

Surviving the Courts: Improving How Provincial Courts Respond to Sexual Assault Cases

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Ethics Statement

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Abstract

This paper is concerned with how provincial courts respond to sexual assault cases, in light of their imperfect record on convicting perpetrators as well as their negative impact on the well-being of many survivors. I first conduct research to identify the causes of both these problems, and then I develop and assess several potential government policies to improve the court process. My research is informed by a literature review and eight interviews with victim support workers, advocates, academics, lawyers, and judges. I conclude that governments need to take multiple actions to address these problems, beginning with policies that specialize court actors and processes, educate judges, and inform survivors.

Keywords: sexual assault; secondary victimization; provincial courts; criminal justice system; Canada

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Glossary

Sexual Assault (Levels I, II, III)	Sexual contact without consent, according to Canada's <i>Criminal Code</i> . Level I cases involve minor or no physical injuries. Level II cases involve weapons, threats, or bodily harm. Level III cases involve wounding, maiming, disfiguring or endangering the life of the victim.
Sexual Offenses	A range of sexual acts such as exploitation, incest, and voyeurism, that are criminalized in Canada's <i>Criminal Code</i> .
Survivor	A term that refers to someone who has experienced sexual assault. Emphasizes their agency and life beyond the assault. Used interchangeably in this paper with 'victim.'
Victim	A term that refers to someone who has experienced sexual assault. Traditionally used by the criminal justice system. Used interchangeably in this paper with 'survivor.'
Complainant	A legal term that refers to the person making an allegation of an offense.
Accused	A legal term that refers to the person charged with an alleged offense.
Perpetrator	Someone who has committed a crime.
Secondary Victimization	Responses to a crime that add to or exacerbate the original trauma experienced by the victim.
Rape Shield laws	Sections 276 and 277 in Canada's <i>Criminal Code</i> that limit using a complainant's prior sexual activities or sexual reputation against them, and Section 486 which allows for media publication bans on complainants' names.

Executive Summary

Only a small fraction of sexual assault cases end up in provincial criminal courts due to an enormous filtering process in the earlier stages of the criminal justice system. Yet conviction rates for sexual assault are consistently the lowest of all victim-based crimes. Furthermore, a majority of sexual assault survivors do not have confidence in the criminal court process and many who go through the process experience secondary victimization. This paper focuses on how to improve how provincial courts respond to sexual assault cases, both in terms of their role in a larger system of impunity for some perpetrators, and their negative impacts on the well-being of many survivors.

This paper examines two general research questions. These questions are answered with evidence from an academic and gray literature review and eight original interviews conducted with individuals from the following categories: victim support worker, advocate, academic, lawyer, and judge.

The first general research question posed is: “What are causing these problems?” (Chapter 4). This paper finds at least three problem drivers. First, because of a lack of external evidence in most sexual assault cases, convictions must be made on the basis of the complainant’s credibility. Credibility is easily thrown into question because of the continued prevalence of rape myths and lack of empathetic understanding in some courtrooms, as well as demanding expectations of reliable testimony in the context of traumatic memories and intimate life. Second, fundamental norms of justice such as the criminal burden of proof are key factors in stacking the odds against the survivor. Third, significant backlogs and delays, often used strategically by perpetrators and defense lawyers, contribute to both prosecutor and survivor drop-outs and pose major inconveniences for survivors who wish to heal.

The second general research question posed is: “What actions will address these problems?” (Chapters 5-8). Criteria are first established to clarify what desirable outcomes are: the most successful policies would hold perpetrators accountable without risking false convictions, would improve multiple facets of victim satisfaction, would ensure stakeholder acceptance, and would account for financial cost. Policy options are then formulated and assessed according to these criteria. Policy options considered are:

1. Specialized Sexual Assault Courts 2. Funding Trauma-Informed, Intersectional Sexual Violence Education for Judges 3. Legislation to Close the Public Gallery and Use Physical Screens, upon the Complainant's Request 4. Comprehensive Legal Advice Program and Giving Complainants' Lawyers Standing, and 5. Preparatory Legal Advice Program.

Research findings reveal that these options perform differently across criteria and that no one policy option will solve the problems of the courts. It is recommended that provinces take multiple actions. Specifically, there is evidence to support three of the five policy options taken together as a bundle: a preparatory legal advice program, a specialized sexual assault court, and judicial education. The comprehensive legal advice program with standing could replace the smaller, preparatory legal advice program, but it is not quite as cost-effective, nor does legislation to close the gallery and use physical screens perform successfully on important criteria.

The options recommended address various aspects of the problem drivers identified earlier. With a preparatory legal advice program where survivors would have access to a few hours of legal advice on whether and how to proceed with police interviews, and what to expect from the courts including cross-examination, survivors would be better informed and prepared for the courts. With a specialized court, survivors would face fewer delays, have increased informational and emotional support, and depending on the design of the courts, could avoid the intense scrutiny and experiences of a full trial. Secondary victimization and insensitive judicial comments would be reduced further through a meaningful judicial education program that increases understanding of the impacts of trauma on behavior and eliminates harmful societal misconceptions about sexual assault.

These proposals do not solve problems completely; victim satisfaction and impunity for some perpetrators will continue despite anticipated improvements. This finding leads to the recommendation that survivors should be informed of existing alternative processes to the criminal court process and that these should be further researched and developed.

Chapter 1.

Introduction

On paper, Canada has some of the leading sexual assault laws in the world. For example, the legal definition of sexual assault is broadly defined to focus on consent rather than penetration, gender, or marital status, and there are “Rape Shield” provisions in the *Criminal Code* to limit defense lawyers from using gendered stereotypes against complainants in court.

In practice, however, there are strong indications that sexual assault survivors face barriers to justice. Only 5% of Canadians report their experience with sexual assault to the police (Statistics Canada, 2015). Only some of those reports make it through the police as “founded”, less than half in some jurisdictions (Doolittle, 2017b), and then police press charges in only some of those remaining “founded” reports (Johnson, 2012). Finally, at the court stage, Canada’s national conviction rate is 43% (Statistics Canada, 2016a). Holly Johnson describes this filtering process as an “attrition pyramid” where 99.7% of perpetrators of sexual assault are not held accountable for their crimes (Johnson 2012). While Johnson’s estimate is unverifiable given that the measures used to count sexual assault crimes differ across different stages of the criminal justice process, this filtering process is indisputable. This leads many to claim that the criminal justice process is incapable of effectively dealing with sexual assault and that there is a “system of impunity for sexual assault perpetrators” (O’Connell, 2017).

Provincial courts play an important role in this system. In 2014-2015, most cases brought to court did not lead to guilty verdicts. The conviction rate was 43% with a total of 1,116 found guilty; 45% of cases were stayed or withdrawn and 10% were acquitted (Statistics Canada, 2016a). These conviction rates are consistently the lowest of all victim-based crimes although the rates of other crimes have dropped substantially in recent years, lessening the divide somewhat. Conviction rates for sexual assault fluctuate across provinces to create a 28% gap across the lowest and highest convicting province. While conviction rates are an imperfect measure for justice outcomes, they are often an important indicator of whether or not perpetrators are being held accountable in some minimum way.

The courts are also viewed and experienced negatively by many survivors. A recent study conducted of 114 sexual assault survivors in three different Canadian cities found that two-thirds of female survivors lacked confidence in the court process, which is more than the 53% who lacked confidence in the police (Department of Justice Canada, 2014). The same study found that many survivors describe their experiences in the courtroom as: not what they were expecting or looking for, cold, unfair, and re-traumatizing.

This paper focuses on how to improve provincial court response to sexual assault cases, both in terms of the courts' role in a larger system of impunity for some perpetrators and its negative impact on the well-being of many survivors. There are of course many other sexual assault issues to address both within and beyond the criminal justice system, including police handling of cases, judicial sentencing and offender rehabilitation, sexual assault prevention, support services for survivors, and responses from institutions such as universities and workplaces. This paper focuses on one important issue among the many surrounding sexual assault.

Chapter 2.

Background

2.1. Sexual Assault Crimes

According to the 2004 General Social Survey on Victimization, 1.6 million Canadians, or 6% of the population aged 15 and older, indicated that they had experienced sexual assault in the past year.¹ This rate has remained relatively stable between 1999 and 2014, while rates of other crimes such as physical assault and robbery have significantly decreased over time (Statistics Canada, 2015).

In 2014, 71% of sexual assaults involved sexual touching, 20% involved forced sexual activity, and 9% involved sexual activity where the survivor was not able to consent because they were drugged, intoxicated, manipulated or forced in other ways than physically. Over half of sexual assaults took place in a commercial or institutional establishment, such as a restaurant or a bar. This is compared to 39% of physical assaults (Statistics Canada, 2009).

The vast majority (94%) of sexual assaults are committed by someone of the male gender (Statistics Canada, 2015), and are usually acted on alone (92%) (Statistics Canada, 2009). About half of sexual assaults are committed by the survivor's husband or partner (53%) (Statistics Canada, 2009). Sexual assault is the least likely crime to be committed by a stranger, at a rate of 44% (Statistics Canada, 2015). Survivors of sexual assault are of the female gender 70% of the time (Statistics Canada, 2009). Indigenous persons are more than twice as likely than non-Indigenous persons to be sexually assaulted (Statistics Canada, 2015).

2.2. Criminal Justice System Response: Pre-Courts

Of all victimization offenses, sexual assault is the least likely to be reported to the police at a rate of 5%. This rate has decreased slightly since 2004 when it was 8%

¹ This does not take into account the possibility that survey participants may not consider their non-consensual experiences as sexual assault nor be willing to divulge them.

(Statistics Canada, 2015). This is compared to the average criminal incident reporting rate of 31% (Statistics Canada, 2015). The reporting rate in 2004 for physical assault was 40% and 47% for robbery. Total police reports for sexual offenses (not necessarily all sexual assaults) have decreased by 36% between 1993 and 2002 (Statistics Canada, 2003).

Most (97.7%) of the 21,362 sexual assaults reported to the police in 2015 were Level I sexual assaults, with the remaining 1.76% Level II, and 0.48% Level III (Statistics Canada, 2016a). The corresponding rates of persons charged were 38%, 54% and 54% respectively (Statistics Canada, 2016a). It should be noted that even Level I classifications of sexual assault can still be very physically violent. In 2007, survivors were physically injured in 17% of Level I cases (Makin, 2013).

Survivors give a variety of explanations for not reporting to the police. The most commonly stated reason is because they felt it was not important enough (58%), which is higher than victims of other violent crimes (39%) (Statistics Canada, 2008). Other common reasons are: that the incident was dealt with in another way (54%), they felt it was a personal matter (47%), or they did not want to get involved with the police (41%) (Statistics Canada, 2008). A 2015 Ipsos Reid poll allowed self-identified victims to identify with 17 responses as to why they did not report to police, including: feeling young and powerless (56%), shame (40%), self-blame (29%), belief that reporting wouldn't do any good (19%), afraid of the legal process (11%), and know the person and didn't want to destroy their life (9%) (Paperny, 2015).

A substantial fraction of reports of sexual assault to the police are “unfounded”, meaning the police consider the allegation to be baseless. A 2017 analysis of 873 police jurisdictions representing 92% of the Canadian population revealed unfounded rates vary significantly by jurisdiction (Doolittle, 2017a). The national average is 19% compared to 11% for physical assault, and ranges from low digits to 51% depending on the jurisdiction (Doolittle, 2017b). This variability is supported by previous studies (Randall, 2010)(Johnson 2012). The reasons for considering allegations unfounded vary. In BC, police sometimes classified a report as unfounded based on whether the survivor verbally said “no,” and how “upset” the complainant seemed (Randall, 2010).

