

## NOTE

### ONTARIO AND BRITISH COLUMBIA'S SEXUAL ASSAULT LAWS FOR UNIVERSITIES: A MODERN APPROACH

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#### INTRODUCTION

In the early hours of January 31, 2015, after an evening of drinking with her friends in downtown Toronto, Mandi Gray, a PhD student at York University, headed home with Mustafa Ururyar, a fellow PhD student with whom Gray had a casual sexual relationship during the preceding two weeks.<sup>1</sup> During the twenty-minute walk to his apartment, Ururyar—upset that her friend declined to join them—began berating Gray, calling her “an embarrassment” and a “slut,” which crushed Gray’s self-esteem.<sup>2</sup> Once in Ururyar’s apartment, he continued to verbally abuse Gray and then forced her to fellate him and have sexual intercourse while she lay frozen in fear.<sup>3</sup>

In the days following this horrific night, Gray reported the assault to police and sought assistance from York University.<sup>4</sup> Ururyar was arrested, charged with one count of sexual assault, and released on bail on February 15, only two weeks after the attack.<sup>5</sup> With Ururyar back on campus, Gray looked into what procedures and protocols York University had in place to protect and accommodate people in her situation, but found none.<sup>6</sup> Due to the emotional toll of knowing that Ururyar was back on campus, coupled with the lack of support from campus administrators,

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\* J.D. 2018, The George Washington University Law School; B.S. 2014 La Sierra University. I would like to dedicate this Note to a dear friend, a survivor of sexual assault and a broken system.

1. See *R. v. Ururyar*, 2016 CanLII 448, ¶¶ 1–2, 30–34 (Can. Ont. C.J.).

2. *Id.* ¶¶ 10–12.

3. *Id.* ¶¶ 15–16.

4. Kristy Hoffman, *York University Fails to Support Sex Assault Victim, Woman Says*, CBC NEWS (Mar. 3, 2015), <http://www.cbc.ca/news/canada/manitoba/york-university-fails-to-support-sex-assault-victims-woman-says-1.2979396> [<https://perma.cc/H3LB-JTL9>].

5. See *id.*

6. Emily Mathieu & Jayme Poisson, *York U Student Files Human Rights Complaint Over Poor Support Following Sexual Assault*, STAR (June 20, 2015), <https://www.thestar.com/news/canada/2015/06/30/york-u-student-files-human-rights-complaint-over-poor-support-following-sex-assault.html> [<https://perma.cc/FZA3-5QW6>].

Gray announced a leave of absence from her studies on February 21.<sup>7</sup> The next day, a university administrator contacted Gray to discuss a security plan, but the offer put Gray in a position of either having “to avoid the man she said sexually assaulted her, or endure having [a security escort] rather than regulating his movement on campus.”<sup>8</sup> Appalled by York’s proposed solution, Gray filed a complaint with the Human Rights Tribunal of Ontario,<sup>9</sup> claiming that “York University discriminated against [her] as a woman and as a sexual assault survivor for failing to have a policy, a practice and the resources specifically for sexual assault.”<sup>10</sup> Gray and York University eventually settled the complaint “with no admission of liability by York, or concession by Gray.”<sup>11</sup>

Unfortunately, York University’s response to Gray’s sexual assault is the norm in Canada.<sup>12</sup> As of November 2014, “only nine of eighty-seven Canadian universities ha[d] created a special sexual assault policy,”<sup>13</sup> and between 2009 and 2013, there were over 700 sexual assaults reported at Canadian colleges and universities.<sup>14</sup> In 2014, among eighty-three universities surveyed, representing a combined enrollment of over one million students, there were 224 reported sexual assaults, or 1.85 reports per 10,000 students.<sup>15</sup> However, these numbers only tell part of the story as the data emanate exclusively from “reported” sexual assaults.<sup>16</sup> Although it is impossible to determine the true number of sexual assaults occurring on Canadian campuses, several surveys suggest that a staggering number

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7. *Id.*; Hoffman, *supra* note 4.

8. Mathieu & Poisson, *supra* note 6.

9. The Human Rights Tribunal of Ontario adjudicates claims of discrimination and harassment brought under the Canadian Human Rights Code in Ontario. See *What We Do*, SOC. JUSTICE TRIBUNALS ONT., <http://www.sjto.gov.on.ca/hrto/what-we-do/> (last visited Mar. 26, 2018) [<https://perma.cc/55PD-MS6R>].

10. See Mathieu & Poisson, *supra* note 6 (noting that Gray also argued that York University failed to warn fellow students about the alleged attack).

11. Alyshah Hasham, *Mandi Gray Settles Human Rights Complaint with York University Over Sex Assault Policies*, STAR (Dec. 12, 2016), <https://www.thestar.com/news/gta/2016/12/12/mandi-gray-settles-human-rights-complaint-with-york-university-over-sex-assault-policies.html> [<https://perma.cc/GEP2-FGJL>].

12. See Emily Mathieu & Jayme Poisson, *Canadian Post-Secondary Schools Failing Sex Assault Victims*, STAR (Nov. 20, 2014), [https://www.thestar.com/news/canada/2014/11/20/canadian\\_postsecondary\\_schools\\_failing\\_sex\\_assault\\_victims.html](https://www.thestar.com/news/canada/2014/11/20/canadian_postsecondary_schools_failing_sex_assault_victims.html) (“Just nine of more than 100 universities and colleges polled by the Star have adopted a special policy to address sexual assault.”) [<https://perma.cc/5KY8-NQZ5>].

13. *Id.*

14. CAN. FED’N OF STUDENTS-ONT., *SEXUAL VIOLENCE ON CAMPUS: FACT SHEET 3* (2015), <http://cfsontario.ca/wp-content/uploads/2017/07/Factsheet-SexualAssault.pdf> [hereinafter *SEXUAL VIOLENCE FACTSHEET*] [<https://perma.cc/QTm8-RAGE>].

15. Lori Ward, *Schools Reporting Zero Sexual Assaults on Campus Not Reflecting Reality, Critics, Students Say*, CBC NEWS (Jan. 31, 2016), <http://www.cbc.ca/news/canada/campus-sexual-assault-survey-1.3328234> [<https://perma.cc/6WJ3-HXX6>].

16. See *id.*

of sexual assaults go unreported.<sup>17</sup>

To address the prevalence of unreported campus sexual assaults, as well as human right complaints against universities, Ontario and British Columbia enacted legislation requiring post-secondary education institutions to implement sexual assault policies and procedures.<sup>18</sup> Without revision, however, these new requirements are unlikely to effect meaningful change. Both laws are ambiguous on key aspects of the policies and procedures institutions should implement, leaving too much open for university interpretation.<sup>19</sup> More importantly, both laws fail to address what policies are appropriate when only witness testimony of the assault exists.

As such, both Ontario and British Columbia's Lieutenant Governors in Council should exercise their rulemaking powers<sup>20</sup> to issue province-wide regulatory guidance for university sexual assault policies and procedures because the current legislation does little to thwart violations of Ontario and British Columbia's Human Rights Codes.<sup>21</sup> The Lieutenant Governors in Council should also, at a minimum, create an online system that provides a means for documenting sexual assault complaints, and require law enforcement and universities to investigate once two reports have been made against the same person.

Part I of this Note highlights the prevalence of campus sexual assaults as well as the reasons most sexual assaults are not reported. It also examines the differences between Canada's criminal justice system and Ontario and British Columbia's legal system regarding human rights violations and complaints. Lastly, Part I introduces Ontario and British Columbia's new sexual assault laws and provides an overview of a non-profit's approach in the United States.

