Group Assault or Swarming Discussion Paper 2000

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I. INTRODUCTION

The topic of group assault or "swarmings" has received increased attention from the media and the public recently. There is particular concern about the perceived increase in frequency and brutality of these types of assaults, as well as their senseless and random nature. While the most widely reported assaults involve youth attacks on other youths, with the resulting focus on reforming the Young Offenders Act, attacks have also been committed by and upon adults. Recently, there has been the intimation that the criminal justice system could do more to deter others from participating in this kind of criminal activity and to more harshly punish those who do.

This paper will briefly set out the relevant social and legal context and raise several questions related to possible reform of the Criminal Code.[1]

II. SOCIAL AND LEGAL CONTEXT

In Canada, the concerns over group assaults or swarmings first appeared in the late 1980s with the emergence of youth gangs/groups in major urban centers. The proliferation of gangs during the 1990s in other Canadian communities has lead to an increased reporting of gang/group related assaults.[2] Swarmings, while one of the tactics used, are not restricted to gangs and occur in the absence of the gang structure. Many reported swarmings are characterized as spontaneous, unorganized or loosely organized attacks. Sometimes racism, prejudice or hate of the victim and the group to which he or she belongs may be motivating factors (e.g., gay-bashing). Other times, there appears to be no motivation at all for the attack.

A. What is a "swarming"?

Different courts have described swarming as, or applied the term to a variety of different situations including:

i. Where victims are surrounded and their clothing or money torn from them by young gangs;[3]

ii. A group attacking an individual for the purpose of stealing something from that individual;[4]

iii. A group attacking an individual or group on account of a prior dispute;[5]

iv. An attack on an innocent stranger acting as a good Samaritan;[6]

v. Young persons demanding money or items of clothing and then beating the individual following refusal;[7]

vi. An unprovoked attack, on a public street, by a group.[8]

Although there may be a fair amount of overlap between these types of situations, there does not appear to be a consistent definition of swarming to date. Certain factors do not seem to be necessary ingredients of the phenomenon (e.g. theft of personal property). Nevertheless, certain basic common features can be identified, including (1) actions by a group (2) against one or several individuals (3) incorporating violence, harassment, intimidation and/or the potential for overwhelming force or pressure.

B. Incidents

While reported swarming incidents attract heavy media coverage, statistical information is limited in Canada. Domestically, statistics have been gathered on the basis of age, gender and crime committed, rather than group involvement.[9] However, one review of Metro Toronto Police statistics does suggest 6.7 swarmings a day in

Toronto in 1999.[10]

In the United States, there has been wider statistical analysis of group assaults. According to the U.S. Department of Justice, Bureau of Justice Statistics (BJS), the number of multiple offender victimizations in 1997 was 1,757,460.[11] Of these, 79% were assaults (50.8% simple and 28.2% aggravated); 19.8% were robberies (13.6% completed and 6.2% uncompleted); and 1.2% were rapes or sexual assaults.

Perhaps unsurprisingly, perpetrators of group violence tend to be confined to specific age groups: 46.4% of these crimes were committed by offenders all between the ages of 12-20, 10.6% by those all aged 21-29; 7.9% by those all aged 30 or over; 0.4% by those all under age 12; 27.6% of those of mixed ages; and 7.1% by those of unknown age or not available. This tendency of proximity of age amongst offenders appears to be reflected in the Canadian experience.

Group violence is largely perpetrated by single race groups; in the U.S. 82.3% of multiple offender victimizations were perpetrated by single race groups.[12]

Despite the absence of statistical evidence in Canada, some courts have taken judicial notice of increased incidents of swarmings.[13] For instance, in R. v. J.M.,[14] the
B.C. Provincial Court found that "this type of 'gang mentality' on public transport or at multi or single transit exchanges such as Skytrain stations is becoming so common it is frightening. One only has to sit in these courts but for a short time to see this offence on a regular basis."