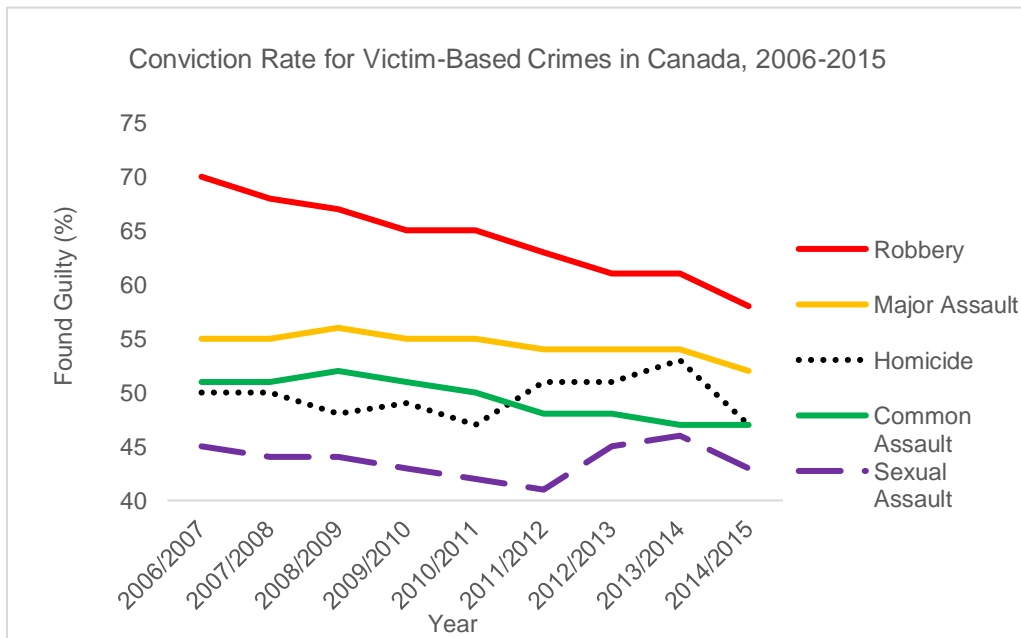
A smaller proportion of founded cases lead to police pressing charges. In some cases, police may determine there is not enough evidence to proceed. Holly Johnson finds that less than half of founded cases lead to a suspect being charged in 2007 (42% for Level I, 45% for Level II, and 68% for level III) (Johnson 2012).

2.3. Criminal Court Response

Impunity for Some Perpetrators

Of sexual assault cases brought to court in 2014-2015, most did not lead to guilty verdicts: 10% were acquitted, 45% were stayed or withdrawn,² and 43% were found guilty for a total of 1,116 found guilty (Statistics Canada, 2016a). This conviction rate is the lowest of all victim-based crime categories such as common assault (47%), homicide (47%), major assault (52%) and robbery (58%) (Statistics Canada, 2016a). This trend has remained relatively consistent over the last decade, although the gap has somewhat decreased as conviction rates for other crimes have decreased.

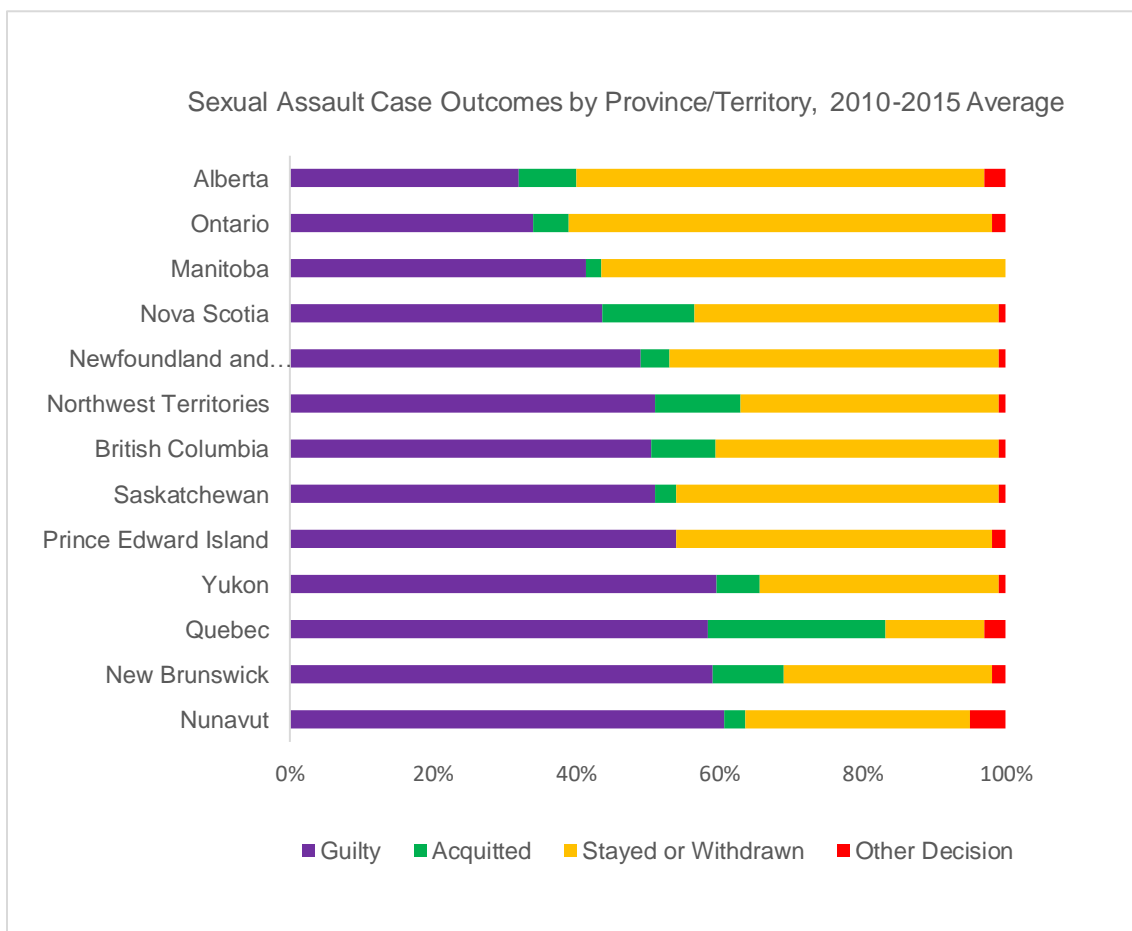
Figure 1: Conviction Rate for Victim-Based Crimes in Canada, 2006-2015. Based on Statistics Canada, 2016a.



² Statistics Canada defines this category as: “stays, withdrawals, dismissals and discharges at preliminary inquiry as well as court referrals to alternative or extrajudicial measures and restorative justice programs. These decisions all refer to the court stopping criminal proceedings against the accused” (Statistics Canada, 2016b).

Conviction rates fluctuate across provinces to as low as 32% and 34% in Alberta and Ontario respectively as of 2015 (Statistics Canada, 2016a). When conviction rates are averaged over 2010-2015 to account for possible fluctuations year to year, Alberta and Ontario remain the lowest convicting provinces while Nunavut, New Brunswick, Quebec and the Yukon have significantly higher rates peaking at 60% (Statistics Canada, 2016a). This makes for a 28% gap in range across the country. Acquittal rates also vary dramatically across the country. Often those provinces with the highest conviction rates also feature the highest acquittal rates. Over the five year-period of 2010 to 2015, the acquittal rate in Quebec was 25%, British Columbia and New Brunswick 10%, Alberta 8% and Ontario 5% (Statistics Canada, 2016a).³

Figure 2: Sexual Assault Case Outcomes by Province/Territory, 2010-2015 Average. Based on Statistics Canada, 2016a.

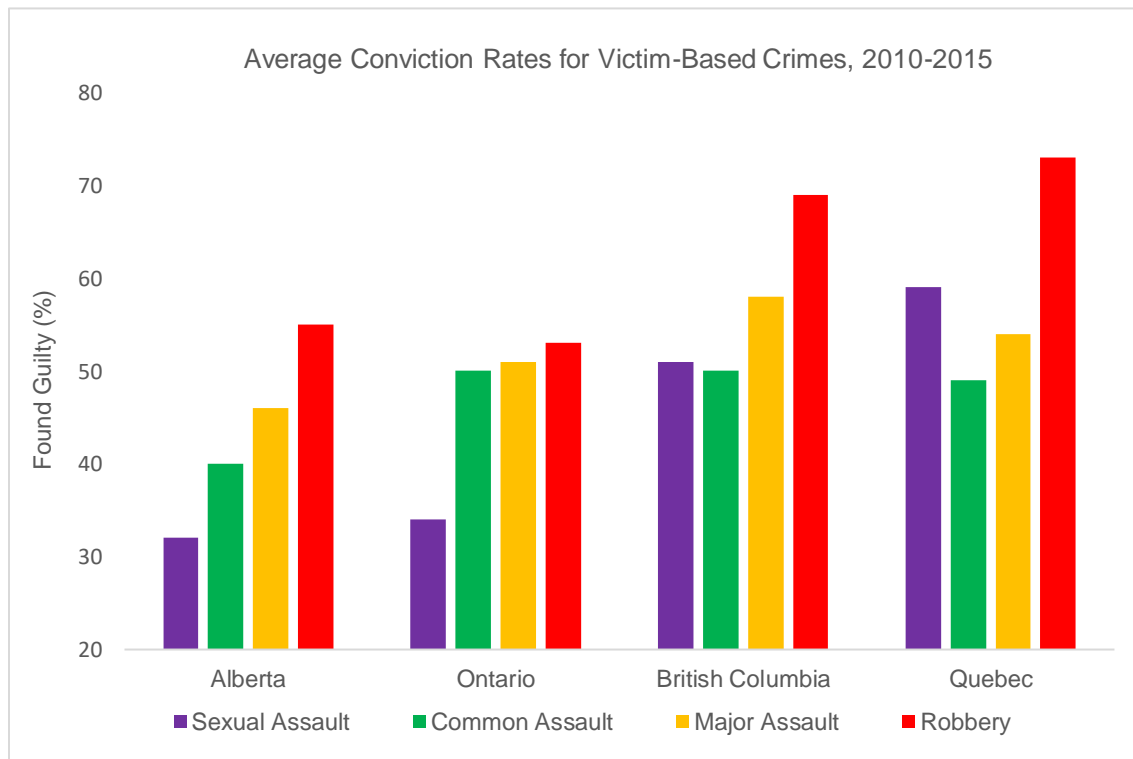


³ For Newfoundland and Labrador, the classifications “acquittal” and “stayed and withdrawn” are sometimes used interchangeably (Statistics Canada, 2016b).

There are many possible explanations for the diversity in outcomes across provinces that warrant further research but are not within the scope of this paper. Conviction rates do not provide precise measure for justice outcomes. Caution should be taken in comparisons because, for example, provinces and territories may have different systems for classifying their cases (Statistics Canada, 2016a).

Low conviction rates in Alberta and Ontario cannot be fully explained by a tendency for their courts to convict less in general. As seen in the graph below, their courts convict less for sexual assault crimes than for other crimes (Statistics Canada, 2016a).

Figure 3: Average Conviction Rates for Victim-Based Crimes, 2010-2015. Based on Statistics Canada, 2016a.



In the international context, Jorge-Martine Jehle finds wide variation in conviction rates for sexual offenses in Europe (Jehle, 2012). Noting the difficulties in comparative criminology given variations in statistical measures and definitions of sexual assault across countries, he nevertheless compares each country's number of convictions to the number of suspects cited in police reports. The ratios of success for convictions are as follows: Germany 14%, Netherlands 25%, Sweden 40%, and France at 82%. Jehle

notes that the number of reports to the police is lower in France and higher in Sweden, and urges further study on why there is such wide variation in conviction rates across countries.

Some critics consider conviction rates for sexual assault to be appropriately low because the courts are successfully doing their duty in combatting false allegations of sexual assault. However, there is little evidence that false allegations of sexual assault occur at a significantly, if at all, higher rate than other crimes. Estimates of false sexual assault allegations are extremely divergent and are considered unreliable for many reasons including small sample sizes and flawed methodologies (Rumney 2006) (Lisak *et al.* 2010). For instance, the 1996 FBI statistic of false allegations (8%), a higher rate than other crimes (2%), is often cited. However, as Lisak *et al.* note, that study is based on the unfounded rates of police, where “misclassification of cases...is routine” and where consistent criteria is not applied across crimes. Lisak *et al.* goes on to estimate based on the most recent reliable studies that false allegations reported to the police are between 2 and 10% (Lisak *et al.* 2010). Regardless of the exact figure, false allegations do not appear to be of major concern.

Critics also emphasize that the conviction rate for sexual assault is roughly similar to that of other crimes, especially since some rates have decreased in recent years. However, this argument fails to account for the gaps between sexual assault cases and other cases earlier in the criminal justice system; from lower reporting rates to unusually high unfounded rates. The cases brought to court have passed through this filtering process, and yet, lead to fewer convictions. Furthermore, this is not a convincing argument against efforts to improve court responses to sexual assault cases. It may even be the case that improving implementation of justice in this area of crime could lead to better outcomes for other crimes.

