A Specialized Sexual Offences Court for Quebec

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Abstract

At a moment coinciding with the height of the global #MeToo movement, legislators in Quebec announced an initiative, crossing partisan lines, to establish a specialized court for sexual offences. In consequence, Quebec has become the first Canadian province to study the feasibility of a specialized court to address exclusively sexual violence matters. Other provinces may well follow suit, given the growing awareness of how difficult it is for survivors of sexual violence to feel heard, respected, and vindicated within current criminal justice frameworks.

While a specialized court stands to enhance justice outcomes for survivors of sexual violence, several key questions must be addressed well ahead of establishing such a court, to ensure its clarity of purpose and its effectiveness. This article sets out to identify these questions and provide a framework for legislators to evaluate and respond to them. It seeks to ensure that a specialized court will deliver robust justice results for survivors while avoiding pitfalls that could threaten or compromise the tenets of fundamental justice. The article begins by examining the factors that have led survivors and their advocates to be deeply skeptical of our current criminal justice framework's capacity to deliver equitable results via processes that account meaningfully for survivors' experiences and integrity. It then examines specialized courts in other jurisdictions primarily South Africa, which has been referred to as a model by Quebec legislators, to assess their successes. Finally, the analysis draws on insights gleaned from specialized courts, domestic and abroad, to identify and elaborate on the elements essential to the design and implementation of an effective specialized sexual offences court. Ultimately, this article seeks to support the critical and

complex work of legislators endeavouring to enhance access to justice for survivors of sexual violence while upholding the principles of fundamental justice inherent to our current criminal law framework.

The #MeToo movement[1] prompted worldwide calls for more effective, responsive, just, and compassionate outcomes for survivors of sexual violence. The height of this movement dovetailed chronologically in Canada with the publication of the results of a 20-month investigation of approximately 900 police forces across the country. The investigation, branded as "Unfounded" for the title of the series that ran in the *Globe and Mail* setting out its findings, showed that police dismissed as baseless nearly 1 in 5 reports of sexual assault. The investigation illuminated serious gaps and flaws in the approaches taken to those who came forward with complaints, survivors and victims[2] who saw themselves on the receiving end of interrogation, skepticism, and hostility, leading to cases being closed by police, precluding their prosecution and trial.[3] The result of this journalistic inquiry was staggering from a procedural justice perspective: more than 37,000 cases previously deemed "unfounded" have been or will be reopened and

[1] The movement began as early as 2006 by Tarana Burke and developed viral popularity in 2017 as a hashtag on social media at that time as a wave of calls to end sexual harassment, sexual assault, and other forms of sexual violence spread across the globe, notably in the wake of sexual assault allegations against Harvey Weinstein. Ultimately, the movement came to represent a call to name and resist abuses of power by members of dominant groups that took the form of sexual violence especially against women and gender minorities.

[2] Throughout this article, the terms "survivor" and "victim" are used interchangeably to denote a person who has experienced sexual violence. Each term is used throughout the literature, although the language of "survivor" represents more recent efforts to convey the resilience of those who have experienced sexual offences and continue to cope with their ongoing effects. Ultimately, these individuals must be free to decide how to refer to themselves, and this article seeks to respect that choice by invoking both terms throughout.

[3] Robyn Doolittle, "Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless", *The Globe and Mail* (3 February 2017) online: < https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/ >.

reviewed by law enforcement officers to reassess whether available evidence was truly insufficient for a prosecution to proceed.[4]

Quebec was not sheltered from developments that saw publicly notorious figures become the target of sexual assault allegations or that subjected law enforcement officials to heightened scrutiny. In fall 2017, nine women came forward to report incidents of sexual assault and sexual harassment against Gilbert Rozon, founder and former president of the Just for Laughs Festival.[5] At the same time, the press reported that 11 people brought complaints of sexual misconduct against media personality, Éric Salvail.[6] Meanwhile, both the *Sûreté du Québec* and the Gatineau police force, inspired by the Globe and Mail's "Unfounded" series and the so called "Philadelphia model",[7] signaled in

[4] See Jessica Howard, "Q&A: After Unfounded, award-winning journalist Robyn Doolittle delves into #MeToo", *Canadian Women's Foundation* (18 July 2018) online: <https://www.canadianwomen.org/blog/qa-after-unfounded-award-winning-journalist-robyn-doolittle-delves-into-metoo/.

[5] See Isabelle Ducas, "Allégations d'inconduite sexuelle: neuf femmes dénoncent Gilbert Rozon", *La Presse* (18 October 2017) online: <https://www.lapresse.ca/actualites/201710/18/01-5140493-allegations-dinconduite-sexuelle-neuf-femmes-denoncent-gilbert-rozon.php>.

[6] See Katia Gagnon & Stéphanie Vallet "Inconduites sexuelles reprochées à Éric Salvail", *La Presse* (18 October 2017) online: <https://www.lapresse.ca/actualites/enquetes/201710/18/01-5140378-inconduites-sexuelles-reprochees-a-eric-salvail.php>.

[7] In 1999, the Philadelphia Inquirer released an investigative report revealing that the Philadelphia Police Department had failed to investigate thousands of sexual assault cases, in the last two decades of the 20th century. Following this, the Women's Law Project (WLP), a legal advocacy group based in Philadelphia, created, in conjunction with the Police Department, a review process of all unfounded cases. This collaboration between community advocates and police was unprecedented in the country. Since then, community organizations across the city, including the WLP, have implemented an annual review process of all sexual assault cases (including open cases). This review process has come

December 2017 that it would invite victims' rights advocates to review its approach to sexual assault complaints.[8] Finally, these developments also coincided with the circulation of the Final Report of a working group of the *Barreau du Québec* on legal responses to sexual offences in the province. The Report articulated a series of recommendations, all of which were aimed at supporting and providing more resources to victims and heightening the awareness and sensitivities of professionals charged with investigating and prosecuting sexual offences.[9]

While discussions in Quebec emerging at the apex of the #MeToo movement advanced many important, constructive propositions for empowering those who had experienced sexual violence, none focused on judicial institutions. For that reason, it came as a surprise to some when, in late 2018, the newly elected *Coalition Avenir Québec* (CAQ) government began contemplating the creation of a specialized divisional court for the prosecutions of sexual offences. The idea originally came from Véronique Hivon, a lawyer and member of the National Assembly for the *Parti Québecois*. Hivon proposed a non-partisan review

to be known as the "Philadelphia Model". See the Women's Law Project brief, online: <https://www.womenslawproject.org/domestic-sexual-violence/sexual-violence/>.

[8] See Sureté du Québec, News Release, "Le gouvernement s'inspire du modèle de Philadelphie dans le cadre d'un projet pilote de la sûreté du Québec" (1 December 2017) online: <https://www.sq.gouv.qc.ca/nouvelles/comite_revision/>; Marie-Lou St-Onge "Sur le vif : Les policiers de Gatineau s'inspirent de Philadelphie pour aider les victimes d'agression sexuelle", *Radio-Canada* (27 November 2017) online: <https://ici.radio-canada.ca/premiere/emissions/sur-le-vif/segments/entrevue/48813/ciasf-simon-drolet-abus-sexuel-plaintes>.

[9] Secrétariat de l'Ordre et Affaires Juridiques du Barreau du Québec, "Traitement des dossiers en matière d'agression sexuelle au Canada" (2017) 49:10 Le Journal du Barreau.

of provincial approaches to sexual assault cases through the creation of a special division of the Court of Québec. Hivon's proposal included other elements, which received less media attention but are equally notable, including the creation of one-stop **centres** for victims,[10] which would provide resources for both legal and psychological aid. Complainants would also be able to testify with a screen or by videoconference without having to show a need for accommodation.[11] Concurrently, Hivon proposed abolishing the 30-year limitation for civil suits and to modify the *Crime Victims Compensation Act* to better account for the realities of victims of sexual assault.[12]

Hivon's ideas were well received by the government of the day. Premier François Legault signaled his openness to the notion of a specialized court in December 2018,[13] following which, Justice Minister, Sonia Lebel and Hivon

[10] See Johnathan Montpetit, "Idea for special sexual assault court gains steam in Quebec in wake of #MeToo", *CBC News* (24 January 2019) online: <https://www.cbc.ca/news/canada/montreal/idea-for-special-sexual-assault-court-gains-steam-in-quebec-in-wake-of-metoo-1.4990459>.