C. Public opinion

Regardless of whether there is an actual increase in these types of attacks in recent years or not, what is indisputable is that there is a heightened public awareness and concern over the issue of swarmings. Recent high profile cases such as those involving Reena Virk, Dmitri "Matti" Baranovski and Jonathan Wamback have received significant media attention. The brutal and horrifying nature of some of these attacks generate fierce public outrage which is sometimes, but not always, accompanied by criticisms of various aspects of the criminal justice system.

Perhaps the most detestable aspect of these crimes is the unfairness of a large-scale surprise attack on a helpless and unsuspecting individual who has absolutely no chance at defending him or herself. Often the public is most upset about the meaninglessness and randomness of the brutality. When theft is a motivating factor, the public is generally more disturbed with the petty nature of the object toward which the attack is directed.

Because many high profile cases involve youths, the perceived remedy has often been called for from other areas of the criminal justice system – particularly reforms to the Young Offenders Act that would remove "protections" for young persons charged with these types of crimes such as publication bans and transfer to adult court.[15] Any youth-driven reform would require exploration of a variety of special concerns and will not be addressed in the context of this paper.

In addition to taking notice of the increased frequency of swarming attacks, the judiciary is also amenable to taking notice of the increased public concern about group assaults. To cite one example, in R. v. Morris, the Ontario Court of Justice (General Division) wrote that "…there is widespread public concern in Toronto and in other large metropolitan areas throughout Canada respecting street violence, random violence and as well gang violence."[16]

III. CURRENT LEGAL RESPONSES

The public perception may be that group assaults are increasing in frequency and severity and that the criminal justice system should do more to address the problem. In fact group violence is currently dealt with directly and indirectly in various ways by the criminal justice process.

A.Existing offences: evidentiary and substantive issues

The Criminal Code has multiple offences capable of applying to group violence depending on the precise circumstances. These include, amongst others, assault (and variations), sexual assault (and variations), manslaughter, murder, robbery, extortion, impeding attempt to save life, criminal harassment, uttering threats, intimidation, and inciting hatred. Most swarming situations appear to result in a charge of some degree of assault or homicide depending on the degree of injury inflicted, or robbery where theft is involved.

The public may perceive that the group nature of an offence could pose either practical or theoretical difficulties for a court in assigning blame to an individual. A review of the case law relating to "swarming", "group assault" and "gang assault" does not indicate that it is more difficult to prosecute or secure a conviction in the case of group assault as compared to single offender attacks. In actual fact, the courts appear willing to accept evidence of group assaults, and to allocate responsibility to members of the group individually for their respective actions.[17]

Other common law jurisdictions seem equally capable of assigning culpability to individuals involved in group crime. In the United Kingdom for example, the England and Wales Court of Appeal held in R. v. Uddin [18] that,

- In truth each in committing his individual offence assisted and encouraged the others in committing their individual offences. They were at the same time principals and secondary parties.
- Because it was often a matter of chance whether one or other of them inflicted a fatal injury, the law attributed responsibility for the acts done by one to all of them, unless one of the attackers completely departed from the concerted actions of the others and in so doing caused the victim's death.

Another possible problem with prosecuting swarming type offences is the potential difficulty of identifying the assailants, particularly in cases where the victim is alone and severely beaten. The absence of evidence has rarely arisen as a problem.[19]

There may also be concerns that some members of the attacking group may escape liability because of insufficient evidence of their direct commission of assault. Such concerns can generally be countered by reference to subsection 21(1) of the Criminal Code which holds responsible people who, although they do not personally commit the offence, aid or abet another person to commit it.[20] Most participants in a group assault who do not actually apply force personally could be charged as aidors or abettors under subsection 21(1). The standard for such a charge is the leading case of R. v. Dunlop and Sylvester,[21] where Dickson J. (as he was then) held that,

- Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch on enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.
- …Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement.[22]

In R. v. McQuaid,[23] while it was not required to base culpability on subsection 21(1), the trial judge explicitly stated that he would have done so if necessary, writing,