Unsatisfactory Experiences for Survivors

It is well established that many survivors are significantly negatively impacted by court processes. Constance Backhouse states that “witnesses who testify have always felt that it is they who were on trial rather than the person who they understood as having assaulted them” (Wright, 2016). Feminist scholars often echo that “the criminal trial frequently silences, doubts and disinherit survivors and renders them to the role of

mere 'witnesses'" (Flynn, 2015).

The 2014 Department of Justice study of 114 sexual assault survivors cites that some who have experienced the courts "perceive that the survivor does not have as many rights as the offender", believe that some criminal justice professionals are not helpful or sympathetic to survivors", and describe the courts as "hard on them", "cruel", and "cold and uncaring" (Department of Justice Canada, 2014). The same study cites ways in which many survivor expectations were not met including: looking to regain a measure of control over their lives when realizing that control rested with police and prosecutor, hoping to voice their experiences and be heard, and speak to the accused, but being limited in what they could say and to whom. Finally, many describe the process as re-traumatizing. As one survivor in the Department of Justice study noted:

"It is like being raped all over again. You have no control over what happens in the court. You are a powerless victim to the justice system, like a kid again."

Chapter 3.

Methodology

3.1. Research Questions

My research aims to answer two broad questions:

1. “What are causing these problems?” Specifically, what barriers are there to achieving results in provincial courtrooms across Canada, in terms of both holding perpetrators accountable and improving victim satisfaction? This question will be addressed in Chapter 4.
2. “What actions will address these problems?” Specifically, what policies can lead to achieving better results in the courts while considering possible trade-offs? This question will be addressed in Chapters 5-8.

3.2. Methodology

To answer these questions, I used multiple data collection methods. I conducted a literature review based on qualitative and quantitative data from the following sources: the Canadian Socioeconomic Database; academic, gray paper, and newspaper searches; and publications recommended by interviewees. I also collected qualitative data by conducting semi-structured interviews with 8 experts knowledgeable about sexual assault trials in Canada. I spoke to individuals from categories listed below on a confidential basis, unless otherwise noted. **These experts do not necessarily endorse my paper or its recommendations:**

- 3 support workers
- 1 anti-violence advocate
- 1 lawyer, not personally experienced in sexual assault cases: Clodagh O’Connell, Barrister & Solicitor in BC
- 1 legal scholar: Professor Jennifer Koshan, Faculty of Law, University of Calgary
- 2 judges: one identified as Judge G. Cioni, who served in Alberta from 1971 to 2015

To make recommendations about what policies government should adopt, I used a basic policy analysis methodology: establish evaluation criteria for assessing policy options, select the most promising policy options to assess, assess policy options, and make recommendations.

3.3. Limitations

I did not intend to interview survivors as a separate category of experts because I would have had limitations in providing the necessary support services to conduct interviews and because I acknowledge that the views of many millions of survivors would be better captured through recent research from survivor surveys and interviews that are far more extensive than mine could have been.

No prosecutors were interviewed in part due to limited means of contacting them confidentially.

My research has been framed to focus on the court response portion of the criminal justice system. This is primarily an issue of containing the scope, however there are good reasons to focus on the courtroom. For instance, researching policies to improve the pre-court stage of the criminal justice system still leaves survivors facing the barriers of the courtroom. I also had less access to data sources from the police.

Chapter 4.

Problem Drivers

There are at least three main sources driving the problem of why conviction rates are low and why many survivors are dissatisfied with court response: the lack of external evidence (which elevates the impact of rape myths and stereotypes, and personal scrutiny in the context of intimacy and trauma); fundamental norms of justice; and backlogs and delays.

4.1. Lack of External Evidence

The determination of sexual assault cases often depends on establishing whether consent was obtained or not. Without a third-party witness in most sexual assault cases, the court must make its decisions based on *credibility and reliability* of conflicting narratives provided from the complainant and the defense. Credibility has to do with who can be believed, and reliability has to do with who can provide the most accurate account of the experience (without bias, memory loss, etc.). There are several possible factors that facilitate tilting credibility and reliability against complainants:

Rape Myths and Stereotypes

Rape myths are erroneous beliefs about sexual assault, survivors, and perpetrators of sexual assault. The prevalence of rape myths can influence the credibility and reliability of complainants, as well as of the accused. For instance, a judge may decide a complainant's testimony is not credible on the basis that they did not react to the alleged sexual assault the way stereotypes deem they should have (kicking, screaming, etc.). As Justice Claire L'Heureux D. Dubé's notes in *R v Seaboyer* (2016), rape myths "operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly."

Rape myths include:

- expectations of how an “ideal victim” should react to sexual assault (such as verbally saying no, struggling, or not continuing contact with the perpetrator)
- expectations of what perpetrators of sexual assault are like (such as being “creepy”, or being of a certain race)
- discriminatory gender stereotypes (such as the propensity of women to be misled by therapists, for jilted females to seek revenge on their exes, or for sex workers to have an agenda)
- expectations for survivors to be held responsible for risk-taking (victim-blaming)
- misunderstandings of what consent means in law (such as believing in “implied consent”)
- prejudice about sexual activities (such as the view that it is common to regret consensual “one-night stands”, motivating false allegations of sexual assault)

While the definition provided by Dubé identifies insidious subconscious factors influencing decisions, the issue here can also be more simply understood as lack of empathetic thinking. One support worker I interviewed indicated that “there’s just a real lack of understanding of how people act when they’re sexually assaulted.” Stereotypes can also go beyond sex or gender, to bias against Indigenous peoples and persons living with disabilities, mental health, unemployment, or substance use issues. It was frequently mentioned in my interviews with support workers that survivors with these characteristics are less likely to have their cases lead to convictions.

Many legal scholars, feminist scholars, women’s advocacy groups, and activists maintain that rape myths persist in Canadian courtrooms despite Rape Shield laws. Quantitative research on their prevalence is limited. Several qualitative analyses point to clear examples that they do occur at some scale.

Susan Ehrlich uses 1990s data to show how defense lawyers make use of linguistic and rhetorical devices, such as prepositions and framing, to perpetuate rape myths that support their arguments (Ehrlich, 2001). Other research found that judicial language tended to describe stranger rape in the language of violence but partner rapes were described using less violent words, suggesting for example, that the defendant was “offering” his penis to the victim’s mouth (Linda Coates, Bavelas, and Gibson, 2001).

Most recently, the inappropriate comments of four Alberta judges are being scrutinized publicly on appeal; for example, one judge asked a complainant why she could not just keep her knees together (Crawford, 2017). Christine L.M Boyle states that poor decisions get made despite most judges taking some educational courses in sensitivity (Makin, 2013). Jennifer Koshan has reviewed 400 marital rape cases between 1983 and 2013 and finds that poor decisions are still being made across all jurisdictions in Canada (Blatchford, 2016). Elaine Craig provides anecdotes from recent court transcripts demonstrating that cross-examinations still deploy rape myths to invoke lack of credibility, such as suggesting that a complainant should surely have screamed during an assault (Craig, 2015).

The permeability of certain Rape Shield laws has also been brought into question. In an analysis of 14 cases between 2002 and 2006, Lise Gotell finds that in nearly half, some therapy, medical, child welfare, or other personal records were released to the defense by judges without sufficient justification (i.e. through waivers, or without consideration to its potential discriminatory uses based on stereotypes) (Gotell 2008). Elaine Craig also points to several cases where Section 276 of the Criminal Code is misinterpreted or violated. Section 276 is meant to shield against defense lawyers using evidence about a complainant's sexual history to make arguments that rely on rape myths. Craig points to several recent cases where judges have permitted such evidence to be used to demonstrate a "pattern of consent" (Craig 2016b).

Personal Scrutiny in the Context of Intimacy and Trauma

Sexual assault complainants face what Craig describes as an "inhospitable court", which can damage the perceived credibility and reliability of the complainant. Although complainants' names are usually placed under publication ban, the courtroom is a public arena. Sexual assault trials require complainants to publicly answer invasive questions about intimate sexual activities and traumatic experiences, in addition to other aspects of their lives. Former prosecutor Sandy Garossino writes that it is standard to also ask invasive questions about drug use, mental health, social media use, tattoos and piercings, nude photographs, sexts, pubic grooming habits, sexual preferences and habits, and personal finances (Garossino, 2014).

“Most people can't even talk about sex, let alone get up in a courtroom to talk about

something like this while the person you are accusing sits there staring at you...It's a nightmare." – Christine L.M. Boyle, University of British Columbia (Makin, 2013)

Some scholars argue that these invasive questions are not merely inherent to the nature of sexual assault crimes, but are specifically put forward by defense lawyers to the fullest extreme. David Tanovich argues that defense lawyers still view their jobs in cross-examination as that of "whacking" the complainant (Tanovich, 2015). Craig highlights efforts to humiliate complainants through some court transcripts where, for example, the defense repeatedly insists to a complainant that her vagina was "wet" because she was aroused.

"I just remember starting off [this support work] and being shocked at how they actually spoke to the victim; I get that they're really trying to rile up the victim and get them confused and say things they don't mean; but it's brutal, like I actually can't believe it." – support worker interviewee

Defense lawyers tend to strongly disagree that this is a phenomenon and argue that judges interfere in the rare circumstances that this does occur.

This type of invasion into the personal lives of survivors is not only difficult to experience for many, but the answers revealed can be used to propagate rape myths. Even in courtrooms free of rape myths, though, Craig argues that complainants who do not comply exactly to norms of civility and scripted communication in the courtroom are seen as less reliable. Craig argues, "the good witness...does what is expected. She does not rage against the unnecessary humiliation of a defense lawyer whose professional role ostensibly demands that he interrogate, to an absurdly granular degree, [her bodily details]" (Craig, 2015). Survivors of assault must comply in a context where they often become tired, distressed, require counselling services, and have their experiences of sexual assault invalidated as the defense portrays them as lying, confused, and/or hysterical over a multi-day process.

The environment also shines a harsh spotlight on the complainant during cross-examination. Craig argues that complainants are expected to maintain "an unrealistic level of consistency" on minute affairs such as the colour of their dress over a series of retellings of their experiences since the sexual assault occurred (Gee, 2016). The

credibility of complainants “amount[s] to a required performance of the requisites of rational legal subjectivity, for which there is always the possibility of failure” (Gotell, 2008). Arguably, most people except for those in the legal profession would not fare well in the face of cross-examination.

The probability of failure is exacerbated given the impact of trauma on survivors recounting their experiences. Clinical psychologist Dr. Lori Haskell states that traumatic memories may not follow expected patterns of reliability (Tremonti, 2016). For instance, trauma may make it difficult to provide linear narratives of what happened and to recollect basic facts.

“So, we would say to policy makers, sit in on trials.... if you can, actually put yourself in that position, and see how those things play out. And sitting there, just ask yourself, is this scene, is this scene right?”—support worker interviewee

4.2. Fundamental Norms of Justice

Certain fundamental norms and structures of Canadian courts further tilt the scales of credibility and reliability away from the complainant and towards the accused.

First, the presumption of innocence of the accused deliberately and explicitly tilts the scales in favour of the accused. The presumption of innocence allows the accused several rights that the complainant is not granted. For instance, the accused has the right of disclosure which allows them to view and prepare themselves to respond to the prosecutor’s evidence while the complainant does not receive the same benefit. It also allows them the right to cross-examine the complainant. The complainant does not have such a right – indeed no testimony from the accused is required. Furthermore, the accused has the resource of counsel to make their case. While the complainant has the same right to counsel, they do not have that resource provided to them, despite the often increased weight given to their testimony during cross-examination. Instead, the complainant is provided with a Crown prosecutor who does not work on their behalf but rather the state. Some Crown prosecutors may take more time to meet with survivors to bolster the case but this is not required in theory nor is it the normal practice (Bennett, 2012). These factors stack credibility and reliability in one direction.

Second, the prosecutor's evidence, including the complainant's testimony, must meet the evidentiary burden of proof beyond a reasonable doubt. Notably, this burden is a heavier burden than that of the balance of probabilities. As Judge Horkins noted in *R v. Ghomeshi* (2016):

“My conclusion that the evidence in this case raises a reasonable doubt is not the same as deciding in any positive way that these events never happened. At the end of this trial, a reasonable doubt exists because it is impossible to determine, with any acceptable degree of certainty or comfort, what is true and what is false.”

Both judges interviewed said that the criminal burden of proof was the key deciding factor making it difficult for complainants to succeed in sexual assault cases.

Third, there is the issue of how the court is structured, in terms of having a judge deliberate over conflicting accounts between Crown and Defense counsel. Lawyer David Butt, who has represented many complainants, describes this structure as “adversarial justice” and argues that Canadian courts are set up to have winners and losers not seeking the true history of events but taking whatever means necessary to win (Butt, 2016). This structure may exacerbate the propagation of rape myths and contribute to an inhospitable personal scrutiny of complainants that, as described earlier, negatively affect the credibility and reliability of complainants.