17. See SEXUAL VIOLENCE FACTSHEET, *supra* note 14, at 3 (“Less than one in ten incidents of sexual violence are reported to the police and date rape is the most under-reported crime in Canada. This high level of under-reporting shows that statistical reports largely underestimate the prevalence of sexual violence.”).

18. See Sexual Violence at Colleges and Universities, O. Reg. 131/16 (Can. Ont.); Sexual Violence and Misconduct Policy Act, S.B.C. 2016, c. 23 (Can. B.C.).

19. See Andrea Lowes, *Bill 23: British Columbia's Response to Sexual Violence and Misconduct on Campus*, RUBIN THOMLINSON BLOG, (Aug. 10, 2016), <http://www.rubinthomlinson.com/blog/bill-23-british-columbias-response-sexual-violence-misconduct-campus/> [https://perma.cc/HM54-GUVY].

20. See Ministry of Training, Colleges and Universities Act, R.S.O. 1990, c. M.19, s. 17 (Can. Ont.) (Ontario Lieutenant Governor in Council has the authority to make regulations “requiring that appropriate supports, services, and accommodation relating to sexual violence be provided to students affected by sexual violence”); Sexual Violence and Misconduct Policy Act, S.B.C. 2016, c. 23, s. 7 (Can. B.C.) (British Columbia Lieutenant Governor in Council can make regulations “respecting any matter for which regulations are contemplated by this Act”).

21. See Human Rights Code, R.S.O., 1990, c. H.19 (Can. Ont.); Human Rights Code, R.S.B.C., 1996, c. 210 (Can. B.C.).

Part II identifies weaknesses of Ontario and British Columbia's current legislation and suggests changes to help preserve the right to be free from sexual harassment and assault on university campuses. It also makes the case for instituting a reporting system modeled after a non-profit in the United States. The system will provide students a method to document and report even the most unsubstantiated allegations of sexual misconduct to assist in formal investigations and disciplinary actions. Finally, Part II outlines steps to overcome potential shortcomings of such a system.

## I. BACKGROUND

### A. *The Prevalence of University Sexual Assaults in Canada*

University campuses are communities inside of communities.<sup>22</sup> They often have restaurants, housing, libraries, medical services, clubs, and other entertainment venues.<sup>23</sup> Although designed as “safe spaces with the mission to educate students and engage the community in critical thought and discussion,” university campuses are also “environments where women face sexual violence starting from the first day they step foot on campus.”<sup>24</sup> One in five women experience sexual assault before graduation, and young women experience the highest rates of sexual violence in Canada.<sup>25</sup> Moreover, one study found that “[o]ver one-third of those who experienced unwanted sexual experiences said that their most serious experience happened [as a student] . . . with over one-half reporting that it happened in their first year of studies.”<sup>26</sup> The same study also discovered that more than eighty percent of campus rape victims knew their assailant,<sup>27</sup> and another organization reported that “an estimated 90% of sexual

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22. See, e.g., *Campus Map*, UNIV. ONT., <https://uoit.ca/maps/> (last visited Mar. 26, 2018) (indicating the locations of food courts, health offices, libraries, dorms, and recreational centers on the campus) [<https://perma.cc/GCY7-H4AU>].

23. *Id.*

24. SEXUAL VIOLENCE FACTSHEET, *supra* note 14, at 2. These statistics apply to all of Canada and only include “police-reported” instances. *Id.* at 1. While both women and men can be victims of sexual assault, nine of ten reported sexual assaults are against women. *Id.*

25. *Id.* The police-reported rate of sexual assault against women aged eighteen to twenty-four is twice the rate for women aged twenty-five to thirty-four, and four times higher than women between thirty-five and forty-four. *Id.*

26. See *id.* at 2. In a campus survey of undergraduate students at the University of Alberta, twenty-one percent of students reported having at least one unwanted sexual experience at some point in their life. *Id.*

27. *Id.*; see also *Bill C-46: Records Applications Post-Mills, A Caselaw Review*, CAN. DEP'T JUST., [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06\\_vic2/p3\\_4.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p3_4.html) (last visited Mar. 26, 2018) (indicating that “two fifths of all victims (41%) were assaulted by an acquaintance, 10% by a friend, [and] 28% by a family member”) [<https://perma.cc/6G2L-ETXJ>].

assaults are committed by repeat perpetrators.”<sup>28</sup>

### 1. Most Sexual Assaults Are Not Reported

While most sexual assault survivors can readily identify their assailant, less than one in ten incidents of sexual violence are reported to the police.<sup>29</sup> The few survivors who report their assault wait an average of eleven months before doing so.<sup>30</sup> The survivors who do not report cite many reasons. In some instances, survivors remain silent because recognizing the problem can lead to unwanted public attention, including newspaper headlines,<sup>31</sup> rumors in the community,<sup>32</sup> and public investigations and trials extending well over a year.<sup>33</sup> This concern is often exacerbated by fears that the public will blame the victim for failing to take proper precautions or dressing or behaving in a way that provoked the assault.<sup>34</sup> Other common reasons survivors chose not to report include “[f]eeling young and powerless, [s]hame, [s]elf-blame, [d]esire to move on, [e]ffect on future relationships, and [fear] of further damage from [their] attacker.”<sup>35</sup> One of the most troubling explanations for underreporting, however, is the lack of confidence in the criminal justice system.<sup>36</sup>

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28. *What We Do*, CALLISTO, <https://www.projectcallisto.org/what-we-do> (last visited Mar. 26, 2018) [<https://perma.cc/R9VR-J3FY>].

29. SEXUAL VIOLENCE FACTSHEET, *supra* note 14, at 3.

30. CALLISTO, *supra* note 28.

31. *See, e.g.*, Etana Cain, *Why the Mandi Gray Sexual Assault Case Matters*, HUFFINGTON POST: BLOG (July 25, 2016), [http://www.huffingtonpost.ca/ywca-toronto/mandi-gray-case\\_b\\_11185374.html](http://www.huffingtonpost.ca/ywca-toronto/mandi-gray-case_b_11185374.html) (demonstrating sexual assault cases can lead to headlines in newspapers) [<https://perma.cc/K8VB-KLSN>].

32. *See id.*

33. *See id.* (highlighting the public attention of Gray’s eighteen-month trial); *see also* R. v. Ururyar, 2016 CanLII 448, ¶ 36 (noting that Mandi Gray—the PhD student who reported Ururyar for sexual assault—endured an eighteen-month trial).

34. *See* SEXUAL VIOLENCE FACTSHEET, *supra* note 14, at 3. The fear—and reality—of victim blaming is well-summarized as follows:

Victim blaming shifts the responsibility from the perpetrator to the individual who experienced sexual assault. Victim blaming occurs when the victim of sexual harassment or assault is said to be partially responsible for the attack. Victim blaming can occur through a variety of forms, such as believing that the style of clothes, demeanor or actions of the victim provoked the actions of the perpetrator, thereby excusing the attacker for their violence.

*Id.*

35. *See* Anna Mehler Paperny, *Why Don’t Women Report Rape? Because Most Get No Justice When They Do*, GLOBAL NEWS: CAN. (Feb. 23, 2015), <http://globalnews.ca/news/1845136/why-dont-women-report-rape-because-most-get-no-justice-when-they-do/> (statistically showing reasons why victims do not report sexual assault to police, which include “Feeling young and powerless 56%, Shame 40%, Self-blame 29%, Desire to move on 26% . . . Effect on future relationships 18%, [and] Afraid of further damage from attacker 15%”) [<https://perma.cc/ZX9M-A3B6>].