- While I am convinced beyond a reasonable doubt as to the guilt of these 6 accused on all counts based on the testimony of their accomplice, Danny Clayton, were it necessary, I would also be prepared to say that each of the accused and Danny Clayton were parties to the aggravated assault of Darren Watts as charged on the Indictment, within the meaning of s. 21(1). I am satisfied the men in the circle were all there for the same reasons: to kick or beat Darren Watts; or help in administering the beating; or encourage it; or stand -- as observed by others --

shoulder to shoulder so as to form a circle thereby ensnaring Darren Watts and preventing him from getting away or stopping others from coming to his rescue.[24]

Solidarity, reliance and trust are important in gangs and certain peer groups. In some circumstances, violations of group solidarity or insubordination are met with physical reprisals or threats. This reality might potentially suggest the availability of the defence of compulsion for group members who participate in violence out of fear for their own safety.[25] In actual fact, the statutory defence under section 17 of the Criminal Code foresees such situations and expressly disallows the defence both for most offences of serious personal violence and where the person is a party to "a conspiracy or association whereby the person is subject to compulsion". It should be noted that other aspects of the defence (i.e. the requirements of immediacy of threats and presence of the person threatening) have been challenged as unconstitutional and the provision is currently under appeal to the Supreme Court.[26]

It should also be noted that the statutory defence does not apply in the case of aidors and abettors.[27] In such circumstances, the common law defence of duress, which is similar to the statutory defence in section 17, is available. At common law, duress is available for all offences. However, the proviso that the defence is unavailable to a party to a conspiracy whereby he or she was subject to compulsion also exists at common law.[28]

The combined effect of exclusion of most violent offences and excluding the defence where the accused is a "party to a conspiracy or association whereby the person is subject to compulsion" generally ensures that the defence is not available in the case of swarmings.

B. The sentencing process

For the offender and the victim and their family, as well as for society at large, the effectiveness of the criminal justice process is measured as much by reference to the terms of a sentence as to the outcome of a trial.

The serious nature of swarmings is highly relevant to the sentencing process. Some may believe that an individual's level of responsibility is reduced if there are others who have also participated, in essence that each individual is only held responsible and punished for their individual acts regardless of the totality of harm inflicted.

In fact, the opposite is true. It is well established that multiple offender assault is a serious aggravating circumstance for sentencing purposes. Appellate courts throughout Canada have approved of such determinations.[29] Similar practice is followed in other common law jurisdictions.[30]

In R. v. Thambian,[31] the sentencing judge held,

> I am entitled to take into account that you, on your own behalf, sir, acted as a member of a group. In my view, the law is quite clear that that is an aggravating factor… the principle to which I am directing myself is that persons working in a gang and inflicting violence on others are to be viewed as having committed a more serious offence than if each was not operating in a gang.

The courts clearly sentence each offender for their own actions and not the actions of others. However, the courts do have regard to the relevant consequences of the accused's actions and all of the circumstances of the attack; where the accused's own participation has the effect of encouraging others, thereby aggravating the assault on the victim, the accused must bear responsibility for that aspect of his or her actions as well. For example, in R. v. MacIntyre,[32] the Alberta Court of Appeal held,

> …when individuals act as part of a group or gang and perpetrate criminal acts, this gang-like feature of their activities does not permit each individual to offer his individual involvement alone, ignoring for sentencing purposes, the seriousness of their collective actions. When a person acts in concert with other members of a group or gang to victimize a single victim, that person must accept the consequences, which flow from this group action. Each member of the group must be taken to know that by committing individual assaults upon a victim, he advances, and even encourages, the violence of the others. The victim hardly delineates.

It is especially noteworthy that the aggravating nature of group violence applies not only in relation to adults, but also in relation to young persons.

