

“TALK ABOUT SENTENCING”

CORNWALL PUBLIC INQUIRY PHASE 2 WORKSHOP OCTOBER 22, 2008 7:00 – 9:00 P.M.

Phil Murray, the moderator for the workshop, opened the meeting, welcomed the guests and outlined the schedule for the evening. He noted that simultaneous translation services are available for those who wish to hear the presentations in French.

Phil then introduced the authors of the draft paper being presented, Angela Long and Louise Tansey-Miller, both members of the Cornwall Public Inquiry staff.

ANGELA LONG

Angela Long took the podium, and gave a general overview of sentencing in Canada, noting that the push for stricter sentencing terms, especially for sexual offenders, is a key public policy issue. However, there is a general lack of knowledge about sentencing and sentencing trends in Canada. She explained that the research paper is an attempt to provide information on sentencing and sentencing trends for non-familial (i.e. outside of the family) cases of child sexual abuse.

Tougher sentencing is a tool to reduce child sexual abuse, but it is not the answer. Statistics show that only 2 to 5% of all criminal incidents that are reported to the police will reach the sentencing stage.

In 2005, there were 9,877 reported incidents of sexual violence against children – a rate of 206 per 100,000. In the same year, there were 7,063 reported incidents of sexual violence against adults – a rate of 39 per 100,000. This means that children report incidents of sexual violence at a rate 5 times greater than adults. In 2003, children made up 21% of the population of Canada, but were the victims of 61% of reported incidents of sexual violence.

In 2005 in Canada, 39% of people who sexually offended against children were family members. 48% were known to the victim, but were not family members – for example, babysitters, teachers, clergy. Only 13% of people who sexually offended against children were strangers.

Also in 2005, 21% of reported victims of childhood sexual abuse were males, and 79% were females.

The study found that in general, the rates of incarceration (imprisonment) in Canada have been dropping for these offence categories. This appears to be correlated to the implementation of conditional sentencing in Canada, where offenders serve their custodial sentence in the community instead of in prison. However, offenders convicted

of sexual offences are more likely to receive prison sentences (49%) compared to those convicted of non-sexual violent crimes (35%). In addition, on average sexual offenders receive longer sentences than those convicted of non-sexual violent crimes.

Sentencing laws and policies in Canada are influenced by two theories of punishment or sanction. The first is the “utilitarian” model, which justifies the punishment or sanction through the specific benefits achieved by the sentence: general deterrence, in which people are deterred from committing crimes by the threat of imprisonment, and specific deterrence, in which the offender is deterred from committing future crimes by the fact of his or her imprisonment. The second is the “retributivist” model, in which punishment is justified because the offender must repay his or her debt to society.

In 1996, the principles of sentencing were codified into law in Canada. This means that judges now have specific principles they must refer to before imposing a sentence on an offender. However, most of these principles were already in place and used by judges in practice. These codified rules are set out in s. 718 of the *Criminal Code*. The objectives of sentencing are: to denounce unlawful conduct, to deter the offender and others from committing crimes, to separate offenders from society, to assist in rehabilitating offenders, to provide reparations for harm done, and to promote a sense of responsibility in offenders, and to acknowledge the harm done to victims and the community.

As of 2004, when a court imposes a sentence for an offence that involves the abuse of person under 18 years of age, primary consideration shall be given to the objectives of denunciation and deterrence of such conduct (s. 718.01).

In addition, sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1), and the court shall also take into consideration any relevant aggravating or mitigating circumstances.

Angela Long then began to outline the principle findings made in the draft research paper on sentencing trends. She explained that the paper considered only cases of non-familial sexual abuse of children in the provinces of Alberta, Ontario and Quebec, from 1969 to 2008. Both French and English cases were considered. Only cases with an adult offender were examined, and only cases where a sentence was imposed were considered. Only cases that had been reported on judicial databases were considered.

