments, as would the explicit recognition of marital rape as a form of gender-based violence

⁴¹⁹ See for example Sheilah Martin, "Some Constitutional Considerations on Sexual Violence Against Women" (1994) 32 *Alberta Law Review* 535; Christine Boyle, "The Role of Equality in Criminal Law" (1994) 58 *Saskatchewan Law Review* 203; John McInnes and Christine Boyle "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 *University of British Columbia Law Review* 341; Isabel Grant "Second Chances: Bill C-72 and the Charter" (1995) 33 *Osgoode Hall Law Journal* 379; Sheehy (1999), *supra*; McIntyre (2000), *supra*; Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 *Osgoode Hall Law Journal* 297; Rosemary Cairns Way, "Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?" (2005) 4 *Journal of Law and Equality* 203.

⁴²⁰ See for example Margo L. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 *Ottawa Law Review* 71; Sherene Razack, "What Is to Be Gained by Looking White People in the Eye? Race in Sexual Violence Cases" in *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: U of T Press, 1998), 56; McIntyre (2000), *ibid.*; Pascale Fournier, "The Ghettoisation of Difference in Canada: "Rape by Culture" and the Danger of a "Cultural Defence" in Criminal Law Trials" (2002) 29 *Manitoba Law Journal* 81; Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief", (2007) 52 *McGill Law Journal* 243.

⁴²¹ See Vasanthi Venkatesh's paper for the ACWHRP on international law for further discussion.

⁴²² *ICCPR* Articles 9, 23(4) and 26.

⁴²³ *CEDAW* Articles 2(b) and (c), 15, 16.

⁴²⁴ *General Recommendation 19* Comments 1, 4, 6, 7, 9, 23 and 24.

⁴²⁵ *Goekce v. Austria*, CEDAW/C/39/D2005 Aug. 5, 2007 and *Yildirim v. Austria* CEDAW/C/39/D/6/2005 Oct. 1 2007, on-line: http://www.un.org/ga/search/view_doc.asp?symbol=CEDAW/C/39/D/5/2005 and http://www.un.org/ga/search/view_doc.asp?symbol=CEDAW/C/39/D/6/2005.

in the Commission of Human Rights' *Elimination of Violence Against Women*⁴²⁶ and the *Declaration on the Elimination of Violence Against Women*.⁴²⁷ Other treaties, such as the *Convention on the Rights of Persons with Disabilities*, would also be relevant in the case of women experiencing intersecting forms of inequality.⁴²⁸ International norms could be used to advocate amendments to the *Criminal Code* around sexual violence in spousal relationships as well.⁴²⁹

Alternatively, international law might be used more directly to make a complaint against Canada for its failure to adequately protect women from marital rape. A complaint could be made under the Optional Protocol of the *ICCPR* to the Human Rights Committee, or under the Optional Protocol to *CEDAW* to the Committee on the Elimination of Discrimination Against Women.⁴³⁰ Before complaints under the Optional Protocols will be accepted, claimants must have exhausted their domestic remedies. While these claims may be a last resort, Canadian women have previously enjoyed some success in this realm.⁴³¹

VII. The Relevance of Indigenous Law, Customary Law and Legal Pluralism relating to Marital Rape in Canada

The other area in which women's equality, autonomy and security of the person arguments will be important is in the context of "cultural defences".

So far, cultural considerations have come into play largely at the stage of sentencing in Canada. For example, in *R. v. Curley*, the purported cultural age of consent was considered relevant in sentencing three Inuk men for sexual intercourse with a female under the age of 14.⁴³² In *R. v. Lucien*, two young men originally from Haiti were granted a community based sentence taking into account their "particular cultural context."⁴³³

⁴²⁶ Resolution 2003/45, Article 7.

⁴²⁷ *DEVAW*, Article 2(a).

⁴²⁸ *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006). Article 16 of the *Convention* requires states to take action to protect the freedom of persons with disabilities from exploitation, violence and abuse. Articles 3 and 6 explicitly recognize the rights of women with disabilities.

⁴²⁹ See *CEDAW* Articles 2(f), 5(a); *General Recommendation 19*, Comments 11, 24(e), *Elimination of Violence Against Women*, Article 14(d), *DEVAW* Article 4.

⁴³⁰ Anne Bayefsky has a very helpful website providing information on how to file a complaint under *CEDAW*, and notes gender-based violence as an example of a potential case that might be brought under the Optional Protocol. See bayefsky.com: http://www.bayefsky.com/complain/37_cedaw.php.

⁴³¹ *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981) (concerning the right to culture under article 27 of the *ICCPR* for Aboriginal women who lost their status when they married non-Aboriginal men under Canada's *Indian Act*).

⁴³² The victim was 13, described as "slow", and became pregnant as a result of the offence. The accused were sentenced to one week in jail in addition to time served (3 weeks in remand). See *R. v. Curley, Issigaitor and Nagmalik*, [1984] N.W.T.R. 263 (Q.L.). The sentence was increased to 4 months jail on appeal, although the Court of Appeal agreed that "cultural circumstances" leading to ignorance of the law was relevant as a mitigating factor in sentencing. See *R. v. Curley, Issigaitor and Nagmalik*, [1984] 4 C.N.L.R. 72 (N.W.T.C.A.). For a comment on *Naqitarvik, Curley* and other uses of "Native" culture in sexual violence cases, see Nightingale, *supra*.

⁴³³ *R. v. Lucien* (1998) A.Q. no 8 (Cour du Quebec), cited in Fournier, *supra* at 88. The Cour d'appel du Quebec found errors in the judgment of the court below, but did not overturn the sentence (Fournier, *ibid.* at 99).

In the marital rape context, cases dealing with section 718.2(e) of the *Criminal Code* and *Gladue* have already been discussed. Only two other cases deal with the assertion of culture as a mitigating factor, and the argument was rejected in both cases. In *R v. Bodosis*, the victim's evidence indicated that in their culture (Greek) "it is customary for women to accommodate the wishes of their husbands whatever their individual preference."⁴³⁴ Justice M.E. Lane of the Ontario Court of Justice rejected the suggestion that culture should mitigate sentence, commenting that "[c]ultural relativism cannot justify deviations from the social and legal norms expected under Canadian law".⁴³⁵ Given the accused's "lack of insight about the seriousness of his behaviour, specific deterrence was seen to be a factor, as was general deterrence and the idea that "all cultural groups [must] appreciate that the law of sexual assault applies equally to them as well as others in our society."⁴³⁶ Nevertheless, the accused was sentenced to a relatively short jail term (7 months) plus 2 years probation for forced sexual intercourse with his wife. In the second case, *R. v. V.M.*, the accused was Peruvian and there was some suggestion that his cultural background may have led him to believe that "his wife is his property." As noted above, the sentencing judge stated that "[b]asically, and, fundamentally in this country, one must respect every other person."⁴³⁷ The accused was sentenced to 30 months jail for several offences against his estranged wife, including sexual assault.

