Prosecuting and Sentencing Police Sexual Assaults:
A Canadian Perspective

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Abstract

This thesis is intended to provide a first normative review of the justice system and Canadian criminal courts’ handling of police sexual assaults. To achieve this purpose, the author, after having described the phenomenon of police sexual misconduct and the implications of the legal concept of sexual assault (s. 271 Criminal Code), outlines the main barriers to prosecution and the sentencing framework that was generally applied in Canadian police sexual assault cases. The analysis is based on twelve cases heard before Canadian courts, but excludes ethics and professional misconduct cases from institutions such as the Special Investigation Unit in Ontario.

Finally, the thesis concludes with a chapter dedicated to possible solutions. This last segment is divided into three subsections: before trial, at trial, and at the sentencing phase. Solutions suggested include not only legal reforms, but also educational changes in law schools.
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INTRODUCTION\textsuperscript{1}

Police sexual misconduct (hereinafter “PSM”) is a phenomenon that has been analyzed by American criminologists and legal scholars mostly since the 1990s. It includes an array of acts going from gender profiling to criminal behaviours such as sexual assault and distribution of child pornography. Scholars from the United States have allowed us, through theoretical and empirical studies, to understand PSM and to better assess its occurrence. They concluded, \textit{inter alia}, that misconduct described as being in the lower spectrum of PSM would happen on a regular basis. However, they underlined that PSM would be much less frequent when the behaviour is also a criminal act under the law.

Nevertheless, data on PSM is not available in the Canadian context. Indeed, no studies have been undertaken, thus, leaving a gap in the legal literature about police sexual crimes. Therefore, the purpose of this study is to review twelve Canadian cases of police sexual assaults in order (1) to underline the main features of victimization, (2) to provide a normative analysis of the courts’ treatment of police sexual assaults at the prosecution and sentencing phases, and (3) to suggest ways of improving the criminal justice system’s handling of such offences. Hence, I hope that it will begin to fill the void in the legal literature about police sexual violence in Canada. A specific methodology helped me reach those objectives. My method was to add a hypothetical factual background which permits the reader to engage himself with facts, to understand how obstacles arise

\textsuperscript{1} The masculine form is used throughout this thesis for ease of reading, but refers to both men and women.
throughout the criminal process and to visualize how this imaginary case could be treated by courts.

To achieve the aforementioned threefold objective, the thesis will consist of four chapters organized through the development of the hypothetical fact pattern. Thus, most sections will be ordered to reflect chronically the obstacles that a complainant might encounter in a case of police sexual assault. Firstly, I will define sexual assault in Canadian criminal law and contextualize the concept of police sexual assault, which is the foremost topic of the thesis. Therefore, it will set the basis for the reader so that he can better understand the scope of my analysis. Secondly, the thesis will explore the most common barriers to prosecution. Thirdly, I will analyze which sentencing principles and aggravating or mitigating factors can be applied in police sexual assault cases in order to see if there are any general rules usually applied in such cases, and, lastly, I will discuss ways to envision police sexual assault differently in order to improve its handling by the Canadian criminal justice system.

**METHODOLOGY**

In order to illustrate which challenges a victim of police sexual assault may experience, I have decided to structure the thesis with a hypothetical factual background. This imaginary case – inspired by some Canadian criminal cases – will be introduced after a short overview of the context and definitions relevant to study the sensitive topic that is police sexual assault. This narrative aspect will facilitate the understanding of the obstacles that a complainant may face at various stages of the criminal proceedings. Also, I have chosen this method, as it will allow me to provide examples of barriers which are
likely to materialize in practice. Therefore, it will offer the opportunity for the reader to visualize how some features of the criminal justice system can impact a victim by linking the theory with fictive facts. If I have had the same structure using an actual case, I would have used very graphic details and the personal experience of a Canadian civilian as the centrepiece of my thesis. Thus, in an attempt to respect victims’ privacy, I decided to craft a hypothetical case which tries to reflect reality as much as possible. Moreover, choosing one of the Canadian cases rather than the hypothetical background may have sent the message that the case used was more relevant than the others. Hence, using a fictive narrative allows me to discuss the Canadian case law in the most respectful way possible and only when necessary for the purpose of my analysis.

Nonetheless, it is clear that this technique comes with the following challenges: (a) respecting victims’ dignity as well as police officers’ reputation, and (b) avoiding going into stereotypical views of these parties. Furthermore, some may argue that a hypothetical case may diverge too much from reality. To answer both those critiques, I have used elements from actual police sexual assault cases and asked colleagues to review the fictive facts in order to ensure that they were realistic. This precaution can also counter a narrative which would be too subjective and which would reflect personal and/or prejudicial opinions on one of the parties. Finally, it has to be taken into account that our courts make use of narrative techniques, and thus, it is a method that is often relied on in our legal system.

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2 I wish to thank my colleagues Carolyn Mouland (L.L.M. Candidate at the University of Toronto), Heather Hui-Litwin (Ph.D and L.L.M. Candidate at the University of Toronto) and Marie-Laurence Leclerc (B.A. in Criminology, L.L.B.) for their insightful comments on my hypothetical factual background.
CHAPTER 1 – CONTEXT AND DEFINITIONS

Police sexual assault is a phenomenon encompassed in the more general concept of PSM.\(^3\) Succinctly, it can be described as a sexual assault committed by a police officer. This definition may appear to be without any uncertainties. However, we might question whether police sexual assaults can be committed by off-duty police officers, as there are conflicting opinions on the inclusion of off-duty misconduct in PSM.\(^4\) For instance, Maher, a PSM expert, suggested that: “police officers may not perceive any connection between officers’ sexual misconduct while off-duty and the police profession, including the power and control that comes with the profession.”\(^5\) For the purpose of this thesis, I decided to incorporate the analysis of off-duty police sexual assaults in the scope of my thesis, as, in those circumstances, the issues related to the lack of denunciation remain akin. For example, when a victim knows his assailter is a member of a police organization, this victim may face obstacles that are similar to the ones encountered in cases of on-duty police sexual assault, such as fear of retaliation, distrust of the system, humiliation, and so forth.

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\(^3\) PSM is defined as: “Any behavior by a police officer, whereby an officer takes advantage of his or her unique position in law enforcement to misuse his or her authority and power to commit a sexually violent act, or to initiate or respond to some motivated cue for the purpose of personal gratification. This behavior must include physical contact, verbal communication, or a sexually implicit or explicit gesture directed toward another person.” Timothy M. Maher “Police Sexual Misconduct” (2003) 28:2 Crim Justice Rev 355, at p. 357 (hereinafter “Maher (2003)”).


\(^5\) Maher (2003), \textit{supra} note 3, at p. 369.
As I do not intend to analyze the requisites of sexual assault as defined by the *Criminal Code* and its implication in Canadian law, but rather to scrutinize how police sexual assaults are prosecuted and sentenced in the Canadian context, I will briefly outline the act of sexual assault itself, in order to ensure that there is no ambiguity regarding the scope of my analysis. Sexual assault (s. 271 *Cr. C.*) is comprised in the offence of assault (s. 265 *Cr. C*.). Indeed, it can be defined as an assault which happens in a particular sexual context. The *actus reus*, for which all elements must be proven beyond reasonable doubt, consists of a sexual touching for which the complainant did not consent. The first two components of the *actus reus* (i.e. the touching and its sexual nature) are assessed by an objective approach, while the trier of fact will evaluate the consent subjectively. Furthermore, the mental element consists of the intention to touch paired with the knowledge (including recklessness and wilful blindness) that the person who is being touched did not consent. Thus, the notion of consent is a requirement for both the *actus reus* and the *mens rea*. However, for the *mens rea*, the court will study the victim’s consent from the perception of the accused. Moreover, the Supreme Court of Canada has, as early as 1987, stated that sexual gratification can be relevant but is not necessary to classify an offence as being a sexual assault. This statement is relevant in the context

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9 *Id.*, at para 42.
10 Consent has to be given at the moment the sexual touch is happening. Justice Molloy reviewed the current state of Canadian law on consent in *R. v. Nyznik*, a case in which three police officers were acquitted of a sexual assault charge. Justice Molloy adequately held that flirts, apparent interest in someone, kisses, presence in a strip club with male colleagues and offers to have group sex prior to engaging in sexual activity have no influence on the consent at the time of the sexual act. (*R. v. Nyznik*, 2017 ONSC 4392, at para 138.)
11 *R. v. Ewanchuk*, supra note 8, at para 45.
of police sexual assault as some case derives from sexual touching with goals other than the fulfilment of sexual desires (e.g. humiliation or demonstration of power). \(^{13}\)

Having underscored what is intended by the concept of sexual assault, it may be hard for civilians to conceive that police officers engage in those behaviours. \(^{14}\) In light of the cases studied for the purpose of this thesis, Canadian criminal courts have heard what was described as minor sexual touching (e.g. kissing) \(^{15}\) to serious breaches of trust involving sexual acts by police officers (e.g. attempt of sexual penile penetration, \(^{16}\) rapes, \(^{17}\) touching of genitalia for sexual gratification on the occasion of a traffic stop \(^{18}\) or during a strip search, \(^{19}\) etc.).

The perceived inexistence of police sexual assaults may be reinforced by the fact that scholars have more been interested in the broader concept of PSM than by police sexual assaults, which benefit from no major research papers. Still, experts on PSM, have held,

\(^{13}\) See, for instance, \textit{R. v. Desjourdy}, 2013 ONCJ 170, in which this kind of claim was argued. (This case resulted in an acquittal.)

\(^{14}\) Sankofa argued that it is not an abnormal phenomenon in the United States. She wrote: “[p]olice sexual violence is not an anomaly. There are several news stories of sexual assault during traffic stops, in response to traffic incidents or domestic violence calls, or the extortion of sex from sex workers. Police officers have abused their authority in ways that leave women disproportionately vulnerable to sexualized police violence but gaps in data, underreporting, and fear of retaliation, make it difficult to map its prevalence and the populations most vulnerable”: Jasmine Sankofa, “Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform, (2016) 59 Howard L.J. 651, at p. 655.

\(^{15}\) \textit{R. v. Rossignol}, 147 NBR (2d) 287, at p. 10.


that minor misconduct, especially, are more common than we may think. For example, in the United States, police sexual violence was, in 2010, the second most reported misconduct after the excessive use of force.\footnote{See United States (Washington D.C.), 2010 Annual Report, (Washington D.C.: The Cato Institute's National Police Misconduct Reporting Project, 2010).} Moreover, it appears that this phenomenon is not limited to some specific police agencies or regions, as studies from across the United States came to similar findings regarding PSM frequency and features. Therefore, it is hard to argue that PSM is only the result of bad immediate supervision or of geographical specificities. Furthermore, studies from the mid-1990s and more recent ones tend to show that the situation is not improving and that PSM is still an actual concern. More importantly, we should consider that data on PSM is generally limited to the cases that led to criminal charges and, thus, is somehow not 100% representative of the prevalence of the phenomenon.\footnote{Stinson et al “Police Sexual Misconduct”, supra note 4, at p. 127. Similarly, Timothy M. Maher claimed: “[h]aving been a police officer, I concluded that [it is] only the tip of the iceberg. If we are limited to data from cases exposed by the media and the courts, there is much that is being missed.” See Timothy M. Maher, “Cops on the Make: Police Officers Using Their Job, Power, and Authority to Pursue Their Personal Sexual Interests” (2007) 7 JIJIS 32, at p. 33.}

Additionally, academics have fleshed out contributory circumstances which may explain the occurrence of PSM. As police sexual assault is comprehended in PSM – despite the fact that it occurs less often than minor misconduct –\footnote{For instance, Maher (2003), supra note 3, at p. 367, concluded that serious incidents (e.g. an act amounting to a sexual assault) were less reported by the police officers participating in his study than minor misconduct. However, he accounted that “the lack of reported serious incidents of PSM could be interpreted in different ways. First, officers may not be willing to report serious incidents for fear of possible repercussions for offending officers. Second, there may be far fewer serious incidents actually occurring. Third, officers may be inaccurately reporting incidents because of their personal perception of what is forced and violent and what is not. However, even if the serious incidents in this study were underreported by a factor of two or three, the great majority would remain in less serious categories.”} those factors may help having a better understanding of the conditions fostering police sexual assaults. Thus, before engaging in depth in Canadian police sexual assault cases, I will make a brief review of
the hypotheses that have been offered to answer the following question: why does working as a police officer might induce an individual to engage in improper sexual conduct, including, but not limited to, criminal behaviours?

Firstly, feminist scholars have posited that PSM is a gender-based behaviour perpetrated against women. This claim seems to find an echo with statistics as they show that more than 99% of PSM is perpetrated by male police officers and that 92.1% of the victims are women. As for the Canadian criminal cases that were studied for this thesis, all offenders were males and all victims or complainants were females. In addition, some academics argue that the male dominance among police services can partly account for misconduct perpetrated against female police officers and civilian women. For instance, Prokos and Padavic have claimed that female police officers are being treated harshly in police academies as qualities traditionally associated with femininity – such as emotions and social aptitudes – are believed to be incompatible with a crime-fighting function. Other feminist scholars added that this sexist attitude exists not only in training, but also in general police functions. Hence, it would explain, to some extent, cases of sexual harassment of female colleagues. Likewise, those experts claim that if such behaviours

23 Stinson et al, “Police Sexual Misconduct”, supra note 4, at p. 120. See also Peter B. Kraska and Vincent Kappeler “To Serve and Pursue: Exploring Police Sexual Violence Against Women” (1995) 12 Just. Q. 85. See, for instance, the “driving while female” phenomenon, which feminist scholars consider to be a systemic abuse of women: United States (Nebraska), Police Professionalism Initiative University of Nebraska, Driving While Female: A National Problem in Police Misconduct, (Omaha: Samuel Walker and Dawn Irlbeck, May 2002).


are regarded as acceptable while in training or with colleagues, they might be reproduced on duty.\textsuperscript{26}

Secondly, studies have reported that the police culture would encourage a code of secrecy. This code, also labelled as “the Blue Wall of Silence”, potentially discourages officers to report improper acts committed by their colleagues and, thus, partly clarify why police misconduct is underreported.\textsuperscript{27} This is supported, especially, by Maher’s studies which have shown that most police officers would not report PSM unless the misconduct was amounting to a criminal behaviour under the law.\textsuperscript{28}

Thirdly, other academics have proposed the hypothesis that PSM is enhanced by the fact that law enforcement officers are in direct contact with people in a position of vulnerability such as children and sex workers.\textsuperscript{29} Also, police officers may have interactions with civilians in circumstances that render those individuals even more vulnerable. For example, a lot of police-civilian encounters happen at night-time, without close supervision of superiors and out of the sight of the public’s eyes.\textsuperscript{30} Some may posit that the absence of supervision and of witnesses would encourage improper behaviours, as they are less likely to be noticed. Furthermore, scholars have added that police officers,  

\textsuperscript{27} Maher (2003) supra note 3, at pp. 359 and 367.
\textsuperscript{28} See Maher (2003) supra note 3. This argument will be discussed in detail in the next chapter of this thesis (see chapter “Barriers to Prosecution”, subsection “Code of Secrecy”).
when on active duty, have a large discretion as to where they go and whom they intercept, which may participate in the victimization of vulnerable citizens.\textsuperscript{31}

Lastly, other experts have suggested that only a minority of police officers would commit PSM. However, they also argued that the practice of officer shuffling, which permits policemen to be transferred between law enforcement agencies, would foster recidivism and, thus, increase PSM.\textsuperscript{32} Indeed, an officer committing misconduct would shuffle so that he can avoid punishment. Hence, this argument pinpoints the lack of sanctions within police agencies as a factor explaining the occurrence of PSM. The lack of punishment hypothesis can be supported by Maher’s finding. This author undertook a study on PSM and asked his participants to rank nine factors that would “influence on the decision to engage in or refrain from PSM”.\textsuperscript{33} For this purpose, officers had to rate the nine elements from 1 (no importance) to 4 (a lot of importance). Three of them got over 3. All of those were personal or family-related (i.e. personal values, self-control and spouses’ reactions). Disciplinary measures seemed to have a moderate effect on the decision to engage in PSM (2.8) and written policy on sexual misconduct was the factor that received the lowest rate (2.4).\textsuperscript{34} Therefore, we might ask if the structure in place to prevent and punish sexual misconduct is an effective one.

\textsuperscript{31} Stinson \textit{et al}, “Police Sexual Misconduct”, \textit{supra} note 4, at p. 119.
\textsuperscript{32} See Rabe-Hemp and Braithwaite, \textit{supra} note 26, at p. 140. In their study, Rabe-Hemp and Braithwaite posited that for almost 75% of the victims whom cases were analyzed, the offender was a repeater. This data appears to be consistent with the hypothesis of officer shuffling.
\textsuperscript{33} Maher (2003), \textit{supra} note 3, at p. 368.
\textsuperscript{34} \textit{Id}., at p. 369.
The aforementioned aspects of the police institution could contribute to sexual misconduct, including police sexual assault, and account why some consider those behaviours to be “occupationally derived”,\textsuperscript{35} rather than exclusively relying on individual characteristics. Finally, this argument is consistent with statistics reported by Sankofa, which propose that, in the United States, the rate of sexual assailants is higher for police officers than for civilians.\textsuperscript{36}

\textbf{CHAPTER 2 – PROSECUTION: WHAT ARE THE BARRIERS?}

In this section of the thesis, I will underscore the barriers to prosecution that a victim may face after having experienced a police sexual assault. My objective, hereby, is to offer a clearer portrait of why victims might be reluctant to file a complaint against their assailant and, in the same vein, why there are so few cases reaching the trial stage. Also, it will be helpful to reflect upon this specific chapter when I will elaborate solutions to prevent or to manage more adequately police sexual assaults later on in this thesis (see Chapter 4). To flesh out each obstacle, and in order to provide the reader with an example of how those impediments affect the criminal proceedings, let’s introduce the hypothetical background, exposed in the methodology section:\textsuperscript{37}

\textsuperscript{35} Stinson \textit{et al}, “Police Sexual Misconduct”, supra note 4, at p. 141. See also Maher, \textit{supra} note 21, who dismissed the rotten apple theory.
\textsuperscript{36} Sankofa, \textit{supra} note 14, at p. 669.
\textsuperscript{37} This background is inspired by several judicialized Canadian cases that were studied for the purpose of this thesis, including but not limited to, \textit{R. v. Rossignol}, supra note 15; \textit{Evans v. Sproule} [2008] O.J. No. 4518, 176 A.C.W.S. (3d) 895 (ON SC) Chapnik J. and \textit{R v Mandip Sandhu}, 2015 ONSC 1679.
HYPOTHETICAL CASE

Anna’s Version

Anna is 21-years old. She grew up in the Jane-Finch neighbourhood of the northern Toronto area, with her parents and younger siblings. After she graduated from high school, Anna began to work as a basketball coach for the local community centre. She works part-time, mostly on evenings, and babysits her siblings in the daytime, as her parents cannot afford to pay for daycare.

On December 14th, she went out with her friends to celebrate her 21st birthday. Her best friend, Simone, came over to Anna’s parents’ house at 7 pm and they got ready together. They also opened a bottle of wine while trying on outfits and putting on their makeup. Anna did not want to deal with the inconvenience of lugging her large parka around all night, so she went out with just her dress on. They went to Anna’s favourite restaurant downtown, where they met up with some more friends. Anna had another glass of wine with dinner before they moved on to two pubs on Queen Street and King Street West. To celebrate, her friends took turns buying a round of shots for the whole group at each of the two pubs.

At 1 am, Anna told her friend she wanted to go back home as her stomach was starting to feel queasy and as she did not want to miss the last northbound subway from King Station. After thanking all of her friends for joining on the birthday celebrations, Anna left the second pub and headed to the subway station. While on the subway, Anna’s nausea worsened, but she was conscious and did not feel drunk or out of control. Since she only had a few beverages between 7 pm and 1 am, she suspected the combination of wine and liquor with food had just given her some indigestion.