4.3. Backlog and Delays

In my interviews, it was widely recognized that prosecutors have large workloads. Some support workers noted that prosecutors may not even contact the survivor before going to trial, or do it too late, while another support worker noted variability – some survivors received only one phone call and others more.

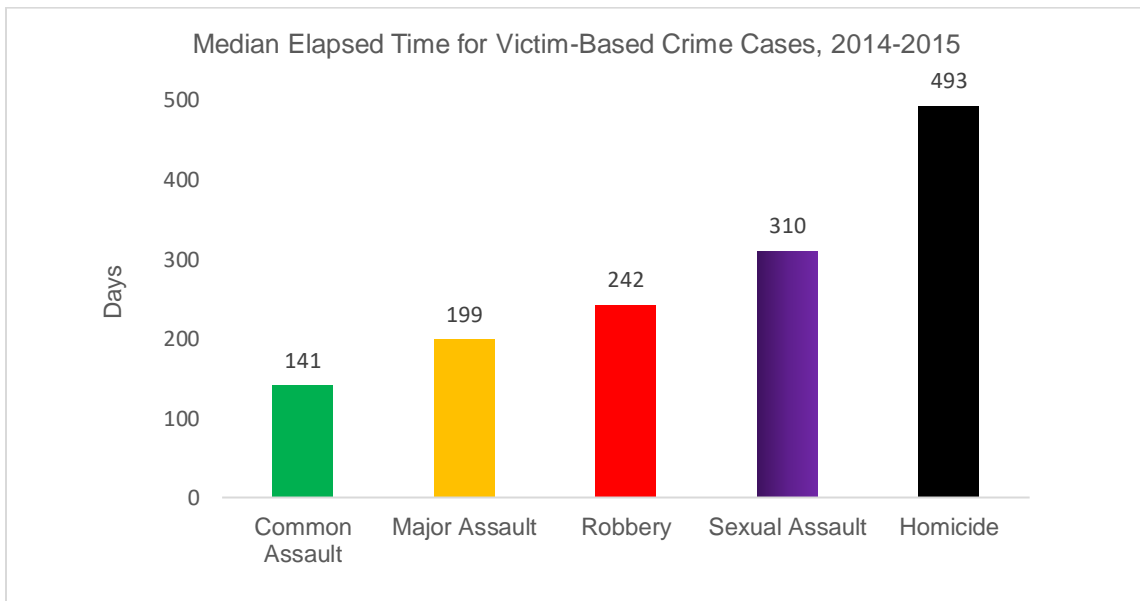
“The courts are backlogged, [prosecutors] informally, I think, are encouraged to kind of get things off their plate, they're certainly not encouraged to run iffy cases. So, that's one factor. It's a very big factor too.”—support worker interviewee

As a former prosecutor in Manitoba states, the standards for a prosecutor to pursue a case in most provinces (reasonable prospect for conviction) are simply higher

than those of police to charge a suspect (Malaviya, 2008). Given this standard, and the difficulties in pursuing sexual assault cases, backlogs just add to the many reasons for prosecutors to drop cases.

Delays also pose an issue for survivors. The median elapsed time for sexual assault in cases in Canada is 310 days, which is significantly higher than other victim-based crimes except for homicide (Statistics Canada, 2016b).

Figure 4: Median Elapsed Time for Victim-Based Crime Cases, 2014-2015. Based on Statistics Canada, 2016b.



One support worker noted that many survivors may not be aware at the time of police interviews that they must testify in front of the accused so many months later. Another support worker noted that survivors need to take time out of work and find childcare in some cases, only to face cancellations. Pressure from the perpetrator to drop-out persists during a longer elapsed time (Tutty *et al.*, 2011). Furthermore, interviewees noted an issue with delays particular to sexual assault cases:

“Women then get in a place in their healing process where they don’t want to reopen that can of worms, they don’t want to go back there, they want to put it behind them.” – support worker interviewee

“[Survivors] don’t want a long-term relationship with this person that harmed them, especially if it’s an acquaintance sexual assault or something, where they don’t have a

relationship...already.” –anti-violence advocate interviewee

Finally, the high expectations for a complainant to provide accurate and consistent memory recall during cross-examination are more difficult to meet the longer the elapsed time between the crime and the cross-examination.

Delays happen for many reasons (Standing Senate Committee on Legal and Constitutional Affairs, 2016). Sometimes defense can play a big role:

“It’s absolutely used as a tactic. Defense lawyers know. I don’t mean to demonize them because I’ve met some pretty decent ones, but defense lawyers know that the longer this drags on, the more likely it is that at some point she is going to go ‘fuck it. I’m not doing this anymore.” –support worker interviewee

Chapter 5.

Policy Evaluation Criteria

Policy options are compared to one another based on common criteria. These criteria have been chosen to represent the most important objectives and trade-offs to achieving those objectives. These criteria, and their respective measures, are defined and justified below, with a summary table provided at the end of this chapter.

5.1. Justice

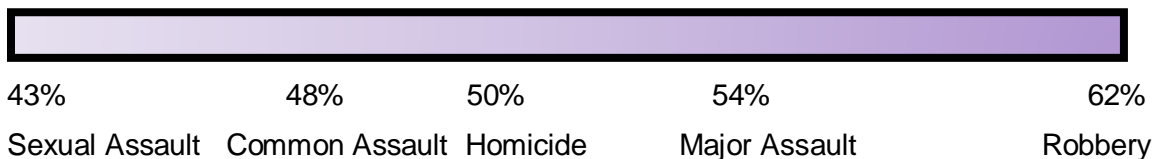


i. Holding Perpetrators Accountable

One of the main objectives of this paper is to address the contributions the court makes to the larger issue of “impunity” for some perpetrators of sexual assault. Impunity has to do with perpetrators failing to be held accountable for committing a crime. While conviction rates do not provide a precise measure for justice outcomes, they are the closest measure available to capture this concept. The higher the rate, the more likely this aspect of justice is fulfilled.

Increases in conviction rates will be ranked as: Negligible, Minor, Moderate, and Major. Policy options will be ranked relative to one another. For reference, a major increase in conviction rates at the national level would put sexual assault conviction rates on par with those of major assault.

Figure 5: Canadian Conviction Rates, Victim-Based Crimes, 2010-2015 Average. Based on Statistics Canada, 2016a.



ii. Protecting Innocent Accused

However, it is possible to achieve high conviction rates at the expense of justice. This is why it is important to recognize justice as serving dual purposes; while holding

perpetrators accountable is important, so is ensuring that innocent people who are falsely accused are not convicted. Therefore, the second aspect of justice that will be measured is the risk of false convictions. The ranking for this is: Negligible, Minor, Moderate, and Major.

These two criteria of justice, holding perpetrators accountable and protecting the innocent accused, are not perfectly negatively correlated; there are multiple mechanisms to hold perpetrators accountable that correlate with varying degrees of false convictions.



5.2. Victim Satisfaction

Another main objective of this study is to address the negative experiences survivors undergo as part of court processes. Although a perpetrator might be found guilty, it may come at a profound psychological cost to the survivor through hostile, drawn-out court processes.

This criterion attempts to capture the survivor's quality of experience with courtroom processes. The primary impact on quality of experience measured will be i. the extent to which secondary victimization is minimized. Secondary victimization includes experiences of being victim-blamed, disrespected, and re-traumatized. Other factors that will be considered for each option is the ii. impact on court delays and iii. access to informational or emotional supports.

It may also be possible that some policy options have iv. an impact on the survivor's sense of justice even though it may not lead to convictions. It is important to include this as a component of victim satisfaction even though it may not fit traditional understandings of justice (Clark 2015). As Kathleen Daly argues, we should "not assume there is one (or perhaps a handful) of desirable justice responses"; context matters, diversity exists, and it is important to be open to shades of gray (Daly 2015). Indeed, interviews with survivors show that justice spans a range of possible outcomes beyond convictions. These include acknowledgement and validation of harm, a response from public authorities that demonstrates a commitment to prevent sexual assault, the perpetrator taking responsibility through an apology and being held accountable, and wanting to feel safe, free, and able to move on (Clark 2015).

This study acknowledges that framing victim satisfaction in universal terms is problematic as all survivors experience assault differently and additionally have different experiences across race, language, class, and other characteristics (Johnson and Fraser 2011). This study is limited in scope from taking an in-depth approach to measuring impacts on diversity.

Taking these measures together, victim satisfaction will be ranked in terms of improvement: Negligible; Minor; Moderate; Major.



5.3. Stakeholder Resistance

One of the key trade-offs to any new policy that may affect its effectiveness or ability to be implemented well is stakeholder resistance. In this paper, the stakeholders considered will be those relevant actors who could resist the policy to the extent that it may influence its success. This paper is not concerned with the personal taste or opinion of various actors if they do not pose a threat to the success of the policy. Therefore, considerations for stakeholder resistance include the risk of the policy facing a constitutional challenge from stakeholders or the risk of not being implemented as intended. The measure for stakeholder resistance will be the extent to which those relevant stakeholders are resistant to the policy. The ranking will be: Negligible; Minor; Moderate; Major.

5.4. Financial Cost






One of the key considerations to any new policy is financial cost, meaning the public expenditures that would be required. Public decision-making is often constrained by considerations of cost.⁴ The rankings will be: Negligible; Minor; Moderate; Major. These respectively refer to around a million dollars, a few million; several millions; and tens of millions. Again, only rough estimates can be provided.

⁴ This refers only to financial cost, not economic cost. For those who are interested, a recent benefits transfer economic valuation places the intangible and tangible costs of sexual assault in Canada at between \$136,372 - \$164,417, the highest for any crime cost after homicide which is in the millions (Gabor, 2016).

5.5. Evaluation Matrix

Table 1. Evaluation Matrix with Criteria and Measures.

Criteria	Criteria Definition	Measure	Rankings
Justice 	i. The extent to which perpetrators are held accountable	Increase in conviction rate	Negligible; Minor; Moderate; Major (nationally, on par with major assault)
	ii. The extent to which the innocent could be wrongfully punished	Risk of false convictions	Negligible; Minor; Moderate; Major
Victim Satisfaction 	The extent to which quality of experience for the survivors is improved	Improvement in the quality of experience based on: <ul style="list-style-type: none"> i. minimizing secondary victimization ii. minimizing delays iii. increasing emotional and/or informational support iv. fulfilling alternative notions of justice 	Negligible; Minor; Moderate; Major
Stakeholder Resistance 	The extent to which actors who could negatively impact the effectiveness of the policy resist the policy	Level of resistance	Negligible; Minor; Moderate; Major


<p>Financial Cost</p> 	<p>The extent to which public expenditures are committed</p>	<p>Annual dollar amounts</p>	<p>Negligible (around a million); Minor (a few million); Moderate (several million); Major (tens of millions)</p>
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Figure 6: Visual Ranking System for Evaluation Matrix.

Least desirable outcomes

Most desirable outcomes



Chapter 6.

Policy Options

Five policy options have been selected for consideration by government decision-making bodies (federal or provincial governments). The policy options explored here attempt to address the problem drivers identified earlier (Ch.4) except that none of the options attempt to change fundamental norms of justice, such as the presumption of innocence and proof beyond a reasonable doubt. Of the options considered, not all directly modify the court process. For example, while one option makes major modifications to the courtroom structure, another option simply requires judges to take time away from court, and another provides services to survivors before even reaching court. However, all options target the problems found within the court process.

This chapter outlines what these options are and assesses their potential success according to the established evaluation criteria. Other policy options that were considered briefly but not in-depth can be found in Appendix A.

6.1. Specialized Sexual Assault Court

Specialized courts are designed to better address specific types of crimes than general courts. There are a wide variety of design elements available including but not limited to file-ownership (one prosecutor per victim), prosecutors and judges who are specialized in the area, and dedicated support worker programs. There is no such court for sexual assault in Canada but there are many specialized courts that address different types of cases such as drugs and domestic violence.