[11] See Simon-Olivier Lorange, "Violences sexuelles: le PQ souhaite modifier le système judiciaire", *La Presse* (26 September 2018) online: <https://www.lapresse.ca/actualites/elections-quebec-2018/201809/26/01-5198105-violences-sexuelles-le-pq-souhaite-modifier-le-systeme-judiciaire.php>.

[12] See François Messier, "Le Parti québécois réitère sa promesse de créer un tribunal spécialisé pour les crimes sexuels", Radio-Canada (26 September 2018) online: <https://ici.radio-canada.ca/nouvelle/1126313/veronique-hivon-parti-quebecois-agressions-sexuelles-chambre-specialisee>; "L'opposition demande une réforme majeure à l'Indemnisation des victimes d'actes criminel" *Radio-Canada* (28 March 2018) online: <https://ici.radio-canada.ca/nouvelle/1092085/opposition-quebec-demande-reforme-indemnisation-victimes-actes-criminel>.

[13] See François Messier, "Un tribunal spécialisé pour les crimes sexuels? « Je suis ouvert à ça », dit Legault", *Radio-Canada* (13 December 2018) online: <https://ici.radio-canada.ca/nouvelle/1141731/premier-ministre-francois-legault-entrevue-telejournal>.

initiated a non-partisan meeting with two other members of the National Assembly — Hélène David (Liberal) and Christine Labrie (*Québec Solidaire*), representing Quebec's two other political parties — to discuss the possibility of a specialized tribunal for sexual offences in Quebec.[14] The Province is set to begin an analysis of this proposal through the work of a committee of experts ("Expert Committee") that will study measures to enhance support to victims of sexual and domestic violence, and report back by spring 2020.[15]

This paper seeks to inform the analysis of that Expert Committee and of other bodies that may be charged with considering the benefits and potential drawbacks of a specialized tribunal for sexual and gendered violence offences. Although the idea of a specialized sexual offences court is the first of its kind in Canada, it is entirely possible that other Canadian provinces and territories will follow suit. The proposal in Quebec has attracted considerable media attention, most of it positive, but questions about the form such a tribunal would take, the resources it would require, and whether and how it would result in a shift in juridical analyses remain unanswered. From the outset, government officials have maintained that the Province would not call for altering the burden of proof in criminal prosecutions of sexual offences, maintaining that this

[14] See Marie-Laurence Delainey, "Violences sexuelles : première rencontre entre les partis à Montréal", *Radio-Canada* (13 January 2019) online: <https://ici.radio-canada.ca/nouvelle/1146656/violences-sexuelles-rencontre-partis-politiques-tribunal-special>.

[15] See Lia Lévesque, "Quebec brings together experts to support sexual and domestic violence victims" *Global News* (18 March 2019) online: <https://globalnews.ca/news/5067925/quebec-brings-together-experts-to-support-sexual-and-domestic-violence-victims/>.

would always rest with the Crown, the standard being that for all criminal offences: beyond a reasonable doubt. This seems logical, since even if Quebec were inclined toward a reverse onus provision for sexual offences, such a move would be *ultra vires*,[16] criminal matters being within the ken of Parliament and not provincial legislatures,[17] and likely unconstitutional.[18]

This article delves into the discrete issue of whether a special court for sexual offences, whether in Quebec or any other jurisdiction, stands to improve justice outcomes. As the Province embarks upon an in-depth study of this question, the analysis here seeks to discern the promise of specialized tribunals and the conditions under which that promise can be realized. In this connection, this article speaks to the social, economic, and cultural forces that stand to affect, for better or for worse, the success of an initiative that purports to improve law's engagement with those who have experienced sexual violence, most of whom will be women, gender minorities, and children and adolescents. The analysis begins (Part I) by reviewing the shortcomings in our current juridical approaches to receiving, investigating, prosecuting, and sentencing

[16] See Bill C-75, for example, a federal law included a reversal of onus at bail in domestic violence cases where the accused person has already been convicted of a previous offence. *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 2019, c. 25.

[17] See Paul Arcand, "Agressions sexuelles : Sonia Lebel indique qu'il est impossible de modifier la règle de preuve", *98.5 FM Montréal* (14 January 2019) online: <https://www.985fm.ca/nouvelles/politique/182192/agressions-sexuelles-sonia-lebel-indique-quil-est-impossible-de-modifier-la-regle-de-preuve>.

[18] See *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*(UK), 1982, c 11.

sexual offences. It proceeds (Part II) to consider models of specialized tribunals in jurisdictions outside of Quebec, focusing here on domestic violence courts in other provinces and sexual offences tribunals in South Africa, both of which have been presented as models by politicians who have pitched the specialized tribunal proposal in Quebec. Last, this article examines (Part III) the potential contributions of a sexual offences tribunal for victims and for Quebec society more broadly, its potential limits, and the factors that require clarification to ensure that such an initiative enhances justice outcomes. It sets the groundwork for analyses that would contribute to the effective development and operations of a sexual offences specialized court for Quebec or any other province or territory in Canada.

Part I: Shortcomings of Current Legal Approaches to Sexual Offences

A core limitation of criminal justice approaches to sexual offences pertains to the widely held view that these approaches neglect victims' needs and interests. These perceptions are likely anchored to data related to prosecution and conviction rates for sexual offences, yielding a view that the burden of reporting is not offset by the prospect of a positive outcome.[19] Distrust of criminal justice systems is also a likely by-product of social narratives that have developed over decades detailing the hostility that victims, who ultimately mustered the courage to come forward, encountered in engagements with police, lawyers,

[19] See Statistics Canada, *Self-Reported Sexual Assault in Canada, 2014*, by Shana Conroy and Adam Cotter, Catalogue Juristat No 82-002-X (Ottawa: Statistics Canada, 11 July 2017).

and judges.[20]

Data from **2014** indicate that in that year, over **5300** sexual offences were reported in Quebec, two-thirds of which were sexual assault cases.[21] These reported incidents are likely a small proportion of the overall number of actual incidents of sexual offences; various sources indicate that only 1 in 20 of such cases is reported to law enforcement officials,[22] rendering sexual assault the most underreported offence in the country.[23] Further, of those cases that are reported, only 43% in 2017 resulted in charges being laid against the accused, and of that fraction, less than one-half (49%) proceeded to trial. Cases that went to court had a conviction rate of 55%, with offenders in such incidents sentenced to custody 56% of the time.[24] Ultimately then, of the small proportion of sexual offences that are reported, a sizable number are streamed out of the system at each

[20] See Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 626.

[21] See Ministère de la sécurité publique du Québec, *Les infractions sexuelles au Québec en 2015*, (Québec : Ministère de la sécurité publique du Québec, 2015)

[22] See Statistics Canada, *Police-reported violence against girls and young women in Canada, 2017*, by Shana Conroy, Catalogue Juristat No 85-002-X (Ottawa: Statistics Canada, 17 December 2018); Secrétariat à la condition féminine, *Information Guide for Sexual Assault Victims 3rd Edition*, by Jessica Cantin-Nantel (Montréal: Table de concertation sur les agressions à caractère sexuel de Montréal, 2018) at 10.

[23] See Alana Prochuk, "Women's Experiences of the Barriers to Reporting Sexual Assault" (Vancouver: West Coast LEAF, November 2018), online (pdf): <http://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf> at 12.