When she got off the subway train, Anna had a little more than one kilometre to walk to her parents’ home. She usually grabbed a taxi from the station to her house but, as the fresh air was helping with her nausea, Anna decided to walk. She remembers it was especially dark and that it felt chillier than when she left her friends on King Street.

While Anna was on the sidewalk at a few blocks from her destination, she saw a police cruiser passing by. It stopped and the police officer reversed the cruiser in her direction. The officer in the car, Officer Smith, lowered the passenger window. He remarked to Anna that it was too cold outside to be so scantily clad, and asked Anna if she was all right. Anna replied “yes”. The officer then demanded to know where she lived and if he could give her a ride home given that the temperature was dropping and it was quite icy and slippery to be walking in the dark in stiletto heels. Since Anna was eager to get some sleep and give her stomach a rest, she said sure, and moved to enter the rear passengers’ side. Officer Smith said, “Come sit up front where it’s warmer, that’s where all the cold-hearted criminals go”.


When Smith approached the front of Anna’s parents’ house, there was no car in the driveway. He asked whether she was living alone. Anna answered that it was her parents’ house, but that they must have been out with her younger siblings to celebrate the upcoming holidays. Then, Anna thanked Officer Smith for his kindness.

While Anna was searching for the handle on the car’s door, Officer Smith grabbed her by the left arm asking her if she had forgotten something. Before she could say anything, Officer Smith pulled her body against his and kissed her despite her agitation. As he was kissing her, he grasped her breast with one hand. Anna realized her form-fitting dress had rolled up close to her hips and felt him reach between her legs, at which point she had finally located the handle, and managed to extricate herself from him to get out of the cruiser.

Anna remembered running into her home and that she was terrified that Officer Smith would chase her into the porch. Once inside, she leaned on the wall next to the door and burst into sobs. She could not remember how long she stayed crying there, but reported that eventually she glanced outside and saw that the cruiser was gone. She went into the bathroom and vomited before going to bed.

A month after the incident with Officer Smith, Simone offered Anna to pick her up as they were both working at the community centre that day. Anna, who usually walked, accepted her friend’s offer. While they were waiting at a red light, a police car stopped in the lane at their right. When Anna glanced outside and saw it, she got really agitated. Simone, who had noticed Anna’s behaviour, said, “What’s happening? You are trembling! Are you feeling OK!?”. Anna nodded that she was.

After their working shift, Simone found Anna in the washrooms. She was sobbing and breathing nervously. As she thought Anna was having a panic attack, Simone brought her friend to the hospital. When she calmed down, Anna explained to her doctor what happened. The physician then inquired as to whether she wanted to file a complaint. She answered that no one would believe her as Smith was a police officer and that she did not want to see him again. Thus, the doctor called a psychologist on staff to speak with Anna prior to her discharge. After a long discussion and an assessment of Anna’s mental state, the psychologist convinced Anna to file a complaint.

Officer Smith’s Version

Officer Smith is a 28-year-old man working in Toronto as a police officer for 4 years. His colleagues and superiors praise him for his devotion to his job and for his excellent sense of responsibility. He is a father-to-be and lives with his beloved wife for 9 years. He never had any run-ins with the criminal justice system prior to the events of December 14th.
That night, Smith was assigned to patrol alone in the Jane-Finch neighbourhood. He was working the night shift from 6 p.m. to 6 a.m. Pursuant to the Police Service’s Holiday Patrol Directive, he was on the lookout for impaired drivers, and was required to exercise increased vigilance to intercept all motorists suspected of intoxication.

Around 2.30 am, Smith saw a young woman later identified as Anna, walking alone. He remembers that it was an especially cold night and that she was inadequately dressed for the weather, wearing no coat, inappropriate footwear to be traipsing along icy conditions, and was stumbling at a meandering pace down the sidewalk. When he came abreast of Anna and asked her if she was fine, she told him she was. During this interaction, Smith began to have doubts that Anna was impaired by alcohol. Not only was she unsteady, her cheeks were rosy, he detected a strong odour of vodka when she spoke to him, and gulped as if she was about to vomit. In light of the weather, her state of dress and impairment, Officer Smith considered that it might be dangerous to let her walk alone at night. So, he asked Anna where she lived and offered to drive her home. Anna clambered into the front passenger seat of the police cruiser and told him an address which was only a few blocks away from where his cruiser was idling. It took less than 2 or 3 minutes to reach the destination.

When he pulled curbside in front of Anna’s address, Officer Smith alleged that Anna would not get out of the car and that she was very chatty and leaning toward him. She told him that she was living with both her parents and her younger siblings. Anna also joyfully mentioned that it was her 21st birthday but she was disappointed because she was single and hadn’t had a birthday kiss. She said she was pleased to know that chivalry wasn’t dead and to show her appreciation, she kissed him goodnight. Smith was shocked, and turned away from her to immediately place both hands on the steering wheel. He was uncomfortable not only because he had been kissed by a civilian while on duty, but also because that civilian was clearly impaired. He then asked her if she was able to safely exit the vehicle to get into the house herself, and departed quickly once Anna reached her doorstep.

2.1 Victims’ Profile

Getting cases of sexual assault in which the offender is a police officer to trial is particularly difficult for several reasons. One of them is the issue of victims’ credibility. For instance, Cara E. Trombadore has noted that police officers frequently victimize people from low social strata or who are otherwise vulnerable. This hypothesis suggests that victims are often from parts of society living in poverty, working in the sex industry,
struggling with a past of drug abuse or criminalization, are youth, or are part of an ethnic minority. Thus, their credibility might, unfortunately, be easier to challenge and/or legal resources might not be available to them. Therefore, this section intends to flesh out victims’ characteristics in Canadian cases of police sexual assault in order to illustrate Trombadore’s hypothesis in our context.

The hypothetical narrative was designed to reflect the victimization of some groups of individuals. For example, Anna is a young woman living in the Jane-Finch neighbourhood, which is according to Statistics Canada an area of Toronto with a high density of population and an elevated level of violent crime (2006). Moreover, according to CBC’s data, this neighbourhood is inhabited by a significant proportion of new Canadians and single parents in need of social infrastructure as well as 24% of low-income individuals (2012). In the hypothetical case, the victim is a woman, as most of police sexual crime victims according to American data and as all of the Canadian victims in cases studied for the purpose of this thesis. Also, we might infer that Anna lives in economic insecurity as she occupies a part-time job, as she holds no post-secondary degree and as her family cannot afford daycare fees for her younger siblings. Most importantly, she was allegedly intoxicated when the event occurred, a detail that will likely be discussed at trial. All of those elements, once combined, place Anna in a

38 Trombadore, supra note 29, at pp. 154 and 167-169; Cliff Robertson, Police Misconduct: a General Perspective, (Boca Raton, CRC Press, 2016), at p. 95; and Rabe-Hemp and Braithwaite, supra note 26, at p. 132.


41 See Stinson et al, “Police Sexual Misconduct”, supra note 4, at p. 128 and Stinson et al, supra note 24, at pp. 666,667 and 673.
vulnerable position compared to Officer Smith who benefits from a good professional reputation as a police officer.

For some, the comments regarding Anna’s situation might seem to be too stereotypical. Unfortunately, there are some Canadian cases which appear to support Trombadore’s hypothesis about the victimization likelihood that may derive from the complainants’ social status or vulnerability. Indeed, it seems that there are two main categories of victims: the non-normative individuals (e.g. sex workers and individuals that are detained or arrested by police officers) and normative yet vulnerable people (e.g. youth, non-English speakers). For instance, in *R. v. Mandip Sandhu*, a police officer sexually assaulted a woman while he was verifying massage salons’ licences. The victim said that Mandip Sandhu, the police officer, offered $100, and then $120, if she would not only do a massage, but also engage in sexual acts, which the victim declined. He then identified himself as being a Toronto Police Service officer and asked to check the salon’s licence. Afterwards, she found him alone in an upstairs massage room and unwillingly performed oral sex on him, as he acknowledged having a gun. The licence plate number of the police vehicle, which had been noted on a business card, confirmed officer Mandip Sandhu’s visit to the salon. As the complainant was a masseuse, this case raises the issue of prostitution in massage salons, which is consistent with the thesis that PSM is

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*Id.*, at para 6. The word “acknowledge” might seems to be misused at first sight. However, it really reflects what happened in this case: “[The victim] could now see [the officer’s] side-holstered gun through his open jacket and […] asked him whether that was a gun. The man said it was.”

*Id.*, at paras 8 and 19.
often perpetrated against marginalized people (or people they believe to be non-normative people such as sex workers).\textsuperscript{45}

Additionally, allegations of sexual offences mostly against Indigenous women in the province of Quebec also demonstrated the possible validity of Trombadore’s hypothesis. Indeed, there have been, in the last few years, numerous allegations of PSM as well as generic police misconduct. The first part of an inquiry of this matter led to 38 complaints – especially in the regions of Abitibi-Témiscamingue and Côte-Nord – and a second part, still in progress, studied 55 other complaints (thus, I will comment on the first part which is more documented).\textsuperscript{46} In a documentary that led to this inquiry, one woman reported that she was paid $100 to perform oral sex and another $100 to stay silent. She added that she was asked to do so by seven different police officers.\textsuperscript{47} This complainant was using

\textsuperscript{45} The complainant denied being a sex worker, a fact which was suggested by the police officer. (R. v. Mandip Sandhu, supra note 37, compare para 4 to paras 14-16). Similarly, in the sentencing decision of the Von Seefried case (R. v. Von Seefried, [2017] O. J. No 1094, at para 21), the judge answers to comments of the accused on marginalized women: “[F]inally, it is not lost on me that the brazen nature of the crime itself could inferentially be related to the subjective impressions testified to by the defendant -- a generalized assumption about some women who work in Karaoke establishments. Did this sort of bias about women who work in Karaoke Clubs inform his conduct? Did he think that women employed in the sex trade industry were vulnerable members of society less inclined to involve the authorities? What is the real reason he asked for the victim's phone number? Why did he call her?”

\textsuperscript{46} In this first part of the investigation, 15 out of 38 cases were of a sexual nature: Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: “Part 1 – Me Fannie Lafontaine, Independent Civilian Observer into SPVM’s investigation of allegations of criminal acts committed by police officers against Indigenous peoples throughout the province of Quebec and Professor, Faculty of Law, Université Laval” online at <https://www.cerp.gouv.qc.ca/index.php?id=57&tx_cspqaudiences_audiences%5Baudiences%5D=117&tx_cspqaudiences_audiences%5BaAction%5D=show&tx_cspqaudiences_audiences%5BController%5D=Audiences&cHash=492225c76c5f02c8af0bc6572436f21ca> at 00:29:55. See also Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 3 – Pascal Côté, Commander and Yannick Parent-Samuel, Lieutenant Detective, SPVM” (4 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspqaudiences_audiences%5Baudiences%5D=115&tx_cspqaudiences_audiences%5BPartner%5D=show&tx_cspqaudiences_audiences%5BController%5D=Audiences&cHash=c6296291b0217a01c9081b537c71fe83> at 00:41:50 ff.

\textsuperscript{47} Enquête/Radio-Canada, “Abus de la SQ : les femmes brisent le silence” (22 October 2015) online <http://ici.radio-canada.ca/tele/enquete/2015-2016/episodes/360817/femmes-autochtones-surete-du-quebec-sq>, at 00h03m15s ff and 00h20m00s. She claimed that sometimes she was paid in cash, sometimes with cocaine and other times with both cash and cocaine.
the money to pay for her drugs and was intoxicated when those events happened.\textsuperscript{48} She claimed that all the women that were working in the sex industry in Val d’Or had similar encounters with police officers.\textsuperscript{49} Other women reported undesired sexual intercourse or fellatio in police stations,\textsuperscript{50} in a cabin or on remote forest roads,\textsuperscript{51} as well as being victims of the practice of starlight tours.\textsuperscript{52} The credibility of these women (i.e. the one that participated in the documentary and/or who filed complaints against police officers) was severely attacked by Quebec radio announcers and police officers have strongly shown their support to the officers under investigations, rendering the complainants particularly vulnerable and raising the social tension in Quebec.\textsuperscript{53}

\textsuperscript{48} Enquête/Radio-Canada, supra note 47, at 00h17m10s ff.
\textsuperscript{49} Id., at 00h19m36s ff.
\textsuperscript{50} Id., at 00h24m05s ff. A barmaid in Val d’Or claimed that many women were beaten by police officers if they refused to perform fellatio. She estimated that 15 to 30 women had reported this conduct to her. (Id., 00h21m00s ff). One woman, that refused to be identified, accounted that she was thrown out of the car, assaulted and left alone when she refused to engage in oral sex on an off-duty police officer near Waswanipi. (Id., at 00h24m36s ff.)
\textsuperscript{51} Id., at 00h03m09s and 00h17m30s ff.
\textsuperscript{52} Id., at 00h15m15s ff. A police inquiry report was issued in November 2016. Charges were laid against two police officers of the Côte-Nord region; one of them died before the trial. None of the officers from Abitibi-Témiscamingue were charged. The report itself suggested that the evidence was not sufficient to identify and/or prosecute the other police officers. However, one must be cautious as this does not mean that no improper acts were perpetrated against native women in Quebec. See Quebec, Rapport de l’observatrice indépendante : Évaluation de l’intégrité et de l’imparzialité des enquêtes du SPVM sur des allégations d’actes criminels visant des policiers de la SQ à l’encontre de femmes autochtones de Val-d’Or et d’ailleurs, (Quebec, Me Fannie Lafontaine, 2016), at p. 53. Other allegations of sexual assault by police officers of Schefferville were reported by Indigenous women to the National Inquiry Into Missing and Murdered Indigenous Women and Girls. See, for instance, Fanny Lévesque, “Je ne vais jamais abandonner la cause de ma fille” La Presse, (2 December 2017) online <http://plus.lapresse.ca/screens/41225ade-3c1c-4700-91ed-9edd21809534%7C_0.html?utm_medium=Ulink&utm_campaign=Internal+Share&utm_content=Screen>. Finally, starlight tours were described by Cao Liqun as “the non-sanctioned police practice of picking up Aboriginal persons in their cruisers and taking them, on bitterly cold Saskatchewan [or other provinces and territories] nights, to the outskirts of the city and leaving them there.” Cao Liqun “Aboriginal People and Confidence in the Police” (2014) 56 Canadian J. Criminology & Crim. Just. 499, at p. 518. This definition is similar to the one given by Lafontaine in her report with the exception that she does not specify that the tours are happening during cold nights. Nevertheless, she stressed that those tours are often done in dangerous conditions. See p. 15.
\textsuperscript{53} Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part I – Janet Mark, Coordinator of Aboriginal relations” (4 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=115&tx_cspaudiences_audiences%5D=
Moreover, the hypothesis that police sexual assaults are perpetrated against vulnerable people seems to find validation in the fact that many victims are minors or young individuals. As a matter of fact, a criminology study concluded not only that youth are more likely to be victimized in PSM cases, but also that the victims were more likely to be children if the police officer who committed the reprehensible conduct was an experienced police officer. In Canada, there is no criminal case involving a child (the youngest victim reported in criminal case being 14 years old). However, the theory that young individuals are more likely to be victimized is consistent with the victims’ profile in Canadian cases as most of them were either between 14 and 26 years old (Anna was 24 years old, and, thus within this age range) or either described as being young by the courts.

For instance, in Ramsay, a corporal of the R.C.M.P. requested than an Indigenous teenager meet him at the police station – on grounds that the court found to be unclear – and then talked to her about her sexuality. For reasons that were not exposed, Corporal Ramsay asked the teenager if she was a virgin, to which she responded “no”. He then

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54 Stinson et al, “Police Sexual Misconduct”, supra note 4, at p. 131 (see graph). Young women are the more likely to be victims of police sexual misconduct. For instance, almost all victims in Stinson et al’s study were aged of less than 42 years old. Also, there was a significant percentage of victims aged of less than 17 years old.

55 Id., at p. 136. “The simple odds of the victim being a child in cases where an officer was arrested for a sex-related crime went up by 16% for each three-year categorical increase in the officer’s years of service at time of arrest, controlling for all other variables. This means the victim of a sex related crime for which an officer was arrested was more likely to be a child if the arrested officer was an experienced law enforcement officer.” However, the study concluded that children were more likely to be victims of police sexual misconduct in private residences.

56 See, for example, R. v. Rossignol, supra note 15, at p. 2. Also, it is relevant to note that this age range is slightly different from the one depicted by Stinson et al, “Police Sexual Misconduct”, supra note 4. See note 54.

57 R. v. Ramsay, supra note 16.
asked whether her mother knew it, to which she also answered “no”. According to the victim, Ramsay threatened her of revealing that information to her mother if she would not have sexual intercourse with him. Hence, this case is an example of the typical profile of vulnerable complainants accounted by Trombadore. Indeed, the teenager was young, from a marginalized group, and at the mercy of the officer who was in possession of private information as well as in a position of authority.\footnote{There are other examples in which youth and vulnerability are involved in Canadian police sexual assault cases: in \textit{R v. Rossignol}, a woman described as “young” by the court was assaulted by a police officer wearing his uniform after he had observed that her car was present in the driveway at 2.15 am (\textit{R. v. Rossignol, supra} at note 15, at pp. 2-3); in \textit{R v. Bracken}, a 18 years-old was sexually assaulted by a police officer who was investigating on her previous complaint and who was regarded as a friend (\textit{R. v. Bracken}, 2005 SKPC 64, at paras 1 and 5-15); in \textit{R. v. Von Seefried}, the complainant who was sexually touched on the breast and clitoris and kissed while sitting on the back seat of a police vehicle was a 23-year-old foreign student with a poor knowledge of English and Canadian law (\textit{R. v. Von Seefried, supra} note 18, at pp. 7-20 (summary of the evidence)); lastly, in \textit{Evans v. Sproule}, Sproule, who was patrolling, intercepted a 24-year-old woman in the middle of the night. He then drove her to a parking lot and tried to kiss her while heavily pressing his body against hers. Sproule tried a few times to kiss the victim, but he finally drove her back to her car (\textit{Evans v. Sproule, supra} note 37, at paras 6-11).}

Furthermore, vulnerability might come from police custody or from the ignorance of the extent of police powers. In Anna’s case, she appears to have voluntarily accepted Officer Smith’s offer for a ride home, but what if he had told her that she could not walk while intoxicated and, thus, ordered her to sit in the car? And what if she thought that she could not say “no” to a police officer? Those questions are particularly relevant as, according to the Supreme Court of Canada in \textit{R. v. Therens},\footnote{\textit{R. v. Therens [1985] 1 S.C.R. 613}. \textit{Therens} was not a case studying police sexual assault. The matter was on detention such as intended by s. 9 of the \textit{Canadian Charter of Rights and Freedoms}, Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (UK), 1982, c 11 (hereinafter “Charter”).} it is reasonable to infer that most citizens will obey to police officers in such circumstances. The Supreme Court held:
[I]t is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand.60

Our courts have studied psychological detention of civilians by the police on several occasions. For instance, in R v. Grant,61 the key case in this area, the Supreme Court of Canada has confirmed the categories of detention described in Therens.62 Thus, the Court affirmed the existence of psychological detention in Canadian criminal procedure. The Court held that: “[t]he question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand.”63 This question is generally asked in cases in which an accused claims that his constitutional rights have been infringed by police detention. However, I argue that in some police sexual assault cases, although the victim is not in the traditional position of someone maintaining that he was arbitrarily detained contrary to s. 9 of the Charter64 (i.e. accused), a victim still may be psychologically detained and, thus, comply against his will to police demands.