The researchers ended up with 768 cases: 541 from Ontario, 105 from Alberta, and 122 from Quebec. In the Alberta cases, 34% of victims were male and 61% were female; in Quebec 60% were male and 35% were female; and in Ontario 47% were male and 48% were female. In the other cases, the sex of the victim was not apparent from the court judgment. In all three jurisdictions, the sex of the offender was overwhelmingly male, with 99% in Ontario and Alberta, and 98% in Quebec. Ms. Long pointed out, however, that there are a larger number of female offenders in familial sexual abuse cases, which were not reviewed in this study.

In the vast majority of these cases, the offender received a sentence of incarceration. In Alberta, 74% were incarcerated, in Ontario 81%, and in Quebec 78%. Offenders in Alberta received longer sentences than in the other two jurisdictions. However, over time sentences appear to be dropping in Alberta and Ontario, and increasing in Quebec. In cases of historical sexual assault – where at least ten years had elapsed from the commission of the crime to the time it went to trial – sentences in Alberta were much lower. Ontario saw higher sentences for historical sexual abuse crimes.

Where the offender was in a position of trust over the victim of childhood sexual abuse, the expectation on starting the research was that the research would find that these offenders received higher sentence. In fact, the exact opposite was found. In all three provinces, offenders in a position of trust over the victim received lower sentences compared to offenders who were not in a position of trust.

The researchers then looked at whether there was a difference in sentences imposed on offenders who abused male victims compared to those who abused female victims, as there has been a common concern expressed that those who abuse male victims receive lighter sentences. The study found that there was very little difference in sentences imposed. The sentences varied slightly, but were mostly equal between male and female victims.

Angela Long concluded her presentation by making the following points:

- The majority of sentences in all jurisdictions reviewed resulted in a sentence of imprisonment;
- The average length of sentence was longest in Alberta;
- The average sentence over time has been decreasing in Alberta and Ontario, and increasing in Quebec;
- Custodial sentences for historical cases were on average lower than for non-historical cases in both Alberta and Quebec, but were higher for historical cases in Ontario;
- In all three provinces the average sentence was lower for those in trust relationships with their victims than those in non-trust relationships; and
- In all three provinces, there was no significant difference in sentences based on the sex of the victim.

Angela then turned the podium over to her colleague, Louise Tansey-Miller, the co-author of the research paper.

LOUISE TANSEY-MILLER

Louise Tansey-Miller began by explaining what is meant by the terms “aggravating” and “mitigating” factors in sentencing. Under our system of justice, similar cases should be treated in a similar manner, which applies to both the offender and the offence. “Aggravating” factors are used to justify imposing a stricter sentence; “mitigating”

factors are used to justify a more lenient sentence. Both are used to ensure the sentence “fits the crime”.

Only two aggravating factors are codified in the *Criminal Code* – the fact that the person abused was under 18 years of age, and the fact that the offender abused his or her position of trust and authority. The *Criminal Code* does not list mitigating factors.

However, common mitigating factors considered by judges in sentencing offenders are as follows:

1. Lack of a criminal record.
2. Prior good character – e.g. steady work history, references, community service.
3. Age of offender – e.g. a young adult, or an elderly person.
4. Mental illness – this can be seen as either a mitigating factor, if the person is seeking help for their condition, or as an aggravating factor if the person is not willing to seek treatment.
5. Intellectual disability.
6. Guilty plea – the timing of the guilty plea is considered, with an early guilty plea acting as more of a mitigating factor.
7. Remorse.
8. Rehabilitation efforts.
9. Offender’s disadvantaged background or being a victim of abuse him/herself.

Common aggravating factors are:

1. Use of violence.
2. Cruelty.
3. Prior criminal record, especially for crimes of a similar nature.
4. Nature of harm to the victim – e.g. physical/psychological harm.
5. Planning/organization of crime – e.g. luring the victim.
6. Group offences, multiple victims, long period of time.
7. Mental illness – in instances where treatment would not work or where the offender is not willing to be treated.

She then went on to explain that the study showed that offenders in positions of trust over their victims – babysitters, employers, coaches, teachers, doctors, foster parents – received sentences lower than those offenders who were not in a position of trust over their victims – the exact opposite result than was expected. She suggested this could be explained in part by mitigating factors – prior good character, a good work history and being gainfully employed – all of which indicate conformity to social norms. However, in offenders who use their position of trust to abuse children, their employment often facilitated their access to children and facilitated their opportunities to commit these crimes.