36. *See* SEX INFO. & EDUC. COUNCIL OF CAN., SEXUAL HEALTH ISSUE BRIEF 3 (2015), <http://sieccan.org/wp/wp-content/uploads/2015/01/SIECCAN-Sexual-Health-Issue-Brief>

A 2014 survey of 114 Canadian sexual assault survivors found that two-thirds chose not to report because “they were not confident in the court process and in the criminal justice system in general.”<sup>37</sup> Among some of the cited reasons survivors lacked faith was the notoriously low sexual assault conviction rates.<sup>38</sup> For example, of the 15,200 sexual assaults reported to police in 2004, 13,200 (86.8%) were recorded as a crime;<sup>39</sup> 5,544 (36.5%) had charges filed; 2,824 (18.6%) were prosecuted; and only 1,519 (10%) resulted in a conviction.<sup>40</sup> While every case is different, insufficient evidence is the primary reason why reported sexual assault cases do not lead to a conviction.<sup>41</sup>

### B. *Canada's Judicial System*

Canada's constitution delegates judicial power between the federal and provincial governments. While the federal government has the exclusive right to enact and enforce criminal law,<sup>42</sup> Canada's provinces have jurisdiction over most criminal proceedings, including sexual assault cases.<sup>43</sup> At the provincial level, the lowest courts are trial courts called Provincial Courts.<sup>44</sup> Above the Provincial Courts are the Provincial Superior Courts

\_Sexual-Assault.pdf [hereinafter SEXUAL HEALTH ISSUE BRIEF] (noting that many victims think the “police will not take their report seriously”) [https://perma.cc/38EP-CWA7].

37. MELISSA LINDSAY, CAN. DEP'T OF JUSTICE, A SURVEY OF SURVIVORS OF SEXUAL VIOLENCE IN THREE CANADIAN CITIES 7 (2014), [http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/tr13\\_19/tr13\\_19.pdf](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/tr13_19/tr13_19.pdf) [https://perma.cc/PC9F-5KSB].

38. See Larry C. Wilson, *Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services*, 23 WINDSOR Y.B. ACCESS JUST. 249, 259 (2005).

39. Generally, a sexual assault is not recorded as a crime when there is not enough evidence to investigate further. See Holly Johnson, *Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault*, in SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE, AND WOMEN'S ACTIVISM 613, 627 (Elizabeth A. Sheehy ed., 2012).

40. SEXUAL HEALTH ISSUE BRIEF, *supra* note 36, at 3.

41. Compare SEXUAL HEALTH ISSUE BRIEF, *supra* note 36, at 3 (illustrating the low probability of reported sexual assaults resulting in a conviction), with *Evidence in Rape, Sexual Assault and Child Sex Abuse Cases*, SEXUAL ASSAULT CAN., <http://www.sexassault.ca/evidence.htm> (last visited Mar. 26, 2018) [hereinafter *Sexual Assault Evidence*] (explaining the difficulties in proving a sexual assault case, which include lack of physical evidence, witnesses, and reliable testimony) [https://perma.cc/TC5W-X59D].

42. In Canada, while “[s]ome [administrative] regulations are used to define schedules of prohibited drugs . . . criminal offences remain defined in legislation.” Kent Roach, *Canada*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 97, 101 (Kevin Heller & Markus Dubber eds., 2010). Thus, “administrative regulations . . . do not play an important role in Canadian criminal law.” *Id.*

43. Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91–92 (Can.); see also *Criminal Code-General*, CANADIAN LEGAL FAQs, <http://www.law-faqs.org/national-faqs/criminal-code/criminal-code/> (last visited Mar. 30, 2018) (“While the federal government has exclusive jurisdiction to enact criminal law, the provinces have the authority to administer the criminal law.”) [https://perma.cc/JKF9-5HDE].

44. See generally *How the Courts are Organized*, CAN. DEP'T JUST., <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html> (last visited Mar. 26, 2018) (providing an overview of the

and Provincial Courts of Appeal, which primarily hear appeals from the Provincial Courts and the Provincial Superior Courts, respectively.<sup>45</sup> The Supreme Court of Canada is the highest appellate court in Canada.<sup>46</sup>

In addition to provincial trial and appellate courts, Canada's provinces also have quasi-judicial adjudicative bodies known as administrative tribunals.<sup>47</sup> Administrative tribunals, which are created by statute, focus on specific subject matter, such as human rights.<sup>48</sup> Depending on the circumstances of a campus sexual assault, a survivor could pursue justice through the criminal justice court system, a human rights tribunal, or both; however, the procedures and types of remedies available vary with each.

### 1. Sexual Assault in Criminal Cases

In Canada, sexual assault is a criminal offense that carries a maximum sentence of ten years.<sup>49</sup> The government, called the Crown,<sup>50</sup> must prove a sexual assault case beyond a reasonable doubt.<sup>51</sup> Many survivors lack confidence in Canada's criminal justice system because producing enough evidence to meet this burden of proof is difficult in sexual assault cases.<sup>52</sup> First, although evidence can include "witness testimony, witness statements, forensic evidence, photographic evidence, and statements and/or admissions against interest," most sexual assault cases rely solely on witness testimony from the survivor.<sup>53</sup> This is particularly true when survivors wait an average of eleven months before reporting the attack.<sup>54</sup> Thus, the determining factor in these cases hinges on the survivor's credibility.<sup>55</sup> In 2016, for example, Jian Ghomeshi, a former celebrity CBC television host, was acquitted on four counts of sexual assault.<sup>56</sup>

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Canadian court system) [<https://perma.cc/HCQ2-XBV9>].

45. *Id.*

46. *Id.*

47. *See* CANADA CRIMINAL LAWS, REGULATIONS, AND PROCEDURES HANDBOOK 73 (2017).

48. *See infra* Part I.A.2.

49. Criminal Code, R.S.C. 1985, c. C-46, s. 271(a) (Can.).

50. *See Who is the Crown?* LAWFACTS, <http://lawfacts.ca/node/119> (last visited Mar. 26, 2018) (describing "the Crown" as a term used for government lawyers at both the federal and provincial level in criminal cases) [<https://perma.cc/5HQG-W7C8>].

51. *See generally* R. v. Lifchus, [1997] 3 S.C.R. 320, 332 (Can.) (indicating that the requisite standard of proof in a criminal case is beyond a reasonable doubt, and that reasonable doubt is "based on reason and common sense which must logically be derived from the evidence or absence of evidence").

52. *See supra* Part I.A.1.

53. SEXUAL ASSAULT EVIDENCE, *supra* note 41.

54. *See supra* Part I.A.1.

55. *See* SEXUAL ASSAULT EVIDENCE, *supra* note 41.

56. *See generally* R. v. Ghomeshi, 2016 CanLII 155 ¶¶ 1, 8 (Can. Ont. C.J.) (dismissing

Ghomeshi established reasonable doubt by highlighting inconsistencies in the survivors' testimonies, which was the only evidence the Crown produced.<sup>57</sup> At the end of the verdict, Judge William Horkins provided the following summary:

My conclusion that the evidence in this case raises a reasonable doubt is not the same as deciding in any positive way that these events never happened. At the end of this trial, a reasonable doubt exists because it is impossible to determine, with any acceptable degree of certainty or comfort, what is true and what is false. The standard of proof in a criminal case requires sufficient clarity in the evidence to allow a confident acceptance of the essential facts. In these proceedings the bedrock foundation of the Crown's case is tainted and incapable of supporting any clear determination of the truth.<sup>58</sup>

Issues of credibility can be overcome, however, with the admission of other sexual misconduct evidence as similar fact evidence. While bad character evidence is typically inadmissible, “[s]imilar fact evidence is a narrow exception to the general exclusionary rule that the Crown cannot lead bad character evidence in criminal trials.”<sup>59</sup> Similar fact evidence is only admissible when the probative value outweighs the potential for misuse.<sup>60</sup> As the Canada Supreme Court held, “[f]actors that may support admission of such evidence include the proximity in time of the similar acts, similarity in detail, the number of occurrences of similar acts, similarities of circumstances, and any distinctive features.”<sup>61</sup> Thus, when a survivor's credibility is not enough, evidence that the accused has sexually assaulted other persons could be admissible as similar fact evidence.