These cases reflect important differences in the contexts in which cultural arguments might arise. First, in the case of Indigenous peoples in Canada, the ongoing context of colonization must be recognized.⁴³⁸ For some time, Indigenous peoples (including Indigenous women) have asserted their sovereignty over matters including interpersonal violence,⁴³⁹ and reforms to the Canadian criminal justice system in the area of sexual violence and sentencing of Aboriginal offenders can only be seen as partial and temporary responses in light of this political reality. For example, in a number of marital rape cases, sentencing circles were considered and sometimes used as a way of taking cultural issues into account.⁴⁴⁰ In other cases, courts have listened to the views of elders about the accused's role and regard in the community.⁴⁴¹ However, these approaches maintain overall jurisdiction in the Canadian state and its institutions, as courts are not obliged to convene circles, to ensure victim participation, to follow the circle's recommendations, or to otherwise take the views of the community into account.⁴⁴² Compared to our African partners in the

⁴³⁴ *R v. Bodosis*, [2009] O.J. No. 2707 (O.C.J.), at para. 17.

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.* at paras. 19 and 20.

⁴³⁷ *R. v. V.M.*, [1999] O.J. No. 3905, 105 O.T.C. 153, 44 W.C.B. (2d) 156 (S.C.J.) at para. 8.

⁴³⁸ See Bonita Lawrence and Enakshi Dua, "Decolonizing Antiracism" (2005) 32 *Social Justice* 120.

⁴³⁹ See for example Patricia Monture-Okanee and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992), 26 *UBC Law Review* 239.

⁴⁴⁰ See *R. v. W.B.T.*, [1997] S.J. No. 826 (C.A.), *R. v. H.K.C.*, [1997] S.J. No. 577 (C.A.), *R. v. J.J.*, [2004] N.J. No. 422 (C.A.).

⁴⁴¹ *R. v. J. (J.)*, [1990] N.W.T.J. No. 41 (S.C.), *R. v. Betsidea*, [2007] N.W.T.J. No. 90, 2007 NWTSC 85 (S.C.).

⁴⁴² Sentencing circles are not traditional practices for all Aboriginal communities, and there has been some debate about their use in Canada, including whether they adequately protect the interests of victims. See for example Mary Crnkovich, "A Sentencing Circle" (1996) 36 *J. Legal Pluralism & Unofficial L.* 159; Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18 *Can. J. Women & L.* 479. In *R. v. H.K.C.*, *supra*, the victim indicated that she did not wish to participate in the circle, and the court proceeded without her over the objections of the Crown. At some point during the circle the judge decided "it was no longer appropriate to carry it on as a judicial proceeding", and sentenced the accused to 2 years less a day imprisonment (at para. 2). This was increased on Crown appeal to 3.5 years imprisonment. See also *R. v. J.J.*, [2004] N.J. No. 422 (C.A.), where the Court noted that the victim had been pressured to participate in the circle.

ACWHRP, Canada must be recognized as a state with ongoing colonization rather than a post-colonial state. To portray Indigenous arguments for self-determination on criminal justice matters as “customary law” within the context of the Canadian justice system fails to give adequate recognition to Indigenous norms and practices in this area and instead sees those laws and practices through the eyes of the colonizer.⁴⁴³

In the second context, diasporic Africans⁴⁴⁴ and members of other ethnic, cultural and religious minorities in Canada may seek to raise defences or make arguments about the mitigation of sentence based on customary, cultural or religious norms. The articulation of arguments based on women’s rights is more complicated in such cases, as women’s rights to equality, autonomy and security of the person may be seen to clash with an accused person’s rights of religion and culture, which are also constitutionally protected.⁴⁴⁵ It is important not to essentialize women who are sexually violated by their partners according to a dominant standard, nor to paint all non-Western cultural norms as harmful to women.⁴⁴⁶ At the same time, claims of culture asserted as defences or in mitigation of sentence for violence against women are widely rejected,⁴⁴⁷ and are contrary to international norms.⁴⁴⁸ It is doubtful that these arguments could be used as direct defences against marital rape in Canada. However, as noted earlier, cultural considerations and biases may nevertheless creep in to the analysis of issues such as credibility, consent and belief in consent in the judicial treatment of marital rape. This is another area for equality based interpretive arguments and education of judges and other criminal justice actors in terms of their obligation to view these cases through the lens of women’s equality.

VIII. Conclusion: Lessons from the Legal Treatment of Marital Rape in Canada

The Canadian experience with the criminalization of marital rape shows that legislative abolition of the immunity alone will be insufficient to provide women with legal recourse for sexual violence in spousal relationships free from the operation of discriminatory myths, stereotypes and rationalizations. Abolition is certainly a key first step, and it must be accomplished with legislative clarity similar to that seen in the Canadian provision that stipulates that spouses can be charged with sexual assault. Abolition must also be accompanied by legislative definitions of

⁴⁴³ See Eberts and Monture, *supra*.

⁴⁴⁴ There are no cases in the sample where the parties are identified as diasporic Africans.

⁴⁴⁵ See e.g. Beverley Baines, "Equality's Nemesis?" (2006) 5 J.L. & Equality 57, who argues that the “no hierarchy of rights” approach seen in cases like *Mills*, *supra*, will be problematic in cases of women’s equality in the context of religious fundamentalism. Freedom of religion is protected under s.2(a) of the *Charter*, and s.15 protects against discrimination on the basis of religion, race, national or ethnic origin, and analogous grounds (including, perhaps, culture).

⁴⁴⁶ See e.g. Maneesha Deckha, “Gender, Difference, and Anti-Essentialism: Towards a Feminist Response to Cultural Claims in Law”, in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 114; Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford University Press, 2006); Colleen Sheppard, "Constitutional Recognition of Diversity in Canada" (2005-2006) 30 Vt. L. Rev. 463; Angela Campbell, “Wives’ Tales: Reflecting on Research in Bountiful” (2008) 23 CJLS 121.

⁴⁴⁷ See e.g. Baines, *supra*; Deckha, *ibid.*; Ayelet Shachar, "The Paradox of Multicultural Vulnerability", in Christian Joppke and Steven Lukes, eds., *Multicultural Questions* (Oxford University Press, 1999); Onora O’Neill, *Towards Justice and Virtue* (Cambridge University Press, 1996), *Bounds of Justice* (Cambridge University Press, 2000).