Currently the only specialized courts for sexual assault in North America, such as The New York Sexual Offenses Court (*circa* 2005), make sentencing decisions but do not hear trials. New Zealand has established a two-year pilot of a specialized sexual assault court, which begins hearing cases in mid-2017. South Africa developed its first sexual assault court in 1993 and had 74 such courts by 2004 (New Zealand Law Commission, 2015). These courts featured specialized prosecutors and judicial officers, as well as victim counselling. The last court closed in 2008 after backlogs and concerns

about prioritizing court resources; however, a 2013 government review recommended re-establishing them. An audit between 2002 and 2003 revealed conviction rates of 62%, compared to 42% in the general courts (Justice and Constitutional Development Department, 2013). Victim satisfaction was also reported to be high, with only 10% of 44 survivors surveyed expressing dissatisfaction (Flynn, 2015). There were still some concerns with delays, secondary victimization, and insufficient access to support services and follow-up care (Flynn, 2015).

Canadian Domestic Violence Courts

Canada began developing specialized courts for domestic violence in the 1990s. There are currently over 65 domestic violence courts in Canada (Ursel, 2014), spanning across most provinces and territories. Each court varies widely in its design elements. For example, Ontario's courts have a pro-prosecution policy that encourages prosecutors to pursue cases even when the survivor withdraws, the Yukon's has a rehabilitation or treatment component, and Calgary's is designed to reduce delays and increase the use of peace bonds. Some courts are more 'integrated' meaning they are more focused on making convictions, while others are more 'interventionist' meaning they are more focused on preventing recidivism. There is therefore no one Canadian model. What many courts have in common however are:

- specialized prosecutors
- caseworkers to support survivors
- file-ownership or at least some element of case management that treats domestic violence cases apart from other cases
- guidelines for timelines to reduce delays

These three elements make up the lowest threshold for a specialized court.⁵

Many advocates have supported specialized sexual assault courts and most of the interviews I conducted also strongly supported specialization of some sort. In the

⁵ Jennifer Koshan in my interview with her emphasized that specialized judges are a highly valuable piece to the specialized court puzzle. Specialized judges typically have not been used after a brief trial period in Winnipeg (Tutty *et al.* 2008). It may be difficult to find a sufficient and sustainable number of judges willing to staff only sexual assault cases, as was the case when the UK considered implementing sexual assault courts (New Zealand Law Commission, 2015).

2014 survey of 114 sexual assault survivors across Canada, some survivors indicated the desire for specialized prosecutors (Department of Justice Canada, 2014).

a. Justice

i. Holding Perpetrators Accountable

There is some evidence to support that a specialized sexual assault court in the style of existing Canadian domestic violence courts would contribute to increased convictions.

Tutty, Ursel, and Douglas note 2002 conviction rates for specialized domestic violence courts in Edmonton, Calgary and Winnipeg, at 52%, 53%, and 54% respectively. They compare these rates to Regina, which did not have a special court at the time, at 55%, and national statistics for 2003 domestic violence, at 49% (Tutty *et al.* 2008). The differences are small if not insignificant. According to a 2011 evaluation of the domestic violence court in Calgary, the court does not appear to have increased conviction rates (Tutty, Koshan, Jesso, and Warrell, 2011). The history of Winnipeg's domestic violence court suggests that there is as much variability in conviction rates within a specialized court as there might be across both specialized and general courts. Winnipeg's specialized court started in 1990, and between 1992 and 2004 conviction rates have fluctuated between 44% and 56% (Ursel, 2014). There has been a rough incline since 2000 though (Ursel and Hagyard, 2008). Ursel and Hagyard speculate that this is correlated with a dramatic reduction in cases set for trial, as well as the appointment of a committed prosecutor (Ursel and Hagyard, 2008).

The domestic violence court in Toronto records substantially higher conviction rates: 81% in a sample of 387 prosecuted (Dawson and Dinovitzer, 2008). In another study by The Woman Abuse Council of Toronto where volunteers tracked 96 cases over 8 months, 67% of accused were found guilty (53% plead guilty) (The Woman Abuse Council of Toronto, 2006). However, convictions are classified such that an offender found guilty of only one of many possible charges is considered convicted (Dawson and Dinovitzer, 2008). In the case of domestic violence, which sometimes involves multiple and/or different charges such as trespassing, this could mean many charges are being dismissed.

ii. Protecting Innocent Accused

There is little to no risk of increasing false convictions with this policy option. In theory, the public acknowledgement and concern with sexual assault expressed by selecting this option could embolden some malicious persons to take advantage of the system, but this option does not provide them with many tools to take them very far. Prosecutors with more experience in their area likewise do not pose a threat to the justice system –if anything they are more capable of spotting false allegations.

b. Victim Satisfaction

There is a good chance that victim satisfaction would be higher than with improved relationships with prosecutors, more information and emotional support for survivors, reduced delays, and in some court designs, fewer trials. Some key concerns would remain, especially in terms of severe cross-examinations and judicial insensitivity.

A qualitative study with 29 criminal justice personnel and health and social service providers in Ontario suggests that many survivors have had positive experiences with domestic violence courts especially when kept informed by a victim assistance program (Johnson and Fraser, 2011). This is backed by older data where victims in Ontario's early intervention courts were significantly more likely to be satisfied with court outcomes than other victims (Johnson and Fraser, 2011).

Support workers and specialized prosecutors are often viewed positively. Several stakeholders of the Calgary courts interviewed in 2011 asserted that there was more empathy, knowledge, and communication than before. Of 19 victims interviewed, 90% found court workers helpful (Tutty, George *et al.*, 2008). As one support worker interviewed noted, as the case drags on over months, Crown is likely not going to be keeping in touch with victims, so having some support is key. Support workers can act as a link between Crown and victim when it is most needed. A Winnipeg study found that victim assessment of specialized prosecutors was more mixed with 44% positive, 10% mixed/factual, and 40% negative on average (Ursel, 2013).

Some courts eliminate the issues of rape myths, stereotypes and personal scrutiny in the context of intimacy and trauma altogether by avoiding a full trial with cross-examination, which some survivors may prefer. In Calgary, prior to the specialized court, 43% of cases were concluded before trial or without a trial (Tutty, Knight, Warrell 2011). Now, 70% now are (Tutty *et al.* 2011). This correlated with an increase in the use of peace bonds from 8% to 32%. A similar trend occurred in Winnipeg; guilty pleas increased by 7% a decade after the court's inception (Ursel and Hagyard 2011), and between 2001 and 2008, the jump went from 44 to 74% (Ursel, 2013). In conviction-focused courts such as the one in Toronto though, severe cross-examinations are still a mainstay.

Many of these specialized courts are associated with reduced delays. A 2011 evaluation of the Calgary courts found that delays were noticeably decreased (Tutty, Koshan *et al.*, 2011), and similar results were found in Ontario (Johnson and Fraser, 2011). Still, there are criticisms of many delays and adjournments. The Woman Abuse Council of Toronto study of 96 cases in Ontario found that the average case was completed in 12 months, as opposed to the 4-month guideline set out by the Ministry of the Attorney General (The Woman Abuse Council of Toronto, 2006).

There are also concerns about a lack of awareness of the dynamics of intimate partner violence. This concern is raised by a court watch pilot project conducted by volunteers, observing three domestic violence courts in Toronto between 2013-2015 (Cassell, Green and MacGregor, 2015). They found that although some judges provide excellent examples for condemning violence, sometimes judges barely acknowledge or verbally denounce the violence; make comments to soothe the perpetrator; make comments trivializing the victim's experience of abuse; and provide minimal indication of understanding the power dynamics at play in relationships. Some of the stakeholders in the 2011 Calgary evaluation also suggest the need to enhance education of justice personnel about diverse populations, such as ensuring that the experience of domestic violence felt by immigrants is not minimized (Tutty and Koshan *et al.*, 2011).

c. Stakeholder Resistance

Setting up a specialized court requires political will, judicial leadership and

multiple partnerships (Bennett, 2012). Typically, judges and Crown prosecutors play a large role in developing specialized courts. It is likely that there are willing participants among judges and Crown prosecutors to set up specialized sexual assault courts. Many judges are likely to prefer working on a rotational basis than being specialized but this policy option which could pose staffing issues for specialized judges, but this option as analyzed does not require a high degree of judicial specialization.

d. Financial Cost





The cost for a province to maintain a specialized sexual assault court in a province similar in size to BC is estimated to be in the low multi-millions per year.

Specialization of prosecutors is not expected to incur massive spending as it mostly requires redistributing resources rather than expanding resources. Depending on the extensiveness of any training the prosecutor receives, there may be costs associated with this, as well as capital costs of maintaining a courtroom. Court administrative changes should not be underestimated either. In BC, the cost of court services annually is greater than the cost of the judiciary (BC Ministry of Justice and Ministry of Public Safety and Solicitor General, 2016).

Most of any additional costs associated with this option have to do with case worker services to support survivors. Manitoba's Ministry of Justice provides services to over 10,000 victims of crime at \$4.56 million (Manitoba Ministry of Justice, 2016). There were 323 sexual assault cases in 2014-15 in BC so roughly speaking, the annual cost of a dedicated victim assistance program would be only a fraction of that. Specialized courts with counselling services would cost more.

e. Summary

Table 2. Summary Evaluation of Option 1.

Justice 		Victim Satisfaction 	Stakeholder Resistance 	Financial Cost 
Negligible to Major [Minor]	Negligible	Moderate	Negligible	Minor

6.2. Funding Trauma-Informed, Intersectional Violence Education for Judges

This option would provide grants to independent judicial associations to make trauma-informed intersectional sexual violence education available for judges on a recurring basis. The province would have to give judges paid leave to take this program as well. The program would be composed of self-reflective sexual-assault specific education, such as two day-long workshops, covering information about rape myths, Rape Shield provisions, and how trauma influences behavior, using an approach that acknowledges intersectionality or diversity in the Canadian population. Ideally the education would not just be theoretical but hands-on with a practical application component. Education programs could be developed in partnerships between provinces, the National Judicial Institute, and victim support groups. However, due to judicial independence, judicial associations would ultimately be the arbiters of the programming content.

Currently, judicial education in Canada is run by judicial associations. Judges often must include attendance at conferences and programs in their education plans. For example, new provincial judges across all provinces attend a week-long skills seminar within a year of joining the judiciary. Judges in BC are required to attend two conferences a year and attend two weeks of shadowing other judges. The National

Judicial Institute also offers optional courses spanning a broad range of subjects, and seminars and conferences are held by the Canadian Institute for the Administration of Justice and the Canadian Association of Provincial Court Judges.

My interviews with judges and lawyers suggest that these courses are of excellent quality and there is no lack of resources for judges to know their duties. However, because they are optional, judges are busy and may not take advantage of them. Judges are also self-selecting in prioritizing learning, meaning that those that might need it the most might not use it. Furthermore, there is no public listing for education with a heavy emphasis on an intersectional lens and the impacts of trauma on behavior and testimonial evidence. In response to recent public controversy over insensitive judicial remarks made in court, Alberta's Chief Judge Matchett is now programming a 6-hour program on sexual assault law at the court's 2017 spring conference. This policy option would provide funding for education of this kind, and would tie the funding to programming most likely to be accessed by most judges, such as biannual conferences.

The most ideal version of this option would be to couple this programming with an accreditation scheme. However, governments are restricted in being able to implement accreditation schemes among the judiciary. The judiciary would have to develop this themselves. Indeed, in England and Wales, judges are required to complete three days of interactive training by a judicial association before presiding over sexual assault cases (New Zealand Law Commission, 2015). This specialization is an initiative of the judiciary itself (Shetreet and Turenne, 2013), and at least two-thirds of circuit judges are authorized through this process (Pitchers, 2003).

Lacking the ability to force accreditation, the option being examined in this paper would simply aim to provide funding for education programs.⁶

⁶ At the time of writing this paper, a private member's bill (Judicial Accountability Through Sexual Assault Law Training) was introduced in parliament that requires written (not only oral) judgements, tracks the number of judges who have received voluntary education, and restricts eligibility for judicial appointment to lawyers who have taken recent sexual assault education. The first two measures increase judicial accountability but the third lacks effectiveness without a commitment to funding the education.

a. Justice

i. Holding Perpetrators Accountable

Judicial education can have a significant impact on judges. Koshan observes from her work analyzing marital rape cases from 1983 until 2013 that judges have improved over time in eliminating harmful myths and stereotypes from their decision-making processes. However, she indicates that there is still work to be done in this area. Similar limitations are found with the Ontario domestic violence courts which provide intimate violence training to judges (Ontario Women's Justice Network, 2011). A volunteer court watch program observing cases in Toronto noted that many trivializing and problematic comments were still being made by judges (Cassell *et al.*, 2015). Koshan says that "in part that just shows how deeply entrenched some of the myths and stereotypes are about how victims are expected to act...it does some take some time to root [them] out." To change a value system is a life-long process, and as another support worker notes, "you can only effectively train people who are interested in learning."