Second, because most survivors know their attackers,<sup>62</sup> the determining issue in sexual assault cases often comes down to whether there was consent.<sup>63</sup> Like the survivor, the accused will also primarily rely on his own testimony to show consent, resulting in a “he said, she said” case.<sup>64</sup> The difference, however, is that the accused need only create the inference that there was consent, whereas the burden on the Crown is to prove

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criminal charges against a TV personality due to lack of credibility of the claimants).

57. See *id.* ¶¶ 136–38.

58. *Id.* ¶ 140.

59. David M. Tanovich, *An Equality-Oriented Approach to the Admissibility of Similar Fact Evidence in Sexual Assault Prosecutions*, in *LAW, LEGAL PRACTICE, AND WOMEN'S ACTIVISM* 542 (2012).

60. See *R. v. Handy*, 2002 SCC 56, [2002] S.C.R. 908, 909 (Can.).

61. *Id.*

62. *Id.* at 910; see *supra* Part I.A.

63. See *SEXUAL ASSAULT EVIDENCE*, *supra* note 41; see also Criminal Code, R.S.C. 1985, c. C-46, s. 273.1 (Can.) (defining consent as “the voluntary agreement of the complainant to engage in the sexual activity in question”).

64. See *SEXUAL ASSAULT EVIDENCE*, *supra* note 41. Although both women and men can be victims of sexual assault, nine out of ten reported sexual assaults identify a male as the assailant. *SEXUAL VIOLENCE FACTSHEET*, *supra* note 14.

beyond a reasonable doubt that the survivor did not consent.<sup>65</sup> Thus, when sworn testimony is the only available evidence, the charges “against the accused turn[] entirely on the assessment of the reliability and credibility of the complainant.”<sup>66</sup> Depending on the circumstances of a sexual assault, the criminal court system may not be the only venue available to survivors seeking justice.

## 2. Sexual Assault in the Human Rights Context

When universities fail to have clear policies and protocols in place for sexual assault survivors, they may be liable for sex discrimination under their provincial Human Rights Code.<sup>67</sup> Both Ontario and British Columbia’s respective Human Rights Codes prohibit sex discrimination in restaurants, stores, schools, housing, and most workplaces within their territories.<sup>68</sup> Although sexual assault is a criminal offense in Canada,<sup>69</sup> when the assault takes place on campus or involves a university’s students, the assault can also be considered sexual harassment, a form of sex discrimination.<sup>70</sup> Not only do students have the right to be free from sex discrimination, but under both Ontario and British Columbia’s Human Rights Codes, universities also have a “legal duty to take steps to prevent and respond to sexual harassment.”<sup>71</sup>

To hold a university responsible for violations of their provincial Human Rights Code, survivors can file a complaint, or application, with their province’s Human Rights Tribunal. Although Ontario and British Columbia’s Human Rights Tribunals, which were established under their respective Human Rights Codes,<sup>72</sup> are similar to provincial trial courts in

65. See *Sexual Assault Evidence*, *supra* note 41.

66. *R. v. Ghomeshi*, 2016 CanLII 155 ¶ 131 (Can. Ont. C.J.).

67. See *supra* Introduction (highlighting Mandi Gray’s human rights complaint against York University).

68. See Human Rights Code, R.S.O. 1990, c. H.19, s. 1 (Can. Ont.); Human Rights Code, R.S.B.C. 1996, c. 210, s. 8 (Can. B.C.).

69. See *supra* Part I.B.1.

70. See *Bell v. Ladas*, (1980), 1 C.H.R.R D/155, 155 (Can. Ont. Bd. Inquiry) (explaining that under the Ontario Human Rights Code, the “forms of prohibited conduct . . . run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as . . . insults”).

71. See *Policy on Preventing Sexual and Gender-Based Harassment*, ONT. HUM. RTS. COMMISSION, <http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0> (last visited Mar. 26, 2018) [<https://perma.cc/2U2L-9FA9>]; Human Rights Code, R.S.O. 1990, c. H.19, s. 2 (Can. Ont.) (providing that students should be free from sexual harassment); Human Rights Code, R.S.B.C. 1996, c. 210, s. 8 (Can. B.C.) (generally prohibiting discrimination in accommodations, services, and facilities).

72. See Human Rights Code, R.S.O. 1990, c. H.19, s. 32–45 (Can. Ont.); Human Rights Code, R.S.B.C. 1996, c. 210, s. 31–50 (Can. B.C.).

many ways, there are three pertinent distinctions.<sup>73</sup> First, Human Rights Tribunals are presided over by a chairperson adjudicator who can be a judge, but is typically an expert in human rights law.<sup>74</sup> Much like traditional courts, adjudicators “hear arguments and evidence provided by lawyers before making a written decision on the record.”<sup>75</sup> These decisions are normally final and binding, but they can be reviewable in Provincial Superior Courts through a process called judicial review if, for example, the Tribunal incorrectly interpreted the Human Rights Code.<sup>76</sup>

Second, the evidentiary rules trial courts abide by are not strictly enforced in tribunals.<sup>77</sup> Though some evidence may be inadmissible in court, tribunal adjudicators have discretion to admit all relevant necessary evidence save for privileged communications.<sup>78</sup> This is important because while the burden of proof is a balance of probabilities (or “more likely than not”) for both civil court cases and tribunals, tribunals may admit evidence that would not otherwise be admissible in civil court.<sup>79</sup>

Finally, what most distinguishes a tribunal from a court of law is that tribunals are not bound by the principle of *stare decisis*.<sup>80</sup> Although tribunals can use prior decisions for guidance and persuasion, they could also “legally make a decision that differs from a past decision, on the same subject and issues, delivered from the highest court in the land.”<sup>81</sup> Nonetheless, most tribunals adhere to prior tribunal and court decisions “to ensure consistency in the law and to prevent the embarrassment of having their decisions overturned by the courts.”<sup>82</sup>

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73. These distinctions apply to all Canadian administrative tribunals, not just Human Rights Tribunals. See CANADA CRIMINAL LAWS, REGULATIONS, AND PROCEDURES HANDBOOK, *supra* note 47, at 73–74.

74. *Id.*

75. *Id.*

76. See *How Do I Ask the Court to Review the Tribunal Decision?*, B.C. HUM. RTS. TRIBUNAL, <http://www.bchrt.bc.ca/complaint-process/after-hearing/review.htm> (last visited Mar. 26, 2018) [<https://perma.cc/A23G-Y4AR>].

77. See, e.g., Human Rights Code, R.S.B.C. 1996, c. 210, s. 27.2(1) (Can. B.C.) (“A member . . . may receive and accept . . . evidence and information that the member . . . considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.”).

78. *Id.* s. 27.2(2) (indicating that inadmissible evidence in a court due to a privilege is also inadmissible in the Human Rights Tribunal).

79. See, e.g., *R. v. Oakes*, [1986] 1 S.C.R. 103, 135 (Can.) (indicating that the burden of proof for human rights complaints is the civil standard of balance of probabilities).

80. See CANADA CRIMINAL LAWS, REGULATIONS, AND PROCEDURES HANDBOOK, *supra* note 47, at 74.

81. *Id.*; see also *Altus Grp. Ltd. v. Calgary (City)*, 2015 CanLII 86, ¶ 16 (Can. Alta. C.A.) (“[A]n administrative tribunal is not bound by its previous decisions or the decisions of its predecessor . . .”).