It has long been recognized that young people tend to commit crimes in groups.[33] A group assault is in principle no less aggravating because it was committed by a group of youths than by a group of adults. Although special principles govern the determination of sentence in respect of young persons by virtue of the Young Offenders Act, the courts do approach group assault by young persons as more serious than an assault by a single young person. For example, the Manitoba Court of Appeal held, in this regard, that "although deterrence to others is less of a goal in the case of a young offender, it remains a factor in a group crime such as this. Extremely violent behaviour by groups of youth simply cannot be tolerated".[34]

Although as a general rule, group perpetrated violence is an aggravating factor on sentencing, it should be noted that in some cases, aspects related to the group nature of the crime have been held to be mitigating circumstances for sentencing purposes. Such relevant factors have included: participation as a follower,[35] the absence of planning of the attack,[36] the length of membership in or association with the group or gang,[37] and subsequent dissociation from the group or gang.[38]

Also of note, the principle that group action is more serious than the same violence committed by one person has been codified in respect of the offence of sexual assault. Sexual assault is elevated to sexual assault causing bodily harm if committed by more than one person.[39]

IV. WHAT SHOULD BE DONE?

A. Limitations

A number of parameters must be kept in mind throughout the discussion of options. First, any possible discussion about amending the Criminal Code to address swarmings must obviously respect the constraints set by the Charter, in particular those found in section 7 (fundamental justice), section 11(d) (presumption of innocence) and section 12 (cruel and unusual punishment). This discussion paper will not canvass all possible Charter difficulties related to the options.

Any legislative remedy would also have to delineate the boundaries of the conduct it seeks to address. Providing rational and clear definitions could prove to be a difficult task. The terms most likely to be used to categorize the activity would include "groups" and/or "gangs". Gang and group are not synonymous; gang has negative connotations that group does not, and also implies greater familiarity between its members. A legislative remedy would have to reflect a policy choice in this regard. A policy choice would also have to be made in terms of the number of victims or the ratio of attackers to victims. For instance, should an attack by a large group on a slightly smaller group qualify as a swarming?[40] At what point does the ratio become one which involves excessive unfair advantage? How might that be described in legislative language?

Further, both group and gang are vague and imprecise terms. Even if there were clear and convincing reasons for focusing on one over the other, there may be linguistic difficulties in delineated that focus. For example, how many people make up a group? Are two people sufficient? What degree of familiarity between group members is required? What defines a gang?

B.Possible avenues of reform

Much of the drive toward a legislative response to swarmings stems from the perception that those who participate in this type of activity are not held responsible for their conduct, "get off" too lightly or benefit from legal "technicalities".

Several possible ways to amend the Criminal Code to deal with perceived problems related to swarmings come easily to mind: (1) creation of a new substantive offence;

(2) addition of group assault to the definition of aggravated assault; (3) explicit reference to group activity as an aggravated circumstance on sentencing.

The creation of a new substantive offence would effectively reflect society's revulsion for this type of activity. However, any proposed offence would likely build on the existing offence of assault and include additional elements such as membership in a group or the presence of multiple offenders. The addition of elements, beyond those required for proof of assault, arguably makes successful prosecution more difficult, rather than easier. The prosecution would have to prove beyond a reasonable doubt each additional element, notwithstanding that a case for assault would have been complete. It may well be that the prosecution would opt to prove the simpler charge of assault, rather than expending additional energy to end up with the same number of convictions.

This has in fact been the experience in the United States, in relation to gang-related legislation. One review noted:

> In several states that have passed comprehensive gang statutes, prosecutors indicate that they are not using the statutes extensively. Under special statutes, it is often complicated and time consuming to prove criminal gang membership or a gang-related motive. Prosecutors often find they have the same or better results with the standard criminal codes related to robbery, homicide, and drug trafficking.[41]

In creating a new offence, great care would also have to be taken to avoid extending liability to a person solely on the basis of their membership in a group or their mere presence at the scene. To penalize a person who commits no act and does not assist or encourage another person to commit a crime may create a form of "guilt by association" which is generally shunned in the criminal law. It arguably contravenes the Charter on the ground that it creates an offence in the absence of personal fault, or even action, by the accused. Likewise, it can be said to violate the common law requirement for actus reus.

Either of sections 267 or 268 of the Criminal Code could be amended to deem participation in a group assault to be an assault causing bodily harm or an aggravated assault thus raising the maximum penalty to 10 or 14 years respectively. This would be akin to paragraph 272(1)(d) which makes a sexual assault participated in by more than one person a more serious offence than simple sexual assault and provides a higher penalty.