⁴⁴⁸ See e.g. the Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women, Comments 62 and 101.

consent and mistaken belief in consent (where relevant) as well as evidentiary rules and sentencing norms that account for women's full rights to equality, sexual and reproductive autonomy and security of the person. Even if such legislative provisions are in place, judicial interpretations of these provisions must be informed by principles that fully recognize women's rights under both domestic and international law and avoid discriminatory myths and stereotypes about marital rape. Training of judges, prosecutors and other justice system personnel is critical in this effort, as are strong interpretations of professional obligations in Codes of Conduct. Training of police is also critical to ensure that women are not discouraged from reporting marital rape, and to ensure that founding rates are not affected by discriminatory myths and stereotypes. Other Canadian initiatives such as specialized domestic violence courts and civil domestic violence legislation require further study in terms of their impact on cases of marital rape before they can be recommended as useful options.

Missing from the Canadian picture is a clear sense of how the treatment of marital rape, whether in the criminal or civil context, is influenced by factors such as the race, culture, immigration / refugee status, Aboriginality, disability, and class of the offender and victim. Further research on this issue is crucially important. At the same time, the cases reviewed in this paper do make it clear that recognition of equality for victims of marital rape must include analyses of the ways in which the justice system uses and perpetuates discriminatory myths and stereotypes based on race, culture, religion, disability, class, and other forms of oppression.

If legislative reforms or more proactive state responses in furtherance of women's equality, autonomy and security of the person are not forthcoming, constitutional challenges may be an option. The Canadian experience with such challenges has been mixed, but could be supported by relevant norms of international law. Constitutional and international norms are also relevant to the sovereignty of Indigenous peoples and the decolonization of Canadian law relating to sexual violence in spousal relationships and more broadly.

In addition to reform and implementation of the substantive and procedural laws concerning marital rape, the importance of public education and awareness is mentioned by many commentators. The persistence of discriminatory myths and stereotypes about marital rape evidenced in the case law confirms the need for public education in this area. Such efforts are also essential to ensuring that women know what legal options are available to them. Victims' services and supports including advocates, legal aid, rape crisis centres, shelters, and income support are also important, and must be made available to all women who experience sexual violence.

More fundamentally, structural factors contributing to women's inequality and their vulnerability to marital rape must also be addressed by governments in accordance with their obligations under Canadian and international law. Marital rape must be fully recognized as a systemic practice of discrimination that is enabled, normalized by and contributes to interlocking forms and relations of oppression, dependency and domination based on sex, sexuality, race, culture, religion, disability and class. Until the systemic nature of marital rape is recognized and its underlying discriminatory rationales are rejected, spousal relationships will remain a location where relations of dominance and subordination are reproduced. The law is not the only site at which this rethinking must occur, but it is a critical site for reform nevertheless. In addition to fundamental

legal reforms, economic and social equality are essential in order to reduce women's dependency upon individual men and the systemic devaluation of their full citizenship.

Appendix A
List of Relevant Cases

Supreme Court

1. *R.v. Sansregret* [1985] S.C.J. No. 23; *R. v. Sansregret* [1985] S.C.J. No. 23
2. *R.v. W.(G.)* [1999] 3 S.C.R. 597; *R.v. W.(G.)*, [1999] S.C.J. No. 37

British Columbia

1. *R. v. N.M.R.*, [1985] B.C.J. No. 2050 (C.A.)
2. *R. v. White*, [1986] B.C.J. No. 66, 24 C.C.C. (3d) 1 (C.A.)
3. *R. v. Harker*, [1986] B.C.J. No. 538 (C.A.)
4. *R. v. C.(G.C.)*, [1988] B.C.J. No. 2153 (Co. Ct.)
5. *R. v. Nikal*, [1986] B.C.J. No. 2754 (Co. Ct.)
6. *R. v. C. (M.H.)*, [1988] B.C.J. No. 2620, (C.A.)
7. *R. v. C. (H.L.)*, [1988] B.C.J. No. 1299 (Co. Ct.)
8. *R. v. Lefebvre*, [1991] B.C.J. No. 2054 (S.C.)
9. *R. v. A.S.B.*, 10 B.C.A.C. 234, [1992] B.C.J. No. 281 (C.A.)
10. *R. v. E.D.*, [1992] B.C.J. No. 1713, 16 B.C.A.C. 193, 17 W.C.B. (2d) 82 (C.A.)
11. *R. v. G.A.L.*, 21 B.C.A.C. 81, [1992] B.C.J. No. 2529 (C.A.)
12. *R. v. Louis*, [1993] B.C.J. No. 2812, 36 B.C.A.C. 212, 22 W.C.B. (2d) 245 (C.A.)
13. *R. v. R.F.*, [1994] B.C.J. No. 2501, 51 B.C.A.C. 164, 26 W.C.B. (2d) 42 (C.A.)
14. *R. v. R.G.*, [1994] B.C.J. No. 3094 (C.A.)
15. *R. v. McDowell*, [1995] B.C.J. No. 929 (Prov. Ct.)
16. *R. v. M.S.W.*, [1995] B.C.J. No. 1445 (C.A.)
17. *R. v. H.S.H.*, [1995] B.C.J. No. 2855 (Prov. Ct.)
18. *R. v. J.L.A.*, [1995] B.C.J. No. 2978 (Prov. Ct.)

19. *R. v. B.A.*, [1996] B.C.J. No. 268, 71 B.C.A.C. 231, 30 W.C.B. (2d) 155 (C.A.)
20. *R. v. D.W.K.*, [1996] B.C.J. No. 1148, 31 W.C.B. (2d) 94 (C.A.)
21. *R. v. W.J.M.*, [1996] B.C.J. No. 1661, 79 B.C.A.C. 289, 31 W.C.B. (2d) 487 (C.A.)
22. *R. v. T.A.*, [1996] B.C.J. No. 2492, 84 B.C.A.C. 77, 33 W.C.B. (2d) 91 (C.A.)
23. *R. v. J.J.C.*, [1997] B.C.J. No. 1817, 96 B.C.A.C. 1, 35 W.C.B. (2d) 425 (C.A.)
24. *R. v. G.P.W.*, [1998] B.C.J. No. 838 (C.A.)
25. *R. v. F.G.N.*, [1998] B.C.J. No. 2170, 112 B.C.A.C. 148, 39 W.C.B. (2d) 435 (C.A.)
26. *R. v. D.N.M.*, 115 B.C.A.C. 91, [1998] B.C.J. No. 2810 (C.A.)
27. *R. v. N.P.R.*, [1998] B.C.J. No. 2908 (C.A.)
28. *R. v. R.S.M.*, [1999] B.C.J. No. 798, 1999 BCCA 218; [1999] B.C.J. No. 1495, 1999 BCCA 376 (C.A.)
29. *R. v. L.S.U.*, [1999] B.C.J. No. 2618 (S.C.); 2001 BCCA 529, [2001] B.C.J. No. 1875 (C.A.)
30. *R. v. B.J.S.*, 2000 BCCA 117, [2000] B.C.J. No. 321 (C.A.)
31. *R. v. G.O.G.*, 2000 BCPC 10, [2000] B.C.J. No. 804 (Prov. Ct.)
32. *R. v. C.K.*, 2001 BCCA 379, [2001] B.C.J. No. 1119 (C.A.); sub nom *R. v. Kinde*, [2002] B.C.J. No. 735, 2002 BCCA 233 (C.A.)
33. *R.v. A.M.S.*, 2002 BCSC 857, [2002] B.C.J. No. 1443
34. *R. v. D.J.S.*, [2002] B.C.J. No. 1198, 2002 BCSC 612, 54 W.C.B. (2d) 399; 2002 BCSC 613; 2002 BCSC 614 (sub nom *R. v. Stubinski*)
35. *R. v. R.W.V.*, [2003] B.C.J. No. 2751, 2003 BCSC 1806, 60 W.C.B. (2d) 63 (S.C.)
36. *R. v. G.E.M.*, 2004 BCSC 668, [2004] B.C.J. No. 1856 (S.C.)
37. *R. v. Went*, 2004 BCSC 1205, [2004] B.C.J. No. 1900 (S.C.)
38. *R. v. T.M.E.*, [2004] B.C.J. 844, aff'd 2005 BCCA 388, [2005] B.C.J. No. 1696 (C.A.)
39. *R. v. McIsaac*, [2005] B.C.J. No. 946, 2005 BCSC 385, 29 C.R. (6th) 274 (S.C.)