The degree of impact that education can have is also tempered by the extent to which the problem is located in the lack of awareness or insensitivity of judges. When asked, support workers could not identify the percentage of judges who lack awareness and are insensitive. However, all the support workers interviewed concluded that trauma-informed education is a priority for judges. It is fair to say that most judges could probably use some education. Even well-lauded judges such as Justice Horkins in the Ghomeshi decision relied on stereotypical assumptions about what survivor behaviour should be post-assault (despite warning against such myths), used unreasonable standards of memory, and made a comment about how navigating the criminal justice system is simple (Sealy-Harrington, 2016). As former prosecutor Sandy Garossino writes, judges in Canada both lack diversity and accountability that other professions do; although a handful of judges have resigned upon investigation, no judge has ever been fired in forty-five years (Garossino, 2016).

The potential success of this option is also limited by the extent to which the fundamental norms of the court influence judicial decision-making. Both judges interviewed indicated that the decisive factor in not convicting was the heavy burden of

providing proof beyond a reasonable doubt.

“I start off by believing both people, both version of events...I am somewhat like an empty vessel...I work hard to be clear and empty when I start to listen. When there are parts to one person’s version of events that ring true, it can begin to raise a reasonable doubt.” –judge interviewee

Whether reasonable doubt is established is up to the judge to investigate. Reasonable doubt is prevalent though; as one judge notes, human dynamics often “aren’t beyond reasonable doubt realities...they’re grey and mucky.” Furthermore, they describe the criminal standard of proof of beyond a reasonable doubt as the need to be close to 99% satisfied on the prosecutor’s evidence. The risk of convicting someone who was in fact innocent weighs heavily on their decision-making. The impact of an education program on convictions is therefore limited by the degree to which cases are determined by these fundamental norms of justice.

ii. Protecting Innocent Accused

There is little to no risk of increasing false convictions with this option. This option is meant to dispel false conceptions and myths that cloud better judgement. It does not provide judges with any education to be biased against the accused.

b. Victim Satisfaction

Canadian sexual assault survivors surveyed in 2014 recommend training all judicial actors to have a better understanding of what it is like to go through sexual assault, to treat them with more respect, express the severity of the situation, and use appropriate language (Department of Justice Canada, 2014). There is no doubt that it can be a devastating experience when a judge, whom society respects as an impartial figure, makes insensitive comments or allows myths and stereotypes into court proceedings. Victim satisfaction is expected to improve insofar as some judges will apply their learning in cases and secondary victimization is reduced; but the increase in victim satisfaction will be limited because of the inherent limits of education programs.

c. Stakeholder Resistance

Judicial education is an important and longstanding feature of the Canadian criminal justice system. The judges I spoke to expressed that existing educational resources are of high quality. Providing funding for sexual assault education is likely to be looked upon well or neutrally by many judges.





However, it is not so clear that judicial associations receiving funding would appreciate parameters on the content of programming. While a trauma-informed, intersectional approach to understanding sexual violence and the courts is likely to be the most effective in dispelling rape myths and stereotypes, it is not clear that judicial institutes would wish to take on this approach. Programming available at these institutes are, as one judge I interviewed expressed it, “good and progressive”, which suggests they would be open to this kind of programming; however, there may be limits to programming content that is perceived to be influenced by third parties such as survivors and their advocates. Stakeholder acceptance therefore may compromise the effectiveness of the program.

d. Financial Cost

The primary costs of this policy option would be the judge’s paid leave for professional development and the development and service delivery of the education program. The average wage for provincial judges per hour with available data for four provinces is \$108 (Job Bank, 2016). To take BC as an example, if all 150 provincial judges were to receive two days of education on-site, the cost for paid leave would be \$259, 200. If the development and service delivery of the program were set at \$2000 per judge, the total cost to the province would be roughly \$500,000 for one year of programming.

e. Summary

Table 3. Summary Evaluation of Option 2.

Justice 		Victim Satisfaction 	Stakeholder Resistance 	Financial Cost 
Minor to Moderate [Minor]	Negligible	Minor to Moderate [Minor]	Minor to Moderate [Moderate]	Negligible

6.3. Legislation to Close the Public Gallery and Use Physical Screens, upon the Complainant’s Request

Currently, the Supreme Court of Canada has given judges some discretion over when to protect a person’s privacy in the courts (Cameron, 2003). Judges are known to frequently close the gallery in the case of children who are survivors of sexual assault. Judges rarely if ever do so in the case of adult survivors. Survivors may also apply for testimonial aids in accordance with *Criminal Code* provisions, such as placing a physical screen between themselves and the accused or using closed-circuit television to testify from a separate room; but according to my interviews, this does not appear to be commonly applied for or granted.

This option would introduce federal legislation to require judges to honour the requests of survivors (through Crown) to close the public gallery and place physical screens between the survivor and the accused during testimony and cross-examination. This legislative tool would be similar to the *Criminal Code* provisions around publication bans. Currently, the *Criminal Code* allows survivors to apply to the judge for publication bans against media reporting on their names. Judges are only required to honour the request for those under the age of 18; although they often do for adults as well. In this case, judges would be required to honour these requests regardless of age.

This option would be accompanied with a strong recommendation to subsidize transcripts on sexual assault cases or to provide full-time staff to transcribe them, whichever is most cost-effective.⁷ This way, courtrooms can still be considered open to the public.

The Institute for Policy Research in the UK recommends closing public galleries (Institute for Policy Research, 2015). New Zealand already has closed galleries during testimony and cross-examination, and Austria and Scotland have it in place for the duration of the entire trial. The New Zealand Law Commission recommends taking it a step further and including separate entrances and waiting areas outside the courtroom, as per the design of sexual assault courts in South Africa (New Zealand Law Commission, 2015).

a. Justice

i. Holding Perpetrators Accountable

Countries with this or more expanded versions of this option in place (New Zealand, Austria, Scotland) do not necessarily fare much better than Canada in terms of attrition throughout the criminal justice system (Lovett and Kelly, 2009).

It is possible that closing the public galleries, even when allowing for transcripts, could improve how well a survivor does in the courtroom to a certain degree. The issue of personal scrutiny in the context of intimacy and trauma could be alleviated.

“Obviously, a huge issue is that the survivor is seeing the accused...it can be that the whole courtroom is packed with the accused family members. There are scenarios of faces being pulled and eyerolling and the looks, and it’s devastating to witness that even when you’re not intimately tied to the case. I can’t imagine being in that position and having to look out at those faces.” –support worker interviewee

“It is an intimidation tactic to show up with a team or your whole extended family.” –anti-

⁷ Transcription services currently cost 3-5 dollars a page in Ontario and Manitoba (Administration of Justice Act, 2014), and can reach in the many of thousands of dollars in BC (Mulgrew, 2014).

violence advocate

Another support worker said that even just having someone physically in the courtroom to support a survivor can mean a lot to strengthen their testifying; inversely, having many there against the survivor could affect their testimony or willingness to give one.

Physical screens between the survivor and the accused can also be helpful. As one support worker noted, it would help with the fact that the accused is “literally 10 meters in front of you.”

Survivors may still encounter the accused and their family and friends milling about outside the courtroom or in the washrooms however.

One potential negative outcome for survivors is not having access to viewing live cross-examinations of other survivors to prepare for their own; and losing the potential support of friends, family, or public who may support the survivor in the public gallery.

ii. Protecting Innocent Accused

Coupled with publication bans, this option could in theory facilitate false allegations. However, the risk of false convictions is mitigated substantially by having transcripts still available; everything that occurs in court is still on public record and open to public scrutiny. Survivors still undergo cross-examination, and not much has changed in the balance of rights and duties.

b. Victim Satisfaction

In the 2014 survey of sexual assault survivors in Canada, some survivors indicated that they would like to be able to give testimony without a public gallery as well as have the judge meet with them in independent rooms from the accused (Department of Justice Canada, 2014). Support workers interviewed likewise saw these measures as beneficial to the survivor. They would certainly address the issue of intimidation tactics and facilitate testifying on intimate and personal matters.

Victim satisfaction is kept low because transcripts would become more readily available. The public would have increased access to all the minute details of the testimony. Even with a publication ban on the survivor's name, easy access to these details is most likely to be undesirable. In addition, survivors would lose potential emotional support from allies in an open gallery. Some people, including survivors, may also criticize this option because it stigmatizes sexual assault and sex, making it seem like it is shameful or inappropriate to speak about these issues; and because it could contribute to victimization of the survivor by suggesting that most survivors are not willing to face the accused. Although this option is designed so that survivors should retain the right to an open gallery and speak without a screen if they so wish, there is still some chance of this stigma persisting.

c. Stakeholder Resistance

Stakeholder resistance is expected from many angles. The reason for designing this option to work through legislation is because of anticipated resistance from judges to do so voluntarily. While one judge interviewed expressed personal interest in closing the gallery, another judge also expressed they did not necessarily see the need to close off the courts indiscriminately to all survivors. There is likely to be resistance from some judges.

The potential success of this program is also contingent on whether stakeholders, such as defense lawyers, will raise a constitutional court challenge. The Canadian court system has a longstanding tradition of an open court system. However, what this means exactly has been in dispute in recent decades. In *C.B.C. v New Brunswick* (1996) the Supreme Court of Canada acknowledged that the public can be "excluded from the courtroom in order to protect the innocent and safeguard privacy interests" (Cameron, 2003). Accommodations have recently been made to enact publication bans on sexual assault survivors' names, and to close courtrooms for children. Yet this option is certainly subject to constitutional challenge. It cannot be predicted how the Supreme Court would balance privacy and protection against the tradition of open courts. It is not unlikely that the Supreme Court would require that there





be alternative courses of action taken or at least mitigating measures. In this case, making transcripts available may sufficiently fulfil the mandate for open courts.⁸

d. Financial Cost

The cost of closing the galleries and using physical screens is minimal. The cost of hiring full-time staff to provide transcripts, in for example BC with 323 cases, could be well above hundreds of thousands of dollars. There is a risk of much higher costs if this policy were challenged on the grounds of violating the constitution. A government defense could cost upwards of a million dollars in legal fees.

e. Summary

Table 4. Summary Evaluation of Option 3.

Justice 		Victim Satisfaction 	Stakeholder Resistance 	Financial Cost 
Negligible to Minor [Negligible]	Negligible	Minor to Moderate [Minor]	Major	Minor

6.4. Comprehensive Legal Advice Program and Giving Complainants’ Lawyers Standing

This program would provide independent legal advice to survivors to facilitate navigation of the court process and protect their interests. For maximum efficiency, the program would be designed to span the entire criminal justice process so that advice would be provided prior to the survivor making a police testimony up until case closure; legal advice provided earlier especially could have cascading effects into the court

⁸ It is an interesting question to ask what it is about having court proceedings transpire “live” that is more open than having them on paper soon after – it is not as if the public gallery should be allowed to influence the judgement.

process. For the purpose of this analysis, the program would be capped at 35 hours per survivor. However, caps are not recommended in practice because cases can range from requiring a few hours of work to a hundred; funding should be applied on a discretionary basis. This number simply reflects about a week's worth of work. The program would likely not be able to provide services to the many thousands of survivors contemplating reporting to the police, and so could be determined on the basis of income.

This option also includes changes to the *Criminal Code* to give complainants and their lawyers standing, for maximum potential effect. Currently, these lawyers do not have standing in court, meaning the right to participate in the trial, except in some provinces, when third party documents about a survivor's personal records are requested.

Survivors could be advised on: the various avenues available for pursuing sexual assault cases; filing a police report; what kinds of questions may be asked and what to expect in terms of personal scrutiny; and what the process looks like. Lawyers are not allowed to coach their clients or influence the testimony given, but they can provide much-needed information for a survivor to make decisions that will improve their experience and chances of success in the criminal justice system. In court, they could ask questions of the survivor and raise objections to lines of inquiry that are inappropriate.

This option provides independent legal advice distinct from meetings that a Crown prosecutor may have with a survivor; the Crown works on behalf of society in general and does not represent the survivor. While the Crown's duties to the survivor may be greater than is often assumed (Woolley, 2014), it is currently not maximized in this way. Indeed, Crown prosecutors are incredibly busy, and their current support levels to survivors vary. Ontario support workers interviewed state that some survivors do not even receive a phone call from Crown, make enough of a connection, or have the chance to tell their story, while others say they are given enough time.