Such an amendment would effectively heighten the severity of the offence and its deterrent value. However, such a move raises other questions for consideration. The sentencing framework for sexual assault is not identical to that for assault. [42] The Criminal Code unambiguously treats sexual assault as a more serious offence. This type of amendment would have to carefully address the extent to which group assault can and should be dealt with similarly to group sexual assault.

Further, deeming group assault to be more serious than simple assault would amount to only a partial response to those concerns with swarming incidents. Such a change would fail to address the prosecution of swarmings that result in death (and are prosecuted as manslaughter or murder) or swarmings that are prosecuted as robberies.

Another option is to incorporate group violence as an aggravating factor into the Criminal Code. This is not unprecedented [43] and does have symbolic value as a means of reflecting increased concern with a particular activity. However, group involvement is currently routinely dealt with in sentencing on a case by case basis, and any such an amendment would be little more than a restatement of the existing common law. Codification of common law aggravating factors should arguably be used sparingly to remedy perceived problems, or the Criminal Code risks becoming overly particularized and unwieldy.

V. QUESTIONS FOR DISCUSSION

The cursory canvassing of the issues surrounding group assault or swarmings outlines a potentially new area of criminal law and raises a number of points for discussion on which we are seeking your views.

1. Do current legal mechanisms adequately allow for prosecution of swarmings? If not, what gaps or deficiencies exist?

2. If prohibitory mechanisms are sufficient, are the sentencing provisions sufficiently capable of punishing offenders, and deterring and denouncing swarmings?

3. If improvements can be made, what option(s) do you prefer? Why?

4. Precisely what is the nature of the conduct any initiative should seek to address? Should the focus be broadly on group violence or more narrowly tailored to address gang violence? How might either of these terms be defined?

5. Are all crimes more serious if committed by more than one person? In other words, should any new mechanism address group crimes generally, or only crimes of violence? Are some crimes particularly worthy of condemnation due to the group nature (e.g. assault and sexual assault)?

6. How should any changes impact on (or avoid impacting on) provisions in the Criminal Code which already take the group nature of the offence into account (e.g., aggravated sexual assault is found where more than one person participates in the assault)?

7. In your view, if there is a problem, is it primarily one related to young persons? Or is it appropriate for the Criminal Code to be amended to address the problem?

8. What other options for addressing this problem exist?

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[1] This paper will not address possible non-legislative or non-criminal justice mechanisms for dealing with this type of behaviour, such as education legislation and vicarious civil liability, nor will it deal with exclusively youth-oriented reforms.

[2] This observation is supported by similar comments made in Youth Violence and Youth Gangs: Responding to Community Concerns, a 1994 report of Solicitor General of Canada found at http://www.sgc.gc.ca/epub/pol/e199456/e199456.htm. The same observation was made by Michelle Shephard in "Teen gangs: fear in our schools" a special report in The Toronto Star. October 24, 1998.

[3] R. v. J.J.M., [1993] 2 S.C.R. 421.

[4] R. v. R.K.E., [1996] M.J. No. 14 (Man. C.A.).

[5] R. v. H.M., [1993] O.J. No. 3244 (Prov. Div.).

[6] R. v. Cormier, [1994] N.S.J. No. 150 (N.S. C.A.).

[7] R. v. A.S.-C.Y., [1997] B.C.J. No. 1906 (B.C. Prov. Ct.).

[8] R. v. McQuaid, [1997] N.S.J. No. 21 (N.S. C.A.).

[9] Information on gang activity is limited to organized crime such as biker gangs and other criminal organizations. The Canadian Centre for Justice Statistics does not collect information on group assaults. Statistics are coded by criminal offence, not elements of the crime.