40. *R. v. B.S.S.*, 2006 BCPC 135, [2006] B.C.J. No. 802 (Prov. Ct.)
41. *R. v. A.S.B.*, 2006 BCPC 598, [2006] B.C.J. No. 3447 (Prov. Ct.)
42. *R. v. D.B.M.*, [2006] B.C.J. No. 3638, 2006 BCSC 208; [2007] B.C.J. 2903, 2007 BCSC 1937 (sub nom *R. v. MacArthur*)
43. *R. v. B.T.*, 2007 BCPC 268, [2007] B.C.J. No. 1836 (Prov. Ct.)
44. *R. v. Dahlman*, 2007 BCSC 1912, [2007] B.C.J. No. 2822 (S.C.); see also [2007] B.C.J. No. 2828, 2007 BCSC 1913, 77 W.C.B. (2d) 122 (S.C.) (Prov. Ct.)
45. *R. v. M.J.T.*, [2008] B.C.J. No. 900, 2008 BCPC 131 (Prov. Ct.)
46. *R. v. Benham*, [2008] B.C.J. No. 2148, 2008 BCSC 1531 (S.C.)

Alberta

1. *R. v. P.T.M.*, [1977] A.J. No. 323 (ASCAD)
2. *R. v. R.W.F.*, [1992] A.J. No. 915 (Prov. Ct.)
3. *R. v. R.H.*, [1994] A.J. No. 124, 149 A.R. 230 (C.A.)
4. *R. v. B.G.O.*, [1994] A.J. No. 604 (Prov. Ct.)
5. *R. v. Dutchek*, [1995] A.J. No. 233, 162 A.R. 363 (C.A.)
6. *R. v. D.P.L.*, [1995] A.J. No. 1084 (Prov. Ct.)
7. *R. v. L.W.G.*, [1996] A.J. No. 653, 187 A.R. 21 (C.A.), [1996] S.C.C.A. No. 410 (appeal to SCC abandoned)
8. *R. v. B.H.T.*, [1998] A.J. No. 223, 1998 ABPC 135 (sub nom *R. v. Twoyoungmen*)
9. *R. v. D.W.G.*, [1999] A.J. No. 1123, 1999 ABCA 270 (C.A.)
10. *R. v. G.D.M.*, [2000] A.J. No. 1456, 2000 ABCA 319 (C.A.)
11. *R. v. MacFie*, [2001] A.J. No. 152, 2001 ABCA 34 (C.A.)
12. *R. v. G.A.M.*, [2001] A.J. No. 1711, 2001 ABPC 252 (Prov. Ct.)
13. *R. v. A.B.*, [2003] A.J. No. 1289, 2003 ABPC 180 (Prov. Ct.)
14. *R. v. B.J.S.*, [2005] A.J. No. 883, 2005 ABPC 158 (Prov. Ct.)

15. *R. v. G.D.*, [2005] A.J. No. 1208, 2005 ABQB 163 (Q.B.)
16. *R. v. A.F.L.*, [2005] A.J. No. 1897, 2005 ABPC 367 (Prov. Ct.)
17. *R. v. G.E.W.*, [2006] A.J. No. 476, 2006 ABQB 317 (Q.B.)
18. *R. v. O.F.B.* [2006] A.J. No. 788, 2006 ABCA 207, 391 A.R. 215, (C.A.); see also *R. v. O.F.B.* [2005] A.J. No. 1795, 2005 ABCA 451 (C.A.)
19. *R. v. McDonald*, [2007] A.J. No. 186, 2007 ABCA 53 (C.A.)
20. *R. v. C.C.*, [2007] A.J. No. 1383, 2007 ABPC 337 (Prov. Ct.)
21. *R. v. P.P.S.*, [2008] A.J. No. 662, 2008 ABQB 362 (Q.B.)
22. *R. v. L.G.P.*, [2008] A.J. No. 1488, 2009 ABCA 1 (C.A.)
23. *R. v. D.J.D.*, [2009] A.J. No. 819, 2009 ABPC 216 (Prov. Ct.)
24. *R. v. D.J.D.*, [2010] A.J. No. 733, 2010 ABCA 207 (C.A.)
25. *R. v. K.R.D.*, [2010] A.J. No. 272, 2010 ABPC 56 (Prov. Ct.)

Saskatchewan

1. *R. v. Boliantz*, [1987] S.J. No. 189, 56 Sask. R. 78 (C.A.)
2. *R. v. W.W.B.*, [1991] S.J. No. 42, 90 Sask. R. 108 (C.A.)
3. *R. v. J.K.*, [1993] S.J. No. 359, 113 Sask. R. 23 (C.A.)
4. *R. v. H.K.C.*, [1997] S.J. No. 577, 158 Sask. R. 157 (C.A.)
5. *R. v. W.B.T.*, [1997] S.J. No. 826, 163 Sask. R. 29 (C.A.)
6. *R. v. L.E.G.*, [1999] S.J. No. 318 (Prov. Ct.)
7. *R. v. C.C.B.*, [1999] S.J. No. 672, 185 Sask. R. 102 (Prov. Ct.), *aff'd* [2000] S.J. No. 423, 2000 SKCA 72 (sub nom *R. v. Bird*)
8. *R. v. Hetsler*, 2000 SKQB 126, [2000] S.J. No. 192 (Q.B.)
9. *R. v. R.D.D.*, [2001] S.J. No. 354 (Prov. Ct.)
10. *R. v. D.D.H.*, 2002 SKPC 7, [2002] S.J. No. 72 (Prov. Ct.)