This statement is reinforced by the fact that psychological detention can happen even if the legal ground on which the police officer proceeds is questionable (e.g. the aforementioned impossibility for Anna to walk while being drunk) or in the absence of

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60 R. v. Therens, supra note 59, at para 57.
64 Charter, supra note 59, at s. 9.
legal excuse (i.e. psychological detention without legal compulsion). For instance, in several cases studied for the purpose of this thesis, police officers engaged with the victims without having a lawful excuse. For example, in *R. v. Ramsay*, a R.C.M.P. corporal asked a young teenager to meet him at the police station. No reasons were given as to why he made this request. Also, in *R. v. Rossignol*, a police officer knocked at a young woman’s door at 2.15 a.m. while wearing his uniform only because he had seen her car in the driveway.

Furthermore, other cases revealed that the police sexual assault derived from the abuse of an existing police power. For instance, in *Evans v. Sproule*, a police officer drove the victim to a remote parking lot after having intercepted her vehicle. Police powers certainly do not include driving citizens around town without lawful ground to do so. Regardless of the unlawfulness of this conduct, police powers generally include the prior interception of the vehicle. As for *R. v. Von Seefried*, this case exposed that the police officer intercepted a vehicle without any apparent reason. He then checked if the driver was impaired. When the police officer learned that the passenger had drunk some beers, he asked her to provide him with her driver's licence and to follow him into his police SUV. At this point, he kissed her, insert his hands beneath her clothes and touched her clitoris. The dash camera had been turned off and there was, thus, no other evidence than

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65 See Steven Penney and James Stribopoulos, ““Detention” under the Charter after R. v. Grant and R. v. Suberu” (2010), 51 S.C.L.R. (2d) 439, at paras 1-50 for a discussion on detention as intended by s. 9 of the Charter.
66 *R. v. Ramsay*, supra note 16.
70 *R. v. Von Seefried*, supra note 18.
the victim’s and the accused’s testimonies.\textsuperscript{71} The court in \textit{Von Seefried} concluded that the police officer did not have any “investigative rationale” concerning the passenger consumption of alcohol and driver licence.\textsuperscript{72} Likewise, Officer Von Seefried was convicted for a second sexual assault in which he followed the victim to her driveway and insisted that she had a cigarette with him.\textsuperscript{73} She complied. He then sexually assaulted her. Officer Von Seefried tracked her down and found her phone number after several inquiries (i.e. to her friends, to her acquaintances and in databases).\textsuperscript{74} He then asked her to meet with him one more time. During this last meeting, the officer sexually assaulted the victim for a second time.\textsuperscript{75} Once again, if we assume that the first pull over of the car was legal, all the actions that followed were not. Additionally, in \textit{R. v. Mandip Sandhu},\textsuperscript{76} previously discussed, the events happened following the verification of a licence, which is a valid police task. However, Mandip Sandhu was working alone, despite the fact that such duty has to be executed by two law enforcement officers for security reasons.\textsuperscript{77} Therefore, this affair provides another example of a police sexual assault which was perpetrated as a result of non-compliance with police powers or regulations.

In light of those cases, we may question (a) the knowledge of civilians regarding police powers and their constitutional rights and (b) their ability to refuse to comply if they

\begin{itemize}
  \item \textsuperscript{71} \textit{R. v. Von Seefried}, supra note 18, at pp. 7-20 (those pages summarize the evidence).
  \item \textsuperscript{72} Id., at p. 59. The court added: “[i]n the ordinary course traffic stops for the basis of sobriety checks focus on the operator of the vehicle - not the passenger. These stops may involve the driver being removed from the vehicle to isolate the odour of alcohol or for the purposes of an approved screening device demand for example. Not the removal of the passenger.” The prior interception is, however, permitted. See \textit{Highway Traffic Act}, R.S.O. 1990, c. H.8.
  \item \textsuperscript{73} \textit{R. v. Von Seefried}, supra note 17, at paras 1-7.
  \item \textsuperscript{74} Agreement on facts in \textit{R. v. Von Seefried}, supra note 17 (publication ban).
  \item \textsuperscript{75} \textit{R. v. Von Seefried}, supra note 17, at paras 1-7.
  \item \textsuperscript{76} \textit{R. v. Mandip Sandhu}, supra note 37.
  \item \textsuperscript{77} Id., at para 59.
\end{itemize}
know that the officer is acting unlawfully. In other words, on the one hand, Anna might have felt that the officer, who was wearing his uniform and who was in his police cruiser had the legal ability to detain her for walking in the street at night. On the other hand, whether she knew or not the extent of police powers, Anna might have felt obliged to comply because of the position of authority in which Officer Smith was standing.

Moreover, strip-searches executed while a person is being detained can amount to sexual assaults. Here again, civilians do not always understand the extent of police powers regarding those intrusive searches. This ignorance, doubled by police officers’ position of authority, may render civilians even more unprotected against PSM. R v. Golden, heard before the Supreme Court of Canada, has first ruled on the perceptions of citizens regarding strip-searches. The Court recognized the humiliating character of this practice. It also stated that women and minorities, especially, might perceive strip-searches as “visual rapes” and/or “may experience such a search as equivalent to a sexual assault”. Visual rape is not a concept which is included in the offence of sexual assault. However, after Golden, the deliberations on where to draw the line between sexual assaults and lawful strip-searches have continued.

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[78] Here, it is relevant to analyze the absence of resistance (and the resistance myth) depicted in sexual assault studies. See, for example, Melanie Randall, “Sexual Assault Law, Credibility, and “Ideal Victims”: Consent, Resistance, and Victim Blaming” (2010) 22 Can. J. Women & L. 397. I could have quoted many other pieces studying the resistance phenomenon. The objective here is not to undertake an exhaustive review of the literature, but only to suggest one paper which accounts for the nexus between resistance and sexual assault.

[79] R. v. Golden, 2001 SCC 83. The court defined a strip-search as: “the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person’s private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments.” (at para 47.)

[80] Id., at para 90.

[81] Id.

[82] Id.
For instance, in *R. v. Greenhalgh, R. v. Desjourdy* and *R v. Khan*, the detainees argued that the strip-searches they experienced amounted to the conduct prohibited by s. 271 *Cr. C*. Khan and Greenhalgh were convicted of sexual assault, while Desjourdy was acquitted. In *R v. Khan*, the officer searched the detainee three times. The first time consisted of a pat down for safety purpose. The second time, the pat down search expanded to the complainant’s chest. Finally, Khan looked at the complainant’s breast with a flashlight at which point she expressed her discomfort. Also, in *R. v. Greenhalgh*, a law enforcement officer, working at the Canada-US boarders, strip-searched four women. Three of them were asked to take off their clothes and were touched underneath their underwear, on the genitalia and vagina area, on the buttocks, and on the breast. A fourth woman was forced to remove her clothing. However, Greenhalgh did not touch her sexually as he did for the three others. In contrast with those two cases which led to sexual assault convictions, in *R. v. Desjourdy*, the accused handled a female detainee who was non-cooperative and aggressive by cutting her bra with scissors. She was then left for several hours in a cell without any clothes to cover her chest. The court, in this affair, dismissed the argument that Desjourdy’s touch amounted to a sexual assault.

Ultimately, Putska and Sheehy have conducted a study on the phenomenon of strip-searching of women in Canada. They concluded that criminal courts are reluctant to

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84 *R. v. Khan (ONSC)*, supra note 83.
87 Id., at paras 5-13.
consider strip-searches as sexual violence or sexual assault.\textsuperscript{89} Only in a few cases, already aforementioned, did the courts look at strip-searches, not only as abuses of authority, but also as criminal behaviours. Thus, although many women, particularly racialized women, perceive the experience of being strip-searched as a sexual assault, the police conduct will seldom be considered as such. For instance, in \textit{R. v. Raugust},\textsuperscript{90} the court concluded that: “[t]he version of the search described by the accused would constitute more of a sexual assault than a search. [Still i]t is inconceivable that Cst. Grieco-Savoy, an experienced police officer, would do something of this nature at all”.\textsuperscript{91} It is preoccupying to read such statements as they send the message that experienced police officers are immune to commit such misconduct. Moreover, those comments reinforce the conclusion of Putska and Sheehy who claimed that police officers are not afraid of criminal prosecutions for abusive strip-searches as they think that they will be believed over complainants or that they can easily convince judges that their conduct was minor or did not trigger \textit{Charter} remedies.\textsuperscript{92}

\subsection*{2.2 Distrust of the System, Retaliation and Fear}

Victims’ marginalization is not the only issue which may explain the few numbers of police sexual assaults cases going to trial in Canada. Insofar as the offender is a police officer, the breach of trust experienced by the victims renders prosecuting particularly challenging. Often, the victims do not know whom to trust and have to deal with feelings

\textsuperscript{90} \textit{R. v. Raugust}, 2004 SKPC 71.
\textsuperscript{91} \textit{Id.}, at para 79.
\textsuperscript{92} Putska and Sheehy, supra note 89, at pp. 276-277.
of humiliation and fear of retaliation.\textsuperscript{93} Hence, this segment will explore how the trust in the justice system can be disrupted as a result of the sexual assault, hereby identifying another feature which makes police sexual crimes underreported.\textsuperscript{94} For instance, in Anna’s hypothetical case, she specifically claimed that everyone would believe a police officer over her, which is a preoccupation that was also underscored by many Canadian victims of PSM, as this section will expose.

Along with distrust in the system, fear of reprisal is an argument frequently posited to explain why a victim of PSM does not denounce the officer’s unlawful conduct to authorities. Those reasons, suggested by criminologists, are consistent with the sayings of an Indigenous woman of Schefferville, in Quebec, who stated that she has been sexually assaulted by a white police officer while she was pregnant. She kept this event secret for twenty years. When asked why she stayed silent, this woman answered that she was afraid of police officers and scared that she would be depicted as a liar.\textsuperscript{95} Distrust in the system was also pinpointed by several Indigenous women in regard to cases of sexual and general misconduct committed by police officers in Val D’Or, Quebec. For instance, one woman said: “Who will make a complaint against the police? What do you think the policemen will do? [They will say that they] never heard about it” (free translation).\textsuperscript{96} In


\textsuperscript{94} Distrust of the system and fear of retaliation are not exclusive to police sexual assault. For instance, see \textit{R. v. Leblanc}, 2003 NBCA 75, at para 5, in which the victim held: “[w]hen I walk into a public place, with police officers present, I feel like they know exactly who I am, and that if the time came that I needed the assistance of the Fredericton City Police, I would be ridiculed. Furthermore, feeling as intimidated by the entire force as I do, I don't feel that I would trust an officer in my home again!” Officer Leblanc had gone through her diary and stole money from her.

\textsuperscript{95} Enquête/Radio-Canada Info, “Le silence est brisé” (31 March 2016) online <https://www.youtube.com/watch?v=bXj927UB9tc>, at 00:08:15 ff.

\textsuperscript{96} Enquête/Radio-Canada, \textit{supra} note 47, at 00:04:00 ff.
the same way, in the aftermath of the documentary on police misconduct in Quebec, Édith Cloutier, director of Val D’Or Native Friendship Centre, wrote a letter to Captain Pelletier of the Sûreté du Québec asking what would be the measures taken to prevent the women who denounced police officers from being intimidated or being targets of retaliation, underlining the concern that reprisal is for complainants.97

Additionally, one compelling Canadian case on the impact of police sexual assault on the victims’ feeling toward the system is R. v. Bracken.98 In this case, the sergeant investigating the victim’s file of sexual assault, developed an inappropriate relationship with her, which led to the victim’s breast being grabbed in a police cruiser. The victim told the prosecutor that she wanted to withdraw charges on her previous assailant in order to avoid Sergeant Bracken, showing that fear and desire of avoidance might induce victims into not complaining.99 Therefore, an investigation of Sergeant Bracken’s conduct was undertaken and he was charged with sexual assault.100 Undeniably, this case illustrates the issue of distrust, as in her impact statement, the victim stated twice: “If I can’t trust a police officer then who can I trust?”101

Moreover, other Canadian cases have offered examples of the complainants’ fear of reprisals. First, in R. v. Von Seefried, the victim was intercepted while the police officer was exercising his duties under the Highway Traffic Act.102 He thus had access to her name, her licence and her home address. He also had his phone number, as he asked it,
and called twice after the events.\textsuperscript{103} The court recognized the issue of reprisal by holding that it was normal for the victim to ask for advice as whether she should report the offence because of the possibility of retaliation.\textsuperscript{104} Second, in \textit{R. v. Nyznik},\textsuperscript{105} the complainant mentioned that she was afraid to file a complaint as the alleged perpetrators were police officers and were allowed to carry handguns. She was clearly concerned about her safety. Justice Molloy dismissed the likelihood that police officers would actually harm the complainant with their guns. Indeed, she held: “I have no difficulty understanding why the complainant could be fearful about many things. The possibility that the defendants, or the officers investigating her complaints, might come after her with guns is not one of them.”\textsuperscript{106} Hence, fear of reprisal is not always fully acknowledged by courts although victims often underline it.

\subsection*{2.3 Communication & Cultural Issues}

There are other factors, that although do not clearly appear in the factual background or in the courts’ decisions, may impact the victims’ successes through the criminal proceedings, such as cultural differences between complainants and police officers. Therefore, the next subsection unveils features of the criminal justice system that may create additional barriers for a victim of police sexual assault but which are not necessarily reported by police officers and courts and, thus, possibly unknown to the public.

\begin{footnotes}
\footnote{\textit{R. v. Von Seefried}, supra note 18, at p. 66.} \footnote{\textit{Id.}, at pp. 32-35. Indeed, the court concluded that: “[i]t is clear that the complainant sought advice from several friends as to what to do. She did not know how to handle this situation. She was aware that the defendant had her address and phone number and name. She was understandably concerned about potential reprisals.”} \footnote{\textit{R. v. Nyznik}, supra note 10.} \footnote{\textit{Id.}, at para 155.}
\end{footnotes}
One of those circumstances is a communication-related concern. For instance, the situation in Val d’Or and Côte-Nord, aforementioned, may also be explained, by reasons linked with cultural differences that render native people more vulnerable in the Canadian criminal justice system. For instance, during the investigation, French and English were used by police officers when communicating with native people (witnesses or victims). No interpreters were ever asked to assist even though many Indigenous languages are spoken in those areas of Quebec. The police organization in charge of the investigation (i.e. Montreal Police Service (hereinafter “SPVM”)) justified this choice by the fact that no one requested to be interviewed in his or her native language. The independent observer, assessing the impartiality of the investigations, recommended conducting future interviews in Indigenous languages, but did not perceive major issues of communication as most Aboriginals can speak French or English. It is to be noted that she did not have direct access to the victims or to the witnesses.

Assuming that those issues are relevant to study in police sexual cases, one may wonder why Anna’s narrative does not specify cultural or linguistic issues. It is to be noted that I have chosen to exclude this information in order to better reflect the actual reality. Indeed, not including this kind of information seems to be the practice among courts. For instance, the only case in which the aboriginal status of a victim was reported is in R. v. Ramsay, but there was no mention of cultural or language issues. I did not manage to

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108 Lafontaine, supra note 52, at pp. 9 and 64.
109 Id. On this point, it is relevant that the English of Indigenous people may diverge from Standard English. Hence, it might lead to false interpretations. For more information on Aboriginal and Standard English, see Amanda Carling “A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions” (2017) 64 Criminal LQ 415, p. 435 ff.
110 Lafontaine, supra note 52, at p. 72.
collect any data on the victims’ culture in first instance and in appeal decisions which would confirm or infirm this statement (it might be because there is no relevant data). Also, a flagrant language difficulty was studied in *R. v. Von Seefried*. In this case, the victim was speaking Mandarin and had a very poor knowledge of English. The language barrier rendered the procedure more complex as she did not have sufficient English knowledge to always clearly express herself.\(^{111}\) Nevertheless, it is to be hoped that judges do not consider this issue only in the likelihood of serious miscarriages of justice (as in *Von Seefried*).

Finally, none of the other cases studied for the purpose of this thesis covered language and cultural barriers. Likewise, Putska and Sheehy have concluded in a study on the strip-searching of Canadian women that we seldom know the race of the individual who was subjected to the search while reading the courts’ decisions. For instance, in the aforementioned *Desjourdy* case,\(^{112}\) it was reported by academics that the detainee who had been strip-searched is of African-Canadian descent, a detail that was omitted by the courts.\(^{113}\) Hence, it is hard to assess the extent of cultural factors and racism in strip-searches, as it is for the other cases of police sexual assault. Putska and Sheehy, thus, rose that this colourblindness or this “cultureblindness” fail to fully understand the extent of *Golden*’s teachings.\(^{114}\) In the same way, in police sexual assault cases, colourblindness

\(^{111}\) *R. v. Von Seefried*, supra note 18, at p. 27 ff.
\(^{112}\) *R. v. Desjourdy*, supra note 13.
\(^{113}\) Tanovich, *supra* note 19, subsection “Gendered and Racialized Violence”.
\(^{114}\) Putska and Sheehy, *supra* note 82, at pp. 263-265. Indeed, the authors claimed: “[g]iven the Supreme Court of Canada’s recognition in *Golden* that minorities—including African-Canadians and Aboriginal persons—may be particularly impacted by strip searches, it is concerning that so few decisions consider whether systemic racism may have been at play or how illegal strip-searching has particular repercussions or meanings for racialized women.” (at p. 265.) See also *R. v. Golden*, *supra* note 79, at para 90, in which the Court held that minorities, especially, may experience strip-searches as sexual assaults.
may prevent us from having a complete portrait of the behaviour. Hence, if Officer Smith had made use of racial profiling when intercepting Anna, it would bring to light another facet of the circumstances. This aspect can extend our understanding of victims’ marginalization and could also help us to craft solutions that would be sensitive to racism issues, if need be. However, as in many decisions, those details were omitted in Anna’s case.

2.4 Code of Secrecy

The lack of prosecution of police sexual assaults could also be an outcome of the “Blue Wall of Silence”. This concept is defined as: “an unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer.”¹¹⁵ In a study on female police officers’ perceptions of PSM in 2010, Maher concluded that most participants thought that the code of secrecy “exerted considerable pressure not to report such behaviour committed by fellow officers.”¹¹⁶ I argue that this practice may be a contributory factor for the small number of trials. Indeed, as studies on PSM have proven, law enforcement officers are reluctant to denounce their colleagues’ misconduct.¹¹⁷

Likewise, Maher pointed out that policemen involved in his 2003 study reported that they

¹¹⁵ Gabriel J. Chin and Scott C. Wells, “The Blue Wall of Silence as Evidence of Bias and Motive to Lie: a New Approach to Police Perjury” (1998) 59 U. Pitt. L. Rev. 233, at p. 237. This idea of code of secrecy is often linked to the police culture. However, Marc Alain and Martin Grégoire challenged this concept of culture shared by all police officers. According to them, there would be several layers depending on *inter alia* the functions exercised by the individuals (patrol, investigation, etc.) and their ranks. Police officers with similar duties would be more likely to share a common professional culture. Marc Alain and Martin Grégoire, “L’éthique policière est-elle soluble dans l’eau des contingences de l’intervention” (2007) 31:3 Déviances et Société 257, at p. 266.


might not denounce their partners’ misconduct unless they constitute more serious offences such as “rape, sexual assault, or sex with a juvenile.” All participants in the study, except one, stated that their readiness to denounce one of their colleagues was correlated with the seriousness of the alleged misconduct. Perceptions of female police officers were slightly different. Indeed, 45% of Maher’s female participants believed minor misconduct were less likely to be reported. Nevertheless, several women officers reported that serious incidents would neither be denounced.