82. CANADA CRIMINAL LAWS, REGULATIONS, AND PROCEDURES HANDBOOK, *supra* note 47, at 74.

C. *A Legislative Response to Human Rights Complaints Against Universities*

In the last few years, universities across Canada have been heavily criticized for failing to support students who were sexually assaulted.<sup>83</sup> Although some cases lead to newspaper headlines and human rights complaints, most Canadian universities informally resolve harassment or discrimination complaints by staff, faculty, and students.<sup>84</sup> According to a study of more than twenty Canadian universities, less than ten percent of complaints are resolved through a formal investigative process.<sup>85</sup> Universities argue that they “avoid a formal process not because it can be long, expensive and lead to damage to a school’s reputation,” but because they believe that informal processes such as mediation and education better help victims.<sup>86</sup> Students and sexual assault survivors disagree, stating that “an informal process leaves too much to the discretion of an administrator.”<sup>87</sup> The few cases investigated through a formal process are usually done through a university’s general discrimination and harassment policy.<sup>88</sup> While these policies are built around provincial harassment codes, many have proven inadequate to handle sexual assault complaints.<sup>89</sup> Regardless of the type of investigative process universities use in sexual assault cases, both informal and formal processes can lead to human rights complaints when universities fail to correctly handle sexual assault reports.<sup>90</sup> In response, Ontario and British Columbia recently enacted legislation requiring their universities to implement stand-alone sexual assault policies.

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83. See, e.g., Hasham, *supra* note 11 (highlighting criticism that York University faced in its response to reports of sexual assault).

84. Simona Chiose, *Justice on Campus*, GLOBE & MAIL, <http://www.theglobeandmail.com/news/national/education/canadian-universities-under-pressure-to-formalize-harassment-assaultpolicies/article29499302/> (last updated Nov. 12, 2017) [<https://perma.cc/F3A6-R7V3>].

85. *Id.*

86. *Id.* But see, e.g., Ward, *supra* note 15 (“Too often institutions care more about their reputations than about the safety of those on campus . . . .” (citing Canadian Federation of Students Chairperson Bilan Arte)).

87. Chiose, *supra* note 84; see also Ward, *supra* note 15 (indicating that students do not report because of the lack of university support).

88. See Laura Kane, *University of B.C. Unveils Draft Sexual Assault Policy in Wake of Complaints*, CBC NEWS (June 7, 2016) <http://www.cbc.ca/news/canada/british-columbia/ubc-sexual-assault-policy-1.3621262> [<https://perma.cc/U26S-E497>].

89. See Mathieu & Poisson, *supra* note 6 (describing human rights complaint filed by York University student following reported sexual assault); Chiose, *supra* note 84 (highlighting instances of inadequate informal and formal investigations leading to human rights complaints against universities).

90. See Chiose, *supra* note 84.

### 1. Ontario and British Columbia's University Sexual Assault Laws

The Ontario regulation, Sexual Violence at Colleges and Universities (Bill 132),<sup>91</sup> which amended the Ministry of Training, Colleges and Universities Act<sup>92</sup> and came into force on January 1, 2017, requires that a college or university in Ontario “shall have a sexual violence policy that addresses sexual violence involving students enrolled at the college or university . . . [and] sets out the process for how the college or university will respond to and address incidents and complaints of sexual violence involving students.”<sup>93</sup> Similarly, British Columbia's Sexual Violence and Misconduct Policy Act (Bill 23), requires that on or before May 18, 2017, each public post-secondary institution in British Columbia “must establish and implement a sexual misconduct policy that addresses sexual misconduct,<sup>94</sup> including sexual misconduct prevention and responses to sexual misconduct.”<sup>95</sup> The sexual misconduct policy must also set out procedures for making and responding to complaints and reports<sup>96</sup> of sexual misconduct involving students.<sup>97</sup>

Both laws also grant their respective Lieutenant Governor in Council broad rulemaking power.<sup>98</sup> The pertinent language illustrating the authority granted to Ontario and British Columbia's Lieutenant Governors in Council to make regulations is best summarized in Section 17 of Ontario's Ministry of Training, Colleges and Universities Act, which states

91. Sexual Violence at Colleges and Universities, O. Reg. 131/16 (Can. Ont.).

92. Ministry of Training, Colleges and Universities Act, R.S.O. 1990, c. M.19 (Can. Ont.).

93. *Id.*

94. The Act defines “sexual misconduct” to include the following:

- (a) sexual assault, (b) sexual exploitation, (c) sexual harassment, (d) stalking,
- (e) indecent exposure, (f) voyeurism, (g) the distribution of a sexually explicit photograph or video of a person to one or more persons other than the person in the photograph or video without the consent of the person in the photograph or video and with the intent to distress the person in the photograph or video,
- (h) the attempt to commit an act of sexual misconduct, and (i) the threat to commit an act of sexual misconduct.

Sexual Violence and Misconduct Policy Act, S.B.C. 2016, c. 23 (Can. B.C.).

95. *Id.*

96. A complaint is made by an individual who is either the victim or accused, and a report is made by someone other than the victim or accused. *Committee of the Whole House: Hearing on Bill 23 Sexual Violence and Misconduct Policy Act*, Official Report of the Debate of the Legislative Assembly, 5th Sess., 40th Parliament, at 13271, May 18, 2016 (Can. B.C.) (statement of Hon. Andrew Wilkinson, Minister of Advanced Education).

97. *See* Sexual Violence and Misconduct Policy Act, S.B.C. 2016, c. 23 (Can. B.C.).

98. *See* Ministry of Training, Colleges and Universities Act, R.S.O. 1990, c. M.19, s. 17(11) (Can. Ont.) (stating that the Ontario Lieutenant Governor in Council has the authority to make regulations “requiring that appropriate supports, services, and accommodation relating to sexual violence be provided to students affected by sexual violence”); *see also* Sexual Violence and Misconduct Policy Act, S.B.C. 2016, c. 23, s. 7 (Can. B.C.) (stating that the British Columbia Lieutenant Governor in Council can make regulations “respecting any matter for which regulations are contemplated by this Act”).

that the Lieutenant Governor in Council “may make regulations governing topics . . . or elements that shall be included in sexual violence policies” and regulations “requiring that appropriate supports, services and accommodation relating to sexual violence be provided to students affected by sexual violence.”<sup>99</sup>

#### D. *The U.S. Guidelines and a Non-Profit's Approach*

Ontario and British Columbia are not alone in their efforts to combat campus sexual assault. Recently, universities across the United States have been heavily criticized for failing to adequately respond to complaints and reports of sexual assault.<sup>100</sup> Like its northern neighbor, the United States also has legislation which prohibits sex discrimination at universities, referred to as Title IX.<sup>101</sup> Title IX's implementing regulations set forth mandatory requirements for universities, including adopting “procedures providing for prompt and equitable resolution” of sexual assault reports.<sup>102</sup> Unlike Ontario and British Columbia, however, the United States provides universities with regulatory guidance that “explains how the requirements of the Title IX regulations apply to situations involving sexual harassment of a student and outlines measures that schools should take to ensure compliance.”<sup>103</sup> The policy guidance is intended “to help [universities] adjust their own policies and practices to enhance civil rights protections for students and avoid committing civil rights violations.”<sup>104</sup> Among some of the areas covered by the regulatory guidance include informal and formal resolution procedures, investigative policies, privacy concerns, and due process rights.<sup>105</sup> For example,

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99. Ministry of Training, Colleges and Universities Act, R.S.O. 1990, c. M.19, s. 17(11)(b) (Can. Ont.).