[10] Lamberti, Rob. "Swarming heists fall" in The Toronto Sun, February 23, 2000 found at http://www.canoe.ca/TorontoNews/ts.ts-02-23-0008.html. Mr. Lamberti reports that from 1998 to 1999, "police statistics showed the number of swarmings – defined as street robberies involving three or more bandits – dropped slightly to 2,450 from 2,491." When the Metropolitan Toronto Police were contacted to confirm this information,

an official indicated that these types of statistics were not kept.

[11] U.S. Department of Justice, Bureau of Justice Statistics, Criminal Victimization in the United States, 1997, NCJ-174446 (Washington, D.C.: U.S. Department of Justice, 2000), Table 45. Also found in Maguire, Kathleen and Pastore, Ann L. eds. (1998) Sourcebook of Criminal Justice Statistics [Online]. Available: http://www.albany.edu/sourcebook page 186 (table 3.27).

[12] Maguire, Kathleen and Ann L. Pastore, eds. (1998) Sourcebook of Criminal Justice Statistics. Available: http://www.albany.edu/sourcebook page 187, Table 3.28.

[13] The Nova Scotia Court of Appeal has held, "[j]udicial notice can be taken of the increased activity of gangs of youths "swarming" innocent citizens on the streets of Halifax-Dartmouth over the last several years." in R. v. Cormier, supra note 6, paragraph 37.

[14] R. v. J.M., [1995] B.C.J. No. 2862 (B.C. Prov. Ct.). See also R. v. Cormier, supra, note 6; R. v. A.S.-C.Y., supra, note 7.

[15] The Wamback petition drive, currently standing at over 900,000 signatures, inter alia calls for ""Gang member" status (organized crime) to be applied to allow for additional incarceration for gang crimes including swarming" (taken from the Wamback petition "Letter of Concern to the Prime Minister and the Minister of Justice" found at http://www.jonathanwamback.com/writtenletter.html).

[16] [1994] O.J. No. 2343 (Ont. Ct. of Justice – G.D.) at paragraph 13.

[17] See R. v. A.S.-C.Y., supra, note 7; R. v. H.M., supra, note 5; R. v. J.C., [1998] B.C.J. No. 969 (B.C. Youth Ct.); R. v. J.M., supra, note 14; R. v. Le, [1992] A.J. No. 819 (Alta. C.A.); R. v. McQuaid, [1996] N.S.J. No. 91 (N.S. Sup. Ct.); R. v. Sharpe, [1999] O.J. No. 5251 (Ont. Sup. Ct.); R. v. Miloszewski, [1999] B.C.J. No. 2710 (B.C. Prov. Ct.); and R. v. Thambian, [1993] O.J. No. 3285 (Ont. Gen. Div.).

[18] [1998] T.N.L.R. No. 232.

[19] However, in R. v. N.D. [1993] O.J. No. 2139 (Ont. C.A.) it appears that a conviction was overturned based on the absence of evidence linking the three accused to the gang and of their participation in the assault.

[20] Subsection 21(1) reads: Every one is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it.

[21] [1979] 2 S.C.R. 881; 47 C.C.C. (2d) 93 cited to C.C.C..

[22] Ibid, at 106 and 110.

[23] [1996] N.S.J. No. 81 (N.S. Sup. Ct.).

[24] Ibid, at para 18.

[25] The defence of compulsion is found in section 17 which reads: A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

[26] R. v. Langlois (1993), 80 C.C.C. (3d) 28 (Que. C.A.) and in R. v. Ruzic (1998), 128 C.C.C. (3d) 97 (Ont. C.A.), which is currently on appeal to the Supreme Court of Canada.

[27] R. v. Hibbert, [1995] 2 S.C.R. 973; R. v. Paquette, [1977] 2 S.C.R. 189.

[28] R. v. Fitzpatrick [1977] N.I. 20 (Northern Ireland Criminal Court of Appeal) cited with approval in R. v. Logan (1988), 46 C.C.C. (3d) 354 (Ont. C.A.); affirmed on other grounds [1990] 2 S.C.R. 731.