11. *R. v. J.T.D.*, 2002 SKPC 59, [2002] S.J. No. 525 (Prov. Ct.)
12. *R. v. Lemaigre*, 2003 SKPC 144, [2003] S.J. No. 686 (Prov. Ct.)
13. *R. v. S.G.B.*, 2005 SKQB 510, [2005] S.J. No. 759; see also [2009] S.J. No. 556, 2009 SKQB 360 (sub nom *R. v. Brass*)
14. *R. v. B.U.*, 2006 SKQB 477, [2006] S.J. No. 703; [2006] S.J. No. 776, 2006 SKQB 476 (Q.B.); aff'd 2008 SKCA 5
15. *R. v. McAdam*, 2006 SKPC 109, [2006] S.J. No. 783 (Prov. Ct.)
16. *R. v. Woods*, [2008] S.J. No. 200, 2008 SKCA 40 (C.A.)
17. *R. v. T.C.*, [2009] S.J. No. 665, 2009 SKCA 124 (C.A.)
18. *R. v. Butz*, [2009] S.J. No. 727, 2009 SKCA 142 (C.A.)

Manitoba

1. *R. v. Bodnar*, [1990] M.J. No. 418 (Prov. Ct.)
2. *R. v. E.L.D.*, [1992] M.J. 445, 81 Man.R.(2d) 264 (C.A.)
3. *R. v. A.W.S.*, [1998] M.J. No. 26, [1998] 4 W.W.R. 364, 122 C.C.C. (3d) 442 (C.A.)
4. *R. v. Bone*, [2007] M.J. No. 270, 2007 MBCA 95, 225 C.C.C. (3d) 171, 51 C.R. (6th) 336 (C.A.)
5. *R. v. Brunen*, [2007] M.J. No. 486, 2007 MBQB 320, 76 W.C.B. (2d) 574 (Q.B.)
6. *R. v. Allan*, [2009] M.J. No. 427, 2009 MBQB 323 (Q.B.); [2010] M.J. No. 183, 2010 MBQB 120 (Q.B.)

Ontario

1. *R. v. A.R.T.*, [1982] O.J. No. 122 (C.A.)
2. *R. v. N.B.*, [1992] O.J. No. 1802 (O.C.J.)
3. *R. v. B.W.*, [1992] O.J. No. 4011 (O.C.J.)
4. *R. v. G.S.G.* [1993] O.J. No. 466, 63 O.A.C. 156, 19 W.C.B. (2d) 49 (C.A.)
5. *B.W. v. P.M.M.*, [1994] O.J. No. 2241 (Ont. C.J.)

6. *R. v. Mielke* [1994] O.J. No. 2826 (ON Ct GD)
7. *R. v. K.L.* [1994] O.J. No. 2875 (O.C.J.)
8. *R. v. J.T.*, [1994] O.J. No. 3937 (O.C.J.)
9. *R. v. M.C.*, [1994] O.J. No. 4029; 4348 (O.C.J.).
10. *R. v. T.J.*, [1994] O.J. No. 4167, 28 C.R. (4th) 195, 23 W.C.B. (2d) 152 (O.C.J.).
11. *R. v. E.H.* [1995] O.J. No. 3302 (ON Ct GD)
12. *R. v. A.V.* [1995] O.J. No. 4012 (ON Ct GD)
13. *R. v. D.W.C.*, [1995] O.J. No. 4360 (O.C.J.).
14. *R. v. A.R.* [1996] O.J. No. 367 (ON Ct GD)
15. *R. v. S.B.*, [1996] O.J. No. 5457; [1996] O.J. No. 1187 (O.C.J.).
16. *R. v. P.D.L.*, [1997] O.J. No. 3775, 40 O.T.C. 199, 36 W.C.B. (2d) 371 (O.C.J.).
17. *R. v. Green*, [1997] O.J. No. 4082 (O.C.J.).
18. *R. v. A.A.*, [1997] O.J. No. 5758 (O.C.J.).
19. *R. v. J.C.*, [1998] O.J. No. 1637 (O.C.J.).
20. *R. v. J.C.T.* [1998] O.J. No. 1688, 39 O.R. (3d) 26, 124 C.C.C. (3d) 385 (C.A.)
21. *R. v. C.P.S.*, [1998] O.J. No. 2743 (O.C.J.)
22. *R. v. G.W.M.*, [1998] O.J. No. 3122 (O.C.J.)
23. *R. v. G.S.*, [1998] O.J. No. 3552 (O.C.J.), aff'd [2001] O.J. No. 1963 (C.A.), leave to appeal dismissed, [2002] S.C.C.A. No. 21
24. *R. v. K.B.* [1998] O.J. No. 4146 (ON Ct GD)
25. *R. v. H.V.* [1998] O.J. No. 4694 (O.C.J.)
26. *R. v. G.D.D.*, [1998] O.J. No. 4846 (C.A.)
27. *R. v. W.F.*, [1998] O.J. No. 5424; [1998] O.J. No. 5604 (O.C.J.).

28. *R. v. T.T.*, [1998] O.J. No. 6369 (O.C. J.).
29. *R. v. L.S.*, [1999] O.J. No. 309 (O.C.J.).
30. *R. v. F. (D.S.)*, [1999] O.J. No. 688, 43 O.R. (3d) 609, 169 D.L.R. (4th) 639 (C.A.), aff'ing *R. v. D.S.F.*, [1997] O.J. No. 5628
31. *R. v. E.D.*, [1999] O.J. No. 1502 (O.C.J.)
32. *R. v. M.T.*, [1999] O.J. No. 1561, 95 O.T.C. 394 (S.C.J.)
33. *R. v. C.W.R.*, [1999] O.J. No. 1583 (ON Ct GD)
34. *R. v. M.J.B.*, [1999] O.J. No. 2235, 99 O.T.C. 36 (S.C.J.)
35. *R. v. K.F.L.*, [1999] O.J. No. 2623 (S.C.J.)
36. *R. v. E.M.*, [1999] O.J. No. 3417 (Prov. Ct)
37. *R. v. W.R.B.*, [1999] O.J. No. 1470, 94 O.T.C. 203, [1999] O.J. No. 1394 (O.C.J.)
38. *N.C. v. W.R.B.*, [1999] O.J. No. 3633, 105 O.T.C. 81 (S.C.J.)
39. *R. v. V.M.*, [1999] O.J. No. 3905, 105 O.T.C. 153, 44 W.C.B. (2d) 156 (S.C.J.)
40. *R. v. B.S.D.*, [1999] O.J. No. 5183 (O.C.J.)
41. *R. v. D.G.K.*, [1999] O.J. No. 5239 (S.C.J.)
42. *R. v. S.F.*, [1999] O.J. No. 5807 (S.C.J.)
43. *R. v. G.R.*, [2000] O.J. No. 4096; [2000] O.J. No. 4215 (O.C.J.)
44. *R. v. D.B.*, [2000] O.J. No. 4699 (S.C.J.).
45. *R. v. G.B.*, [2000] O.J. No. 5513 (S.C.J.)
46. *R. v. S.H.*, [2001] O.J. No. 118 (C.A.), varying *R. v. Hussain*, [1999] O.J. No. 4728 (S.C.J.)
47. *R. v. Samuel*, [2001] O.J. No. 895, 49 W.C.B. (2d) 268 (O.C.J.)
48. *R. v. C.G.*, [2001] O.J. No. 1243, aff'd [2002] O.J. No. 986 (C.A.)
49. *R. v. Nelson*, [2001] O.J. No. 2353, 2354, 2355 (S.C.J.)
50. *R. v. S.B.G.*, [2001] O.J. No. 3785 (S.C.J.)