This phenomenon was also analyzed in a study undertaken with young police officers (from police academy to their second year of practice) in Quebec. This piece concluded that there was an unwillingness to denounce colleagues. Interviewees in the study also indicated that: “what is said in the police vehicle stays in the vehicle”. The paper underscored that, despite disagreement with an act or conduct of a fellow police officer, participants did not want to report a colleague, even for an unlawful conduct (e.g. driving while impaired). In the same vein, one participant stated that he knew a police officer who had to resign because his colleagues were not trusting him anymore after he arrested an officer who was impaired while driving. In addition, a noteworthy point is that the more expertise police officers had, the more likely they were to conform to the code of silence or to have a neutral attitude toward it. Likewise, another study examining the inclination to report colleagues’ conducts claimed that Quebec policemen were less likely

118 Maher (2003), supra note 3, at p. 375.
119 Id.
120 Maher (2010), supra note 116, at pp. 271-272. Also, one officer participating in Maher’s study referred to a “wolf-pack mentality”, Maher (2010), supra note 116, at p. 277.
121 Alain and Gregoire, supra note 115, at p. 269.
122 Id., at p. 269 ff.
123 For instance, 37% believed that excusing a fellow police officer who committed an unlawful act is acceptable, while 25% disagreed. Alain and Gregoire, supra note 115, at p. 273.
to disclose a “severe” misconduct, as they feared public exposure. The general conclusion of this study was that legal obligation or not, police officers were reluctant to denounce their colleagues. However, those pieces on police ethics were not meant to address the issues of police sexual assault or PSM.

Although the code of secrecy has not necessarily a direct effect on the prosecutions, it may impact the criminal cases as it might create an appearance of bias, mainly in cases involving multiple police officers. For instance, one Canadian case in which the wall of silence might have had an effect on criminal proceedings is R. v. Desjourdy. In this affair, the complainant, S.B., was arrested and brought to the police station. Justice T. Lipson held that according to the evidence, she was intoxicated, hostile and non-cooperative while being searched. The decision debated on whether the strip-search, in which Sergeant Desjourdy cut the complainant’s bra and shirt, amounted to the conduct prohibited by s. 271 of the Cr. C. S.B. told the court that while being searched, she urinated on herself which increased the humiliation of being half naked in front of police officers. She also alleged that officers mocked her for doing so in an attempt to embarrass her and to punish her for her aggressive behaviour. The court concluded, after observing S.B.’s state of intoxication and her decision not to testify at trial, “I note […]

125 Id., at p. 22.
126 However, Quebec policemen were more likely to perceive general misconduct scenarios as more serious than their American counterparts. Quebec police officers were also more likely to give severe punishments for major misconduct (e.g. stealing in a found wallet or driving while impaired), but to be more lenient for less serious acts. Id. at p. 13.
127 R. v. Desjourdy, supra note 13. See the comments of Professor Lafontaine on the means to prevent the code of secrecy: Public Inquiry, Part 1 – Me Fannie Lafontaine, supra note 46, at 00:52:09 ff.
128 Id., at para 34.
that she gave her version of events approximately 2 ½ years after they took place. For all of these reasons, it would be unsafe for the court to accept the complainant’s unsupported claim that she was taunted by the officer shortly before her bra and shirt were cut off. [my emphasis]129 I want to draw attention that witnesses that could have supported S.B.’s claim were all colleagues of Sergeant Desjourdy and that some of them might have been exposed to S.B.’s assaultive behaviour, which injured one of their fellow officers. Thus, considering that studies show a reluctance to denounce colleagues, the concern of police secrecy might deserve reflection in events akin to Desjourdy.130 This observation is made without suggesting any dishonesty in this particular case; however, such circumstances may create an appearance of bias.

Furthermore, the conduct of the sergeant who investigated the complaint in R. v. Von Seefried appears to be an indicator of the potential existence of the “Blue Wall of Silence”. Although I do not want to suggest anyone’s bad faith and that I am not, as for the justice M. Felix, “here to judge the conduct of [the] Sergeant”,131 the investigation appears to be highly suspicious. Indeed, the sergeant proceeded to the interview of the complainant while her boyfriend was present, thus, risking tainting the witnesses. Also, he did not electronically record it.132 Those missteps in the police investigation, which could have had a great impact on the procedures, are suspicious when the alleged

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129 R. v. Desjourdy, supra note 13, at para 97. It can be noteworthy to look at Desjourdy’s previous conducts with female detainees, see Gary Dimmock, “Desjourdy had previous run-in for how he treated female prisoner” Ottawa Citizen (9 April 2014) online <http://ottawacitizen.com/news/local-news/desjourdy-had-previous-run-in-for-how-he-treated-female-prisoner>.

130 It might be relevant to consider that according to Stinson et al: “[the police officers’] occupational status typically promotes a high degree of trust and authority, whether they are on duty or off duty.” (Stinson et al, “Police Sexual Misconduct”, supra note 4, at p. 143.)

131 R. v. Von Seefried, supra note 18, at p. 28.

132 Id., at p. 28, recognized that electronic recordings are not mandatory. However, Iaccobucci J. held that there is a growing recording practice. See R. v. Oickle, [2000] 2 SCR 3, 2000 SCC 38.
offender is a fellow police officer. Thus, the court held that those errors were: “particularly unconscionable given the allegation being made - that an on-duty uniformed police officer had sexually assaulted a member of the community.”

Moreover, an Indigenous woman from Quebec stated that she did not denounce the police officer who had sexually assaulted her, as policemen would protect each other leaving her without anyone to defend and believe her. Another Indigenous woman from Quebec stated that police officers were aware that she had been assaulted by one of their colleagues and that they were not doing anything about it. Those are two examples of how the code of silence may deter complainants from filing complaints as well as weaken the trust of, in those cases, Indigenous women in the justice system.

133 R. v. Von Seefried, supra note 18, at p. 28. Also, in a public inquiry, a Lieutenant-Detective claimed that avoiding tainting the witnesses by isolating them is a basic principle of criminal investigations: Public Inquiry – Pascal Côté, and Yannick Parent-Samuel, supra note 46 at 01:01:05. Jacques Turcot, in the same inquiry, revealed that the photo line-up exposed to one victim included 109 photos while the 4 officers involved were not unknown to the police agencies. This kind of information also create an appearance of bias. See Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 1 – Jacques Turcot, Detective Sergeant, SPVM” (8 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspqaudiences_audiences%5Baudience%5D=120&tx_cspqaudiences_audiences%5Bpartie%5D=1&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=04bf04b43c909207e6f9991d2cd6d93c6f99911> at 00:35:20 ff., and Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 2 – Jacques Turcot, Detective Sergeant, SPVM” (8 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspqaudiences_audiences%5Baudience%5D=120&tx_cspqaudiences_audiences%5Bpartie%5D=2&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=515f88b985a971f80e699dcfa3f5763c6f99911> at 00:31:17 ff. Finally, it is to be noted that this public inquiry is still hearing witnesses and that I have decided to listen mainly to police testimonies regarding the Val D’Or events.

134 Enquête/Radio-Canada, supra note 47, at 00:04:00 ff.

135 Enquête/Radio-Canada Info, supra note 95, at 00:06:10 ff. It is germane to pinpoint that police officers from all over the province (i.e. 2500 individuals) showed their support to the alleged police officers. Public Inquiry, Part 1 – Janet Mark, supra 53, at 00:41:20 ff. See Lafontaine, supra note 52, at p. 38 and Public Inquiry, Part 1 – Me Fannie Lafontaine, supra note 46, at 01:59:03 ff., on possible communications between police officers before the investigations on the Val D’Or events and the concerns that arise from this situation.
In other words, even if he had told his colleagues what happened that night (if we take for granted that he is guilty), there are chances that Officer Smith could have had impunity for the acts he committed. The wall of silence combined with the judicial obstacles for victims of police sexual assaults is, thus, a hypothesis that could be argued to account for the few cases of police sexual assault that went to trial in Canada. However, I do not want to imply that every police officer will stay silent when aware of misconduct committed by fellow officers. Hence, *R v. Khan*\(^{136}\) provides a good example of an officer’s conduct that goes against the code of secrecy. In this affair, a woman was being brought to the police station and searched incidentally to her arrest. Officer Khan was looking for weapons and searched the complainant three times (i.e. he patted her down twice and searched her breast with a flashlight at which point the complainant revealed her discomfort). When the woman arrived at the police station, a female constable informed the complainant that she was going to be searched. The complainant then answered that she had already been searched three times prior to her arrival. Consequently, the constable immediately reported this statement to her superior and an on-staff sexual assault investigator went to interview the complainant about the events.\(^{137}\)

2.5 Sexual Assault Classified as Unfounded

As noted earlier in the hypothetical case, Anna has chosen, despite her fear and all of the obstacles that she faced, to file a complaint against Officer Smith. Thus, she represents a

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\(^{136}\) See *R. v. Khan*, *supra* note 83 (all cases).

small percentage of victims of sexual assault that will undertake criminal procedures. As a matter of fact, a study on PSM, stated that: “[t]he factors that seem to limit the reporting of sex crimes in general—and often contribute to the negative consequences experienced by sex crime victims—seem to be aggravated in cases where the perpetrator is a police officer.” Despite the fact that Anna is one of the occasional victims who will take action against her assailant, there is a new obstacle rising at this phase: her complaint may be classified as unfounded. For instance, let’s imagine that when Anna reaches the police station to denounce Officer Smith, the police officer receiving her complaint does not believe her and classifies her complaint as being unfounded because she was intoxicated when it happened. Actually, the criticisms that are formulated against how police officers handle general sexual assault complaints can also apply to cases in which the offender is a police officer. For instance, Conroy and Scassa, in a study on sexual assaults in Canada, concluded that: “it is known that sexual assaults are classified as unfounded at a higher rate than other types of crimes.” Not only are these offences often classified unfounded, but the cases considered unfounded by police officers are often involving marginalized individuals. This statement is particularly true

139 Stinson et al, “Police Sexual Misconduct”, supra note 4, at p. 122.
140 If we rely on data provided to Teresa DuBois and Professor Crew by some Ontario police services between 2003 and 2007, Anna’s complaint has 7.69% of chance to be classified has unfounded. Indeed, 541 out of 12 878 complaints were classified that way in Toronto. The aforementioned study, however, was not looking specifically at police sexual assaults. The number of complaints classified as unfounded in police sexual assault cases may thus differ from 7.69%: Teresa DuBois, “Police Investigation of Sexual Assault Complaint” in Sexual Assault in Canada: Law, Legal’s practice and Women’s Activism ed. Elisabeth A. Sheehy (2012: University of Ottawa Press: Ottawa), pp. 191-209, at p.197.
142 Conroy and Scassa, supra note 141, at p .360, Teresa Dubois undertook a review of factors that have been pointed out by studies as having a nexus with the disbelief of the complaint (i.e. mental health,
when the victim suffers from health problems or mental disorders.\textsuperscript{143} Hence, the way police officers currently handle sexual assaults may enhance the rate of under judicialized cases. For example, in the documentary in which Indigenous women denounced police officers in Val d’Or, Quebec, one of them pointed out that even if they went to file complaints, they never heard back from anyone.\textsuperscript{144} As aforementioned, unfortunately, those same marginalized individuals appear to be more likely to be victims of police sexual assaults which creates a vicious circle: marginalization is linked with the likelihood of being victimized, individuals coming from marginalized groups are more likely to have their complaints classified as unfounded and rejecting their complaints might render them even more vulnerable.\textsuperscript{145}

2.6 Miscellaneous

This chapter has explored a few barriers that someone like Anna may encounter prior to reaching the trial stage. However, the obstacles list drafted in this thesis is not exhaustive. There are many others factors that might increase the complexity of police sexual assault cases that, if assessed, permits us to have a broader understanding of the phenomenon. Therefore, it is relevant to take a look at criminologists’ findings on PSM.

One of the first questions we may ask in an attempt to understand police sexual assault is whether or not, acts like the ones committed by Officer Smith or other forms of PSM are

\textsuperscript{143} Conroy and Scassa, \textit{supra} note 141, at p. 360.
\textsuperscript{144} Enquête/Radio-Canada, \textit{supra} note 47, at 00:26:50 ff. After the documentary, the Sureté du Québec called back some complainants to see if they could go through with the procedures. (See 0:30:03 ff.)
\textsuperscript{145} To understand the impact of unfounded complaints on women reporting sexual assaults, see DuBois, \textit{supra} note 140, at pp. 191-209.
occurring on a regular basis in our society. Despite the assertion of one trial judge who
held that assaults and abuses of trust by police officers were infrequent,\textsuperscript{146} data on PSM
tend to show the contrary. Indeed, in the United States, the media, as well as criminology
studies,\textsuperscript{147} have reported a high number of PSM cases. For instance, \textit{The Guardian} stated
that in a one-year investigation made in the United States: “the Associated Press
uncovered about 1,000 officers who lost their badges in a six-year period for rape,
sodomy and other sexual assaults; sex crimes that included possession of child abuse
images; or sexual misconduct such as propositioning citizens or having consensual but
prohibited on-duty intercourse.”\textsuperscript{148} Likewise, studies undertaken by Timothy M. Maher
reported that in average officers claimed that 36.5\% of police officers in their department
participated in at least one type of sexual misconduct.\textsuperscript{149}

Furthermore, not only criminologists have reported that PSM might be more frequent
than we think, but they have listed out potential reasons to account why they are difficult
to prevent and to prosecute. Thus, it is germane to understand the conclusions of various
studies on PSM as they explain why Officer Smith might be harder than any other
offender to prosecute, something that will undoubtedly have an impact on Anna. For
instance, Rabe-Hemp and Brathwaite argued that police officers engaging in PSM might

\textsuperscript{146} \textit{R. v. Greenhalgh, supra note 19, para 54.}
\textsuperscript{147} An American study analyzed 548 cases of sex-related crimes alleged to be perpetrated by police officers
between 2005 and 2007 in 43 US states and in Washington DC: Stinson \textit{et al, supra note} 23, at p. 673. Another study conducted in the US in the 1990s identified 37 cases of rape or sexual assault. The data
originated from the Federal District Courts publications (1978-1992) and from news coverage (1991 to
\textsuperscript{148} Sendensky Matt and Nomaan Merchant, “Investigation reveals about 1,000 police officers lost jobs over
sexual misconduct”, \textit{The Guardian}, (November 1\textsuperscript{st}, 2015) online: <https://www.theguardian.com/us-
news/2015/nov/01/police-sexual-assault-investigation> (adapted version of AP article).
\textsuperscript{149} Maher (2003) \textit{supra} note 3, at p. 367. The eight types reported by Maher are the following: nonsexual
contacts that are sexually motivated (e.g. gender profiling), voyeuristic contacts, contacts with crime
victims, contacts with offenders, contacts with juveniles, sexual shakedowns, citizen-initiated contacts and
officer-initiated contacts. See also pp. 359-360.
be suspended, but provided with letters of recommendations which allow them to potentially re-engage in improper behaviours while employed elsewhere. They added that cases of PSM and of sexual assaults are hard to win. Hence, prosecutors would be reluctant to prosecute unless they possess strong evidence of guilt. Non-prosecution could also be a measure of courtesy. For instance, Stinson et al undertook a study, on American PSM cases, and concluded that some charges did not reflect the conduct as described in the newspaper *inter alia* because of “preferential charging decisions presumably filed as a courtesy to the arrested officer” or because officers were charged with general rather than sexual misconduct. For instance, *R. v. Rossignol* gives an example that, despite a sexual criminalized conduct, the court may accept a guilty plea for the included offence of assault. Also, Maher posited that there is a prosecutorial reluctance to prosecute police officers for misconduct and sexual violence because of the relationship existing between the prosecutorial and police institutions. Hence, prosecutors and police officers’ conducts may cause additional barriers for victims. For instance, it was reported by an Indigenous woman in Quebec that the police station in Val D’Or refused to accept her complaint against a police officer, as it was not filed by a lawyer. Similarly, another native woman held that when she went to see her lawyer to

150 Rabe-Hemp and Braithwaite, *supra* note 26, at pp. 140-141.
151 *Id.*, at p. 141. See also Enquête/Radio-Canada Info, *supra* note 95, at 00:10:30 ff. In the United States, courtesy to police officers was greater when the officer occupied a supervisory function according to Stinson *et al*. Indeed, non-supervisory officers were treated more severely by prosecutors and courts: Stinson *et al*, “Police Sexual Misconduct”, *supra* note 4, at p. 139. See also Sheehy and Psutka, *supra* note 89, at pp. 278-279 (relying on Tanovich).
152 Stinson *et al*, “Police Sexual Misconduct”, *supra* note 4, at p. 123. Unfortunately, most of the findings reported in this section are based on American studies, as there is no similar research on Canadian policemen’s sexual misconduct. This urges to the collection of Canadian data.
154 Maher, *supra* note 21, at p. 38.
155 Enquête/Radio-Canada Info, *supra* note 95, at 00:03:44 ff.
get help, she was told that there was nothing that could be done as it was her version against the police officers’ sayings.\textsuperscript{156}

To summarize this first chapter, Anna or any other victim of police sexual assaults will encounter many hurdles between the sexual assault and the prosecution. This last subsection has outlined many additional obstacles, but it is only a small part of the puzzle. All or a combination of the issues underlined in the subsections of this chapter may influence the outcomes of a complaint to the police. Most of the factors are rooted into systemic defaults (i.e. unfounded rate of complaints, the way courts treat sexual assault victims, etc.) while others are anchored in the police culture (i.e. code of secrecy, the place of women in police institutions, etc.) Thus, a large array of solutions should be crafted to answer all of the concerns underscored.

**CHAPTER 3 – SENTENCING POLICE SEXUAL ASSAULTS**

If Anna succeeds in overcoming all obstacles that have been discussed in previous sections, and if a conviction is entered against Officer Smith, the criminal proceedings will move to the sentencing phase, which comes with its own technical issues. The questions here are: what will be the sentence given to Officer Smith and are there any guidelines that allow us to predict what kind of sentence he will receive? Sentencing is an important part of the criminal process. It has an effect, not only on victims’ and the public’s confidence in the administration of justice, but also on the life of the accused.

\textsuperscript{156} Enquête/Radio-Canada Info, *supra* note 95, at 00:23:35 ff.
From the outset, at the sentencing stage, the function of the offender will, for the first time, be thoroughly scrutinized by the adjudicator so that he can craft an individualized and proportionate sentence. Thus, the following chapter of this thesis will study how police officers who committed sexual assaults are being sentenced in Canada as well as the ethical issues that will emerge at the sentencing hearing. In addition, this section will analyze whether there is a precise path followed by courts in such cases.

Sections 718 and subsequent of the *Criminal Code* are the core provisions to understand sentencing in Canadian criminal law. Briefly, they state that denunciation; deterrence; separation of offenders from society; rehabilitation; reparation; and promotion of offenders’ responsibility the objectives governing the sentencing process. Every offender and circumstances are different and, thus, may command to pursue different combinations of sentencing goals. Along with those objectives, the sentencing process is strongly relying on the principle of proportionality. According to this principle, courts must give sentences proportional to the degree of blameworthiness of the offender and to the gravity of the offence. The *Criminal Code* also lists other concerns at s. 718. For example, this section hold that sentences for alike offences committed in similar circumstances should not dramatically differ (s. 718.2(b) *Cr. C.*), that judges should not give too harsh consecutive sentences (s. 718.2(c) *Cr. C.*), that deprivation of liberty should not be preferred when less restrictive sentences are possible, and, in the same vein,

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157 *Cr. C.*, supra note 6, at s. 718.
158 *Id.*, at ss. 718-718.1 *Cr. C.*
that if imprisonment can be avoided, and if it is reasonable to do so regarding the harm done by the offence, other sentences should be elected (718.2(d)(e Cr. C.).

3.1 Deterrence and Denunciation

In the specific setting of police sexual assaults, most trial judges have highlighted the need to focus on the objectives of deterrence and denunciation. Despite the fact that the Supreme Court of British Columbia noted that: “cases involving assault and abuse of trust by police officers or others holding official positions of authority are, thankfully, rare”, police sexual assault is regarded as a serious problem which is why those sentencing goals are usually prioritized.