100. See, e.g., Naomi Schaefer Riley, *How Colleges Muddy the Waters on Sexual-Assault Accusations*, N.Y. POST (Mar. 6, 2017), <http://nypost.com/2017/03/06/how-colleges-muddy-the-waters-on-sexual-assault-accusations/> (highlighting examples of universities' failed responses to sexual assault complaints) [<https://perma.cc/X745-EGHX>].

101. See generally Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972) (“No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

102. See 34 C.F.R. § 106.8(b) (1972).

103. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/6M92-QEZG>].

104. *Sex Discrimination*, U.S. DEP'T EDUC.: OFF. FOR C.R. (2017), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> (last visited Mar. 26, 2018) [<https://perma.cc/C6BZ-4WVZ>].

105. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 2011), <https://www2.ed.gov/about/offices/list/ocr/letters>

while universities are permitted to use an informal resolution process, the guidelines state that mediation is never appropriate in sexual assault cases.<sup>106</sup> What the regulatory guidance lacks, however, are concrete suggestions to increase campus sexual assault reporting.

### 1. A Non-Profit's Solution to Campus Sexual Assault Reporting<sup>107</sup>

In autumn of 2015, a sexual assault survivor named Jessica Ladd launched a web-based reporting system called Callisto at Pomona College and the University of San Francisco to help combat campus sexual assault.<sup>108</sup> Callisto allows campus sexual assault survivors to “create secure, time-stamped records of their attacks.”<sup>109</sup> After saving the record, survivors can either do nothing, update it at a later date, or they can choose to report it using two different options.<sup>110</sup> The first option is a matching system through which survivors can enter in the identity of the perpetrator and then wait to report until someone else has entered in the same identity.<sup>111</sup> This converts “disputes from ‘he said, she said’ to ‘he said, they said.’”<sup>112</sup> Alternatively, survivors can send the report directly to their school and can do so without the perpetrator's identity.<sup>113</sup> The Director of Campus Relationships for Callisto provided this summary:

Someone could report directly to the school about the incident, but not be ready to report their perpetrator to the matching, or they could be ready to report both the perpetrator and the incident to the school, but they want to backup someone else's story, so they put it in the matching so that if someone else has identified the same perp[etrator], they can support that person.<sup>114</sup>

Although Callisto is still in its infancy, preliminary data from its pilot

/colleague-201104.pdf [hereinafter DEAR COLLEAGUE] (providing examples of policies and procedures that comply with Title IX) [https://perma.cc/926W-PNQG].

106. *See id.* at 8.

107. The information and data contained in this section were accurate at the time of this writing. Current information, including updated Impact Reports, can be obtained by visiting Callisto's website at [www.projectcallisto.org](http://www.projectcallisto.org) or by contacting a Callisto representative.

108. *See* Ian Ayres, *Meet Callisto, the Tinder-Like Platform that Aims to Fight Sexual Assault*, WASH. POST (Oct. 9, 2015), [https://www.washingtonpost.com/opinions/using-game-theory-technology-to-fight-sexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699\\_story.html](https://www.washingtonpost.com/opinions/using-game-theory-technology-to-fight-sexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699_story.html) [https://perma.cc/PEV4-PH57]; Sara Ashley O'Brien, *She Wants her Rape Reporting Software to be Universal*, CNN (Mar. 31, 2017), <http://money.cnn.com/2017/03/31/technology/callisto-sexual-assault-software/index.html> [https://perma.cc/HC2M-FP9W].

109. *Id.*

110. Telephone Interview with Ashley Schwedt, Director of Campus Relationships, Callisto (Feb. 28, 2017) (on file with author) [hereinafter Telephone Interview with Ashley Schwedt].

111. *Id.*

112. Ayres, *supra* note 108.

113. Telephone Interview with Ashley Schwedt, *supra* note 110.

114. *Id.*

schools suggest it is on the path to success.<sup>115</sup> First, at universities with Callisto, students have reported that they are twice as satisfied with their reporting options, whether they have used Callisto or not.<sup>116</sup> More importantly, “every school [Callisto] has worked with has seen an increase in reporting [sexual assaults] up to a three-hundred-percent increase.”<sup>117</sup> It remains unclear if Callisto’s matching system has proven effective in either university or criminal investigations because the system is new and each partnered university owns its individual Callisto data,<sup>118</sup> but at least for Pomona College, “the matching functionality specifically addressed the reluctance of survivors to come forward.”<sup>119</sup> With campus sexual assault survivor-focused ideas, such as Callisto, Ontario and British Columbia, as well as universities around the world, can begin changing the university sexual assault landscape.

## II. ANALYSIS

Despite Ontario and British Columbia’s new laws requiring universities to implement sexual assault policies, it is likely that universities within their provinces will continue to violate the students’ right to be free from sex discrimination unless additional steps are taken. By revising their laws, Ontario and British Columbia can simultaneously increase sexual assault reports and convictions while minimizing university human rights violations. To accomplish this, Ontario and British Columbia’s Lieutenant Governors in Council should exercise their rulemaking powers to issue regulatory guidance for university sexual assault policies, create a web-based system like Callisto, and institute mandatory investigations on individuals accused of more than one assault.

### A. *The Issues with Bills 132 and 32*

At first glance, Ontario’s Bill 132 and British Columbia’s Bill 32 seem like a homerun; however, a close analysis reveals several shortcomings. Both Bills remain silent on what policies and processes universities should adopt when responding to incidents of sexual assault. Section 17 of Ontario’s Ministry of Training, Colleges and University Act, where

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115. See Eliza Milliken, *Becoming a Callisto Campus: What Our Current Partners Think You Should Know*, CALLISTO BLOG (Dec. 8, 2016), <http://blog.projectcallisto.org/author/millikeneliza/> (highlighting that students at Pomona College have more trust in the college too because of Callisto) [<https://perma.cc/F6S4-JDD5>].

116. Telephone Interview with Ashley Schwedt, *supra* note 110.

117. *Id.*

118. *Id.*

119. Milliken, *supra* note 115.

Bill 132 is codified, requires universities in Ontario to have a sexual assault policy.<sup>120</sup> Subsection 3 states that universities “shall have a sexual violence policy that . . . [inter alia,] sets out the process for how the college or university will respond to and address incidents and complaints of sexual violence involving students enrolled at the college or university . . . .”<sup>121</sup> Similarly, Section 2 of British Columbia’s Sexual Violence and Misconduct Policy Act also requires universities to implement sexual assault policies.<sup>122</sup> Subsection 1 necessitates that a policy “(a) addresses sexual misconduct, including sexual misconduct prevention and responses to sexual misconduct.”<sup>123</sup> It also requires the policy to state procedures for making and responding to a complaint or report of sexual misconduct involving a student.<sup>124</sup> Furthermore, both Bills require university administrators to consult with students when designing their sexual assault policies.<sup>125</sup>

Although both Bills require sexual assault policies, their language provides little guidance on what policies and processes are appropriate for universities to adopt. This provides university administrators with enormous discretion to decide what policies and processes to implement. Because of this, universities run the risk of adopting procedures that continue to adversely affect survivors, and ultimately violate their province’s Human Rights Code. Students’ concerns that administrations have too much discretion in investigative procedures will also likely carry forward if the Bills remain unchanged.<sup>126</sup> Without more specific guidance, universities in Ontario and British Columbia must carefully develop policies and procedures on their own in accordance with both the sexual assault policy requirement as well as the Human Rights Code.

This is concerning because the policies and procedures must address several complex areas including privacy, accommodation, and investigation. The recently enacted laws fail to address important privacy concerns. Specifically, the Bills are silent on “who the complaint or report [should] be made to . . . [as well as] what information will be shared with the parties” and the student body.<sup>127</sup> Although many sexual assault survivors do not report their assault due to lack of faith in the criminal justice

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120. See Ministry of Training, Colleges and Universities Act, R.S.O. 1990, c. M.19 s. 17 (Can. Ont.).