51. *R. v. R.C.*, [2001] O.J. No. 4486, 159 O.A.C. 373, 161 C.C.C. (3d) 335 (C.A.), leave to appeal dismissed [2002] S.C.C.A. No. 2
52. *R. v. R.V.*, [2001] O.J. No. 5143 (O.C.J.), aff'd [2004] O.J. No. 849 (S.C.J.), varied [2004] O.J. No. 5136 (C.A.)
53. *R. v. J.A.*, [2001] O.J. No. 5956 (O.C.J.)
54. *R. v. R.C.*, [2002] O.J. No. 865 (C.A.)
55. *R. v. R.R.*, [2002] O.J. No. 2162, 54 W.C.B. (2d) 300 (O.C.J.)
56. *R. v. T.J.D.*, [2002] O.J. No. 2992, [2002] O.T.C. 552 (S.C.J.), aff'd [2004] O.J. No. 1444 (C.A.)
57. *R. v. C.P.K.*, [2002] O.J. No. 4929, 62 O.R. (3d) 487 (C.A.)
58. *R. v. D.F.*, [2002] O.J. No. 5004 (S.C.J.), varied in part *R. v. F.D.J.F.*, [2005] O.J. No. 2148, 198 O.A.C. 126, 197 C.C.C. (3d) 365 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 477.
59. *R. v. A.R.C.*, [2002] O.J. No. 5364, [2002] O.T.C. 1068 (S.C.J.)
60. *R. v. D.K.*, [2003] O.J. No. 562 (C.A.)
61. *R. v. W.T.V.*, [2003] O.J. No. 2272, [2003] O.T.C. 509, 57 W.C.B. (2d) 654 (S.C.J.)
62. *R. v. J.G.C.*, [2003] O.J. No. 2275, 57 W.C.B. (2d) 646 (S.C.J.)
63. *R. v. D.M.*, [2003] O.J. No. 2807 (O.C.J.)
64. *R. v. F.D.*, [2003] O.J. No. 4320 (O.C.J.)
65. *R. v. R.M.*, [2003] O.J. No. 5155, 180 O.A.C. 38, 59 W.C.B. (2d) 525 (C.A.)
66. *R. v. S.D.M.*, [2003] O.J. No. 5625, 61 W.C.B. (2d) 84 (S.C.J.)
67. *R. v. R.B.*, [2003] O.J. No. 5627, 61 W.C.B. (2d) 92 (O.C.J.)
68. *R. v. Q.M.J.*, [2003] O.J. No. 6012 (O.C.J.)
69. *R. v. W.R.G.*, [2004] O.J. No. 399, [2004] O.T.C. 144, 60 W.C.B. (2d) 370 (S.C.J.)
70. *R. v. T.J.D.*, [2004] O.J. No. 1444, 185 O.A.C. 336, 61 W.C.B. (2d) 277 (C.A.)

71. *R. v. T.E.P.*, [2004] O.J. No. 1904, 61 W.C.B. (2d) 654 (Ont. C.A.); see also [2001] O.J. No. 6053 (S.C.J.)
72. *R. v. D.S.*, [2004] O.J. No. 3440 (C.A.), aff'd [2005] S.C.J. No. 36; [2005] O.J. No. 3928.
73. *R. v. D.G.*, [2004] O.J. No. 3496 (O.C.J.).
74. *R. v. K.E.B.*, [2004] O.J. No. 3586, [2004] O.J. No. 3587 (S.C.J.).
75. *R. v. D.J.*, [2004] O.J. No. 4525, 73 O.R. (3d) 367 (C.A.)
76. *R. v. A.A.M.*, [2004] O.J. No. 5306 (S.C.J.).
77. *R. v. J.S.*, [2004] O.J. No. 5637 (O.C.J.)
78. *R. v. M.S.*, [2004] O.J. No. 5673, 2004 ONCJ 397; 64 W.C.B. (2d) 257 (O.C.J.)
79. *R. v. J.M.*, [2004] O.J. No. 5976 (S.C.J.).
80. *R. v. O.T.*, [2005] O.J. No. 1499, 197 O.A.C. 18 (C.A.)
81. *R. v. L.B.*, [2005] O.J. No. 1798, 2005 ONCJ 143 (O.C.J.)
82. *R. v. F.N.*, [2005] O.J. No. 3153, [2005] O.J. No. 3594, 66 W.C.B. (2d) 558 (Ont. C.J.), aff'd 2007 ONCA 276 (sub nom *R. v. Norman*)
83. *R. v. C.R.G.*, [2005] O.J. No. 3764, 77 O.R. (3d) 308 (C.A.)
84. *R. v. C.S.*, [2005] O.J. No. 3785, 2005 ONCJ 391 (O.C.J.)
85. *R. v. T.C.J.*, [2005] O.J. No. 4134, [2005] O.J. No. 5876 (O.C.J.)
86. *R. v. Latreille*, [2005] O.J. No. 4845, [2005] O.T.C. 976, 67 W.C.B. (2d) 748 (O.C.J.)
87. *R. v. Chapman*, [2006] O.J. No. 185, 207 O.A.C. 216, 204 C.C.C. (3d) 449 (C.A.)
88. *R. v. D.W.H.*, [2006] O.J. No. 1009, 208 O.A.C. 109; 68 W.C.B. (2d) 691 (C.A.)
89. *Pilon v. Nahri*, [2006] O.J. No. 2640, 149 A.C.W.S. (3d) 717 (S.C.J.)
90. *R. v. B.R.*, [2004] O.J. No. 5969, aff'd [2006] O.J. No. 3404, 81 O.R. (3d) 641 (C.A.)
91. *R. v. McLeod*, [2006] O.J. No. 3926 (S.C.J.).
92. *R. v. T.V.*, [2006] O.J. No. 4089, 2006 ONCJ 338 (O.C.J.); see also *R. v. Venkatesh*, [2007] O.J. No. 1300 (S.C.J.).