[24] See Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, Catalogue Juristat No 85-002-X (Ottawa: Statistics Canada, October 26, 2017).

one of the multiple stages for criminal prosecutions. These stages are set out in Figure 1, below.

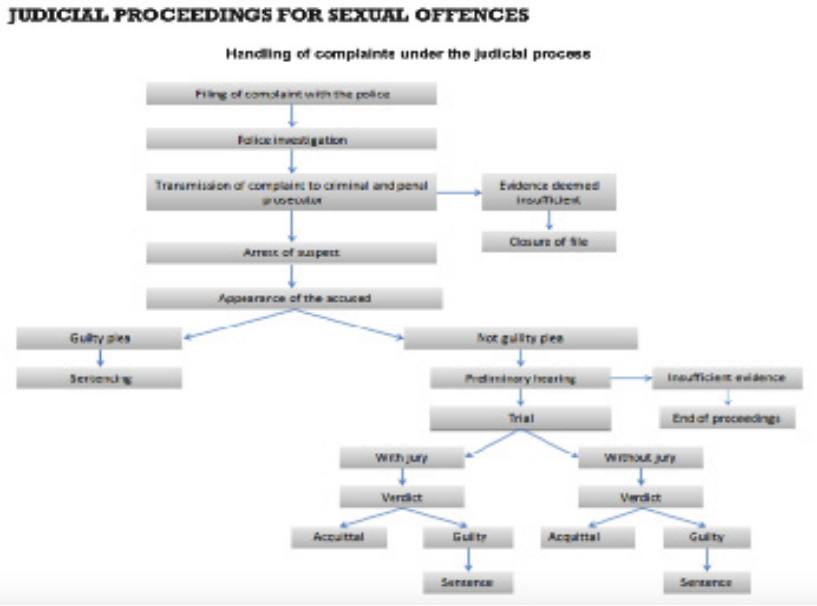

Figure 1: Outline of steps involved in the handling of complaints of sexual offences in the criminal justice system in Quebec[25]

A victim made aware of the multiple steps through which a sexual offences complaint must proceed and of the stark attrition rates at all of these phases could understandably be deterred from seeing the courts as a vehicle for seeking justice and healing. The point is reinforced by considering the identity of many sexual assault victims. These are individuals often without the social, political, or economic resources to navigate justice

[25] See Gouvernement du Québec, Institut National de Santé Public, *Sexual Assault: Judicial Process* (Québec) online : <https://www.inspq.qc.ca/en/file/rotateur5-enjpg>.

processes. Between 25%[26] and nearly 50%[27] of cases involve victims who are children or minors. Victims are most often girls and women,[28] and usually know their alleged assailant, sometimes as their own spouse,[29] a factor that will predictably lead to questions about consent and credibility during investigations and prosecutions. Members of social groups who face systemic barriers to legal and political institutions are also more likely to experience sexual violence: transgender and gender diverse, Two Spirit,[30] Indigenous,[31] disabled,[32] and racialized persons[33] experience higher rates of sexual violence. These are individuals underrepresented in legal, judicial, and political institutions and professions. Their experiences may not be reflected in policing and prosecutorial approaches if these have failed to account for "the multiple ways in which social positions"[34] affect

[26] See Secrétariat à la condition féminine, *supra* note 22.

[27] See Ministère de la sécurité publique du Québec, *supra* note 21.

[28] See Statistics Canada, *supra* note 24.

[29] See Secrétariat à la condition féminine, *supra* note 22.

[30] See Alex Bucik, "Canada: Discrimination and Violence against Lesbian, Bisexual, and Transgender Women and Gender Diverse and Two Spirit People on the Basis of Sexual Orientation, Gender Identity and Gender Expression" (Ottawa: Egale Canada Human Rights Trust, 2016) at 4-5, online): <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_25380_E.pdf>.

[31] See Statistics Canada, *Violent victimization of Aboriginal women in the Canadian provinces, 2009*, by Shannon Brennan, Catalogue Juristat No 85-002-X (Ottawa: Statistics Canada, 17 May 2011).

[32] See Secrétariat à la condition féminine, *supra* note 22.

[33] See Jane Doe, "Who Benefits from the Sexual Assault Evidence Kit?" in Elizabeth A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 362.

[34] See Holly Johnson & Jennifer Fraser, "Specialized Domestic Violence Courts: Do They Make Women Safer?" (2011) published online (pdf): <http://www.oaith.ca/assets/files/Publications/Criminal%20Law/DVC-Do-theyMake-

the conditions under which sexual violence and reporting occurs. Individuals who have lived social marginalization are also more likely to face systemic barriers to accessing justice in the form of discrimination and bias based on myths and stereotypes that can affect perceptions about credibility. Further, as discussed below, for many, their experiences with state institutions have elicited a reluctance to trust judicial processes and state institutions.[35]

If willing to face the odds and bring a complaint for a sexual offence, a victim might still experience other barriers related to the fact that, once a complaint lands in the criminal justice system, the complainant becomes almost secondary or peripheral to the process. A filed complaint moves through the hands of the police, prosecutors, then a judge, with decisions made at each stage that will have deep ramifications for the victim. At the same time, the victim's "lack of choice and control" with respect to these decisions can prove frustrating, and potentially impact a decision about whether to continue to engage or cooperate with a process.[36]

Further, the historic disregard and mistreatment of victims who reported sexual violence is well-known and documented, lending itself to distrust in police and other justice authorities. Distrust of legal actors, and a resultant reticence to report to them, will be particularly acute for survivors from communities whose "past experiences with law enforcement have been disappointing and

Women-Safer.pdf> at 8.

[35] Prochuk, *supra* note 23 at 25.

[36] *Ibid*.

even traumatizing."[37] Aware of the historical and cultural propensity to see victims, particularly those perceived or portrayed by social stereotypes as sexually promiscuous,[38] as the authors of their own misfortune, many survivors will undoubtedly be daunted by the prospect of coming forward, knowing they risk facing interrogations for their own role in or contribution to the acts reported.[39]

Feminist legal scholars have long criticized the criminal justice system's engagement with sexual violence. They point to biases, whether conscious or not, held by judges and lawyers in the courtroom,[40] limiting the efficacy of legislative amendments and new judicial appointments. Court proceedings, along with police investigations and interviews, have also been subject to scrutiny for their

[37] *Ibid* at 30.

[38] For example, it was recently revealed that in an interrogation of a victim of sexual assault in Kelowna, BC, an RCMP officer asked an Indigenous youth whether she was "turned on by this at all", implying her consent to the incident. The victim was a minor at the time of the interrogation. See Holly Moore and Brittany Guyot, "'Were you turned on by this at all?': RCMP officer asks Indigenous youth during sexual assault report", *APTN News* (13 May 2019) online: <https://aptnnews.ca/2019/05/13/were-you-turned-on-by-this-at-all-even-a-little-bit-rcmp-officer-asks-indigenous-youth-during-sexual-assault-report/>.

[39] Prochuk, *supra* note 23 at 5.

[40] See T. Bretel Dawson "Women's Experiences of Judicial Process" in T. Brettel Dawson, ed. *Women, Law, and Social Change: Core Readings and Current Issues, 5th Edition* (Concord: Captus Press, 2009) at 194; Regina Graycar "The Gender of Judgements: Some Reflections on 'Bias'" in T. Brettel Dawson, ed. *Women, Law, and Social Change: Core Readings and Current Issues, 5th Edition* (Concord: Captus Press, 2009) at 200. For a discussion on the language used by courtroom actors and the failings of the criminal justice system in sexual assault cases, see Susan Ehrlich "Perpetuating and Resisting Rape Myths in Trial Discourse" in Elizabeth A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 389.

propensity to revictimize survivors,[41] contributing to low rates of reporting, which are explored below. For their part, Vandervort, Benedet, and Bakht point to the persistence of myths and misconceptions in central legal frameworks such as those that have shaped the law's definition of consent,[42] and the application of evidentiary rules in court.[43]

In Canada, it is only relatively recently that the *Criminal Code* was amended to restrict the admissibility of evidence obtained by cross-examination of complainants about their past sexual history.[44] As Craig describes, legislative and judicial developments in Canada explicitly reject three myths about victims of sexual offences that historically shaped assessments of their credibility: (1) that sexual promiscuity is correlated to an increased

[41] See Mary P. Koss "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action" (2006) 1087 Ann. N.Y. Acad. Sci. at 209-215; See also Dale Spencer, Alexa Dodge, Rose Ricciardelli, & Dale Ballucci "'I Think It's Re-Victimizing Victims Almost Every Time': Police Perceptions of Criminal Justice Responses to Sexual Violence" (2018) 26 Crit Crim 189.