121. *Id.* at s. 17(3).

122. See Sexual Violence and Misconduct Policy Act, S.B.C. 2016, c. 23 s. 2 (Can. B.C.).

123. *Id.* at s. 2(1).

124. *Id.*

125. *Id.* at s. 4; Ministry of Training, Colleges and Universities Act, s. 17(4).

126. See Chiose, *supra* note 84.

127. See Lowes, *supra* note 19.

system,<sup>128</sup> many also cited shame as a reason for not reporting.<sup>129</sup> Shame is derived from the societal stigma around being sexually assaulted, in other words, victim blaming.<sup>130</sup> Because this stigma deters many survivors from reporting attacks, universities need policies and procedures to protect survivors' privacy interests. For example, in cases in which the survivor requests anonymity, Ontario and British Columbia could adopt the protocol used in the United States, which not only requires universities to take all reasonable steps to maintain the survivor's privacy while investigating the case, but mandates the school to inform the survivor that maintaining her secrecy will likely limit the university's response.<sup>131</sup> Likewise, the privacy interests of the accused must also be considered because false accusations of wrongdoing can derail a student's education and life.<sup>132</sup> Without guidance addressing concerns like these, whatever privacy policies universities ultimately adopt could be the subject of a sex discrimination human rights complaint.

Ontario and British Columbia should also issue guidance on appropriate accommodations and support services universities should provide to students when the school receives sexual assault complaints. This is particularly important because improper accommodations have led to human rights complaints alleging sex discrimination.<sup>133</sup> The appropriate guidance requires careful consideration because accommodations available to the survivor and accused will vary depending on the nature and circumstances of each case, which include, among other things, the students' class schedules. At a minimum, Ontario and British Columbia should require universities to inform survivors of their options to avoid the alleged perpetrators the moment survivors make a report. These options should include allowing students to change their academic and living situations at any point in the school year.<sup>134</sup> Without regulatory guidance, however, universities will be left to determine what accommodations are appropriate in complex situations, such as when the accused and accuser share the same course schedule but an investigation deadlocks in a "he said, she said" situation.

The regulations also require universities to develop policies regarding

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128. *See supra* Part I.A.1.

129. Paperny, *supra* note 35.

130. *See id.*; SEXUAL VIOLENCE FACTSHEET, *supra* note 34 (discussing victim blaming).

131. *See* DEAR COLLEAGUE, *supra* note 105, at 5.

132. *See e.g.*, Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [<https://perma.cc/4J5B-LPLN>].

133. *See supra* Introduction.

134. *See* DEAR COLLEAGUE, *supra* note 105, at 15.

the investigation of sexual assault complaints.<sup>135</sup> Among other things, universities must develop investigative policies and processes for “determining whether to investigate an incident or complaint.”<sup>136</sup> This requires a consideration of not only the appropriate process, but also who will be making the decision, the institutional and legal effects of the decision, the finality of the decision, and how the decision is communicated to the parties.<sup>137</sup> All of these considerations must ensure that neither the accused nor accuser’s human rights are violated.

Issuing regulatory guidance to supplement Ontario and British Columbia’s new university sexual assault legislation would benefit both universities and students. Providing guidance to universities should help them adopt policies and procedures in accordance with their respective human rights codes, especially regarding complex areas such as privacy, accommodation, and investigation.<sup>138</sup> Students would benefit from regulatory guidance because it would help dispel any confusion students may have regarding who they should contact for support and what he or she could expect.<sup>139</sup> The challenge that Lieutenant Governors in Council face, however, is issuing regulatory guidance that is well-suited for every university within their respective provenances, regardless of the size and structure of the school and its available resources. Fortunately, by exercising their rulemaking powers, Ontario and British Columbia’s Lieutenant Governors in Council can not only overcome this obstacle by adopting and issuing similar guidance used in the United States,<sup>140</sup> but the Governors can also tackle another challenge: the low sexual assault reporting and conviction rates.

### B. *A Provincial Sexual Assault Reporting System*

In addition to issuing regulatory guidance on policies and procedures universities should adopt, Ontario and British Columbia’s Lieutenant Governors in Council should create a government reporting system modeled after Callisto.<sup>141</sup> Specifically, the Lieutenant Governors in Council

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135. See Ministry of Training, Colleges and Universities Act, R.S.O. 1990, c. M.19 s. 17 (Can. Ont.); Sexual Violence and Misconduct Policy Act, S.B.C. 2016, c. 23 s. 2 (Can. B.C.).

136. See Andrea Lowes, *New Regulation for Colleges and Universities Under Bill 132: Some Answers, But More Questions*, RUBIN THOMLINSON BLOG, (May 26, 2016), <https://www.rubinthomlinson.com/new-regulation-for-colleges-and-universities-under-bill-132-some-answers-but-more-questions/> [https://perma.cc/2ZFF-2JQB].

137. See *id.*

138. *Id.*

139. See generally DEAR COLLEAGUE, *supra* note 105 (containing multiple requirements for recipients to provide contact information to students).

140. See *supra* Part I.D.

141. See *supra* Part I.D.1.

should create a province-wide web-based reporting system that allows sexual assault survivors to document their attacks with the option to either do nothing, immediately submit the report to their school, or submit the identity of their attacker to a matching system.<sup>142</sup> Submitting the identity of their assailant to the matching system will not automatically report the incident to the university or law enforcement; rather, universities and law enforcement will only receive a report once another person has reported the same assailant.<sup>143</sup> In addition to the documenting and reporting options, the system should also house support service information for survivors who need physical and mental health care.<sup>144</sup> For example, the online system could include contact information for local Sexual Assault Nurse Examiners (SANE), who are nurses not only specifically trained to treat sexual assault survivors, but who are also skilled in collecting, documenting, and preserving physical evidence of the assault.<sup>145</sup>

A government-owned reporting system like Callisto provides several benefits over an individual school-based system. First, the data would help increase transparency regarding the number of assaults reported at any specific school. Transparent data will help deter universities from potentially burying reports, as well as assist students in selecting which university to attend. This data could also be used as evidence to hold schools accountable should any school fail to adequately respond to reports. Additionally, the data can be used to evaluate the effectiveness of potential sexual assault awareness programs as well as any trends indicating times or places where campus sexual assaults are more likely to occur. For example, Callisto's preliminary data highlights an increase in website traffic immediately before and after break periods, especially around Halloween.<sup>146</sup> Universities can then use this information to focus their sexual assault awareness programs on these trends. Finally, a matching system owned by the government would be more effective than a school-owned system because the reporting data would follow any student who sexually assaults someone and subsequently transfers to another school within the province.

Creating a comprehensive reporting system will help solve the sexual assault reporting crisis, namely the severe underreporting of sexual violence incidents.<sup>147</sup> A web-based documenting system allows survivors to

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142. See Telephone Interview with Ashley Schwedt, *supra* note 110.

143. *Id.*

144. *Id.*

145. See Phillip Bulman, *Increasing Sexual Assault Prosecution Rates*, 264 NAT'L INST. JUST. J. 14, 16 (2009) <https://www.ncjrs.gov/pdffiles1/nij/228384.pdf> [<https://perma.cc/QJ6V-8VWL>].