[29] See e.g. R. v. MacIntyre (1992), 135 A.R. 166 (Alta. C.A); R. v. W.P.G., [1999] B.C.J. No. 221 (B.C. C.A.); and R. v. Kennedy, [1999] O.J. No. 4278 (Ont. C.A.).
The application of this principle throughout the country is well documented in R. v. Morris, supra, note 16. This case points to the following cases: R. v. Ho Sue, [1990]
O.J. No. 1458 (Ont. C.A.); R. v. L.B, [1993] O.J. No. 271; R. v. Morrissette (1970), 1 C.C.C. (2d) 307; R. v. Maley (1986), 43 S.R. 178 (Sask. C.A.), R. v. Priest (1991),
115 A.R. 388; R. v. Fraser, [1984] 65 N.S.R. (2d) 28 (N.S. C.A.).

[30] In the United Kingdom see R. v. P.J.S. [1999] E.W.J. No. 1452 (England and Wales Court of Appeal (Criminal Division)) and R. v. Dean Simms, Jamie Cockram, Matthew Cockram, [1999] E.W.J. No. 3880 (England and Wales Court of Appeal (Criminal Division)). In the latter case, the Court of Appeal cited the following comments of the trial judge with approval, " '…the seriousness of that sort of conduct is perhaps not so much as to see who struck any one particular blow, for how much damage is done by that blow may be very much a matter of chance. The seriousness is in agreeing to go along as part of the armed group bent on violence." (para 3). For Australian caselaw see the appeal case of Mark Stephen Beljon v. Patrick John O'Brien (nos. 4 and 5), [1990] NTSC 4 (28 February 1990) (Supreme Court of the Northern Territory).

[31] Supra, note 17 at para 15.

[32] Supra, note 29. This case was cited with approval in R. v. Miloszewski, supra, note 17 at para 141.

[33] J.J.M., supra note 3.

[34] R.K.E, supra note 4.

[35] R. v. Blue, [1999] A.J. No. 227 (Alta. Prov. Ct.); R. v. Brownlie, [1997] B.C.J. No. 1972 (B.C. Sup. Ct.); R. v. Higgins, [1980] B.C.J. No. 281 (B.C. C.A.); R. v. J.P.G., [1997] O.J. No. 1490 (Ont. Ct. of Justice Prov. Div.); and R. v. Tong, [1986] B.C.J. No. 3073 (B.C. C.A.).

[36] R. v. Dykstra, [1999] N.S.J. No. 221 (N.S. Sup. Ct.).

[37] R. v. D.D.G., [1994] M.J. No. 761 (Man. C.A.).

[38] R.v. R.K.E., supra, note 4.

[39] Section 272(1)(d) of the Criminal Code reads: 272(1) Every person commits an offence who, in committing a sexual assault,… (d) is a party to the offence with any other person.

[40] A fight between two rival gangs of similar numbers does not generally fit the common understanding of a swarming. In this regard, see for example R. v. J.C., supra, note 17 in which the court expressly disagreed with the Crown's characterization of an incident as a "swarming", finding instead that it was a consensual fight that went wrong, entered into by the victims knowing that they were outnumbered.

[41] Connors, Edward; Johnson, Claire; Saenz, Diana and Webster, Barbara. "Gang Enforcement Problems and Strategies: National Survey Findings". in Journal of Gang Research, Vol. 3, No. 1, National Gang Crime Research

Center, Chicago State University, Chicago, IL. Referring to Institute for Law and Justice, Inc. Gang Prosecution in the United States. National Institute of Justice, Washington, D.C.: May, 1994.

[42] Simple assault carries a maximum penalty of 5 years imprisonment (s. 266(a)), while sexual assault carries a maximum of 10 years imprisonment (s. 271(1)(a)). Assault with a weapon or causing bodily harm carries a maximum of 10 years imprisonment (s. 267), whereas sexual assault with a weapon , threats to a third party or causing bodily harm carries a maximum penalty of 14 years (s. 272(2)(b)). Aggravated assault carries a maximum of 14 years, whereas aggravated sexual assault has a maximum of life.

[43] For example, s. 264(4) deemed aggravating factors in respect of criminal harassement; section 255.1 in relation to blood alcohol levels.