[42] See Lucinda Vandervort, "Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory" (2012) 23:2 CJLG 395. Janine Benedet "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution" (2014) 52:1 Alta. Law Rev. 127 at 135*ff*; For an overview of consent with regards to incapacity see Janine Benedet & Isabel Grant, "A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law" (2013) 43:1 Ottawa L Rev 1 at 4-7.

[43] See Natasha Bakht, "What's in a Face? Demeanour Evidence in the Sexual Assault Context" in Elizabeth A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (Ottawa: University of Ottawa Press, 2012); Benedet, *ibid* at 133*ff* [*Bakht, What's in a Face*].

[44] See Bill C-49, Transportation Modernization Act, 1st Sess, 42nd Parl, 2017 (as passed by the House of Commons May 23 2018). See *Criminal Code*, RSC 1985, c C-46, s. 276. Note that earlier Canadian rape-shield laws were struck down by the Supreme Court of Canada as unconstitutional in 1991 (*R v Seaboyer*, [1991] 2 SCR 577). Current rape-shield laws were tested constitutionally and upheld by the Supreme Court in *R v Darrach*, 2000 SCC 46.

likelihood to consent and to a penchant for lying; (2) that a credible victim reports promptly and a victim to delays reporting is untruthful; and (3) that a victim who does not consent will actively fight back during an assault.[45] While critical to maintaining the dignity of survivors in criminal justice processes, these developments have not managed to eradicate completely "the persistence of rape myths"[46] or "continued reliance on antiquated and unethical strategies to discredit complainants."[47] Indeed, following a nation-wide study of courtroom practices in sexual assault cases, Craig concluded that despite these amendments, legal actors at trial can contribute to the revictimization of complainants.[48] This results from the very nature of the adversarial system and the fact that the survivors are relegated to an observational role at trial. Unsurprisingly, then, engagement with legal and judicial processes can be experienced as compromising psychological safety, undermining "self-esteem, self-confidence, and self-respect" and, ultimately, a victim's overarching healing and recovery.[49]

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[45] See Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51 Osgoode Hall L J 427 at 431-32 [*Craig, Ethical Obligations*].

[46] See Bronwyn Naylor, "Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways" (2010) 33 UNSWLJ 662 at 664.

[47] See Craig, *Ethical Obligations*, *supra* note 45 at 435; See also Jane Goodman-Delahunty & Kelly Graham, "Influence of Victim Intoxication and Victim Attire on Police Responses to Sexual Assault" (2010) 8 J. Investig. Psych. Offender Profil. 22.

[48] See Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen's University Press, 2018) at 219 [*Craig, Putting Trials on Trial*].

[49] Johnson and Fraser, *supra* note 34 at 21.

Further, current criminal justice processes are focused on the accused and procedures associated with their prosecution, whereas questions about victims' safety and empowerment are secondary. Even where an accused person is subject to court orders that prevent or limit contact with the victim, such judicial measures can sometimes prove illusory, lending themselves to "the optics of safety", rather than truly reducing survivors' exposure to risk of revictimization by the accused through retaliation, intimidation, harassment, or abuse once conditionally released.[50]

A final shortcoming of our current criminal justice model relates to the fact that it does not foresee the possibility of restorative justice frameworks. Pilot projects that focus on restorative or therapeutic justice have seen some success in achieving the twin goals of survivor healing and the offender accountability. Restorative approaches will not be advisable or feasible in all cases. Their effectiveness depends on the presence of both a victim who is open to an "alternative pathway" to justice and an offender willing to accept responsibility for the acts in question.[51] Just the same, and not withstanding certain critiques of this model,[52]

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[50] *Ibid* at 15, 24.

[51] Naylor, *supra* note 46 at 670.

[52] As one study found, specialized courts may incentivize the accused to accept responsibility even when the evidence available to the Crown is weak. For some accused, the gamble of going to court, rather than accepting a diversion program, which often holds the possibility of community service over prison and the potential of an absolute and conditional discharge with lighter consequences for one's housing and employment prospects, is simply not worth it. This was the pattern observed by Hannah-Moffat and Maurutto, in their study of domestic violence courts, who offer a nuanced analysis of the different justice paths such courts offer to accused persons. See Kelly Hannah-Moffat & Paula Maurutto, "Shifting and Targeted Forms of Penal Governance:

it is suggested that this approach can offer more promise than would any further efforts to re-train professional actors in the justice system or undertake legislative reform with a view to rendering traditional criminal justice institutions and procedures more "friendly" vis-à-vis victims of sexual offences. Indeed, the latter would quickly, and rightly, be impugned as a threat to the guarantee of a presumption of innocence, the right to make full answer and defence to criminal charges, and the impartiality and independence of legal and judicial actors and institutions.

Conclusion

Current criminal justice processes are marred by several limitations that deter many victims of sexual offences from coming forward, or adversely affect them once an offence is reported. Some of these shortcomings are insurmountable, since criminal justice is necessarily focused on the accused, not the victim. Moreover, that process aims almost uniquely to determine guilt or innocence in a manner that respects the accused's fundamental rights, including those related to personal security, the guarantee of a fair trial, and a presumption of innocence. For that reason, victims' rights and well-being have historically not been central to criminal justice preoccupations.

The question that Quebec thus ought to be asking as it contemplates the creation of a special court for sexual offences is whether it can achieve the goal of foregrounding the importance of victims' healing and safety, while still adhering to fundamental justice concerns and upholding

Bail, Punishment and Specialized Courts" (2012) 16 Theor Criminol 201 at 205 [*Hannah-Moffat & Maurutto, Shifting and Targeted*].

the rights of the accused. Evaluating this issue requires an analysis of what specialized courts in other contexts and jurisdictions have achieved, or not. It is to that topic that the discussion now turns.

Part II: Exploring Existing Specialized Court Models

Specialized courts have emerged as a response to various issues within the criminal justice system that have their roots in multifaceted social challenges. Such courts typically have limited or exclusive jurisdiction over one issue, to which all cases that raise this issue will be routed.[53]

Sometimes called "problem-solving" or "therapeutic" courts in the literature, these institutions seek to undertake a holistic examination of the multiple factors that may lead to criminal outcomes. Often, they will partner with treatment providers or community organizations to provide suitable follow-up and support for victims and offenders.[54] Models include drug treatment courts, Indigenous/Gladue courts, mental health courts, and domestic violence courts.

While problem-based or specialized courts are often thought of as the product of "a need for therapeutic justice",[55] it is critical to appreciate that not all such courts are oriented toward therapy or treatment, at least not in a biomedical sense. Rather, such courts are probably better understood as reflecting an interest in managing complex socio-legal issues

[53] See Susan Eley, "Changing Practices: Specialized Domestic Violence Court Process" (2005) 44 Howard J Crim Justice 113 at 113.

[54] See Natasha Bakht, "Problem-Solving Courts as Agents of Change" (2005) 50 Crim L. Q. 224 at 225 [*Bakht, Problem-Solving Courts*].