146. See Telephone Interview with Ashley Schwedt, *supra* note 110.

147. CALLISTO, *supra* note 28 ("Over 85% of college survivors know their assailant, and less than 10% report to their school or the police.").

document their attack at a time and place of their choosing without having to speak with someone.<sup>148</sup> This system does not require survivors to immediately report their attack, but whenever they do, they will have a time-stamped document recounting exactly what has happened to them. The ability to immediately report to an online system also has the benefit of fact recollection while fresh in the survivor's mind. Callisto reports that around half of the students using the system save their reports without taking any further action.<sup>149</sup> An online reporting system like Callisto will help empower the many sexual assault survivors who choose not to report the attack because they feel powerless or ashamed.<sup>150</sup> Online reporting also saves the survivor from the trauma of having to relive the nightmare in real time when they can present the printout to university administrators or law enforcement.<sup>151</sup>

If preliminary data from Callisto's pilot universities hold true, Ontario and British Columbia's universities, as well as law enforcement, could see an increase in reporting sexual assaults of up to three-hundred-percent.<sup>152</sup> This is partly because of the ease of the online system, and partly because when students see their school taking sexual assault seriously to support survivors, they are more comfortable asking for help.<sup>153</sup> This explains why students with Callisto on their campus are also twice as likely to be satisfied with their reporting options.<sup>154</sup> When students are satisfied with their reporting options, Ontario and British Columbia should also see a decrease in human rights complaints against their universities.

Opponents of a web-based system might view readily available reporting as an opportunity for individuals to fabricate and submit false reports of sexual assault. While possible, this argument fails for two reasons. First, women do not often lie or falsely accuse someone of sexual assault.<sup>155</sup> Several studies have indicated that false reports comprise around two percent of reported sexual assaults.<sup>156</sup> More importantly, it has been

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148. *Id.*

149. See Telephone Interview with Ashley Schwedt, *supra* note 110 ("At any given time, around half of the people who are using Callisto to do something are just saving their record and not choosing to do anything else at that time.").

150. See Paperny, *supra* note 35 (noting the primary reasons individuals do not report sexual assaults).

151. See Telephone Interview with Ashley Schwedt, *supra* note 110.

152. See *id.*

153. See *id.*

154. See *id.*

155. *Myths and Facts*, ROGER WILLIAMS U., <http://rwu.edu/campus-life/health-counseling/counseling-center/sexual-assault/rape-myths-and-fac> (last visited Mar. 26, 2018) [<https://perma.cc/ATS5-Z3ST>].

156. *Id.*; see also KIMBERLY A. LONGSWAY ET AL., NAT'L CTR. FOR PROSECUTION OF VIOLENCE AGAINST WOMEN, FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 2 (2009),

found that the least commonly reported sexual assault is one where the survivor knows their attacker.<sup>157</sup> However, even if false reports result in charges, the accused, through discovery, would be able to obtain all the reports submitted by his accusers, including those against him and any other person the accuser has previously implicated, thus increasing the likelihood of overcoming the charges.

In addition to an increase in reporting, Ontario and British Columbia are likely to see an increase in sexual assault convictions. Although no data are yet available on Callisto's direct impact on sexual assault conviction rates, research suggest that conviction rates increase when cases are backed by sufficient evidence.<sup>158</sup> Because the Canadian government must prove a sexual assault case beyond a reasonable doubt,<sup>159</sup> implementing a documenting and matching system like Callisto can help prosecutors meet this burden.

When survivors document an attack on the web-based system, they can do so at any time, whether it be the night of the attack, or the following month.<sup>160</sup> However, survivors should be encouraged to document their attacks as soon as possible while their memory is still fresh.<sup>161</sup> Once survivors have documented their attack, they may then use that as evidence later. The real opportunity to increase sexual assault conviction rates, however, comes from the matching system.

With the matching system, survivors' documented reports sit in an escrow-like system until someone else has made a report and submitted the identity of the same assailant.<sup>162</sup> When a match is made, both reports are sent to the authorities for investigation.<sup>163</sup> Although no physical evidence may be available, the traditional "he said, she said" case transforms into a "he said, they said" case.<sup>164</sup> Despite the lack of data indicating the effectiveness of the matching system, it is reasonable to infer that when a match is made and charges are filed, many of these cases will result in conviction, especially with the admission of additional reports as similar fact evidence. This is also likely because of the reality that "an estimated

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[http://www.ndaa.org/pdf/the\\_voice\\_vol\\_3\\_no\\_1\\_2009.pdf](http://www.ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf) ("[E]stimates for the percentage of false reports begin to converge around 2–8%.") [<https://perma.cc/LQ25-EL52>].

157. See *Myths and Facts*, *supra* note 155; LONGSWAY, *supra* note 156, at 7.

158. Bulman, *supra* note 145, at 16; see also *Sexual Assault Evidence*, *supra* note 41.

159. See generally *R. v. Lifchus*, [1997] 3 S.C.R. 320, 332 (Can.) (explaining that the requisite standard of proof in a criminal case is beyond a reasonable doubt, and a reasonable doubt is defined as a "doubt based on reason and common sense, which must logically be derived from the evidence or absence of evidence").

160. See Telephone Interview with Ashley Schwedt, *supra* note 110.

161. *Id.*

162. Ayres, *supra* note 108.

163. *Id.*

164. *Id.*

ninety-percent of assaults are committed by repeat perpetrators.”<sup>165</sup> Additionally, prosecutors can further bolster their case beyond the reporting and matching system when survivors utilize the local support services outlined on the system.<sup>166</sup>

Despite all the benefits Ontario and British Columbia could realize by creating a government sexual assault reporting system like Callisto, there are two realities of reporting sexual assault cases that cannot be solved with this system: long court cases and public attention.<sup>167</sup> Although no solutions are currently available to address these shortcomings, experts have expressed the urgency for reform.<sup>168</sup> Until then, universities and the general public can focus on what is possible now: shifting the blame to perpetrators rather than the victim.<sup>169</sup>

#### CONCLUSION

Ontario and British Columbia have begun to take university campus sexual assault seriously by enacting legislation requiring universities within their provinces to implement stand-alone sexual assault policies. Without revision, however, universities run the risk of enacting policies and procedures that discriminate against sexual assault survivors and ultimately violate their human rights. To minimize this risk, as well as to further combat campus sexual assault, Ontario and British Columbia's Lieutenant Governors in Council should exercise their rulemaking powers to modify Bill 132 and Bill 32, respectively, and issue regulatory guidance addressing appropriate policies and procedures universities should adopt when responding to reports of sexual assault. Such changes would not only bring uniformity and clarity to universities and their students, but such policies would also promote relationships with external support organizations and law enforcement.

Ontario and British Columbia should also create a province-wide web-based reporting system that allows sexual assault survivors to document their attacks with the option to either do nothing, immediately submit the report to their school, or submit the identity of their attacker to a matching system. The matching system should not automatically report the incident to the university or law enforcement; rather, universities and law enforcement should only receive a report once another person has

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165. CALLISTO, *supra* note 28.

166. *See* Bulman, *supra* note 145, at 16.

167. *See* Cain, *supra* note 31.

168. *See, e.g.*, Laura Wright, *Sexual Assault Trials: Experts Call for Alternatives to Canada's Current Court System*, CBC NEWS (Feb. 28, 2016), <http://www.cbc.ca/news/canada/alternatives-to-sexual-assault-trials-1.3451140> (highlighting various suggestions to reform the court system) [<https://perma.cc/LVH8-DFPZ>].

169. *See* SEXUAL VIOLENCE FACTSHEET, *supra* note 14, at 3.

reported the same assailant. In its entirety, the web-based system will not only foster the frequency of sexual assault reporting by providing survivors with the ability to privately document the attack and perpetrator from anywhere, but the percentage of convictions per reports filed will also increase. Issuing regulatory guidance on policies as well as creating a provincial web-based reporting platform are necessary to effectively combat campus sexual assault and prove to survivors like Mandi Gray that Ontario and British Columbia support them.