There are some who say that court support workers without legal accreditation can provide some of these supports to survivors. For example, courses could be offered

to survivors directly in a group setting, so long as this process does not contribute significantly to delays. While there may be such cost-cutting modifications, I am considering the maximum possible effect that such a policy could make and therefore will be considering individually designated lawyers for survivors.

Sweden, Norway, and Germany provide sexual assault survivors with independent legal representation and court standing for at least the duration of the trial. Ontario launched a two-year pilot program in 2016, offering 4 hours of legal advice to survivors in Toronto, Ottawa, and Thunder Bay. The advice provided in Ontario is only meant to provide options for the survivor in selecting paths forward and does not apply to the trial itself (Advocate Daily, 2017).

The Federal Ombudsman for Victims of Crime states that there should be improved access to legal aid and legal information (Federal Ombudsman for Victims of Crime 2016). The Institute for Policy Research in the UK also recommends the development and piloting of independent legal representation for survivors (Institute for Policy Research, 2015).

a. Justice

i. Holding Perpetrators Accountable

One of the main themes found in the survey with 114 sexual assault survivors across Canada is that survivors need more information. Several survivors said they need more information on victim rights, what to expect from the criminal justice system, and how cases proceed (Department of Justice Canada, 2014). My interviews with support workers also confirmed these as high priorities.

“[A survivor walks into the police station] not knowing that her first breathless nerve-ridden statement would be an official court document.” –Clodagh O Connell, Barrister & Solicitor

As Matas Lernes notes, survivors often speak to police while still experiencing major trauma which may impact their telling of the story; “any omissions, discrepancies, or inaccuracies can be used to discredit the complainant in a criminal trial” (Advocate

Daily, 2017). Providing survivors with advice on how to approach police testimony could improve the quality of evidence brought to the courtroom.

Likewise, legal advice on how to prepare for cross-examination could be highly useful. When support workers in Ontario were asked if, in their experience, some survivors were more likely to see desired results in court, they responded, “absolutely...it was people who remain calm and were very strong in their answers [during cross-examination]. It was kind of the make or break.”

“Survivors [get] desired results when they really advocate themselves, and they’re very strong in court...women who are very determined, coherent, very strong and forthright in what they’re saying, they seem to have much better results -- so the ones that aren’t really shaken [and] will even correct the prosecutor saying, ‘no, that’s not what I said’, for instance –so really kind of stand up for themselves.” –support worker interviewee

For this reason, the support worker interviewed suggested that survivors are guided through the process; as in “actually going in and watching other trials and seeing what a cross examination looks like so that when you are there it’s not your first time seeing it.” When survivors go through cross-examination for the first time without such exposure “they can often crumble really quickly.”

One judge notes that there is a “fine line” because lawyers cannot influence the evidence, but agrees that access to justice is important.

“It is important not to victimize the victim during the court process. The ideal is for the system to strengthen and empower through the process.” – judge interviewee

“The best Crown case is a witness...who will stand and be frank on the witness stand, I mean you always have to consider motivation but, who does not break down, but faces the questions, and answers them very honestly, boy, every one of them [although not to say that only bold women will be believed].” – judge interviewee

It does appear that legal aid could be of great benefit to victims in supporting their case court. It is not clear to what extent this happens. Data from the pilot program

in Ontario is not yet available. The complainants in the Ghomeshi case famously hired lawyers at some point, to no avail in their cause.

It also not clear how much impact giving complainants' lawyers standing in court would have. My interviewees provided a lukewarm response to the prospect of giving independent lawyers standing in the courtroom, often doubting the extent of that benefit and how it would operate.

We can look to countries that have given sexual assault survivors access to legal advice from lawyers with standing. However, we must look with caution because court data, legal systems, and sexual assault laws vary vastly from country to country.

The general lesson is that there is no country in the world that can be said to be clearly leading in solving this policy problem. The German criminal system has inquisitorial and adversarial elements (Lovett and Kelly, 2009). Out of a sample of 100 cases in a regional district in Germany in 2004, 28 cases made it to court and 23 were convicted, suggesting high conviction in court (82%) but high attrition earlier on in the criminal justice system. Sweden has similar results. In Sweden, survivors have been entitled to a lawyer since a 1988 legislative act. Their system is adversarial like Canada's and they have similar Rape Shield provisions to Canada. There are three professional judges and two lay judges in district court. Out of a sample of 100 cases in a regional court in Sweden, only 13 were tried in court, and 10 led to convictions (77% conviction rate). Norway has similar attrition rates (Amnesty International, 2010). While high conviction may be attributed to improved access to legal advice, it is quite possibly a result of prosecutors selecting cases likely to succeed.

ii. Protecting Innocent Accused

There is a slightly increased risk for false convictions with this option. Providing complainants with lawyers allows them to make their best possible case, and in theory, this could apply to improving the case of those who make false allegations. However, the impact is likely to be minor at most. Countries with variations of this policy option (Sweden, Germany, Norway) are not known for high levels of false allegations.

b. Victim Satisfaction

This option, as one support worker I interviewed noted, places a fair amount of onus on the survivor. It requires that the survivor take an active role in learning and applying that learning. It also promotes that survivors conform to existing rules of the courtroom and legal culture, which can be a difficult and disempowering experience for those feeling they need to become respectable in order to be heard.

This option is also anticipated to lead to delays because lawyers must be scheduled into the process. They may also raise objections that slow the process down.

These issues are likely to be significantly offset by the satisfaction a survivor experiences in receiving support and information. The survivor will also be more prepared for a personally scrutinizing cross-examination, which could significantly improve their experience. In some cases, it may lead the survivor to drop the case based on an informed decision. Either way, victim satisfaction will increase. Of course, a poor-quality lawyer can worsen the experience, but the quality of legal professionals has not been considered a significant issue among support workers interviewed.

c. Stakeholder Resistance

There may be some concern voiced with regards to survivors consulting with lawyers prior to giving police testimony. There is likely to be some resistance from stakeholders on the defense side. However, this option is not anticipated to be subject to a successful constitutional challenge, so long as legal aid for defense is of equal or better availability, and so long as lawyers do not transgress their responsibility to not tamper with evidence. It is not anticipated that this would be a constitutional issue of concern.





d. Financial Cost

Ontario's sexual assault legal assistance program has provided services to 120 people in its first 6 months (Advocate Daily, 2017). The total cost for the anticipated two years is \$2.8 million. Roughly speaking, this makes for \$1.4 million to provide four hours of service to 240 people per year. If a province like BC has 323 cases with a 100% take-

up rate, a pilot program of four hours would cost \$1.9 million per year. A program that includes representation at trial will cost multiple times more, into the tens of millions. If we design a program providing 35 hours on average to a case, the rough estimate to service every single case is \$16.6 million per year.

e. Summary

Table 5. Summary Evaluation of Option 4.

Justice 		Victim Satisfaction 	Stakeholder Resistance 	Financial Cost 
Moderate to Major [Moderate]	Minor	Moderate	Minor	Major

6.5. Preparatory Legal Advice Program

This program is a modified version of the previous option. It would only offer a few hours of legal advice to survivors (about one day of work instead of a full week, so 7 hours, or 20% the size of that program). This program would not rule out giving complainants or their lawyers standing, but it does not require standing in order to function as the legal services provided would be pre-trial. In essence, this program would be in the style of Ontario’s two-year pilot program launched in 2016, which offers 4 hours of legal advice to survivors in Toronto, Ottawa, and Thunder Bay.

The intent to provide independent legal advice to survivors to facilitate navigation of the criminal justice system and protect their interests remains the same. However, the means are more limited. Analysis of this option will be done on comparative terms with the previous option.

a. Justice

i. Holding Perpetrators Accountable

As with the previous program, this program will have a positive impact on survivors being prepared to produce a key document used in court: police testimony. There is also room for an introduction to the expectations of cross-examination. A more thorough preparation for trial is not possible given the fewer hours of legal services available, and survivors will be alone in the courts, which lessens the positive impact of this option.

ii. Protecting Innocent Accused

As with the previous option, there is a slightly increased risk for false convictions with this option anytime a complainant is provided with more information and is empowered. The risk is expected to be even lower with this option given the smaller size of the program.

b. Victim Satisfaction

The main benefit this option has over the previous option is fewer delays; without a lawyer in court, proceedings are expected to move along no slower than before this program. On the other hand, there is less emotional and informational support than with the more comprehensive legal advice program.

c. Stakeholder Resistance

The pilot project in Ontario is operating without any visible stakeholder resistance.





d. Financial Cost

Ontario's sexual assault legal assistance program has provided services to 120 people in its first 6 months (Advocate Daily, 2017) and is anticipated to cost \$2.8 million over two years. Roughly speaking, this makes for \$1.4 million to provide four hours of

service to 240 people per year. To provide 7 hours of service in a province like BC with 323 cases, assuming a 100% take-up rate, the program would cost \$3.3 million per year.

e. Summary

Table 6. Summary Evaluation of Option 5.

Justice 		Victim Satisfaction 	Stakeholder Resistance 	Financial Cost 
Minor to Moderate [Minor]	Negligible to Minor [Minor]	Moderate	Negligible	Moderate

Chapter 7.

Comparing Options

7.1. General Trends

a. Justice

i. Holding Perpetrators Accountable

None of the options rank as having a ‘major’ improvement in conviction rates, which would close the gap between sexual assault and other victim-based crimes. The option of comprehensive legal advice and standing performs the best, with an expected moderate improvement in conviction rates. Most of the remaining options are all expected to have minor impacts on the conviction rate.⁹ The option of closing the gallery and using physical screens is the least likely to impact conviction rates.

ii. Protecting Innocent Accused

None of the options are of particular concern with regards to this criterion, as they only have negligible to minor impacts.

b. Victim Satisfaction

None of the options rank as having a ‘major’ improvement in victim satisfaction. Many of the options perform the same at improving victim satisfaction (moderately), but in different ways. For example, specialized courts have the biggest impact on reduced delays, while legal advice programs significantly increase informational support. Judicial education and closing the public gallery and using screens both target secondary victimization, but are somewhat less impactful.

⁹ Although specialized sexual assault courts could, as in the case of the domestic violence court in Toronto, improve conviction rates significantly, they could also have a negligible impact.

Figure 7: Visual Ranking System for Evaluation Matrix.

Least desirable outcomes

Most desirable outcomes

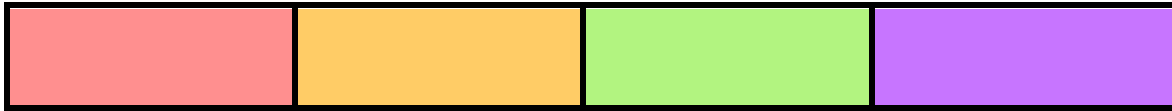






Table 7. Evaluation Matrix with Research Findings.

	Justice Holding Perpetrators Accountable  Protecting Innocent Accused		Victim Satisfaction 	Stakeholder Resistance 	Financial Cost 
A Specialized Court	Negligible to Major [Minor]	Negligible	Moderate	Negligible	Minor
Judicial Education	Minor to Moderate [Minor]	Negligible	Minor to Moderate [Minor]	Minor to Moderate [Moderate]	Negligible
Closed Gallery, Screens	Negligible to Minor [Negligible]	Negligible	Minor to Moderate [Minor]	Major	Minor
Comp. Legal Advice + Standing	Moderate to Major [Moderate]	Minor	Moderate	Minor	Major
Prep. Legal Advice	Minor to Moderate [Minor]	Negligible to Minor [Minor]	Moderate	Negligible	Moderate

c. Stakeholder Resistance

Most of the options are expected to face only negligible to minor stakeholder resistance; except for the option of judicial education which is expected to face up to moderate resistance and the option of closed galleries and physical screens which is expected to face major resistance.

d. Financial Cost

The most expensive option is the comprehensive legal advice program while the least expensive is judicial education. The other options have middling costs, with the option of closing the gallery and using physical screens as the least expensive.

7.2. Selection of Options

This section works from general trends outlined above to moving towards recommendations. One striking observation from the trends above are that none of the options on their own are expected to make major positive impacts. Although these options have been selected for consideration as some of the best options for reform, they still fundamentally fail to provide the most desirable outcomes for sexual assault cases. This is an important conclusion to draw, as it should direct governments to take multiple actions where possible. It should also direct governments to pay attention to and develop alternative systems of handling sexual assault outside of the criminal courts in the medium to long-term (see Appendix B). Outside actors such as the judiciary must also be responsible for developing their own strategies if they are to truly address these problems because it cannot be achieved through the legislative branch alone.