Phil Murray then introduced Ms. Ellen Campbell, Founder and Executive Director of the Canadian Centre for Abuse Awareness and the Martin Arnold Kruze Memorial Fund.

ELLEN CAMPBELL

Ms. Campbell commended the audience and the people of Cornwall for keeping the issue of child abuse in the forefront. She identified herself as an “overcomer” of childhood sexual abuse experienced between the ages of nine and eleven, which she began to deal with approximately twenty years ago. She organized and held the first Canadian conference for adult survivors of childhood sexual abuse, with 300 attendees from across the country. She remarked that 20 years ago, there were only a handful of men, and tonight one-third to one-half of the audience are men.

She told the audience about Martin Kruze, who came forward to talk of the abuse he had suffered at Maple Leaf Gardens in Toronto. After he went public with his story, over 100 other men came forward to disclose they too had been sexually abused there as boys. When Mr. Kruze’s perpetrator was convicted, he received a sentence of two years less a day. Mr. Kruze committed suicide. With the help of Ken Dryden and Shopper’s Drug Mart, the Martin Arnold Kruze Memorial Fund has raised hundreds of thousands of dollars to address issues of abuse and to provide practical assistance.

Ms. Campbell gave her opinion that people in Ontario want minimum sentencing, and that for her, Angela and Louise’s report confirmed for her how far we need to go – and “how out of touch our judiciary are with the population”.

She pointed out several areas where she had a problem with the current situation in Ontario:

1. Sexual abuse is highly unreported – it skews the numbers with men and women victims – men are still only just starting to come forward with reports of sexual abuse.
2. The fact that perpetrators are more likely to get longer sentences if physical violence accompanies the sexual violence – otherwise it is seen as “just sexual abuse”.

She reiterated her view that Canada needs minimum sentencing laws. Ms. Campbell noted that under Florida laws, if the victim of sexual abuse is under 14 years of age, there is a minimum 25-year sentence. She stated that for deterrence to be effective, we need longer sentences to be given to sexual offenders. She pointed out that the current average sentence for sexual assault is 300 days, which isn’t long enough.

In her opinion, pedophiles will re-offend: “Our first priority must be to protect our children – this is more important than showing mercy to offenders. If the offender has no previous record, that just means that he hasn’t been caught – but it is likely that he has offender many times. We are seeing significantly shorter periods of incarceration today,

with judges giving fewer custodial sentences and for shorter periods of time. As more attention is being paid to sexual abuse in our society, sentences are being reduced.”

Ms Campbell indicated that she is on the committee for judicial appointments in Ontario – the first victim advocate to hold this position. She said she looks at the character of the candidate applying for a judicial appointment and tries to imagine what they would be like with a victim, whether they had empathy – and does not only look at their legal expertise.

She questioned why there was a difference in sentences being given in different provinces in Canada. The *Criminal Code* is federal law – so why are sentences different between provinces?

She expressed concern about the current trend towards conditional sentences in Canada (where the offender serves a custodial sentence in the community). With a conditional sentence, a sexual offender could literally “be living in the house next door”.

Ms. Campbell would like to see minimum sentencing laws in Canada – imposing sentences of at least two years for sexual crimes. She pointed at that psychological wounds are inside “where you can’t see them. But that doesn’t make them any less damaging. Childhood sexual abuse kills something inside the victim, and you can’t get it back. All you can do is get past it.” She stated that our judges and legal system need to understand how damaging childhood sexual abuse is. She suggested a good starting point would be sensitivity training for lawyers – after all, “all judges are lawyers”.

In addition, she thinks we need increased services and programs for adult victims of childhood sexual abuse. Currently, there are virtually no programs for men.

She also stated that child sexual abuse offenders should be required to wear electronic monitoring bracelets: “If we can’t incarcerate them forever, we can at least do this to protect our children.”