For instance, in Bracken, a sergeant investigating a sexual assault case developed an inappropriate relationship with the victim. He “talked dirty”, chatted of sexual matters, ask for pictures of the complainant wearing police merchandise – that he gave her and that he demanded her to wear in bed – and lastly grasped the victim’s breast while she was sitting in his police car. In the sentencing decision, the court made a review of cases in which police officers had been convicted and sentenced. The court concluded that denunciation and deterrence are the paramount objectives to focus on, especially when the officer is on active duty. The court added that even if the stigma associated with a conviction might be greater on police officers than on any general offenders, the

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159 Subsection 718.2(e) Cr. C. puts a particular emphasis on Indigenous offenders.
162 R. v. Bracken, supra note 58.
163 Id., at paras 5-28.
164 Id., at para 34.
consequences on the police officer’s reputation cannot substitute the need to stress on both denunciation and deterrence. Finally, the court made it clear that putting emphasis on denunciation, although this principle is particularly important, is not sufficient in such cases.165

Similarly, in Rossignol, an R.C.M.P. officer on duty knocked at the victim’s door without having any legal grounds.166 When the victim answered, he started grabbing her. Then, Rossignol tried to kiss the victim and put his pelvis against hers. After two attempts, he apologized for his behaviour and left.167 The court underlined that the sentence needed to send “a clear message” as such an egregious misconduct cannot be tolerated in our society.168 This statement is consistent with the objective of general deterrence. Indeed, in this case, the court held that it was not necessary to insist on the goal of specific deterrence as Rossignol had suffered a lot since the event as he had been suspended from his employment (with and then without salary).169 Likewise, in Shipley et al, a case in which two police officers used an excessive amount of force by pepper spraying, bending fingers and pushing a civilian against a wall before handcuffing him, the judge held that denunciation, along with general deterrence, were the main objectives to assess.170 The court added that it meant to: “send a message to other officers that assaultive conduct will

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167 Id. The Rossignol case is not a sexual assault case as the R.C.M.P. officer pleaded guilty to the included offence of assault (s. 266 Cr. C.).
168 Id., at p. 10.
169 Id., at pp. 8-9
170 R. v. Shipley et al, 2015 BCPC 276, at paras 3-5 and 17-22. Paragraph 23 also acknowledged that the harm done do the community is a relevant principle in such circumstances: “[a] further objective of any sentence imposed is that it should provide reparation for the harm done to the community. The offence occurred in a public place, it was videotaped by the public, and ultimately posted on social media. Accordingly, there is a need to give back to the community and repair the public harm that has occurred.”
result in consequences.” Therefore, general deterrence in police misconduct cases, including sexual assaults, is emphasized rather than specific deterrence. Moreover, in *Ramsay*, a case in which a corporal of the R.C.M.P. was convicted of attempted rape on a 14-year-old Indigenous teenager, the judge held that he needed to stress on the principles of deterrence and denunciation. Additionally, he stated that the harm done to the victim and her community had to be considered, along with the aforementioned other principles, in order to impose an imprisonment sentence rather than one served in the community.  

Therefore, general deterrence and denunciation are the core objectives on which judges have put focus when sentencing police officers that committed sexual assaults. However, it is also the case, generally, in any sexual crimes, including “those places along the lower end of the scale of gravity”. Those objectives are also the most significant when a police officer perpetrates any offence such as accounted by the Ontario Superior Court which held: “[g]eneral deterrence and denunciation drive the sentencing process in breach of trust cases. Absent an exceptional mitigating factor, severe sentences are justified for police officer offenders.”

### 3.2 Breach of Trust

In addition to the sentencing goals and to the proportionality principle, a judge may weigh the mitigating and aggravating factors of the case (s. 718.2(a) *Cr. C.*). For instance, the aggravating factor stated at s. 718.2(a)(iii) *Cr. C.* (i.e. “evidence that the offender, in

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committing the offence, abused a position of trust or authority in relation to the victim”) is particularly relevant in the context of police misconduct. By way of illustration, in *R. v. Shipley et al*, the court considered that working as a police officer constitutes an aggravating factor. However, the judge did not adjust the sentence in regard to this factor to prevent “double punishing”. The court meant by “double punishment” that law enforcement officers usually get more severe sentences because of their function.

Similarly, in *Bracken’s* sentencing decision, the court held that Bracken had sincere remorse and was not a danger to society. However, it strongly disapproved of the fact that Sergeant Bracken used the complainant’s vulnerability to fulfill his sexual desires. Also, the judge underlined that Sergeant Bracken must have known the state of helplessness of the victim when perpetrating sexual acts. The victim was already vulnerable before meeting, and being sexually assaulted, by Sergeant Bracken as she had experienced previous sexual assaults, and as she also went through the death of her father a few years before Bracken’s assault. Sergeant Bracken knew all of those facts when he committed the assault as he was seen not only as a police officer, but also as a friend by the victim. Hence, the court stated that: “[h]e must have known from his extensive

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175 *Cr. C., supra note 6, s. 718.2(a)(ii).*
177 *Id.* The judge explained his adjudication: “I have not adjusted the sentence with this fact in mind because it is a fact considered in recognizing that police officers generally receive harsher sentences. To consider their status again when adjusting the appropriate sentence would, in essence, result in double punishing the accused.”
178 *R. v. Bracken, supra note 58, at paras 19 and 26-33.*
179 *Id., at paras 21-25.*
180 *Id., at para 27.*
experience in major crimes, and working with sexual assault victims, that she had enduring scars from childhood sexual abuse and was susceptible to influence.”

Moreover, in Braken’s case, the court held that: “[the police officer] not only abused a position of trust in relation to the victim, he also violated his position of trust as a police officer in society.” The position of trust came not only from his function as a police officer, but also because of his relationship with the victim and their age difference of 37 years. Therefore, the judge highlighted how difficult it must have been for the complainant to report Bracken’s behaviour. Indeed, the position of authority of the offenders in cases like this one may lead victims to distrust the system or to fear authority and, thus, not to disclose what happened. Similarly, in R v. Ramsay, the sentencing judge believe that as the offender was acting as a police officer and questioning a teenager on sexual matters with unclear grounds as to why he was asking such questions, the aggravating factor of breach of trust had to be recognized.

Although it is not always discussed as the aggravating factor codified under s. 718.2(a)(iii), the position of trust in which police officers stand is a cornerstone of the sentencing phase. For instance, in R. v. Rossignol, the court held that the touching was a minor one, but that it was made worse since the offender was a police officer wearing his uniform. The judge was worried by the fact that Rossignol was personifying the law as,

182 Id., at para 31.
183 Id., at para 22. Indeed, according to this decision, age differences may be assessed when evaluating if the offender was in a position of trust.
184 Id., at para 22.
at two and a quarter in the morning, police officers are the only representative of the law in function. This is why, when sentencing Rossignol, judge McLellan held that he had to send the message that such misconduct by police officers could not be regarded as inoffensive.

In another decision, the court held that a harsh sentence should not be imposed only because the offender was a police officer on the counts of sexual assault. Indeed, in *R. v. Simard*, eight charges of sexual assault were laid against a police officer as the victims (i.e. 7 women) felt obligated to perform fellatio, to participate in undesired sexual intercourse (including anal or vaginal sex) or were inappropriately touched on their buttocks while they were dancing. The sexual assaults happened while the accused was off-duty and attending bars or alcoholised parties with the victims. It is to be noted that some scholars do not include off-duty crimes as being part of PSM. However, Stinson *et al* concluded that some crimes were more likely to be committed while officers were off-duty. Actually, some sexual offences such as statutory rape; pornography and obscenity offence; online solicitation of a child; and incest were more likely to be perpetrated while the police officer was not on active duty. Therefore, I cannot omit to consider cases like *Simard* in this thesis.

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188 *Id.*, at p. 10. The judge uses the following words: “[i]n the circumstances I think I have to impose a sentence that will send a clear message to everybody that the law does not tolerate this sort of misconduct by law enforcement officers or for that matter, by any stranger by trick getting into a woman's house in the middle of the night to grab her.”
Simard was sentenced to 2 years less 1 day of imprisonment. He received a sentence of 12 months for an undesired anal penetration and of 10 months for sexual touching. He was also sentenced to 2 months less 1 day of imprisonment for counts of drug trafficking.

Judge Larouche considered Simard’s function when sentencing for drug trafficking charges, but not when dealing with the counts of sexual assault.¹⁹¹ I respectfully disagree with this approach. The fact that Simard was a police officer, although off-duty, might have had an impact on victims. For instance, one of the victims said: “No. You are a cop, you are in a good position to know what no means” (free translation).¹⁹² It is also noteworthy that another victim felt the need to specify Simard’s profession to her friend.¹⁹³ The court even acknowledged that every victim knew that Simard was a police officer.¹⁹⁴ Law enforcement and sexual assault, when combined together, are highly sensitive, which makes me believe that the profession of the accused should not be discarded as easily as it was in Simard.

Additionally, the position of trust or authority has been considered in the particular scenario of police sexual assaults happening as a result of a strip-search. For instance, in R. v. Greenhalgh,¹⁹⁵ a law enforcement officer, working at the Canada-United States borders, strip-searched several women. Three women were forced to remove their clothing and were then touched respectively underneath their underwear, on the genitalia

¹⁹¹ The prosecutor in R v. Simard, 2014 QCCQ 7652, at para 5, suggested that Simard’s function was a factor influencing sentencing. The prosecutor suggested that the offences had a negative impact on the police’s reputation. However, the tribunal considered that Simard’s role only had an impact on the drug trafficking charges (at paras 38 and 42) and not on the sexual assault charge. Indeed, judge Larouche held that the sentence related to the offences of drug trafficking had to be purged in prison because he was a police officer, although another offender could have avoided imprisonment for such charges (at para 41).
¹⁹³ Id., at para 96.
¹⁹⁵ R. v. Greenhalgh, supra note 19.
and around the buttocks, the breast and the vagina areas, while a fourth woman was forced to take off her clothes without being touched.\textsuperscript{196} Thus, Greenhalgh was found guilty of three counts of sexual assaults and one count of breach of trust.\textsuperscript{197} Also, for the three counts of sexual assault, the breach of trust was regarded as being an aggravating factor at the sentencing phase.\textsuperscript{198}

To summarize, the notion of breach of trust, despite the fact that it is expressed in different manners in the aforementioned case law, is often at the core of sentencing decisions of police officers. However, it is noteworthy to highlight that although breaches of trust are often examined at the sentencing phase, police officers in the studied cases were not usually charged with the offence of breach of trust codified at s. 122 Cr. c. Only two officers were prosecuted for breach of trust even if most police sexual assault cases I studied – perhaps with the exception of off-duty police misconduct – met the requisites of the offence established by the Supreme Court of Canada in \textit{R. v. Boulanger}.\textsuperscript{199} Thus, I cannot help but to wonder whether our criminal system fails to perceive sexual assaults committed by police officers as being a breach of trust amounting to the conduct prohibited by s. 122 Cr. C.

\begin{footnotesize}
\begin{enumerate}
\item \textit{R. v. Greenhalgh, supra} note 19, at paras 5-13.
\item \textit{Id.}, at para 5.
\item \textit{Id.}, especially at para 67.
\item \textit{R. v. Boulanger}, 2006 SCC 32, at para 58: “1. The accused is an official; 2. The accused was acting in connection with the duties of his or her office; 3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office; 4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused’s position of public trust; and 5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.”
\end{enumerate}
\end{footnotesize}
3.3 Sentences Served in the Community

Despite the fact that the sentencing principles encourage other sentences than imprisonment when feasible, courts have denied the possibility for police officers that have committed sexual assaults to serve their sentences in the community. In any case, it has to be noted that sentences served in the community cannot be given if the sexual assault “was prosecuted by way of indictment”. Other criteria also diminish the number of police officers who can hope for such a sentence, despite being prosecuted by summary conviction. For instance, the Criminal Code enacts that “the court [has to be] satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2”. Insofar as policemen are public officers who have a duty to protect their civilians, sentences served in the community for officers who commit sexual assault seems to be in contradiction with s. 742.1 Cr. C.

Furthermore, the case law appears to be especially reluctant to sentences served in the community in cases of police sexual assault. For instance, in R v. Bracken, despite the fact that both parties agree that the act of sexual assault (touching the complainant’s breast) was at the low end of the spectrum, judge Turpel-Lafond concluded that the seniority of Sergeant Bracken, the vulnerability of the victim, the impact of the behaviour on her and the public confidence in the justice system advocated against a sentence served in the community. He also held that such sentences were usually not compatible

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200 Cr. C., supra note 6, at s. 742.1 f)(iii).
201 Sexual assault being a hybrid offence. Id., at s. 271.
202 Id., at s. 742.1(a).
203 R. v. Bracken, supra note 58, at paras 34-54.
with Saskatchewan jurisprudence on sexual assault committed by people holding a person of trust.\footnote{R. v. Bracken, supra note 58, at para 46. Paragraph 37 quoted a decision which concluded to the contrary. However, I could not manage to get a version of this judgment. This paragraph reads as follows: “Defence counsel filed several cases involving police, corrections officers and other persons in authority where conditional sentences of imprisonment were imposed. For example, emphasis was given in his submissions to the Court to the case of R. v. (G.M.), February 26, 1988, Doc. Ottawa 220 (Ontario District Court, reversing March 30, 1987 decision of Judge Levesque, Ontario Provincial Court). The facts in this case involve a police officer who was on duty and found two teenagers in a car engaged in heavy petting. The police officer separated them and then started to stroke the young woman’s hair and placed his hand on her breast. He phoned the next day to apologize. The court held this was a momentary lapse in judgment for a police officer with a good service record and granted a conditional discharge with probation for one year, including 40 hours of community service.”}

Similarly, in Ramsay, the court stated that a sentence served in the community could not reflect adequately the blameworthiness of the accused and could not put sufficient emphasis on the sentencing principles of deterrence, harm done to the community and harm done to the victim.\footnote{R. v. Ramsay 2000, supra note 16, at para 48.} The court examined a lot of factors, including the facts that the offence was committed in a police station while the accused was wearing a uniform, that the improper conversation about the complainant’s sexual activity was unjustified, that the accused was occupying a position of authority and trust, that the attempted rape happened 30 years prior to the decision and that the accused was rehabilitated. Still, it concluded that those factors commanded to separate the offender from his community.\footnote{Id., supra note 16, at paras 27-49.}

Likewise, in Mandip Sandhu, a case in which a police officer was convicted of sexual assault after having coerced a masseuse into performing oral sex, the Superior Court of Ontario, hearing the conviction and sentence appeals, stated that: “[t]he appellant was convicted of a crime involving sexual violence and an egregious abuse of public trust and
authority. The length and manner of serving this custodial sentence does not reflect an error in principle, nor is the sentence demonstrably unfit.”

Moreover, police officers that commit serious offences are not, generally, considered to be good candidates for community sentences. In the same vein, after having undertaken a review of police crime case law, the Provincial Court British Columbia concluded: “that where a police officer commits serious planned and premeditated criminal offences while in the line of duty, it would only be in rare and exceptional circumstances that a Conditional Sentence would be seen as a fit and just sentence.” This statement seems to find validation in police sexual assault cases.

Finally, to answer the first question asked at the outset of this chapter, we may infer that in Officer Smith’s case, a judge could identify several mitigating circumstances such as the absence of prior criminal convictions, his young age (i.e. 28 years old), the fact that he has a family depending on him and that he has a productive life (e.g. his professionalism has been praised by many colleagues). However, as for any other offender, other mitigating or aggravating factors may be weighed depending on the offenders’ individual characteristics. Still, we might infer that a sentence emphasizing on the principles of deterrence and denunciation will be rendered – if there is a conviction –

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207 R. v. Mandip Sandhu, supra note 37, at para 77.
209 This statement is somewhat reminiscent with the following quote from R. v. Rossignol, supra note 15, at pp. 4-5: “On the sentencing hearing we have a pre-sentence report which is favourable and positive and indicates Mr. Rossignol has made much of his life up until this event and has overcome some limitations in his background. He had a promising future. That is accentuated and underlined by the positive performance evaluation and review reports prepared on him during his four years in the R.C.M.P. The indications from evidence before me is that he was an above average member of the force and a credit to it up until the night in question. Now he is 28 years old, he has a wife and a young child who are dependent on him [...]”
and that it is likely to be an imprisonment sentence rather than one served in the community. Finally, Officer Smith could be charged with sexual assault and breach of trust or, as in most police sexual assault cases, only with sexual assault.

3.4 Collateral Consequences\textsuperscript{210}

The second question asked at the beginning of this chapter was whether a guideline exists to sentence offenders such as Officer Smith. The answer would be that although general deterrence, denunciation and breach of trust seems to be the main factors to analyze when sentencing a police officer, the \textit{Criminal Code} never describes how a judge should sentence a police officer. The Code neither states if the sentence should be different than any general offender. However, the decision \textit{R v. Cook} provides trial judges with factors to weigh when sentencing law enforcement officers.\textsuperscript{211}

For instance, in \textit{Cook}, the R.C.M.P. had placed tracking devices in flour bags, which were proxies for cocaine bags.\textsuperscript{212} The “cocaine” was imported in Canada and contained in a truck. Officer Cook who was unaware of this subterfuge took 15 bags and brought them home. Then, as the signal emitted by the tracking devices allowed the R.C.M.P. to identify Cook’s house, the police got a warrant to search the house. He was charged, \textit{inter alia}, with attempt to possess drugs and breach of trust.\textsuperscript{213} Despite the fact that \textit{R. v. Cook}

\begin{footnotes}
\footnote{210}{This title does not refer exactly to collateral consequences such as discussed in \textit{R. v. Quick}, 2016 ONCA 95 or \textit{R. v. Wong}, 2016 BCCA 416.}
\footnote{211}{\textit{R. v. Cook}, 2010 ONSC 5016.}
\footnote{212}{\textit{Id.}}
\footnote{213}{\textit{Id.}, at paras 1-11.}
\end{footnotes}
was not a sexual assault case, the decision was applied in *Greenhalgh*\(^{214}\) and, thus, I believe that it is relevant to study it when scrutinizing police sexual assaults. Indeed, *Greenhalgh* reassessed *Cook*’s principles of sentencing in order to tailor them to the offences of sexual assault and breach of trust.\(^{215}\) When applying *Cook* for charges of sexual assault, the court, in *Greenhalgh*, retain the following factors: police officers are especially entrusted by the community;\(^{216}\) they may have more occasions to commit crimes;\(^{217}\) public trust them not to do so; and courts have the duty to give severe sanctions to police officers who become criminals in order to respect the public’s confidence in the justice system.\(^{218}\) Lastly, *R. v. Cook* stated that police officers may suffer from stigma during the criminal procedures (although this should not prevent them from getting an appropriate sentence)\(^{219}\) and that usually, sentences for those offenders will be served in protective custody, which shall be regarded as a mitigating circumstance.\(^{220}\)

Likewise, *Cook* underlines two specific aspects that should be regarded when sentencing a police officer: “the consequential impacts of loss of employment, and, incarceration in protective custody.”\(^{221}\) The protective custody and other difficulties (i.e. anxiety, etc.)

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\(^{220}\) *R. v. Greenhalgh*, supra note 19, at para 54; *R. v. Cook*, supra note 211, at para 41. Also, this decision, at para 37, underlined that public shame and humiliation should be considered, but not “over-emphasized”, when the offender is a police officer. However, it was only briefly discussed in *Von Seefried*, supra note 45, at para 82, in which the Court held: “there has already been some penalty meted out because of the public shame and humiliation [but t]his would be a more worthy consideration where there is evidence of the defendant’s remorse or even minimal empathy for the victim of his offence.”
for incarcerated police officers have been discussed in other cases.\textsuperscript{222} For instance, in *R. v. Bracken*, the judge pointed out that the security of a police officer in correctional facilities is at risk, and held that:

[Bracken] will have limited or no access to activities which will involve him in the correctional population. Further, he has only recently retired and there are matters yet to be prosecuted for which he bore investigative responsibilities. The reality is that any jail time under these circumstances exposes him to risk and high anxiety.\textsuperscript{223}

This likelihood of handling police officers through segregation or protective custody was also underlined in *R. v. Von Seefried*\textsuperscript{224} in which the judge stated: “I do not quarrel with the submission that the correctional authorities will have no choice but to adopt measures designed to protect the defendant. Any actual jail time will be very strict and the defendant will not receive privileges to the same degree as other inmates.”\textsuperscript{225}

In the same vein, protective custody comes with risks, as explained in a recent decision on administrative segregation rendered by Justice Leask. He held that: “[t]he other prisoners in general population have a tremendous disdain for [protective custody] prisoners, and many will actively seek them out to assault them or victimize them if they

\textsuperscript{222} In contrast, *R. v. Hodson, supra* note 208, saw protective custody not only as a mitigating factor, but also as a circumstance that should be considered by correctional authorities. The court held: “I appreciate that a jail sentence would be a “hard time” sentence for the Accused, but currently the law in British Columbia establishes that such a consideration is not appropriate for a sentencing court, but rather, a consideration for Corrections authorities”, at para 158 (relying on *R. v. Chand*, 52 BCAC 301; 25 WCB (2d) 459, at paras 14-15).