93. *R. v. Singh*, [2006] O.J. No. 4415, 71 W.C.B. (2d) 688 (S.C.J.)
94. *R. v. E.E.*, [2006] O.J. No. 4941, 72 W.C.B. (2d) 694 (C.A.)
95. *R. v. Hossain*, [2006] O.J. No. 5061 (S.C.J.)
96. *R. v. Mitchell*, [2007] O.J. No. 163, 46 C.R. (6th) 193, 73 W.C.B. (2d) 445 (S.C.J.)
97. *R. v. Ward*, [2007] O.J. No. 444 (S.C.J.)
98. *R. v. R.R.*, [2007] O.J. No. 1121, 73 W.C.B. (2d) 406, aff'd [2008] O.J. No. 2468 (C.A.)
99. *R. v. Douglas*, [2007] O.J. No. 2156 (O.C.J.), aff'd [2007] O.J. No. 5032 (S.C.J.)
100. *R. v. Jackson*, [2007] O.J. No. 3269 (S.C.J.)
101. *R. v. S.A.T.*, [2007] O.J. No. 5059 (S.C.J.)
102. *R. v. V.S.*, [2008] O.J. No. 513, 76 W.C.B. (2d) 634 (S.C.J.)
103. *R. v. Sipos*, [2008] O.J. No. 1660 (C.A.)
104. *R. v. Owjee*, [2008] O.J. No. 2038, 2008 ONCA 409 (ONCA).
105. *R. v. Wilson*, [2008] O.J. No. 3583, 2008 ONCJ 418, 79 W.C.B. (2d) 427 (O.C.J.)
106. *R. v. B.M.*, [2008] O.J. No. 3653 (C.A.)
107. *R. v. K.O.*, [2008] O.J. No. 4193 (S.C.J.)
108. *R. v. Tait*, [2008] O.J. No. 4868, 2008 ONCJ 629 (O.C.J.)
109. *R. v. R.A.G.*, [2008] O.J. No. 4925 (ONCA).
110. *R. v. McGregor*, [2008] O.J. No. 4939, 2008 ONCA 831, 240 C.C.C. (3d) 102 (C.A.)
111. *R. v. Sandhu*, [2009] O.J. No. 374 (C.A.)
112. *R. v. Enever*, [2009] O.J. No. 648, 2009 ONCJ 49 (O.C.J.)
113. *R. v. Singh*, [2009] O.J. No. 840 (O.C.J.)
114. *R. v. B.B.*, [2009] O.J. No. 864; [2009] O.J. No. 862 (S.C.J.)
115. *R. v. H.A.*, [2009] O.J. No. 2146 (C.A.), overturning *R. v. Ali*, [2007] O.J. No. 701 (O.C.J.)

116. *R v. Bodosis*, [2009] O.J. No. 2707 (O.C.J.)
117. *R. v. Wigle*, [2009] O.J. No. 3276, 2009 ONCA 604, 252 O.A.C. 209 (C.A.)
118. *R v. T.T.*, [2009] O.J. No. 3388 (C.A.)
119. *R. v. Bain*, [2009] O.J. No. 3516 (S.C.J.)
120. *R v. Nolan*, [2009] O.J. No. 4237 (C.A.)
121. *R. v. Sihota*, [2009] O.J. No. 4590 (C.A.)
122. *R. v. R.G.*, [2009] O.J. No. 4791, 2009 ONCA 796, 255 O.A.C. 281 (C.A.)
123. *R. v. Ball*, [2009] O.J. No. 5025 (S.C.J.)
124. *R. v. S.R.*, [2009] O.J. No. 5470 (S.C.J.)
125. *R. v. J.A.*, [2010] O.J. No. 1202, 2010 ONCA 226 (C.A.), on appeal to SCC, [2010] S.C.C.A. No. 147
126. *R. v. C.H.*, [2010] O.J. No. 1552, 2010 ONSC 1850 (S.C.J.)

Quebec

1. *R. c. J.-M.D.* [2004] Q.J. No. 13183; [2005] Q.J. No. 6843 (C.Q.)
2. *D.I.D.B. c. R.*, [2006] Q.J. No. 2958, 2006 QCCA 460 (C.A.)
3. *F.J. c. R.*, [2007] Q.J. No. 3027 (C.A.), aff'd [2008] S.C.J. No. 21 (see *R. v. Mathieu*)

New Brunswick

1. *R. v. N. (K.)*, [1988] N.B.J. No. 137, 90 N.B.R. (2d) 271 (QB); [1988] N.B.J. No. 516 (C.A.)
2. *R. v. C. (B.J.)*, [1991] N.B.J. No. 436, 116 N.B.R. (2d) 364 (C.A.)
3. *R. v. Munn*, [1993] N.B.J. No. 418, 138 N.B.R. (2d) 207 (Q.B.)
4. *R. v. G.J.I.*, [1995] N.B.J. No. 117, 160 N.B.R. (2d) 248 (C.A.)
5. *R. v. M.I.P.*, [1998] N.B.J. No. 424 (Q.B.)
6. *R. v. R.K.J.*, [1998] N.B.J. No. 483, 207 N.B.R. (2d) 24, 40 W.C.B. (2d) 376 (C.A.)
7. *R. v. D.I.A.*, [1999] N.B.J. No. 303, 215 N.B.R. (2d) 330 (C.A.)

8. *R. v. L.E.R.*, [2000] N.B.J. No. 407 (Q.B.)
9. *R. v. J.F.*, [2001] N.B.J. No. 286, 2001 NBCA 81 (C.A.)
10. *R. v. N.G.B.*, [2002] N.B.J. No. 147 (Q.B.), appeal allowed [2002] N.B.J. No. 357 (C.A.)