Ms. Campbell then spoke directly to the survivors in the room – and asked them to get involved: “We have a voice, and we can make changes – but it must come from us.”

Phil Murray then introduced Mr. Scott Newark, a former Crown prosecutor who now advocates on behalf of victims, and is a frequent media commentator, panellist and lecturer on various criminal justice and national security issues.

MR. SCOTT NEWARK

Scott Newark told the audience that he had been a Crown prosecutor in Alberta for twelve years. He saw his role as prosecutor as one in which he was also to speak for the victim, to serve the same role as a victim impact statement. As time went on, he began to take on the role of seeking answers, and changing laws.

He pointed out there are a number of groups, organizations and associations involved in criminal justice reform, and no group has contributed more than crime victims – “but only after a horrible, preventable tragedy has occurred.”

In his experience, victims are usually looking for straight answers, for the justice system to tell the truth, and to keep others from being harmed: “They are not looking for your sympathy. They want a justice system where you don’t need to read the small print to find out what happened.”

He stated that as Canadians, we have a right to know if our justice system is working or is not working.

Mr. Newark then said he would like to discuss the report on sentencing, and make recommendations on where we could make changes.

He questioned how long it is taking for cases to get to trial, pointing out that delay has become a tactic.

He noted that in Canada, we do not gather information on offender profiles – how many are on bail, how many are on probation, and how many are on conditional release.

The research paper indicated that children are 21% of the Canadian population, yet 60% of the sexual victims. They are victims of sexual crimes at six times the rate of adult victims. They clearly need special protection – yet the incarceration rate for sexual offenders has dropped to 49%.

The paper reported that only 2-5 % of criminal charges make it through to sentencing. If only 2-5% of charges for child sex abuse end up in a sentence, “this is a completely unacceptable result”.

He noted that of charges laid, 34% are stayed or withdrawn by Crown attorneys. Crown attorneys proceed with charges only where there is “a reasonable likelihood for securing a conviction”. In his view, Mr. Newark indicated that this standard should instead be: “Do I have credible, admissible evidence, and can I show the elements of the offence?” If so, then charges should proceed. His view is that Crown attorneys should not be making decisions on the likelihood of conviction – “that is the job of judges, and Crown attorneys are not judges. If we need more judges in our system to process more cases, then so be it.”

Mr. Newark then moved on to discuss the principles of sentencing. He remarked that: “although these were codified into Canadian law in 1996, they were not invented by the Department of Justice, but are sentencing principles that we have inherited from King Henry II. The concept is that Crown will take care of prosecuting and sentencing for crimes in the public interest. The justice system is not a mediation between the offender

and the victim – when a crime is committed, the public interest is engaged – it affects all of us.”

In his opinion, conditional sentencing is a “pretend sentence” – it is probation. “Serving a conditional sentence in the community” similar to stating that someone is “serving their probation in Millhaven Penitentiary”.

Mr. Newark then pointed out the trend to pre-trial credit and even double credit being given to people denied bail (where those held in jail until their trial are given credit for time served). For example, if they spend six months in pre-trial custody, they are credited with one year off their sentence. He said: “These are people who are being denied bail because they have long records or have violated bail in the past. This is sending the wrong message to the wrong people – offenders are being rewarded for having long records and a history of bail violations – rewarded at a rate of two to one. When an offender receives a sentence of five years, and you then read the fine print and he served 18 months in pre-trial custody, and he received credit for 36 months served, he will serve nowhere near the amount of his sentence. Victims feel betrayed. Repeat offenders know the consequences, and they are not very severe.”

In Mr. Newark’s view: “Our obligation to protect is higher than our obligation to predict future behaviour. And some people are no longer worth that risk – they have repeatedly committed crimes. Rehabilitation is a principle, but the best protection is when no one commits crimes. We need to reinforce the fact that what the offender did was a bad thing. Sexual abuse is bad. We have a right to expect that this behaviour be denounced, and punished. The justice system belongs to the public – not to the offender, not to the lawyers, not to the judges. It belongs to the people of Canada.”