The option of closing galleries and using physical screens must first be set aside. One of the primary objectives of this paper is to address the issue of impunity for some perpetrators in the criminal justice system, yet this option is expected to have negligible impacts in this area. Furthermore, it is expected to face major stakeholder resistance. Without outstanding performance on any other criteria, the value added is not as considerable as with other options.

Four other options remain. The option with the most overall positive impacts is

the comprehensive legal advice program giving lawyers standing, but it has the highest price tag. In the context of court expenditures, the cost may not be out of the question for many provinces. Canada's government contribution to legal aid plans was \$789 million in 2014-2015, and BC's was \$75 million (Statistics Canada, 2016c). A \$16.6 million annual funding injection for sexual assault complainants would be significant but not necessarily too much for a government committed to addressing these problems. Still, this option does not make major positive impacts, only moderate ones.

Given that the price tag for this option may be high for the value provided in some jurisdictions, other options are examined further before it is recommended. The preparatory legal advice program performs well, with minor impacts on justice and moderate impacts on victim satisfaction. The specialized court option has similar positive impacts (but in different ways) at a similar price tag. The judicial education option has fewer victim satisfaction impacts and there could be up to moderate stakeholder resistance to the most effective version of its implementation, but not to it in general. As the most cost-effective option, it is worth the investment.

The expected cost of all three options of a preparatory legal advice program, one specialized court, and judicial education are on comparable terms to the sole option of a comprehensive legal advice program giving lawyers standing. These options taken together as a bundle actually offer more benefits both across the board, particularly across different elements of victim satisfaction, and overall; while none of the positive impacts of the bundle of the options proposed are expected to be "major", together they cumulate to greater improvements to court response. For these reasons, this bundle of three options will be recommended over the comprehensive legal advice program giving lawyers standing, despite the fact that it is the best-performing option when considered on its own.

In jurisdictions where financial cost is not a deciding criterion, replacing the preparatory legal advice program portion of the bundle with a comprehensive legal advice program would undoubtedly have more positive impacts.

Chapter 8.

Recommendations

The provincial criminal courts are criticized for contributing to a larger system of impunity for perpetrators of sexual assault and for negatively impacting the well-being of survivors who choose to participate in the system. In order to address this problem, it is recommended that provinces take multiple actions. Specifically, there is evidence to support three of the five policy options analyzed, taken together as a bundle: a specialized court, judicial education, and a preparatory legal advice program. In contexts where financial cost is not of high concern, expanding the preparatory legal advice program portion of the bundle to a more comprehensive program would have more positive impacts.

With a preparatory legal advice program where survivors would have access to a few hours of legal advice on whether to and how to proceed to police testimony, and what to expect from the courts including cross-examination, survivors would be better informed and prepared for courts. A specialized court would be designed to better address the complexities of sexual assault crimes with design elements such as specialized prosecutors, file-ownership, and a victim support worker program. Survivors would face fewer delays, have increased informational and emotional support, and depending on the design of the courts, could avoid the intense experiences of a full trial. Secondary victimization and insensitive judicial comments would be further reduced through a meaningful judicial education program that increases understanding of the impacts of trauma on behavior and eliminates harmful societal misconceptions about sexual assault.

If this bundle of policies is adopted by a province on a pilot rather than a permanent basis, it is imperative that sufficient funds be allocated to data collection and reporting on the evaluation of these programs. Without statistics and presentations on results, pilot programs have less of a chance of continuing. Similarly, care must be taken to ensure the sustainability of these policies in a few ways; specialized courts only fulfill their basic functions when designed well and funded consistently, and judicial education needs to be up-to-date and recurring.

This bundle of policies is far from perfect. In terms of victim satisfaction, survivors would still have to defend themselves alone on traumatic, intimate issues while facing the defense, the accused, their family, and the public gallery. Based on current domestic violence court numbers, survivors would still face significant delays. There would also be regional inequity in the provision of victim assistance services due to the regional limitations of specialized courts and legal advice, with urban areas more likely to see improvements than rural areas. The impact on conviction rates is limited as well. There is still a very good probability that sexual assault conviction rates will still be below those of other victim-based crimes such as major assault because the problem drivers identified for why sexual assault cases are so difficult to convict are not fully addressed. In particular, myths and stereotypes will not be completely eliminated due to the limitations of judicial education, and the fundamental norms of justice that favour against complainants, such as proof beyond a reasonable doubt, are not altered. The odds are still stacked significantly against the survivor.

For these reasons, several other steps are required that are outside the scope of the criminal court process and this paper. Options outside of the criminal courts explored in Appendix B must be considered. In the short term, it is recommended that information be more clearly made available to survivors about proceeding through the civil courts (through the preparatory legal advice program recommended, at minimum); and that provinces ensure that restorative justice program development is survivor-centered and survivor-controlled. If research is conducted in the areas of further research discussed in Appendix C, this could also strengthen future policies. Finally, the police and judiciary need to be committed to contributing to solving these problems as well. The judiciary should consider the accreditation scheme described on p.32.

Chapter 9.

Conclusion

There is no single appropriate response to the problem of responding to sexual assault crimes. Many government actors have made efforts to begin the conversation on how to respond to sexual assault. In 2015, the Government of Ontario announced a \$41 million sexual assault strategy to make progress in addressing this crime, including improved access to the criminal justice system. In 2016, the federal government committed to a strategy on gender-based violence including a focus on strengthening justice system approaches. This paper aims to contribute further data and analysis into the conversation on how criminal courts can best respond to sexual assault. Significant action is yet to be taken. What is clear is that expecting survivors to avoid or endure onerous processes that ultimately allow many perpetrators to walk away is no longer an acceptable response in Canada.

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Appendix A. Criminal Court Policy Options Not Considered

There are several options for reform within the criminal courts that show some potential but that have not been selected for in-depth analysis. This section outlines some of these options and the reasons they were not selected.

Table A1. Criminal Court Policy Options Not Considered.

	Rationale	Assessment
Gendered Personnel	<p>Many survivors identified the desire to have the option of speaking to prosecutors, defense lawyers, and/or judges of the female gender (Department of Justice Canada, 2014). In Austria, survivors have the right to be questioned by a person of the same sex (Lovett and Kelly, 2009).</p>	<ul style="list-style-type: none"> • There is an “absence of empirical data” on rape myth acceptance among female judges (Temkin and Krahe, 2008). Support workers and advocates noted that education, regardless of gender, is of higher priority: <i>“Quite often women would say ‘I really want to be interviewed by a woman [police] officer’ and my heart would kind of sink because I know who they would send out and she was awful—she was the first one when that woman left the door, was going to be, ‘she’s lying! I don’t believe her!’ And they actually would have been better off with a male who is more sensitive and more in tune.”</i> –support worker interviewee • Support workers in Ontario indicated that having the courtroom closed to the accused’s family and friends who may sneer and intimidate is a higher priority.

		<ul style="list-style-type: none"> • It may also be administratively complex, contribute to delays, and be subject to constitutional challenges.
Fund for Expert Witnesses	<p>Expert witnesses are rarely used, in part because of the expense, which can be between hundreds and thousands of dollars. This fund would go along with a directive to encourage prosecutors to make use of experts on trauma.</p>	<ul style="list-style-type: none"> • A judicial education program would do the same work in a more sustainable and efficient manner. • Defense may retaliate with their own expert witnesses depending on the funds available by the accused, and in a way that may deliberately increase delays through scheduling.
Programs Targeting Defense Lawyers	<p>Defense lawyers are responsible for discrediting survivors and it may be most efficient to target them for policy change. Defense lawyers have ethical duties (Craig, 2016a).</p>	<p>While professional legal societies, law schools, and government where possible should better educate on and enforce Rape Shield provisions, the profit and career incentives for defense lawyers in employing tactics that intimidate and discredit survivors is an additional barrier to change that, for instance, judges and prosecutors are not subject to as public servants.</p>

Appendix B. Alternatives to the Criminal Courts

Given the limited success expected with the options recommended in this paper, some may wish to bypass reform and look to alternative systems altogether for adjudicating cases of sexual assault in society. This is a legitimate line of inquiry deserving more research. My preliminary research in these areas reveals potential to improve victim satisfaction, and other criteria not considered in this paper (such as recidivism, and community healing) but with barriers to implementation that would need to be addressed.

Civil Courts

In Canada, civil lawsuits may be brought against offenders for personal injury damages caused to a survivor through sexual assault. Ontario recently joined other provinces to repeal the time limit on when lawsuits can be filed. The key systemic factor that may improve the outcome and experience for victims with this process is that the burden of proof is much lighter than in a criminal trial; it is based on the balance of probabilities, rather than beyond a reasonable doubt. The accused can also be compelled to speak and be cross-examined.

Currently, most survivors cannot afford the cost of going to trial. A 2000 estimate for an average case in BC is \$50,000 to hire a lawyer, and it increases when institutions are involved (British Columbia Law Institute, 2001). Survivors can be entitled to hundreds of thousands of dollars in damages, and the cost may be increasing with greater societal understanding of the cost of sexual assault. In many cases, survivors may not actually receive the financial benefit because offenders are unable to pay or do not have sufficient assets to sell (British Columbia Law Institute, 2001). Many lawyers will not take cases that are not expected to do well or that they can profit from (British Columbia Law Institute, 2001).

The process still contains many of the same elements as criminal courts currently including severe cross-examination, and the requirement to prove damages to the survivor through personal records, but with the help of a lawyer. It also achieves a different result, as private settlements arguably have a lesser impact on the perpetrator

than a criminal record.

The most prohibitive barrier to considering this as an option in this paper is the financial cost. Accounting for inflation, the cost would be \$66,390 per case, and with 323 cases in a province a year, that makes for \$21.4 million per year. Furthermore, a fully housed staff of civil lawyers working on behalf of the government to support survivors raises questions as to how further public funds should be injected into the pockets of lawyers when they may be better spent on increasing the resources of compensation funds for survivors.

What is clear is that all survivors should receive information about the civil court system to help them make their most informed decisions.

Restorative Justice

Variations of restorative justice include healing circles, mediation, and conferencing. These processes can be integrated with or apart from the criminal justice system. There is some evidence to suggest that victim satisfaction is improved when these processes are used for victims of crimes (Department of Justice Canada, 2000), although documented practices with sexual assault survivors are limited. The New Zealand Law Commission states that reforming the criminal justice system is not enough for New Zealand and that restorative justice needs to be developed alongside criminal court reforms (New Zealand Law Commission, 2015).

In my interviews, support workers expressed that for some survivors “what they’re really looking for, is some sort of omission of guilt, or apology.” Support workers were hesitant in fully endorsing restorative justice processes though. It is “much farther down the road, if at all”, says one support worker.

“There are significant concerns and there needs to be more dialogue in the province about developing guidelines on to how to safely in engage in restorative justice and alternative measures in all cases of power-based and gender-based crimes” –anti-violence advocate

Provinces pursuing restorative justice opportunities should be wary of rushing

into this cost-cutting practice that could privatize criminal matters. It is important to engage in dialogue with all relevant stakeholders, including offender societies, police, government ministries, survivors, victim and gender advocates, and representatives from Indigenous communities. A restorative justice strategy or framework would lay the groundwork for risk assessments and accreditation of practices (New Zealand Law Commission, 2015). As the Federal Ombudsman for Victims of Crime recommends, victims should have a right to know about existing programs, and the programs should ensure a “victim-centered approach” (Federal Ombudsman for Victims of Crime, 2016).

More precise recommendations are deserving of an entirely new research project.

Appendix C. Areas for Further Research

Delays and backlogs were found to be a significant factor in impacting victim satisfaction for the worse and for making it difficult to recall sufficiently credible testimony in court. Research into reducing delays and backlogs in specific courtroom locations would be a highly valuable addition to addressing this problem.

The problem drivers identified in this paper could also be researched further and therefore better addressed. In particular, statistical research could be conducted with conviction rates. For instance, researchers could code all judicial decisions according to certain characteristics of the judge, complainant, or accused, such as gender, and examine any correlations with conviction rates.

Court watch programs and the research conducted currently by law professors, activists, and journalists to document sexual assault trials are important to holding judges to account through processes such as Canadian Judicial Council reviews of judicial conduct.

Beyond the scope of the criminal courts, further research on implementing restorative justice practices safely would be valuable, as would recommendations to the police and to the judiciary. The same can be said for the research question: “What actions can be taken to support survivors?” The answers to this research question may include policies such as sexual assault prevention, increased use of compensation boards, and improved access to sexual assault centres and counselling.

Indigenous survivors and victims deserve an additional investigation of their unique circumstances given Canada’s ongoing colonial impacts on Indigenous communities.