Nova Scotia

1. *R. v. C.B.R.*, [1991] N.S.J. No. 663, 107 N.S.R. (2d) 317, 290 A.P.R. 317 (Co.Ct)
2. *R. v. Swinamer*, [1992] N.S.J. No. 57, 109 N.S.R. (2d) 142, 297 A.P.R. 142 (C.A.)
3. *R. v. R.S.R.*, [1993] N.S.J. No. 42, 118 N.S.R. (2d) 95, 18 W.C.B. (2d) 556 (C.A.)
4. *R. v. D.E.B.*, [1993] N.S.J. No. 46, 117 N.S.R. (2d) 356 (C.A.)
5. *R. v. T.V.G.*, [1994] N.S.J. No. 348, 133 N.S.R. (2d) 299, 31 C.R. (4th) 32 (S.C.)
6. *R. v. S.D.M.*, [1995] N.S.J. No. 236, 141 N.S.R. (2d) 203 (S.C.)
7. *R. v. D.B.C.*, [1995] N.S.J. No. 413, 145 N.S.R. (2d) 72 (C.A.), leave to appeal dismissed [1995] S.C.C.A. No. 225
8. *R. v. L.D.M.*, [2000] N.S.J. No. 60, 182 N.S.R. (2d) 266 (S.C.); [2001] N.S.J. No. 46, 2001 NSCA 19 (C.A.); see also [2000] N.S.J. No. 189 (C.A.)
9. *R. v. C.M.M.*, [2002] N.S.J. No. 197, 2002 NSPC 13, 204 N.S.R. (2d) 247 (Prov. Ct.)
10. *R. v. S.A.W.*, [2002] N.S.J. No. 533, 2002 NSPC 40, 211 N.S.R. (2d) 85 (Prov. Ct.)
11. *R. v. G.L.J.P.*, [2003] N.S.J. No. 348, 2003 NSSC 195 (S.C.); [2003] N.S.J. No. 509, 2004 NSSC 8 (S.C.); see also 2003 NSSC 168
12. *R. v. D.S.C.*, [2004] N.S.J. No. 432, 2004 NSCA 135, 228 N.S.R. (2d) 81 (C.A.)
13. *R. v. S.E.C.*, [2008] N.S.J. No. 261, 2008 NSSC 161, 266 N.S.R. (2d) 30 (S.C.)
14. *R. v. O.A.P.*, [2008] N.S.J. No. 534, 2008 NSSC 365 (S.C.)
15. *R. v. R.S.D.L.* [2009] N.S.J. No. 289, 2009 NSCA 74, 279 N.S.R. (2d) 301 (C.A.)

Prince Edward Island

1. *R. v. Beamish*, [1996] P.E.I.J. No. 85, 144 Nfld. & P.E.I.R. 326 (S.C.)

2. *R. v. D.A.R.C.*, [2002] P.E.I.J. No. 91, 2002 PESCAD 22; 218 Nfld. & P.E.I.R. 329 (S.C.)

Newfoundland and Labrador

1. *R. v. Eisan*, [1988] N.J. No. 241, 71 Nfld. & P.E.I.R. 338 (S.C.)

2. *R. v. Rowsell*, [1990] N.J. No. 364 (C.A.)

3. *R. v. Gulliver*, [1991] N.J. No. 145 (C.A.)

4. *R. v. Pastiwet*, [1993] N.J. No. 130 (S.C.)

5. *R. v. D.E.D.P.* [2002] N.J. No. 174, 214 Nfld. & P.E.I.R. 234 (S.C.)

6. *R. v. R.G.*, [2003] N.J. No. 82, 2003 NLSCTD 44 (S.C.); *aff'd* 2003 NLCA 73, [2003] N.J. No. 336 (C.A.)

7. *R. v. J.J.*, [2004] N.J. No. 422, 2004 NLCA 81 (see also [2002] N.J. No. 149)

8. *R. v. G.W.P.*, 2006 NLTD 136, [2006] N.J. No. 242 (S.C.)

Yukon

1. *R. v. Atlin*, [1986] Y.J. No. 18, 1 Y.R. 21, 16 W.C.B. 366 (C.A.)

2. *R. v. Schmidt*, [1991] Y.J. No. 84 (S.C.)

3. *R. v. S.C.*, [1992] Y.J. No. 93 (S.C.)

4. *R. v. J.W.K.*, [1993] Y.J. No. 237 (Terr. Ct.), *aff'd* [1995] Y.J. No. 9 (C.A.)

5. *R. v. B.G.D.*, [1997] Y.J. No. 63 (S.C.)

6. *R. v. R.F.*, [2000] Y.J. No. 15, 2000 YTTC 507; [2000] Y.J. No. 54, 2000 YTTC 27 (Terr. Ct.)

7. *R. v. G.P.S.*, [2001] Y.J. No. 95, 2001 YKCA 10 (C.A.)

8. *R. v. D.C.*, [2005] Y.J. No. 54, 2005 YKSC 30 (S.C.)

9. *R. v. Tronson*, [2009] Y.J. No. 150, 2009 YKTC 88 (Terr. Ct.)

Northwest Territories

1. *R. v. K.P.R.*, [1989] N.W.T.J. No. 74 (S.C.)

2. *R. v. J. (J.)*, [1990] N.W.T.J. No. 41 (S.C.)

3. *R. v. M.O.M.*, [1991] N.W.T.J. No. 146 (S.C.)
4. *R v. Maher*, [1992] N.W.T.J. No. 148; [1993] N.W.T.R. 33 (S.C.)
5. *R. v. C.M.*, [1992] N.W.T.J. No. 236 (Terr. Ct.)
6. *R v. R.G.*, [1994] N.W.T.J. No. 20 (S.C.)
7. *R. v. B.A.*, [1996] N.W.T.J. No. 7 (C.A.)
8. *R. v. Payne*, [1996] N.W.T.J. No. 112 (S.C.)
9. *R. v. E.P.G.*, [1996] N.W.T.J. No. 119 (S.C.); see also [1997] N.W.T.J. No. 27 (C.A.); [1997] N.W.T.J. No. 160 (C.A.)
10. *R. v. L.E.*, [1996] N.W.T.J. No. 137 (S.C.)
11. *R. v. Kalluk*, [1997] N.W.T.J. No. 15 (C.A.)
12. *R. v. T.G.*, [1997] N.W.T.J. No. 90 (S.C.)
13. *R. v. L.R.F.*, [1997] N.W.T.J. No. 103 (S.C.)
14. *R. v. L.R.*, [1999] N.W.T.J. No. 68 (S.C.)
15. *R. v. M.A.L.*, [2000] N.W.T.J. No. 84, 2000 NWTSC 61 (S.C.)
16. *R. v. D.C.M.*, [2003] N.W.T.J. No. 57, 2003 NWTSC 43 (S.C.)
17. *R. v. Vermillion*, [2003] N.W.T.J. No. 94, 2003 NWTSC 59 (S.C.)
18. *R. v. P.D.C.*, [2005] N.W.T.J. No. 73, 2005 NWTSC 69 (S.C.)
19. *R. v. D.B.*, [2005] N.W.T.J. No. 93, 2005 NWTSC 89 (S.C.)
20. *R. v. C.M.*, [2005] N.W.T.J. No. 112; 2005 NWTSC 100 (S.C.)
21. *R. v. Sunrise*, [2006] N.W.T.J. No. 60; 2006 NWTSC (S.C.)
22. *R. v. Betsidea*, [2007] N.W.T.J. No. 90, 2007 NWTSC 85 (S.C.)

Nunavut

1. *R v. J.A.*, [2008] Nu.J. No. 7, 2008 NUCJ 8; [2009] Nu.J. No. 2, 2009 NUCJ 3 (N.C.J.)