Mr. Newark went on to say: “We need to use the tools that we have developed. We must pay attention to high-risk offenders, as use whatever tools are available to deal with them. We need to apply long-term offender orders, and we need to appropriate supervise them. We need to use electronic monitoring. We need to use s. 810 orders. Paperwork can not be lost in the shuffle.”

Mr. Newark then pointed out several tangible suggestions:

Provincially:

- Expand victim services offices, have provincial Ombudsmen for victims
- Collect victim surcharge revenues, and make the money available when the victims need it
- Create child-friendly facilities
- Increase the priority for cases involving children
- Implement a Justice System Accountability Act, where we track statistics and make public information on the following:
 - The number of crimes committed by offenders on bail, parole, release, etc.
 - The length of time it takes to get cases to trial

- Number of charges laid
- Statistical outcomes of sentence by category of offences.

Federally:

- Improve the DNA data bank.

Mr. Newark closed by stating “we need to get honest on crime. We need to mandate that the court take into account victim considerations before granting adjournments, etc. We need to ensure there is criminal liability attached to those individuals who have responsibility to children and who do not report abuse or attempt to cover it up. We need to end pre-trial custody credits. We need to end conditional sentencing. We need to amend the *Youth Criminal Justice Act* to add the principles of deterrence and denunciation. We need to end pardons for sex offenders. We need to extend the use of s. 810 orders.”

“And above all – we need to remember that the justice system belongs to us. We are entitled to ask questions, and we are entitled to get answers.”

Phil Murray then opened the meeting to questions from the audience.

Q: The research shows that persons in position of trust got lesser sentences, even though this is an aggravating factor. Yet mitigating circumstances include employment, community service, etc. Probation officers, priests, and teachers etc. have good employment records, and a record of community service. Is this the reason people in these and other trust positions receive lower sentences?

Scott Newark responded, stating there is “no easy answer”. He noted that frequently the employment, which is a mitigating factor often, enables the offender to have access to children. “There is supposed to be a balance given the nature of the offence, and the fact that the offender has a job shouldn’t really apply in these cases. The justice system should be looking at what that individual has done.”

Angela Long then remarked that it may be that there is still a pervasive view in our society is that the more dangerous offender is a stranger, and we tend to feel that strangers need to be sentenced more harshly.

Q: I just attended a two-day conference on sentencing, and they said the rate of incarceration has been increasing for the past six years. In addition, tonight’s paper equates sentencing with incarceration, and that is not correct. Offenders may receive lower terms of incarceration, but higher terms of probation, so the time they are supervised is in fact extended – maybe up to five years. They may spend less time in jail, but supervision and monitoring continue for much longer.

Scott Newark responded, noting that he thinks that the increase in incarceration is related to an increase in pre-trial remand. In his view, the fact that someone is on probation does

not mean they are actually being actively supervised. He suggested that electronic monitoring would be more effective, and noted that he thinks there is an inherent value in incarcerating people, because that successfully reduces their access to victims.

Ellen Campbell pointed out that in her view, conditional sentencing does little to protect children, and that our number one priority must be to protect children.

On behalf of the Commission Phase 2 staff, Colleen Parrish, Director of Policy, indicated that she welcomed any information that could be given to the Inquiry staff to improve the draft paper, which will be final in December. She asked that any data or information be provided to her so that it could be considered in finalizing the Phase 2 research paper.

Q: Is there a difference in sentencing between male and female perpetrators?

Angela Long replied, noting that the sample of female perpetrators is so small that it is hard to make any conclusions with statistical validity.

Q: There was an article in Maclean's magazine this summer regarding how the Sex Offender Registry is not able to track offenders, and enables them to move around.

Scott Newark replied that he had seen that article. He then pointed out that we now have s. 810 orders which allow authorities to track offenders after their release from custody.

Q: Mr. Newark, have you been invited to submit your recommendations to the Inquiry?

Colleen Parrish from the Commission staff responded to this question, noting that Phase 2 is open to any feedback and the Inquiry will be pleased to receive and review Mr. Newark's recommendations.

Phil Murray then thanked the panel, and invited interested persons to stay behind and speak with any or all of our panellists.