[55] *Ibid*.

with relevant expertise in collaboration with community actors who can support victims and offenders throughout and following criminal proceedings. [56]These courts thus allow professionals in the criminal justice system, especially judges, to situate juridical principles within, and apply them to, "contextualized knowledge" relevant to the issue at play.[57] Specialized courts also tend to be the result of calls for restorative justice models, particularly in contexts where traditional criminal justice frameworks are seen as failing to meet the objectives of promoting victims' healing and preventing offender recidivism. Notably, these courts rest on an understanding that when criminal behavior is rooted in physical, psychological, social, or economic circumstances, recidivism "is better, and probably more economically, dealt with by effective social intervention than by harsher sentences."[58]

In evaluating whether a specialized court for sexual violence stands to improve justice outcomes, it is helpful to consider another example of a court designed to deal with this issue in a different global context. Before doing so, however, the discussion turns to consider domestic violence courts. This example is chosen as a model that can meaningfully inform an analysis of the prospects of sexual violence courts for three important reasons. First, unlike drug or mental health courts, domestic violence courts focus on the offence rather than the offender's "affliction";

[56] Hannah-Moffat and Maurutto, *Shifting and Targeted supra* note 52 at 202.

[57] See Kelly Hannah-Moffat & Paula Maurutto, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31 CJLS 451 at 468 [*Hannah-Moffat & Maurutto, Aboriginal Knowledges*].

[58] See Arie Freiberg, "Problem-Oriented Courts: Innovative Solutions to Intractable Problems" (2001) 11 J of Judicial Administration 8 at 9.

in this way, these courts are "designed to deal with both the offender and the victim".[59] This is critical for sexual violence courts, given the importance of ensuring that the voices and perspectives of survivors are represented and taken seriously in any new process or institution. Second, like domestic/intimate partner violence, sexual offences have a highly gendered character, with men and women disproportionately representing offenders and survivors respectively.[60] Third, domestic violence courts attempt to move away from the traditional, sometimes exclusive, focus on the accused/offender as is the case in the criminal justice system and instead aim to centre victims and their interests. These efforts could be important to advancing the goal of being more responsive to survivors' critiques of criminal justice processes in sexual offences cases, while being mindful of procedural justice considerations.

[59] *Ibid* at 18.

[60] Sexual assault and intimate partner violence are gendered crimes. According to Statistics Canada, 94% of sexual assaults are committed by men and 87% of victims are women. Further, gender fluid and trans persons are disproportionally affected. A Washington survey found that 47% of trans individuals were sexually assaulted in their lifetime, well over twice the rate of cis-gendered women victims of sexual assault in Canada. Homosexual or bisexual Canadians are likewise six times more likely to be sexually assaulted than heterosexuals. Women are four times more likely to experience intimate partner violence than men. Statistics Canada, *supra* note 17; Statistics Canada, *Criminal Victimization in Canada, 2014*, by Samuel Perreault, Catalogue Juristat No 82-002-X (Ottawa: Statistics Canada, 23 November 2015); Statistics Canada, Family violence in Canada: A statistical profile, 2011, by Maire Sinha, Catalogue Juristat No 85-002-X (Ottawa: Statistics Canada, 25 June 2013); Sandy E. James, *The Report of the 2015 U.S. Transgender Survey* (Washington, DC: National Center for Transgender Equality, December 2016) online (pdf): https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

a) Domestic violence courts

Specialized courts to deal with matters of domestic violence first arose in the 1980s in the United States, proliferating throughout several western jurisdictions in the decade that followed. Their rationale mirrored that of other specialized courts, namely, a realization that traditional criminal justice methods were not effective at supporting victims or reducing recurrence of violence.[61] Instead, responses coordinated with other social services delivered more robust support to individuals and families affected by domestic violence, while also offering the promise of reducing recidivism rates.

The literature on domestic violence courts reveals that they have achieved some improved justice outcomes, notably by elevating the priority of domestic violence cases and by assigning skilled and specially-trained lawyers and judges to these files.[62] The integration of social services has also proven to be beneficial in some instances to empowering victims by keeping them informed and accompanied throughout judicial processes. Notably, advocates can develop a relationship with victims and witnesses so as to keep them apprised about court dates, release dates, bail conditions, their own legal rights, as well as available health and social services and legal resources. These forms of accompaniment are perceived as bearing the potential to keep victims engaged with judicial processes, which is often essential to securing a successful prosecution.[63]

[61] Eley, *supra* note 53 at 114.

[62] *Ibid* at 115.

[63] *Ibid* at 119-120.

Hence, although jurists will typically cite access to justice benefits — notably, reduced backlog of domestic violence cases in general courts, and improved quality in judicial processes and decision-making on account of specialized, trained experts, typically leading to fewer appeals — for at least some authors, the real potential of domestic violence courts lies in their capacity to manage "the collaboration and coordination of people".[64] By bringing together service providers and professionals from within and outside of justice systems to foster victim support and offender rehabilitation, specialized courts are seen as having the potential to improve outcomes in individual cases and more broadly, at a systemic level.[65]

Domestic violence courts are not, however, universally viewed as beneficial. Because their origins emanate from a desire to "see justice" done to perpetrators, discussions about such courts have a strong "tough on crime" flavour to them, raising flags about prosecutorial zeal aimed at securing convictions over and above restorative and rehabilitative goals. While "aggressive pro-prosecution policies" might help victims in some cases, they might also expose them to enhanced risk if they prompt retaliation by an accused and no meaningful physical and psychological safety measures have been put in place.[66] Concerns have also been cited about the risk that increased sharing of information between courts and health and social services providers might expose parents to overreach in the context

[64] *Ibid* at 122.

[65] See Leslie M. Tutty & Jennifer Koshan, "Calgary's Specialized Domestic Violence Court: An evaluation of a unique model" (2013) 50 Alberta L Rev 731 at 753.

[66] Johnson and Fraser, *supra* note 34 at 15.

of child protection interventions.[67] Along the same lines, others have argued that specialized domestic violence courts, though designed to empower women, actually serve to "reinforce a normative and gendered understanding of victimization, risk, agency and violence".[68] As a result, individuals who have experienced domestic violence may quickly be pigeonholed as "victims" with marginal capacity for self-determination. This in turn stands to compromise their ability to make choices for themselves and for their children about fundamental matters related to health, housing, education, and work.

Other critics of domestic violence courts stress that the victim/offender binary is critical to foreground when responding to this offence. Their concern is that a focus on rehabilitation stands to dilute the real harm caused by gendered violence. Thus, according to these critics, this offence should be prosecuted just as severely — or even more so — than any other form of assault. The notion, then, of restorative justice, with its focus on rehabilitating offenders, is viewed as "condoning the behaviour of perpetrators and as sending the wrong signal to the victims."[69] This is so even though the philosophy underlying domestic violence courts distinguishes between "low-risk" and "serious repeat" offenders, the former viewed as amenable to a restorative approach in contrast to the latter, deemed as warranting "vigorous prosecution".[70]

[67] See Jennifer Koshan "Specialised domestic violence courts in Canada and the United States: Key factors in prioritising safety for women and children" (2018) 40 JSWFL 515 at 520 & 527.

[68] Hannah-Moffat & Maurutto, *Shifting and Targeted*, *supra* note 52 at 209.

[69] Frieberg, *supra* note 58 at 18.

[70] Tutty and Koshan, *supra* note 65 at 733.