\textsuperscript{223} *R. v. Bracken, supra* note 58, at para 58.

\textsuperscript{224} *R. v. Von Seefried, supra* note 45, at para 83.

\textsuperscript{225} \textit{Id.}, at para 81.
know someone at some point has been at some point in protective custody.”

In another administrative segregation case, the Ontario Superior Court of Justice stated that it would be: “open to a person being sentenced to suggest that a lower sentence is appropriate due to the likelihood that he or she will spend a significant portion of their time in custody in segregation for their own protection.” This likelihood may derive from the fact that the offender is a police officer and, thus, we should not be surprised if a police officer who committed sexual assault receives a lighter sentence because of this mitigating factor.

In addition, Cook also underscored that loss of employment had to be considered when sentencing police officers. Loss of employment is indeed an issue as many provincial acts include the possibility to suspend with or without pay upon the officer getting charged or convicted of a criminal offence. For instance, s. 115(3) of Quebec’s Police Act, combined with s. 119(2), enacts that a police officer that has been convicted of sexual assault can be discharged unless this officer proves exigent circumstances. Similarly to Quebec’s provisions, Ontario’s Police Services Act s. 89(1) states: “If a police officer, other than a chief of police or deputy chief of police, is suspected of or charged with an offence under a law of Canada […] , the chief of police may suspend him or her from duty with pay.” S. 89(6) adds that if the police officer is convicted and sentenced to imprisonment, the

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227 Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen, 2017 ONSC 7491, at para 188.
228 Police Act, CQLR c P.13.1. The dismissal is allowed upon being convicted of an offence triable summarily or by indictment (s. 119(2)). If convicted of an indictable offence, the dismissal is mandatory s. 119(1). For instance, a police officer from Quebec City was, in June 2018, suspended with pay as he was charged with sexual assault. There is no judgment in this case yet. See Yannick Bergeron, “Un policier de Québec accuse d’agression sexuelle” Radio-Canada (29 June 2018) online <https://ici.radio-canada.ca/nouvelle/1109996/policier-ville-quebec-accuse-dagression-sexuelle-spvq>.
229 Police Services Act, R.S.O. 1990, c. P.15, at s. 89(1).
chief of police may suspend the officer with or without pay. Hence, most provinces, as well as the R.C.M.P., have similar provisions in their statutes or regulations.\textsuperscript{230}

Hereafter, as demonstrated by this legislative review, \textit{Cook} is right when saying that loss of employment might be an issue when sentencing a police officer. However, in practice, \textit{Rossignol} is one of the only police sexual assault decisions in which the loss of employment had an impact on the sentencing decision.\textsuperscript{231} Indeed, the court held that the accused had suffered from being suspended, with and then without pay, to justify that there was no need to emphasize on the objective of denunciation. Moreover, it is to be noted that, when an investigation on Quebec police officers was undertaken in Val D’Or, eight policemen were suspended for the length of the procedures– with pay – as requested by Indigenous chiefs of the region.\textsuperscript{232} The practice, thus, exists but its impact on criminal procedure is not conclusive for the moment.

Nevertheless, the Ontario Court of Justice has highlighted that we should be cautious not to put too much weight on this factor as after having committed a sexual assault “how could [the offender] ever be placed in the community in a position of trust or authority

\textsuperscript{230} E.g. the \textit{Nova Scotia Police Act}, S, NS, 2004, c. 31, at ss. 72(2) 73 79-83 and ss. 18-19; the \textit{Royal Newfoundland Constabulary Act}, S, NL, 1992, c. R-17 , at ss. 22-43; Alta, Reg 356/1990 (with amendments up to and including Alberta Regulation 114/2014), at ss. 5, 8, 9 and 19; the \textit{Royal Mounted Police Act}, R.S.C., 1985, c. R-10, at s. 12 and British Columbia’s \textit{Police Act Police Act}, RS, BC, 1996, c. 367, at s. 110. Other statutes and regulations may apply. The legislation aforementioned is a sample of the Canadian Police Acts and Police regulations and is quoted for information purposes only.

\textsuperscript{231} \textit{R. v. Rossignol}, supra note 15.

\textsuperscript{232} Public Inquiry, Part 1 – Janet Mark, \textit{supra} note 53, at 00:32:00 ff. This suspension provoked a reaction from police officers of the same station who refused to work on weekends as a token of their solidarity. Many individuals also added Facebook stickers as a sign of support to the suspended police officers, \textit{Id.}, at 00:32:41 ff.
Likewise, in a case in which a police officer planted evidence at a suspect’s house, the Ontario Superior Court of Justice concluded that: “[l]oss of employment must be considered, but it cannot trump the need for denunciation and deterrence.”

Hence, even if recommended by *Cook*, not many cases of police sexual assaults have discussed the loss of employment. To conclude, in addition to the characteristics that Officer Smith’s sentence is likely to possess, *Cook* permits us to infer that Officer Smith’s profession may be regarded as a mitigating factor as it increases the likelihood of protective custody. However, the impact of Smith’s future employability on the sentencing phase is not clear yet.

**CHAPTER 4 – SOLUTIONS**

As demonstrated by the fictive case of Anna – which was analyzed through the lens of the actual state of the law and findings in criminology – there are a lot of obstacles to overcome when prosecuting and sentencing police sexual assaults in Canada. However, there are also tools which may help courts to handle those cases, such as the aggravating factor of breach of trust; the objectives of denunciation, deterrence and reparation of harm done to the community and the victim; and guidelines such as the one given in *R v. Cook*. Nevertheless, this legal framework is irrelevant if police sexual assault cases do not reach the trial stage. As aforementioned, retaliation; credibility; fear; distrust of the system; prosecutorial courtesy; and the rate of unfounded sexual assaults are factors

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233 *R. v. Von Seefried, supra* note 45, at para 80. Indeed, the court held: “[t]his consequence cannot be accorded inappropriate weight and dictate the sentencing approach in this case.”


235 In comparison, in the United States, Stinson *et al* have reported that courts are less likely to give a severe sentence if the police officer has lost his employment: Stinson *et al*, “Police Sexual Misconduct”, *supra* note 4, at p. 144.

236 *R. v. Cook, supra* note 211.
which may deter victims from filing complaints against their assailants or which may dampen the chances of success of those complaints. Hence, this chapter intends to provide solutions to the numerous issues outlined throughout this thesis. To this end, the following section is divided into three segments: (1) solutions that could apply before trial, (2) at trial, or, lastly, (3) at the sentencing phase. This threefold chapter, thus, reflects the structure of the thesis (i.e. victimization, prosecution and sentencing). Additionally, it is to be noted that although the following chapter suggests remedies to address prosecuting and sentencing hurdles, there are solutions that would be relevant to apply in general sexual assault cases – and that might have effects on police sexual assaults – that I will not discuss, as they are trespassing the scope of this research.

4.1 Solutions to Implement before Trial

(i) Improving the Complaint Mechanism

One remedy that has often been underlined by scholars is the need to enhance the complaint mechanism for civilians who experience PSM.\(^{237}\) In light of the legal literature and the twelve Canadian cases examined, this suggestion appears to be one of the key points to improve our system’s handling of police sexual assaults. Victims need to see their trust in the system bolstered by an effective complaint system. For instance, many Indigenous women in Quebec, following allegations of sexual abuses by police officers of the Sûreté du Québec, have reported that they were afraid of being regarded as liars, that police officers explicitly told them that no one would believe them or that they were

\(^{237}\) Stinson et al., “Police Sexual Misconduct”, supra note 4, at p. 144 and Rabe-Hemp and Braithwaite, supra note 26, at p. 142.
told that they would not be able to obtain a conviction against a police officer and should, thus, not even file a complaint.\footnote{See Enquête/Radio-Canada, \textit{supra} note 47.} Also, in both \textit{Von Seefried} cases, the victims feared that the police officer would come to their homes or commit any kind of reprisals. They were thus reluctant to file a complaint against the officer.\footnote{See \textit{R. v. Von Seefried}, \textit{supra} note 17, at pp. 32 and 35 and \textit{R. v. Von Seefried}, \textit{supra} note 18, at para 6 (see agreement on facts (publication ban)).} Likewise, this need to improve the complaint mechanism is also implied by Anna’s fictive case, especially when she hesitates to file a complaint because she is afraid of Officer Smith’s and other police officers’ reactions. Those are examples which underscore the need to implement a complaint procedure that complainants are not afraid to use.

In addition, when relying on statistics on the rate of underreported sexual assault,\footnote{Julie Desrosiers and Geneviève Beausoleil-Allard, “L’agression sexuelle en droit canadien”, (Cowansville: Yvon Blais: 2017), at chapter 1, subsection 3.1.} doubled with the data and literature on PSM discussed throughout this thesis (i.e. code of secrecy, retaliation, fear, marginalized victims, etc.), we may reasonably infer that police sexual assaults are also affected by this underreporting problem. Hence, a complaint procedure that would boost the number of denunciations could be a good start to address the underreporting phenomenon of police sexual assaults.

One of the alternatives to the actual complaint mechanism is the Philadelphia Case Review Model. As its name implies, this model was first tried in Philadelphia. Its objective was to reduce the rate of unfounded complaints, as Philadelphia Police Department had, in 1983, an “unfounded rape rate of 43%, [while] the national average
This method consists in the implementation of a non-police committee, which has the duty to review all sexual assault cases classified as unfounded. Hence, this technique is known to diminish the number of sexual offences categorized as unfounded by police officers. However, the purpose of this method is not to undertake the investigation a second time, but rather to assess whether everything that could be done has been done. Here are some examples of questions that might be examined by the committee:

- Were all witnesses that had been identified interviewed?
- Were the interviews conducted in a proper manner, i.e., not calling the victim a liar and not interrogating, blaming or threatening the victim?
- If there was a recantation, was it coerced? Were there circumstances that suggested the recantation resulted from fear of reprisals from the perpetrator and not because the assault did not occur?
- If the investigation supported an arrest, was it made?
- If a case was unfounded, was it proper to do so? Did the investigation demonstrate that no crime had occurred?

Above all, authors of the Philadelphia Case Review Model, as well as police agencies implementing it, believe it may enhance feelings of trust toward police officers and help

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242 Id., at p. 8 ff. It is to be noted that this suggestion mainly applies to off-duty misconduct and to jurisdictions which do not possess institutions such as the Special Investigation Unit (SIU) in Ontario since the SIU is “a civilian law enforcement agency, independent of the police, that conducts criminal investigations into circumstances involving police and civilians that have resulted in serious injury, death or allegations of sexual assault.” Special Investigation Unit, “What We Do” (Ontario: Special Investigation Unit, 2016) online <https://www.siu.on.ca/en/what_we_do.php>. However, it does not mean that no improvement could be made in the SIU’s the process. See also s. 113 Police Services Act, supra note 229.

243 This list is not exclusive. Id., at pp. 8-9.
to induce victims into reporting. Therefore, many major American cities, as well as Canadian cities, have applied the Philadelphia model since 2000. However, some concerns arise when applying this model to police sexual assault cases. First, only one source stated that the non-police committee would comply with standards of representativeness by ensuring that francophone and Indigenous people – in Canada – would be appointed to the committee. As pointed out by Trombadore, police sexual violence victims are mainly marginalized people. Accordingly, committees may want to secure their conformity with a representation norm. Indeed, it might add different perspectives regarding citizens–police-officers relationships. Second, in police sexual assaults, complainants still have to denounce the offender to police officers – possibly colleagues of the assailant – before their complaint is classified and reviewed by the committee (if need be). When the offender is a police officer, the complainants’ mistrust issues might be anchored even deeper than for other sexual assaults and it, thus, 

244 Women’s Law Project, supra note 241, at pp. 1-12 and Calgary Police Service’s Youtube Account, “Calgary police adopt Philadelphia Model for unfounded sexual assaults” (May 18, 2017) online <https://www.youtube.com/watch?v=2d1QN2Uu0aI>.
245 For more details on this method and its implementation in Canada, see Joanne E. Laucius, “Ottawa police to convene civilian panel to review handling of sex-assaults cases”, Ottawa Sun (July 27, 2017) online <http://ottawasun.com/2017/07/27/ottawa-police-to-convene-civilian-panel-to-review-handling-of-sex-assault-cases/wcm/8ff10bdf-a4cf-42b3-9494-eecc3e447d3e>; Calgary Police Service’s Youtube Account, supra note 244.
246 As no studies were undertaken on this model, no data is available and, thus, all of those concerns are purely hypothetical.
247 Laucius, supra note 245. The initial committee in Philadelphia was composed of the Women’s Law Project and their “colleagues from the Support Center for Child Advocates, which provides representation to child victims of abuse, Philadelphia Children's Alliance, Philadelphia’s primary intervention organization for child sexual abuse victims which coordinates multi-agency forensic interviews, and Women Organized Against Rape, Philadelphia’s rape crisis agency.” Women’s Law Project, supra note 241, at p. 8.
248 Representativeness is an important criterion and is also discussed more generally in policing. See, for example, Police Act, supra note 227, at s. 48: “[p]olice forces shall target an adequate representation, among their members, of the communities they serve.”
249 On this aspect, it can be relevant to note that in Quebec’s public inquiry, aforementioned, the interview of complainants were done in neutral locations rather than in police stations in order to foster the trust of the complainants. See Public Inquiry, Part 3 – Pascal Coté and Yannick Parent-Samuel, supra note 46, at 00:31:30 ff. Fannie Lafontaine added that not only were the interviews in neutral location, but also that the police officers proceeding to those interviews were not wearing their uniforms, so that the confidence would be easier to build. Public Inquiry, Part 1 – Me Fannie Lafontaine, supra note 46, at 01:35:16 ff.
creates an additional barrier to prosecution. For instance, to the contrary of other sexual assaults, Anna will have not only to file a complaint, but also to discuss the events with individuals that might be colleagues of Officer Smith, or that are sharing a predominant characteristic with him (i.e. being police officers).

The Philadelphia Model is obviously an option that Canadian police services should study more in depth, as an improved complaint mechanism would greatly help to handle police sexual assaults. As discussed earlier on, this solution may foster complainants’ confidence in the justice system. Therefore, the Philadelphia Case Review Model, which had many successes, may, with some adaptations, be a good tool to increase the number of complaints in police sexual assaults cases. Lastly, it is to be noted that other initiatives to improve the complaint system have been undertaken. For instance, in the aftermath of the events in Val D’Or, a phone line was created by Quebec Native Courtwork Services to facilitate the complaint procedure for Indigenous people who had been victims of abuses committed by police officers.250

(ii) Using Technology to Deter Misconduct

Apart from improving the complaint mechanism, other solutions have been suggested to reduce barriers to prosecution in cases of police sexual assaults. For instance, Stinson et al, experts of PSM in the United States, have recommended a two-fold solution broken as follows: (1) the improvement of the complaint mechanism and (2) the use of body

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250 This second phone line was operative from April 2016. From October 2015 to April 2016 there was a first line managed by the SPVM. See Public Inquiry, Part 3 – Pascal Coté and Yannick Parent-Samuel, supra note 46, at 00:18:08 ff and 01:07:14. See also Public, Inquiry, Part 1 – Me Fannie Lafontaine, supra note 46, at 00:36:54 ff.
cameras to deter officers from engaging in misconduct.\textsuperscript{251} Hence, in this subsection, I would like to briefly comment on the second part of Stinson’s suggestion: the use technology. This remedy, also posited as a solution for police sexual misconduct by the International Association of Chiefs of Police,\textsuperscript{252} comes with many concerns.

First, although some suggest that technology will deter officers from engaging in improper sexual behaviours, it would be of no use for off-duty misconduct leaving, in that respect, potentially a significant portion of those acts aside.\textsuperscript{253} Second, not only are body cameras unable to prevent off-duty misconduct, but also they may not be proper tools to deter the ones committed on-duty. To illustrate this claim, a parallel with dash cameras is relevant. In \textit{R. v. Von Seefried},\textsuperscript{254} when the victim was sexually assaulted in the back of the police SUV, both the dash camera and the in-car camera (showing the rear of the vehicle) were off. Officer Von Seefried admitted that he had turned off the first camera and that he never activated the in-car one. The evidence showed that this officer regularly turned cameras off while on duty.\textsuperscript{255} In addition, this information is particularly troubling as Von Seefried was sentenced to 16 months in this case and, then, to 25 months for another sexual assault.\textsuperscript{256} He also admitted having kissed around 20 women

\begin{itemize}
\item \textsuperscript{251} Stinson \textit{et al}, “Police Sexual Misconduct”, \textit{supra} note 4, at p. 144. Those authors also recommended suggestions to counter officers’ shuffling (see p. 145). However, there is no evidence that this phenomenon happens in Canada.
\item \textsuperscript{252} International Association of Chiefs of Police, \textit{supra} note 93.
\item \textsuperscript{253} Stinson \textit{et al}, “Police Sexual Misconduct”, \textit{supra} note 4, at p. 145.
\item \textsuperscript{254} \textit{R. v. Von Seefried, supra} note 18.
\item \textsuperscript{255} \textit{Id.}, at pp. 49-50. Also, at p. 54, the judge emphasized that the failure to comply with the police services’ directive regarding the use of cameras did not mean that the officer was guilty of any criminal act.
\item \textsuperscript{256} \textit{R. v. Von Seefried, supra} note 45, at para 108 and \textit{R. v. Von Seefried, supra} note 17, at p. 14.
\end{itemize}
during traffic stops. Consequently, we may question the effectiveness of the use of technology to deter police officers from engaging in sexual misconduct. A situation like the one depicted in *Von Seefried* raise the question: would Officer Smith have done the same if he were wearing a body camera?

Finally, I do not want to denigrate the use of technology in policing as it has, for example, provided evidence for police inquests and greatly helped to understand the circumstances surrounding those investigations. However, body cameras, alone, will not prevent all sexual misconduct. Also, this thesis did not cover privacy concerns which may derive from the use of technology in policing. Nevertheless, it does not mean that those issues do not exist. Hence, it is crucial to implement an array of solutions – which will address all of the apprehensions highlighted throughout this thesis – rather than focusing exclusively on the use of body cameras.

4.2 Solutions at Trial

(i) *Proving the Absence of Consent*

When studying sexual assaults, or more specifically police sexual assaults, the notion of consent cannot be overlooked as it is both part of the *mens rea* and the *actus reus*. Nonetheless, consent is not always an easy thing to prove and neither is its absence. For

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258 For instance, the Coroner’s jury in the inquest into the deaths of Reyal Jardine Douglas, Sylvia Klibingaitis, Michael Eligon, in Ontario, recommended making use of video and/or audio recordings in order to find alternatives to shooting, which underlines the usefulness of electronic recordings. Ontario, Coroner’s jury, *Verdict of Coroner’s Jury – Inquest into the Death of Reyal Jardine Douglas, Sylvia Klibingaitis and Michael Eligon*, (Toronto: Coroner’s Court, 2014).
instance, in circumstances akin to Anna’s case, in which both parties are claiming different versions (i.e. Anna kissed Officer Smith vs. Officer Smith sexually assaulted Anna), what exactly happened and whether there was consent or not are issues that will be adjudicated at trial. Still, those concerns are often part of sexual assaults trials. However, a police sexual assault brings another layer of complexity.