The literature raises a final point of caution regarding domestic violence specialized courts in relation to cultural competence and sensitivity to diverse stakeholder populations. One Canadian study indicated that LGBTQ2+ and racialized (notably, African-American) families appear underrepresented in proceedings overseen by these courts.[71] In a similar vein, other research signals that such courts may be ill-equipped to deal effectively with the needs of diverse, especially historically marginalized, population groups such as immigrant and refugee populations, Indigenous persons, persons with disabilities, and the LGBTQ2+ community.[72] These points are essential to underline in thinking about whether and how domestic violence courts can serve as a model for the development of sexual offences courts in Quebec.

b) Sexual offences courts

Calls for new approaches to sexual offences that depart from traditional criminal justice frameworks have been made for years and continue to grow, owing in large part to the perceived shortcomings of orthodox processes described in Part I of this article. Proponents of innovation in this area argue that "formal criminal justice has had its chance" but proved itself ineffective for dealing with sexual offences, the seriousness of which "is not reflected in convictions and sentencing."[73] Accordingly, the potential for alternative justice frameworks for sexual offences is

[71] Koshan, *supra* note 67 at 522.

[72] Tutty and Koshan, *supra* note 65 at 753.

[73] See Barbara Hudson, "Restorative Justice and Gendered Violence: Diversion or Effective Justice?" (2002) 42 Brit J Crim 616 at 623.

explored here using the model that developed in South Africa more than 25 years ago. South Africa is the only country discussed in the literature as having a national sexual offences court initiative, and the reader will recall that Quebec politicians pointed to it as a model when they proposed the idea of a sexual offences court for the province in 2018.[74]

Sexual Offences Courts in South Africa were first introduced in 1993 as a pilot project at the Wynberg Regional Court in Cape Town (the "Wynberg Project")[75] as a way to address the increased reports of rape and the revictimization of complainants who proceeded through criminal justice systems. The Wynberg Project had multiple objectives. It sought to develop a "victim-centred" approach, ensure coordination and integration with service providers, and improve processes to increase reporting and conviction rates.[76] Just four years after its establishment, the Wynberg Project was found to have had some success in achieving these outcomes.[77]

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[74] Montpetit, *supra* note 10. Note that there are other examples of specialized sexual offences tribunals not discussed in this article. For example, New Zealand implemented a pilot project in two cities in 2016. See Office of the Chief District Court Judge of New Zealand, News Release, "District Courts to Pilot Sexual Violence Court" (20 October 2016) online : <http://www.districtcourts.govt.nz/assets/Uploads/827ea2faec/Statement-from-the-Chief-District-Court-Judge-Pilot-SV-Court-.pdf>; Arizona also has a court program named RESTORE, which consists of restorative justice measures in the context of sexual violence. See Naylor, *supra* note 47 at 673*ff*.

[75] See *Report on the Re-establishment of Sexual Offence Court, Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matter*, Department of Justice and Constitutional Development, Republic of South Africa (August 2013) at 18 [*MATTASO*].

[76] *Ibid*.

[77] See *Report Sexual Offences Against Children: Does the Criminal Justice System*

Over the subsequent decade, the Wynberg Project served as a model that was replicated throughout South Africa,[78] with a national strategy for specialized offences courts developed by 2003.[79] Concurrently, special centres for survivors the Thuthuzela Care Centers (TCC) were developed. These were designed as 24-hour, single-stop facilities that provided professional support and services to complainants. They coordinated their services which included medical and psychological support with the specialized court.[80] Further, the federal Department of Justice enacted, in 2004, the Service Charter for Victims of Crime in South Africa,[81] which set out seven rights, including the rights to dignity, fairness, and privacy.

The successes of the specialized courts in South Africa seem to have peaked by 2005, when there were over 70 such courts across the nation. Subsequently, concerns grew with respect to the unequal distribution of resources to these courts, notably those in urban settings.[82] Process changes resulted in file backlogs and postponements, and regular courts began to be relied on again to address sexual offences. The specialized courts were gradually converted to "Dedicated Sexual Offences Courts" (mixed rolls that gave priority to sexual offences).[83]

Protect Children?, South African Human Rights Commission (April 2002) at 26; See also H.B. Kruger and J.M. Reyneke "Sexual Offences Courts in South Africa: *Quo vadis*?" (2008) 33 JJS 32 at 39.

[78] MATTASO, *supra* note 75 at 18.

[79] *Ibid* at 20.

[80] Kruger and Reyneke, *supra* note 77 at 44.

[81] *Ibid* at 46

[82] MATTASO, *supra* note 75 at 23.

[83] *Ibid* at 24.

By 2013, studies were showing a return to under-reporting and under-prosecution of sexual offences, and inadequate treatment of complainants in South Africa[84] triggering the Department of Justice to strike an Advisory Task Force to evaluate the re-establishment of specialized sexual offences courts.[85] While the Task Force called for restoring the specialized courts, challenges with respect to resourcing them appropriately remain.[86] Additional research on specialized sexual offences courts in South Africa signal a need for caution and vigilance about the prospect of bias against perpetrators and a perceived focus on retribution over restoration that risks undermining these courts' legitimacy.

Conclusion

An analysis of specialized courts created to address issues of gender and sexual violence indicates that such institutions offer some potential for improved access to justice outcomes. Notably, specialized courts offer greater focus on the needs of survivors, particularly when judicial institutions partner with social and community services. At the same time, an examination of these courts also reveals their limitations and the extensive resources and care needed to avoid or surmount them. These limitations are so significant that they resulted in the near collapse

[84] See Sheena Swemmer et al. "Rape Justice in South Africa Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012" (2017) Pretoria, South Africa. Gender and Health Research Unit, South African Medical Research Council, at 14.

[85] MATTASO, *supra* note 75.

[86] See Aisling Heath et al. "Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts" (2018) Cape Town, South Africa. Gender Health and Justice Research Unit, at 38 & 40.

of sexual offences courts in South Africa, the success of which currently lags on account of under-resourcing and a perception that these courts stand to compromise the rights of accused persons by unduly focusing on high prosecution and conviction rates. Accordingly, before Quebec attempts to embark on a specialized courts initiative to address sexual misconduct in the province, an analysis of optimal structures for such courts is imperative. This analysis is the subject of the discussion that ensues.

Part III: A Specialized Sexual Offences Court for Quebec Essential Elements

Having considered the difficulties that challenge and often obstruct justice for survivors of sexual offences in the criminal justice system and having analysed the strengths and shortcomings of specialized courts developed in different geographic settings to address gender-related violence, it becomes possible to evaluate Quebec's proposal to develop a specialized sexual offences court. This section draws on lessons learned from the literature examined in the preceding Parts of this article to examine three dimensions, perceived as essential, to ensuring that sexual offences courts in the province yield a meaningful impact on the lives of survivors while also ensuring fairness and justice for those accused of having engaged in sexual offences. First, the ethos and mandate of a sexual offences court for Quebec must be explicitly spelled out. Second, such a court must be appropriately resourced, but not only through funding. Instead, appropriate interdisciplinary expertise is essential to a specialized court's effectiveness. Third, to succeed, the initiative must account for the diverse identities and experiences of those affected by sexual

violence, recognizing for the distrust many will have in judicial institutions regardless of whether they fall within or outside of orthodox criminal justice frameworks.

a) The Ethos and Mandate of a Sexual Offences Court

What should the vocation of a specialized court for sexual offences be? What principles and values ought to animate such an institution? As noted above, although specialized tribunals have often been perceived as aligned with, and contributive to, restorative justice or "treatment" measures, this has not necessarily been true of courts that address gender violence. Domestic violence and sexual offences courts developed in different parts of the world have seemed to have a stronger bent toward ensuring faster and safer access to justice, principally for the benefit of the survivor. These courts also set goals that align higher conviction rates and harsher sentences with enhanced justice outcomes and success. The ethos of these courts thus departs from that which characterizes the restorative and treatment objectives of specialized courts that focus, for example, on drug use and Indigenous offenders.[87] Furthermore, in some cases, a zeal for successful prosecutions in specialized courts for domestic and sexual violence has failed to reflect the victim's own wishes and needs,[88] raising questions about the extent to which they advance victim-

[87] Bakht, *Problem-Solving Courts*, *supra* note 54 at 237 & 242; Hannah-Moffat & Maurutto, *Shifting and Targeted*, *supra* note 52 at 467; Newfoundland Labrador Department of Justice and Public Safety, *Drug Treatment Court Feasibility Study: An Opportunity for Hope*, (St. John's: Department of Justice and Public Safety, May 2017) at 4.

[88] Johnson and Fraser, *supra* note 34 at 15.

empowerment or a trauma-informed approach.[89]

As Quebec's legislators and policymakers contemplate the establishment of a sexual offences court, they would be well-advised to be mindful that justice and support for survivors on one hand, and the guarantee of procedural fairness for the accused on the other, should never be treated or perceived as mutually exclusive. That is, neither of these objectives may come at the other's expense. That being said, pursuing both vigorously and simultaneously will not be easy.

Quebec's Minister of Justice has made clear that a specialized court will not result in an altered burden or standard of proof: in criminal cases, the burden remains with the Crown to prove guilt beyond a reasonable doubt.[90] This point is crucial. Yet the example of South African specialized courts indicates that even when the criminal law remains unchanged, specialized courts can be perceived as rendering injustice to accused persons if they are understood as tilted in favour of finding guilt, boosting conviction rates, and imposing harsh sentences. Accordingly, such courts must be staffed by professionals with the expertise needed to disentangle, but also appreciate the complementarity

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[89] See "Trauma-informed" approaches are characterized by three key principles: awareness of the prevalence and impact of trauma; recognition of how trauma impacts conduct and survivor impulses — fight, flight or freeze — in the face of a traumatic experience, and engagement in steps to avoid retraumatizing survivors. See Crisis & Trauma Resource Institute, "3 Pillars & Principles of a Trauma-Informed Approach", online: <https://ca.ctrinstitute.com/blog/trauma-informed/>.

[90] See Mark Cardwell, "Quebec considers sexual assault courts", *Canadian Lawyer* (March 5, 2019) online: <https://www.canadianlawyermag.com/legal-feeds/quebec-considers-sexual-assault-courts-16945/>.

between, justice for survivors and fundamental principles of procedural fairness and proportionality in sentencing law.[91]

The resources essential to an effective sexual offences court, including human resources, are explored in the discussion that follows. For the moment, however, it should suffice to signal the need to identify, at the very outset of such an initiative for Quebec, the foundational values, mandate, and aspirations of a specialized court charged with addressing the complex, often incendiary, issues associated with sexual violence. To this author's mind, a court of this kind must be animated by two core principles. First and foremost, it must seek to facilitate reporting and justice processes for survivors while responding to their varied needs, which may be legal, social, or medical. A second principle, often viewed as controversial from a survivor-focused perspective, is a stalwart commitment to procedural justice and rehabilitation for offenders with a view to preventing recidivism and, where appropriate, restoring relationships with victims and communities. Theories of restorative justice trigger controversy when contemplated in connection with sexual violence. As seen in the discussion above on domestic violence courts, some view restorative measures as exposing survivors to danger and risk while shielding offenders from the serious consequences they deserve. Nevertheless, a growing body of literature reveals the potential of restorative justice to achieve the twin goals of centring the experiences, perspectives, and voices of survivors in criminal justices processes while promoting rehabilitation reduced recidivism for offenders.[92] An

[91] *Criminal Code*, RSC 1985, c C-46, ss.718*ff*.

[92] See Kathleen Daly "Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases" (2006) 46 Br. J. Criminol. 334; Clare

exploration of restorative justice theory and whether, when, and how it might be effectively deployed in a specialized court for sexual offences are issues that lie beyond the scope of this paper. Just the same, these points require analysis in connection with identifying and articulating the mandate and purpose of the specialized court presently contemplated in Quebec.

b) Resources

The success of specialized courts, particularly in domains related to gendered violence, appears dependant on the capacity of such courts to offer more than conventional juridical services. Of course, this does not mean that jurists prosecutors, defence counsel, judges take up work for which they are untrained. Rather, it calls for recognizing the importance of interdisciplinarity to deal effectively with sexual violence as an embedded social problem. A "guichet unique" ("one-stop") model, could be imagined as a site where sexual offences cases are heard and decided, but also where other service-providers, whose work is relevant to sexual violence response and support for survivors, have space and visibility to support parties as they make their way through reporting and trial procedures.[93]

Accordingly, one could imagine a clinical model that

McGlynn, Nicole Westmarland, & NikkiGodden "'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice" (2012) 39 J. Law Soc. 213; Niamh Joyce-Wojtas & Marie Keenan "Is restorative justice for sexual crime compatible with various criminal justice systems?" (2015) 19 Contemp. Justice Rev 43.

[93] See for example the higher rates of convictions in Sexual Offences Courts in South Africa which were linked to a TCC and multidisciplinary model lauded for addressing gender violence: Kruger & Reyneke, *supra* note 77 at 45.

allows for drop-in clientele to seek services at their own pace, and in accordance with their own timeframe and substantive needs, in spaces designated for services accessory to judicial proceedings. Such services could, for example, deliver information, advice, and care in the domains of immigration, education, legal aid, health, and counselling. Chief among these services will be accompanying survivors so that they are informed and supported throughout processes in which they will not have a standing but to which their participation is usually crucial, all with a view to boosting their empowerment. As seen in Part 1, a key success of the Canadian domestic violence courts model has been their capacity to link victims to resources to maintain their participation in justice processes while also helping them acquire resources relevant to their wellbeing. In many cases, these accompaniment resources will also benefit survivors' children or other dependants.[94] The development of these supports, while promoting survivor's care and wellness, would be accessory to criminal justice proceedings and thus would not compromise the accused's rights to procedural fairness.

Finally, there is no point in proposing an imagined multi-service model to support survivors of sexual violence if the model is beyond the reach of a publicly funded initiative, as would be the case in Quebec. Were this model to be adopted, though, the services integrated within a specialized court for sexual offences would not need to be covered by public funds. Rather, there is much room for imagining shared space with partners in the private

[94] South African model includes playrooms for children as well as provided meals and toys. See e.g. MATTASO, *supra* note 75 at 22; Kruger & Reyneke, *supra* note 77 at 50.

and community-based sectors in one physical setting.[95] Funding for those partners' services would remain static, unchanged by the fact that they have been afforded space and visibility to survivors who have entered the criminal justice system as complainants in judicial proceedings. This collaborative model could thus leverage existing services, facilitating the sustainability of a public model that responds to sexual offences through a holistic approach that moves beyond juridical services to integrate resources aimed to respond to survivors' varied needs. It should, however, be noted that establishing an integrated service model within a specialized court is most likely to be feasible if situated in urban centres, where the services in question will be most readily available. Hence, should Quebec opt to proceed with a specialized sexual offences court initiative, some thought must be devoted to how parties in remote and rural areas may benefit, whether in the immediate or medium term.

While effective accessory services will be essential to the success of sexual offences courts in Quebec, equally crucial is the dedication of resources to the iterative training of jurists working within this specialized tribunal. This would require ongoing educational initiatives to ensure that Crown prosecutors and judges receive special training to ensure a trauma-informed approach to their roles. This would include education for these jurists about the

[95] There are currently a number of groups and associations that could fulfill this role. At the community level, groups such as *Centre d'aide aux victimes d'actes criminels* (CAVACs) & *Centres d'aide et de lutte contre les agressions à caractère sexuel* (CALACS) operate across the province. On the private side, many professionals and professional associations offer services directly catered to the needs of victims of sexual assault. These include psychologists, sexologists, and social workers. See Secrétariat à la condition féminine, supra note 23 at 43-45.

diverse ways in which sexual violence can be lived by different survivors and about procedures that allow for the cross-examination of survivors that respect rape-shield principles.[96] It should further explore the impacts of trauma on memory and the recall and delivery of information, all of which will be relevant to interpretations of evidence and assessments of their credibility. The defence bar has a role and responsibility in this connection, too. While defence counsel are charged with the vigorous representation of their clients and ensuring the full protection of their rights and liberties,[97] defence lawyers must understand the rules of evidence and limits of cross-examination set by Canadian criminal law.[98] As is true for Crown prosecutors and judges, then, defence counsel are obliged to be knowledgeable about developments in law and related fields in this domain.[99] Through ongoing training and education, specialized expertise can be developed by the key professional actors working within in sexual offences courts that assures enlightened approaches to the complainants, the accused, and the rights that each have within criminal justice proceedings.

c) Diversity and Intersectionality

Throughout the history of sexual assault law, legal processes have imagined a "good victim" as a woman who is

[96] See discussion, *supra* notes 44-49.