Therefore, an aspect which deserves consideration when studying consent, and which is rooted in the authority of police officers, is that civilians can be psychologically detained for the duration of their encounter with a law enforcement officer.\(^{259}\) S. 9 of the Charter, which holds that “[e]veryone has the right not to be arbitrarily detained or imprisoned”,\(^ {260}\) generally applies to accused wishing to prove that their constitutional rights were infringed by police officers. Still, I believe that we should not exclude discussions that derived from s. 9’s analyses when studying the concept of consent in police sexual assault cases. From those discussions emerged the principles of psychological detention and compliance with police powers (accounted in the second chapter of the thesis).\(^ {261}\) Then, the Supreme Court of Canada has recognized that even in the absence of physical detention and of legal grounds to detain, a person may believe that he has no choice but to comply with police demands. Thus, when attempting to prove the absence of consent, prosecutors and judges should not neglect that when the offender is a police officer, the authority may induce the victim into complying against his will.

\(^{259}\) See R. v. Therens, supra note 59 and R. v. Grant, supra note 61.
\(^{260}\) Charter, supra note 59, at s. 9.
\(^{261}\) See subsection 2.1 “Victims’ Profile”.

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Still, in police sexual assault cases, lawyers could make use of one enactment of the *Criminal Code* (s. 273.1(1)c)) which declares: “[n]o consent is obtained for the purposes of sections 271, 272 and 273, where […] the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.”\(^{262}\) This section is a cross-reference to paragraph 265(3)d) *Cr. C.*, which states: “[f]or the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of […] the exercise of authority.”\(^{263}\) As police officers are regarded as being in a position of authority for the purpose of sentencing (see subparagraph 718.2(a)iii) *Cr. C.*), and as the same terms in the same act should not be interpreted in a different manner,\(^{264}\) lawyers could plead this clause in order to address this concern in police sexual assault cases.\(^{265}\)

In the same way, if we observe all the cases analyzed in the previous chapter on sentencing, one of the paramount factors studied was the position of trust of the offenders. Henceforth, it is surprising that almost none of the case law has discussed how the consent can be vitiated by the position of trust or of authority, which a police officer usually holds. Moreover, there is a clear nexus between the previous discussion on psychological detention and the words of the legislator in s. 265(3)d) *Cr. C.* (i.e. “submits

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\(^{262}\) It is noteworthy to observe that the French version does not contain the idea of abuse of authority; it rather states “l’accusé l’incite à l’activité par abus de confiance ou de pouvoir.”

\(^{263}\) *Cr. C.*, supra note 6, at s. 265(3)d).

\(^{264}\) See subsection 33(3) of the *Interpretation Act*, 1985, c. I-21, which declares: “[w]here a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings.”

\(^{265}\) I have found no analysis of these provisions in police sexual assault cases. However, *R. v. Ramsay* 1999, *supra* note 16, at para 8, held that the circumstances “could produce the conclusion that there was no consent” after having analyzed the relationship between the accused and the complainant, the profession of Ramsay and age of the parties.
or does not resist”). Accordingly, those provisions would be worth pleading in police sexual assault cases, as they would facilitate the proof of the absence of consent.266

(ii) Putting an End to the Stereotypes Conveyed by the Judiciary

Another solution would be to review the style of education provided by Canadian law schools in an attempt to diminish the use of stereotypes in sexual assault decisions. It might seem surprising to suggest education reforms in a law thesis; however, the case law and the literature I have read convinced me of the necessity to eradicate, still persistent, rape myths.267 Hence, to achieve this purpose, it is relevant to discuss the type of stereotypes that are still conveyed by the judiciary in sexual assault judgments.

First, one myth that needs to be discussed is the victims’ clothing choice.268 For instance, in R. v. Nyznik, a case in which three Toronto police officers were acquitted of sexual assault against a fellow parking law enforcement officer, Justice Molloy reported in her judgment that the credibility of the victim was undermined by frailties and inconsistencies in her testimonies.269 Nevertheless, the decision did not limit itself to underscoring that there were inconsistencies in the complainant’s version. For example, it highlighted twice that the complaint might have said “that she was going to wear a “really short skirt” for “easy access”” but only denies the clothing’s relevance after 187

266 This does not mean that police officers are not entitled to the presumption of innocence. On this point, see R. v. Nyznik, supra note 10, at para 16.
268 This is somehow similar to one of the myths identified in Sampert’s study, supra note 268, at p. 323 ff.: “Myth no. 6: The Victim Provoked the Sexual Assault”. This myth was also reported in the United States by the Women’s Law Project, supra note 241, at p. 5.
269 R v. Nyznik, supra note 10, at (especially) paras 2, 140 ff. and 197.
Putting emphasis on such details, in my opinion, only reinforces degrading stereotypes about sexual assault victims and undermines the gravity of the phenomenon. Although those comments are too often used to wreck women credibility and to convey inappropriate stereotypes on women and their sexuality, Justice Molloy shows a real sensitivity and understanding for the victim of sexual assaults and I cannot see any malicious intent in her decision. Also, despite my aforementioned criticism, as recent decisions still include this kind of information, I have chosen to describe Anna’s clothing (i.e. high heels, a tight dress and no coat) and I would be really curious to know the impact that this information had on the readers’ perception of this fictional character.

Secondly, another important feature to highlight is the existence of victim blaming. Judges Braun and Camp have offered alarming examples of this kind of stereotype. For example, in 2017, in *R v. Figaro*, judge Braun of Quebec’s Provincial Court implied that the complainant wanted the perpetrator to be attracted to her, that she was flattered by his praises, that she was naively romantic, and that it was the first time a man looked...

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270 *R v. Nyznik*, *supra* note 10, at paras 45, 99, and 187. Justice Molloys held: “[t]here was nothing at all wrong with what A.B. was wearing that night. In cross-examination, defence counsel suggested to her that she wore a low-cut top in order to make herself attractive to all the men who would be present at the party. I found that suggestion to be offensive and irrelevant. What a woman wears is no indication of her willingness to have sexual intercourse, nor can it be seen as even the remotest justification for assuming she is consenting to sex” (at para 188.)

271 Id., at paras 186-194.

272 It has to be noted that, in the initial draft, there was no mention of Anna’s dress or high heels. However, when I asked colleagues to give me their impressions on my hypothetical facts, I was told to add this detail so that the narrative would be more realistic. This comment, in itself, is revealing of how myths and stereotypes about sexual assaults are conveyed in the legal community.

273 This includes myths such as the following ones: “[w]omen secretly want to be raped” and “[r]ape happens only to women who are considered “bad” by society, including those considered to be “promiscuous” or to dress provocatively and those who drink alcohol or engage in other activities that render them deserving of rape or blame”, reported by the Women’s Law Project, *supra* note 241, at p. 5. Victim blaming may include the victims’ clothing choice, that I have chosen to discuss separately.

274 *R. c. Figaro*, 2017 QCCQ 7257. It is to be noted that this decision is not a police sexual assault case.
at her this way.\textsuperscript{275} He added that the complainant, a 17-year-old teenager, was beautiful even if she had weight to lose.\textsuperscript{276} Moreover, the comments of the ex-judge Camp have shocked the Canadian public when it was reported that he had told a victim that she should have kept her knees together.\textsuperscript{277} The Court of Appeal of Alberta, thus, held: “[w]e are also persuaded that sexual stereotypes and stereotypical myths, which have long since been discredited, may have found their way into the trial judge’s judgment.”\textsuperscript{278} If judges still convey such stereotypes about women and sexual assaults, police officers, as part of the same legal system, are not immune to entertaining such perceptions.\textsuperscript{279}

Thirdly, the \textit{Nyznik} decision reinforces, in my opinion, the myth that women often lie about sexual assaults.\textsuperscript{280} Indeed, while discussing the inconsistencies in the complainant’s testimony, the court implied that the complainant possibly added events not because she

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\textsuperscript{276} This comment is underlined by the tribunal in its decision: \textit{R. c. Figaro}, supra note 274, at para 23. The tribunal dismissed the argument that the accused had not observed the complainant before. Judge Braun wrote: “C'est assez incompréhensible et incroyable, surtout en prenant en considération le physique particulier de madame K.B. qui est assez abondant; le Tribunal précise que c'est une jolie jeune fille.”

\textsuperscript{277} The BBC reported that: “Mr Camp was presiding over a sexual assault trial when he asked the 19-year-old complainant “why couldn't you just keep your knees together?” He also repeatedly referred to her, the complainant, as the accused, and told her that "pain and sex sometimes go together".” BBC, “Alberta judge told the complainant to, “keep her knees together”” \textit{BBC} (30 November 2016) online <http://www.bbc.com/news/world-us-canada-38163629>.


\textsuperscript{279} Also, Escholz and Vaughn claimed that justice personnel agree and convey such myths: Sarah Escholz and Michael S. Vaughn, “Police Sexual Violence and Rape Myths: Civil Liability under Section 1983” (2001) 29 Crim Justice 389, at p. 390.

\textsuperscript{280} \textit{R. v. Nyznik}, supra note 10. This was one of the myths reported in Sampert’s study, supra note 250. The author labelled it as: “Myth no. 2: Innocent Men Are Regularly Accused of Sexual Assault and Women Regularly Lie about It” at p. 307 ff. This myth is also underlined in a study on the best ways to teach sexual assault to law students: Rosemary Cairns Way and Daphnée Gilbert, “Teaching Sexual Assault: Education of Canadian Law Student” (Fall 2009-Winter 2010) 28:1 Can. Woman Stud. 67, at p. 74.
did not remember, but because she wanted her version to be more plausible. 281 For instance, Justice Molloy also suggested that the complainant might have chosen to hide one information and then disclose it as she “later saw the utility of it”. 282 Suggesting this kind of dishonesty has a great impact on the complainant’s credibility, especially as it is not the only paragraph in the decision in which the truthfulness of the complainant’s memory is being questioned. For instance, the court held:

[If the complainant] has reconstructed a false memory about walking to the Brass Rail, how do I know she has not done the same thing with respect to her conduct at the hotel afterwards? If she has lied about the cab ride to the Brass Rail, how do I trust that she has told the truth about what happened in the hotel room? [my emphasis] 283

Additionally, Justice Molloy held that being afraid that the officers will search for retaliation with their guns, as was the complainant, was not a reasonable fear. I doubt that those comments will help victims of police sexual assaults to denounce their assailants. Such statements may not only reinforce the idea that complainants will not be believed and/or humiliated, but also dismiss complainants’ emotional distress. 284

Fourthly, one myth that is particularly relevant in cases of police sexual assault, although I could not find a clear example of it in the twelve studied cases, is the belief that a person who benefits from a good standing will not commit sexual assault. 285 I wonder whether this stereotype partly explains Putska and Sheehy’s comment regarding police

281 R. v. Nyznik, supra note 10, see especially paras 140-166.
282 Id., at para 152.
283 Id., at para 142.
284 I understand that the police officers were not found guilty in this case (and respect the acquittal verdict), but I firmly think that the comments of Justice Molloy may send the wrong message to future victims of police sexual assaults.
285 Sampert, supra note 267, at p. 318 ff.
officers’ absence of fear vis-a-vis possible prosecutions for abusive strip-searches. Indeed, those authors claimed that police officers often think that their versions will be chosen over the complainants’ ones and that even if complainants are believed they “have fairly good odds in persuading judges that their acts did not amount to a strip search or that even if Golden was violated, the breaches were unintentional, relatively minor, or otherwise ineligible for a Charter remedy.”

Ultimately, our judicial system needs to get rid of stereotypes against victims of sexual assault including victims of police sexual assault. When a judge endorses prejudicial ideas, such as the ones aforementioned, it may reinforce them not only in society but also in the criminal justice system (including among police officers). Therefore, enhancing legal education on sexual assault for judiciaries and for all law students – who will, possibly, be holding significant legal and social positions of power in the future –, is not something that should be too easily dismissed for the benefit of purely normative reforms. In the same vein, a study undertaken by professors of the University of Ottawa exposed relevant points regarding professors of law obligations and duties. For instance, they claimed:

The attitudes, skills and competencies that we reinforce and legitimate in our classrooms will have a powerful and lasting impact on how our students understand and experience the law, how they conceptualize their future within it, and what they understand of their own responsibilities and obligations as future legal professionals.

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286 Psutka and Sheehy, supra note 89, at pp. 276-277.
287 Cairns Way and Gilbert, supra note 280, at p. 69.
288 Id., at p. 69 ff.
289 Id., at p. 70. Similarly, Maher, supra note 21, at p. 38, claimed that the academia has a role to play in diminishing PSM by researching more on this topic.
I agree with the previous quote and believe that changes in the teaching of law may prevent future lawyers and judges to convey myths and stereotypes about sexual assaults and, perhaps, impact on the rate of unfounded sexual assaults and the number of convictions. In addition, Cairns Way and Gilbert, authors of the aforementioned study, invite law professors to reflect on the objectives of their first-year criminal law class: is it merely to teach uncontested doctrine or is it to foster critical thinking to our future lawyers and jurists? Sexual assaults and police sexual assaults victims would deeply benefit from choosing the latter option, as most of the issues underlined throughout this thesis relied on myths, on unfounded beliefs, as well as on the vulnerability of some groups before the criminal justice system. Henceforth, agreeing with Sampert who posited that “legislative changes cannot work if the underlying societal beliefs continue to support myths and stereotypes about sexual violence”,290 I suggest that a significant first step toward a better understanding of the phenomenon of sexual violence committed by police officers is to reconceive our way to teach sexual assaults and the power dynamics that might come into play, especially in police sexual assaults or alike circumstances.

4.3 Preventing Sentencing Distortions

As discussed in the previous chapter, sentencing offers ways to deal with offenders that are police officers through, mainly, the principles of denunciation and deterrence, and the aggravating factor of breach of trust. Thus, we might think that a sentencing reform is not needed to improve Canadian criminal courts’ handling of police sexual assaults.

290 Sampert, supra note 267, at p. 301.
291 This part of the thesis is the result of my participation in the McGill Graduate Law Students Conference (May 4th, 2018). I, thus, which to thank the organizing committee, the attendees and the moderator of my panel, Prof. Joanne St-Lewis, for the insightful discussion that followed my presentation on psychological detention in police sexual assault cases.
However, we may posit that there is a sentencing distortion deriving from the offender’s position as a police officer, as it is seen both as an aggravating and a mitigating factor. Therefore, I am concerned that this phenomenon might prevent society from recognizing the inherent egregious nature of sexual assaults committed by police officers. Hence, the foremost claim that I wish to make throughout this subsection is that the distortion in the sentencing process may shield police officer’s accountability, not only as offenders, but also as representatives of the law.

As I have accounted in previous discussions, police sexual assault does not substantively differ from sexual assault in Canadian law, as they are both codified under s. 271 Cr. C. Accordingly, the offender’s function as a police officer is irrelevant when adjudicating whether the sexual touching occurred. Nevertheless, if a conviction is entered, the fact that the perpetrator is a police officer, regardless of the nature of the crime, can at the same time be a mitigating and an aggravating circumstance. I labelled this phenomenon a sentencing distortion, as the same feature (i.e. the role of a police officer) constitutes both an aggravating and mitigating factor, and thus, alters the need to denounce and underline the gravity of sexual assaults committed by representatives of the law. On the one hand, the aggravating factor is the breach of trust that derives from the offender’s role and his position of authority and/or trust. On the other hand, the collateral consequences such as the loss of employment, public shame, humiliation and the potential segregation in correctional facilities may be regarded as mitigating factors.

292 The position of authority should, however, be considered when looking at the victim’s consent. On that point, see the previous suggestion regarding s. 273.1 Cr. C. The discussions on psychological detention – in the previous subsection and in subsection 2.1 – are not without relevance when assessing consent.
For some scholars, the role of the accused in police sexual assault cases could also impact the proportionality principle. Indeed, relying on Desrosiers and Allard-Beausoleil, a sexual assault could be considered as comprehending a higher subjective gravity “due to the circumstances, surrounding the commission of the infraction” (free translation).\textsuperscript{293} For police sexual assault, this higher level of seriousness would arise from the position of authority and trust. Hence, the gravity, the breach of trust and the collateral consequences considered at the sentencing phase are all factors anchored in the function of the offender. One might, thus, reasonably question whether the function of police officer influences the sentence in a significant way or whether the offender’s role is somehow neutralized, as it both mitigates and aggravates in the sentencing phase. Moreover, this sentencing distortion appears to be at odds with the principles of \textit{R. v. Cusack}, (reaffirmed by the Court of Appeal of Ontario in \textit{R. v. Feeney} and \textit{R. v. Schertzer}) which read as follows:

\begin{quote}
The commission of offences by police officers has been considered on numerous occasions by the Courts, and the unanimous finding has been that their sentence should be more severe than that of an ordinary person who commits the same crime, because of the position of public trust which they held at the time of the offence and their knowledge of the consequences of its perpetration.\textsuperscript{294}
\end{quote}

In addition, in order to be aligned with the teachings of the courts, we may want to recognize through our sentencing principles, not only the seriousness of sexual assaults committed by a representative of the law, but also that this aggravating factor of breach of trust cannot be undermined by the aforementioned sentencing distortion. Police crime

\begin{footnotes}
\textsuperscript{293} Desrosiers and Beausoleil-Allard, \textit{supra} note 240, chapter 5, subsection 1.2. The original text is: “Quant à la gravité subjective, elle découle des circonstances entourant la commission de l'infraction, par exemple l'usage de violence, le lien de confiance ou d'autorité unissant l'agresseur et la victime, l'âge de cette dernière et ainsi de suite.”
\textsuperscript{294} \textit{R. v. Schertzer}, 2015 ONCA 259, at para 133, quoting \textit{R. v. Feeney}, 2008 ONCA 756 and \textit{R. v. Cusack} (1978), 41 C.C.C. (2d) 289 (N.S. S.C.(A.D.)) It is noteworthy that those decisions are not police sexual assault cases. For instance, \textit{Schertzer} dealt with perjury and attempt to obstruct justice, while \textit{Feeney} is a sentence appeal decision of an assault conviction.
\end{footnotes}
is a particularly egregious breach of trust as it is anchored in the law itself and should not be eclipsed too easily by other factors.

Additionally, this sentencing distortion is not the only concern at the sentencing phase. For example, in an attempt to understand whether the fact that the offender is a police officer has a meaningful impact on sentencing, I tried to compare the sentences received in the police sexual assault cases studied for the purpose of this thesis with a judicial classification of sexual assaults sentences provided by judge Sanfaçon in Quebec who after having examined approximately 100 sexual assault cases divided sexual assault sentences into three categories: short-term (12 to 20 months), intermediate (from 2 to 6 years with a particular emphasis on 3 to 4 years sentences) and long-term sentences (7 years or more). The court described the three types of sentences in these words:

Of the sentences ranging from 12 to 20 months in prison (16 cases), we observe that most of these cases involve only one victim. In addition, the sexual acts committed were the least serious ones and/or occurred only on rare occasions and/or over a short period of time. In a small number of other cases, we observe that the advanced age of the accused (75 years or older), the accused's health, and/or a very long period of time between the events and the sentencing were determining factors. At the other end of the spectrum, sentences ranging from 7 to 13 years were handed down in cases involving specific violent circumstances in addition to sexual acts and/or the existence of a criminal record, and were obviously for objectively more serious offences than in the present case.

295 The factual background of the decision which led to this guideline, R. v. Cloutier, [2005] RJQ 287; 29 CR (6th) 365, involved the sexual abuse of two minor victims over long periods. The accused occupied a position of authority, had a stable life and had no prior criminal record. On this matter, it is similar to most of the twelve cases studied (with the exception of officer Von Seefried who was convicted twice of sexual assault). I thus find it relevant to study the classification of judge Sanfaçon as not only the mitigating factors in Cloutier were frequently weighed in the twelve police sexual assault cases, but also as judge Sanfaçon analyzed and summarized a great number of cases prior to drafting this guideline.