[97] See Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: The Federation, 2017), at s.5.1-1.

[98] For a review of problematic practices in cross-examination of complainants see David M. Tanovitch, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2015) 45 Ottawa L Rev 495.

[99] See generally Craig, *Ethical Obligations*, *supra* note 45.

typically young, white, chaste, protests the impugned sexual act with vigour and without ambiguity, and reports that act immediately, recounting the event in a clear and linear fashion.[100] While some individuals who experience sexual assault might indeed fit this description, we know that sexual assault can affect individuals of all genders, ages, abilities, and race and class groups.[101] We also know, as described in Part 1, that a survivor's sexual past, their decision to defer reporting, and their refrain from fighting an attacker is irrelevant to assessments of their credibility as witnesses and complainants in criminal proceedings. Although these legal principles go some distance in imagining who may bring forward a viable complaint as a survivor, the discussion in Part 2 demonstrates the real risk of specialized courts being set up for gender-based violence offences that persist in their neglect of diverse populations.

Specialized courts premised upon a singular paradigm of sexual violence, which fails to account for and show sensitivity to the needs and experiences of diverse communities, would risk replicating the shortcomings survivors and their advocates have identified within traditional criminal justice models. Namely, neglect of demographic data may result in specialized courts failing populations that are disproportionately affected by sexual violence. Such an outcome risks alienating survivors even further from judicial processes.

Consequently, the framing of a specialized court for sexual offences must consider the needs of diverse

[100] Bakht, *What's in a Face*, *supra* note 43 at 591.

[101] *Ibid*.

populations, recognizing that certain communities — notably, sex workers, refugees, persons without stable housing or experiencing substance dependence — may feel particularly vulnerable in judicial contexts, given that coming forward might mean making oneself vulnerable to the exercise of state authority in a way that adversely affects their interests.[102] Hence some key questions that should animate discussions circulating around the framing of a specialized sexual offences court in Quebec would include the following: Should there be a promise of immunity from prosecution for drug, immigration, or sex work-related offences for those who come forward to report a sexual offence? What resources and skills are required to deal with particular communities — such as those composed of trans, Indigenous, and disabled people — that face social marginalization and whose members are exposed to heightened risks of sexual violence? How is it possible to ensure that the rules and procedures applied in proceedings conducted in a specialized court are universal and fair to all, while at the same time being mindful of the distinct needs and experiences of diverse communities?

These are fraught questions that require careful deliberation. They again point to a need for legal systems to engage with disciplinary expertise and resources beyond

[102] See Maria Nengeh Mensah & Chris Bruckert, "10 Reasons to Fight for the Decriminalization of Sex Work", *Maggie's Toronto* (2012) at 3, online: <http://maggiestoronto.ca/uploads/File/10reasons.pdf>; Ben Roebuck "Homelessness, victimization, and Crime: Knowledge and Actionable Recommendations" (Ottawa: Institute for the Prevention of Crime, 2008) at 20; Melina Buckley, "Police Protection of Vulnerable and Marginalized Women" (British Columbia: Missing Women Commission of Inquiry, February 2012) at 12, online: <.http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/POL-1-Feb-2012-MB-Police-Protection-of-Vulnerable-and-Marginalized-Women.pdf>.

juridical spheres if a meaningful attempt is to be made to respond effectively to the diverse needs of survivors of sexual offences while upholding fundamental tenets of criminal justice. Taking up this challenge will require care, time, and creative energy, but stands to advance significantly the goal of responding to sexual offences far more effectively than has been true of criminal justice processes to-date.

Conclusion

This final Part of this article has examined three essential elements for a specialized sexual offences court initiative in Quebec. First and foremost, to be effective, such an initiative must have a clearly identified and articulated mandate. More precisely, careful thought is required as to whether this court will focus principally on enhanced support and resources for survivors, boosting prosecution and conviction rates, or restorative and rehabilitative measures that seek to reduce offender recidivism. As discussed here, these goals are not mutually exclusive, but pursuing them all simultaneously is a challenge that requires skill and care. Second, this Part has demonstrated the importance of carefully framed and implemented resources to the success of a specialized sexual violence court. Such resources must not only be oriented toward accessory measures, in partnership with non-juridical organizations and actors, to support survivors but also toward the ongoing training and awareness-raising of legal professionals working within this justice framework. Third, the development of a specialized court must account for the demographic realities connected with sexual violence. To this end, measures must be sensitive to the distinct needs of diverse populations and take bold efforts to facilitate

the process of coming forward, especially for members of communities whose experiences with law enforcement would trigger distrust in formal justice procedures and institutions.

Conclusion

The proposal for a sexual offences specialized court in Quebec has been cast as a "long overdue" development, "pioneering" in its nature given that the court would be the first of its kind in Canada.[103] Proposed through a rare demonstration of inter-party collaboration and solidarity, the idea of a specialized court has been advanced by four prominent women members of the National Assembly representing Quebec's four major political parties.

This backdrop sets a promising foundation for a specialized court initiative. The hopeful energy circulating around this proposal is understandable, in view of the strong critiques that victims' rights advocates have levied against traditional criminal justice approaches to sexual violence. Those critiques, elaborated upon in Part I of this article, signal the need for innovative juridical approaches to this area of law to enhance access to, and the delivery of, justice for survivors.

At the same time, as Part II has shown, other specialized courts established to address gender-based violence have enjoyed varying degrees of success. At times, the promise of these courts has been frustrated by the failure

[103] See Toula Drimonis, "Proposed sexual assault court in Quebec long overdue", National Observer (28 January 2019) online: <https://www.nationalobserver.com/2019/01/28/opinion/proposed-sexual-assault-court-quebec-long-overdue>.

to resource and equip them appropriately. In other cases, these courts have been plagued by skepticism about their adherence to fundamental justice principles, primarily when their singular objective appears to be boosted conviction rates.

Accordingly, Part III of this article presents three elements that call for attention and diligence in developing a specialized court to address sexual offences in Quebec. Namely, those charged with crafting the framework for this court must contemplate, determine, and explain: the court's ethos and mandate; its expertise- and resource-base, including that established through partnerships; and measures to be devised and administered to see to the needs, rights, and interests of diverse populations affected by sexual violence. Decisions about these issues must be made and expressly articulated well before the court's operations begin.

Sexual violence remains a pervasive, complex social and legal challenge. Preventing and responding to it effectively will take more than a signal initiative like that proposed in Quebec for a specialized court. Nevertheless, if taken up with energy, skill, and care, this development can make a sizable contribution to addressing cases effectively, while delivering critical support to survivors. Additionally, a diligently developed and administered specialized sexual offences court would send a message to all Quebeckers about the importance of the issue to our society, regardless of political ideologies and values. That message would resonate and be relevant to any Canadian jurisdiction where a specialized court for sexual offence is contemplated; although the idea has emerged first in Quebec, the depth

and breadth of sexual violence challenges are such that an initiative of this kind could well be pursued anywhere in the country. This article thus provides legislators with an analysis to support the effective establishment of a specialized court that centres survivors' rights and interests within and beyond legal processes while adhering to fundamental justice principles and leaving space to pursue, where appropriate, the objectives of restoration and rehabilitation.