296 R. v. Cloutier, supra note 295, at paras 76-77. See also Desrosiers and Beausoleil-Allard, supra note 240, at chapter 5, subsection 1.3.1.

297 R. v. Cloutier, supra note 295, at para 76. See also the aggravating and mitigating factors identified by Sanfaçon J., at para 80: “Aggravating factors: maltreatment of one's children, position of authority and/or
Still, this classification does not offer the most effective sentencing framework for police sexual assaults. Indeed, if we rely on this guideline, most of the police sexual assault cases studied in this thesis are regarded as the less serious form of sexual assault.\textsuperscript{298} We might try to explain this phenomenon by underlining the features that most police sexual assault cases are sharing with cases from judge Sanfaçon’s first category (i.e. sentences of 12 to 16 months). First, police sexual assault cases in Canada mainly involved only one victim; second, they were not long-term abuses; third, almost all of them happened only on one occasion; and, finally, in the courts’ opinion, some police sexual assault cases stood at the lower part of the gravity spectrum. For instance, most of the twelve cases studied involved only one victim (with the exception of Greenhalgh and Simard)\textsuperscript{299} and a one-time encounter during a traffic stop (e.g. Evans v. Sproule and Von Seefried)\textsuperscript{300} or other police activities (e.g. Mandip Sandhu; Desjourdy; Khan; Greenhalgh and Bracken).\textsuperscript{301} Also, acts in cases like Rossignol were explicitly described as the court as being “relatively minor”.\textsuperscript{302}

\textsuperscript{298} For instance, Khan (ONSC) was sentenced to 45 days (supra note 83); Rossignol to 2 months (it is to be noted that it was an assault rather than a sexual assault conviction, supra note 15); Bracken (supra note 58) and Ramsay to 9 months (supra note 16) and Mandip Sandhu to 15 months (supra note 37).

\textsuperscript{299} R. v. Greenhalgh, supra note 19 and Simard, supra notes 189 and 191.

\textsuperscript{300} Evans v. Sproule, supra note 37 and R. v. Von Seefried, supra note 18. It is to be noted that R. v. Von Seefried, supra note 17, is the only case involving more than one encounter between the victim and the offender.


\textsuperscript{302} R. v. Rossignol, supra note 15, at p. 10.
In addition, we might infer that lower sentences were given in the studied police sexual assault cases as they were not sharing the specific characteristics of judge Sanfaçon’s third category (i.e. sentences of 7 years and more) such as the use of violence, the existence of a criminal record and the great seriousness of the offence (i.e. more objectively serious than R. v. Cloutier).\textsuperscript{303} Once again, as police sexual assault cases in Canada were often one-time event involving only one victim, it is somehow improbable that they will be considered objectively more serious than R. v. Cloutier\textsuperscript{304} (in this case, Cloutier who was a celebrity manager sexually abused two minors for several years). Moreover, the offenders in the studied case did not have criminal records – with one exception – and had strong support systems; two factors that are not consistent with the circumstances from which derive harsher sentences. Finally, the fact that the offender is a police officer usually makes the victim comply without much resistance. Thus, in most cases, the offender does not make use of violence.\textsuperscript{305}

Hence, if we rely on judge Sanfaçon, Officer Smith who did not make use of violence and perpetrated an offence somehow “less serious” than the ones in Cloutier (as Anna is the only victim, as she is not a minor and as the touching occurred only once) would hardly receive a sentence more severe than 16 months. Also, if we double Sanfaçon’s guideline with the sentences given in police sexual assault cases, we may infer that Officer Smith would even receive less than 16 months. Indeed, if we compare the fictive

\textsuperscript{303} R. v. Cloutier, supra note 295.  
\textsuperscript{304} Id.  
\textsuperscript{305} With the exception of R. v. Von Seefried, supra note 17. See also the discussions on psychological detention and s. 9 of the Charter.
case of Anna with the decisions studied for the purpose of the study, it is more likely than Officer Smith would be given a sentence not exceeding 12 months.\textsuperscript{306}

Therefore, this Sanfaçon’s framework fails to recognize that police sexual assaults are inherently serious, not unavoidably because of the length of the abuses or violent circumstances such as suggested by judge Sanfaçon,\textsuperscript{307} but because of the functions of police officers which are \textit{inter alia} to enforce the law and to protect civilians against crime. Consequently, we should focus more on the position of authority of police officers because of their role which is deeply anchored in the law. If policemen commit crimes, they undermine the rule of law, the public’s confidence in the administration of justice and the whole criminal justice system’s credibility. Hence, sentencing police officers as if the acts they committed were in the lower part of the sexual assault spectrum fails to underscore the intrinsic seriousness of a sexual assault which derives from the action of a state representative using his authority and power to engage in sexual activity.\textsuperscript{308} Additionally, it omits to recognize that this criminal behaviour not only has consequences for the victims, but also for their communities.

Ultimately, as sexual assault is an offence that can include an array of different circumstances (i.e. sexual abuse by a parent, unconsented sexual touching by a partner or a stranger, police sexual assaults, etc.), it is hard to synthesize a sentencing framework which would apply to all kinds of sexual assaults. Therefore, Desrosiers and Allard-

\begin{footnotesize}
\footnotetext[306]{This estimation is based on the cases reviewed for the purpose of this thesis.}
\footnotetext[307]{\textit{R. v. Cloutier, supra} note 295, at para 76.}
\footnotetext[308]{The hypothetical case of Anna presented a sympathetic offender with no prior conviction, a stable life and a family in order to mirror most of the offenders that were depicted in the twelve criminal Canadian cases.}
\end{footnotesize}
Beausoleil are right when warning us that “any synthesizing exercise has to be done cautiously and with modesty” (free translation).\textsuperscript{309} Still, it is relevant to understand that, according to the current sentencing trend, police sexual assaults may be sentenced as if they were in the lower spectrum of sexual assaults. For instance, the judge in \textit{R. v. Von Seefried} – which is the case having the longest sentence and one of the two cases being in Sanfaçon’s intermediate range – held that “the proposed sentence [of] 30 months […] is at the low end of the range for sexual assaults by people in a position of trust, but it is within it.”\textsuperscript{310} If this sentence is in the lower range, so are all of the Canadian criminal cases of police sexual assault.\textsuperscript{311} Thus, I would urge the criminal system to craft guidelines answering the specific problems encountered in police sexual assault cases which differ from other types of sexual assaults.

One of the means to accomplish this suggestion would be, in my opinion, to consider the aggravating factor of breach of trust differently in cases of police sexual assault as it is anchored in the law; as it does not only impact the victim, but also the entire society and as it projects a negative image of police forces. Therefore, if police officers are not sentenced as harshly as other offenders it could greatly undermine the rule of law and the public confidence in the administration of justice, two fundamental principles of our legal system.\textsuperscript{312}

\textsuperscript{309} Desrosiers and Beausoleil-Allard, \textit{supra} note 240, at subsection 1.3.
\textsuperscript{310} \textit{R. v. Von Seefried, supra} note 17, at para 12.
\textsuperscript{311} I wish to warn readers that, as there are not a lot of sentencing decisions, this chapter is only composed of my own observations and has no statistical significance.
\textsuperscript{312} \textit{R. v. Hansen, supra} note 174, at para 33, made valuable comments on this point: “[p]art of the rule of law is that agents of the state must themselves be subject to and obey the law. Police take an oath to uphold the Constitution of Canada, to discharge their duties faithfully and lawfully, to investigate crimes according to the law, and not to abuse trust by violating laws they are obligated to enforce. Because it is presumed that police comply with the rule of law, when sentencing an officer for crimes involving breach of public
CONCLUSION

This thesis was aimed to provide a Canadian perspective on police sexual assaults, as there were, despite recent allegations and convictions, no major studies in Canadian criminal law or criminology focusing especially on those behaviours. It was, and still is, crucial not only to look at how Canadian courts have handled such cases, but also to understand the common features of police sexual assaults in order to properly highlight the main issues and to craft effective solutions. Therefore, this thesis reviewed some of the prosecution barriers, such as the marginalization of the victims, the distrust of the system, the “Blue Wall of Silence”, the rate of unfounded sexual assaults, and so forth. This analysis also examined how police sexual assaults have been sentenced in Canada. Then, this thesis went on to study solutions. Indeed, understanding the concerns related to prosecution and sentencing allowed me to suggest solutions including improvements of the complaint mechanism, the possibility to implement body cameras, education reforms to halt the conveyance of myths about sexual assaults, the use of provisions of the Criminal Code to facilitate the proof of the absence of consent and a sentencing framework which would focus on the features of police sexual assaults.

Nonetheless, as this thesis is a first study on police sexual assault in Canada, there are obvious limitations to it. For instance, the analysis did not extend to ethic cases. I, thus, did not study investigations made by institutions such as the Special Investigation Unit (SIU) in Ontario or at the decisions of the Comité de déontologie policière in Quebec, even if those organizations deal with PSM. This is a huge restriction as, for example, the trust the court may properly consider that the accused is well aware of the consequences of committing the crime.”
SIU has investigated 41 allegations of sexual assault by police officers in 2014-2015.\textsuperscript{313} Hence, an analysis focusing only on courts’ decisions is somehow incomplete and hardly statistically significant.\textsuperscript{314}

Also, I had to rely on American data at some points; mainly, to examine the occurrence of those behaviours, the marginalization of victims, the causes of sexual misconduct and police agencies’ handling of these misconduct. However, we should be cautious and not infer too quickly that what happens in the United States is perfectly mirroring the Canadian situation. Therefore, an empirical study in Canada would be more than welcome to have a clearer portrait of police sexual assaults and PSM. In addition, I am suggesting that an empirical study should cover more forms of sexual misconduct than sexual assault, as if a conduct does not amount to a criminal behaviour, it does not mean that it is proper or compatible with the mission of representatives of the law.\textsuperscript{315} Likewise, having Canadian data would not only provide a better understanding of PSM, but would also help to see if the theoretical solutions suggested, in this thesis as well as by American authors, would really remedy to this phenomenon.

Nevertheless, this thesis is a starting point for a better understanding of police sexual assaults. Thus, the issues underscored throughout the previous chapters deserved to be


\textsuperscript{314} For example, the SIU’s reports exposed that between 1990 and 2014, 472 allegations of sexual assaults were investigated. Special Investigation Unit, “SIU Occurrences Since Inception” (Ontario: Special Investigation Unit, 2004) online <https://www.siu.on.ca/pdfs/siu_occurrences_since_inception.pdf>. Omitting such resources in a study on police sexual assaults undoubtedly affects the outcomes.

\textsuperscript{315} On this aspect, Justice Molloy’s comment should be studied carefully: “[t]he question is not whether they behaved admirably, or even ethically.” R. v. Nyznik, supra note 10, at para 199. My point here is that even if a conduct does not amount to a sexual assault – it does not mean that it is proper or that it does not constitute a PSM.
analyzed carefully in order to craft solutions that will address properly police sexual assaults. I also wish to emphasize that most of the obstacles derive from the way the judicial system perceive police officers and their misconduct and from persisting myths on sexual assaults. Hence, there may be no improvement unless we ensure that there are changes in the legal education of actors of the justice system.

Finally, sexual assault may include an array of different circumstances. However, when studying sexual assault sentences, the cases studied are regarded as being at the beginning of the gravity scale. While most cases did not present long-term abuses, heavy criminal records, child victims or violence, – which are factors appearing to seriously influence the sentence – it does not mean than police sexual assault is not serious. Hence, this behaviour should be sentenced through a different framework which would recognize that, although different from cases such as R. v. Cloutier, policed police sexual assaults are inherently egregious as they are perpetrated by representatives of the law who swore to protect the people they victimize. Indeed, not only do they have major consequences on victims’ lives, but they also undermine cornerstones of our system: the rule of law and the public’s confidence in the administration of justice. If civilians cannot trust their police officers; whom will they trust?

316 R. v. Cloutier, supra note 295.
BIBLIOGRAPHY

LEGISLATION

Federal
Criminal Code, R.S.C., 1985, c. C-46
Interpretation Act, R.S.C., 1985, c. I-21
Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10

Alberta
Police Act, RS, A, 2000, c. P-17
Alta, Reg 356/1990 (With amendments up to and including Alberta Regulation 114/2014)

British Columbia
Police Act, RS, BC, 1996, c. 367

New Brunswick

Newfoundland and Labrador
Royal Newfoundland Constabulary Act, S, NL, 1992, c. R-17

Nova Scotia
Nova Scotia Police Act, S, NS, 2004, c. 31

Quebec
Police Act, CQLR c P-13.1

Ontario
Highway Traffic Act, R.S.O. 1990, c. H.8
Police Services Act, R.S.O. 1990, c. P.15

JURISPRUDENCE

Arguments and Evidentiary Documents

Cases

**Supreme Court of Canada**

*Noor Khan v. Her Majesty the Queen*, 2017 CanLII 49991 (SCC)
*R. v. Boulanger*, 2006 SCC 32
*R v. Golden*, 2001 SCC 83
*R. v. Grant*, 2009 SCC 32
*R. v. Ladouceur*, [1990] 1 SCR 1257

**Alberta**
*R. v. Wagar*, 2015 ABCA 327

**British Columbia**

*British Columbia of Civil Liberties Association v. Canada (Attorney General)*, 2018 BSCS 62
*R. v. Chand*, 52 BCAC 301; 25 WCB (2d) 459
*R. v. Greenhalgh*, 2011 BCSC 511
*R. v. Greenhalgh*, 2012 BCCA 148
*R. v. Greenhalgh*, 2012 BCCA 236
*R. v. Hodson*, 2011 BCPC 243
*R. v. Shipley et al*, 2015 BCPC 276
*R. v. Wong*, 2016 BCCA 416

**New Brunswick**
*R. v. Leblanc*, 2003 NBCA 75
*R. c. Rossignol*, 147 NBR (2d) 287; 375 APR 287

**Nova Scotia**

**Ontario**

*Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491
R. v. Cook, 2010 ONSC 5016
R. v. Desjourdy, 2013 ONCJ 170
R. v. Feeney, 2008 ONCA 756
R. v. Khan, 2015 ONSC 7187
R. v. Khan, 2017 ONCA 114
R. v. Mandip Sandhu, 2015 ONSC 1679
R. v. Nyznik, 2017 ONSC 4392
R. v. Quick, 2016 ONCA 95
R. v. Schertzer, 2015 ONCA 259
R. v. Von Seefried, 2016 ONCJ 791
R. v. Von Seefried, 2017 ONSC 4406

Quebec
R. c. Figaro, 2017 QCCQ 7257
R. c. Simard, 2014 QCCQ 3268
R c. Simard, 2014 QCCQ 7652
Simard c. R., 2016 QCCA 880

Saskatchewan
R. v. Bracken, 2005 SKPC 64
R. v. Ramsay, 1999 SKQB 173
R. v. Ramsay, 2000 SKQB 198
R. v. Ramsay, 2001 SKCA 8
R. v. Raugust, 2004 SKPC 71
R. v. S. (M.), 2003 SKCA 33

SECONDARY MATERIAL: ARTICLES


Alain, Marc, “Une mesure de la propension des policiers québécois à dénoncer des comportements dérogatoires, éléments de culture policière et cultures organisationnelles” (2004) 28:1 Déviences et Société 3


Maher, Timothy M., “Cops on the Make: Police Officers Using Their Job, Power, and Authority to Pursue Their Personal Sexual Interests” (2007) 7 JIJIS 32


Penney, Steven and Stribopoulos, James, ““Detention” under the Charter after R. v. Grant and R. v. Suberu” (2010), 51 S.C.L.R. (2d) 439


Stinson, Philip Matthew Sr et al, “Police Sexual Misconduct: Arrested Officer and Their Victims” (2015) 10 Victims & Offenders 117


Weiss, Karen G., ““Boys Will be Boys” and Others Gendered Accounts” (2009) 15:7 Violence Against Women 801

SECONDARY MATERIAL: MONOGRAPHS


Robertson, Cliff, Police Misconduct: a General Perspective, (Boca Raton: CRC Press, 2016)

ELECTRONIC SOURCES: ONLINE VIDEOS

Calgary Police Service’s Youtube Account, “Calgary police adopt Philadelphia Model for unfounded sexual assaults” (May 18, 2017) online <https://www.youtube.com/watch?v=2d1QN2Uu0aI>


Enquête/Radio-Canada Info, “Le silence est brisé” (31 March 2016) online <https://www.youtube.com/watch?v=bXj927UB9tk>

Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 1 – Janet Mark, Coordinator of Aboriginal relations” (4 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspqaudiences_audiences%5Baudiences%5D=115&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=d3920a81e692809d07f58506d56e71f7>

Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 1 – Me Fannie Lafontaine, Independent Civilian Observer into SPVM's investigation of allegations of criminal acts committed by police officers against Indigenous peoples throughout the province of Quebec and Professor, Faculty of Law, Université Laval” online at <https://www.cerp.gouv.qc.ca/index.php?id=57&tx_cspqaudiences_audiences%5Baudiences%5D=117&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_
Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 1 – Jacques Turcot, Detective Sergeant, SPVM” (8 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspqaudiences_audiences%5D=120&tx_cspqaudiences_audiences%5Bpartie%5D=1&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=492225c76cf02c8af0bc6572436f21ca>

Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 2 – Jacques Turcot, Detective Sergeant, SPVM” (8 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspqaudiences_audiences%5D=120&tx_cspqaudiences_audiences%5Bpartie%5D=2&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=5158bb985a971f80e699dcfa3f5763c>

Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec “Part 3 – Pascal Côté, Commander and Yannick Parent-Samuel, Lieutenant Detective, SPVM” (4 June 2018), online at <https://www.cerp.gouv.qc.ca/index.php?id=57&L=1&tx_cspqaudiences_audiences%5D=115&tx_cspqaudiences_audiences%5Bpartie%5D=3&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=c6296291b0217a01c9081b537c71fe83>

NEWSPAPER ARTICLES


Bergeron, Yannick “Un policier de Québec accuse d’agression sexuelle” Radio-Canada (29 June 2018) online https://ici.radio-canada.ca/nouvelle/1109996/policier-ville-quebec-accuse-dagression-sexuelle-spvq


Lévesque, Fanny, “Je ne vais jamais abandonner la cause de ma fille” La Presse, (2 December 2017) online <http://plus.lapresse.ca/screens/41225ade-3c1c-4700-91ed-9edd21809534%7C_0.html?utm_medium=Ulink&utm_campaign=Internal+Share&utm_content=Screen>


Sendensky Matt and Nomaan Merchant, “Investigation reveals about 1,000 police officers lost jobs over sexual misconduct”, The Guardian, (November 1st, 2015) online: <https://www.theguardian.com/us-news/2015/nov/01/police-sexual-assault-investigation> (adapted version of AP article)

NEWS RELEASES

NON-PARLIAMENTARY DOCUMENTS


Special Investigation Unit, “SIU Occurrences Since Inception” (Ontario: Special Investigation Unit, 2004) online <https://www.siu.on.ca/pdfs/siu_occurrences_since_inception.pdf>


Special Investigation Unit, “What We Do” (Ontario: Special Investigation Unit, 2016) online <https://www.siu.on.ca/en/what_we_do.php>

REPORTS OF INQUIRIES AND COMMISSIONS

Ontario, Coroner’s jury, Verdict of Coroner’s Jury – Inquest into the Death of Reyal Jardine Douglas, Sylvia Klipingaitis and Michael Eligon, (Toronto: Coroner’s Court, 2014)


United States (Nebraska), Police Professionalism Initiative University of Nebraska, Driving While Female: A National Problem in Police Misconduct, (Omaha: Samuel Walker and Dawn Irlbeck, May 2002)