# SEXUAL ASSAULT LEGISLATION: THE BALANCING ACT

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With the advent of the *Canadian Charter of Rights and Freedoms*,[1] judges, lawyers and legislators must give express consideration to the interaction between societal values, fundamental rights and criminal law norms. Moreover, the *Charter* requires us to explain how we balance these sometimes competing interests and why we draw the line where we do. The case of *R.* v. *Seaboyer*[2] and the government's response to it, Bill C-49,[3] provide one of the best examples of this juggling act. I will examine this issue by discussing the Supreme Court of Canada's decision in *Seaboyer*, the nature of the problem of sexual assault and its relationship to the *Charter* and criminal law.

## I. *R.* v. *Seaboyer*

In *Seaboyer*, an accused charged with sexual assault sought to cross-examine the complainant on her previous sexual conduct. The accused was prevented from doing so by virtue of ss. 277 and 276 of the *Criminal Code*.[4] Section 277 excluded evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. Section 276 barred evidence of the complainant's sexual activities subject to the following exceptions:

- past sexual relations between the accused and the complainant;
- evidence to rebut prosecution evidence regarding the complainant's sexual history;
- evidence tending to establish the identity of the assailant; and
- evidence regarding sexual relations which occurred on the same occasion in support of the accused's belief that the complainant consented.

At issue was whether the evidence excluded by ss. 277 and 276 violated the accused's rights to make full answer and defence, and to a fair trial, contrary to ss. 7 and 11(d) of the *Charter*.

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[1]Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2](1991), 7 C.R. (4th) 117 (S.C.C.) [hereinafter *Seaboyer*].

[3]*An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38 [hereinafter Bill C-49].

[4]R.S.C. 1985, c. C-46.

The Supreme Court of Canada held that the principles of fundamental justice in s. 7 of the *Charter* mandate certain rules concerning the exclusion of otherwise relevant evidence.[5] Evidence sought to be introduced by the Crown will not be admissible if its probative effect is outweighed by its prejudice to the accused.[6] A higher standard is imposed with respect to the exclusion of evidence offered by the defence. Such evidence will be excluded only if its probative effect is *substantially* or *clearly* outweighed by the prejudice to the trial process.[7]

Applying this latter test to s. 277, all members of the Supreme Court held that evidence of past sexual conduct is never relevant to the issue of the complainant's credibility or to the likelihood of consent. Therefore, exclusion of this evidence did not violate the accused's rights under s. 7 of the *Charter*. However, the Court divided on the constitutionality of defence evidence excluded by s. 276. Justice McLachlin, writing for the majority of the Court,[8] states that the exclusion was too broad and did not allow for the exercise of judicial discretion where necessary in the interests of justice. The majority expressed caution in restricting the power of the accused to call defence evidence because of its effect on the fundamental tenet of our judicial system that an innocent person must not be convicted.

In dissent, Justice L'Heureux-Dubé concluded that the evidence barred by s. 276 was irrelevant.[9] Arguments to the contrary relied on myths concerning women and rape.[10] Justice L'Heureux-Dubé further concluded that if she were wrong on the issue of relevancy, exclusion was warranted because of the extreme prejudicial effect evidence premised on rape myths would have on the trial of the legal issues. Section 7 of the *Charter* did not entitle the accused to adduce *any* evidence which *might* lead to an acquittal.

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[5]*Supra*, note 2 at 138. According to the Supreme Court, "[r]elevant evidence ... is evidence that in some degree advances the inquiry, and thus has probative value ... ." (quoting from E.W. Cleary, ed., *McCormick's Handbook of the Law of Evidence*, 2d ed. (St. Paul, Minn.: West, 1972) at 438-40). As a general rule, everything which is probative is admissible as evidence, unless its exclusion can be justified on some other ground.

[6]See also *R.* v. *Corbett*, [1988] 1 S.C.R. 670 and *Morris* v. *R.* (1983), 36 C.R. (3d) 1 (S.C.C.).

[7]*Supra*, note 2 at 139-40.

[8]Lamer C.J.C., La Forest, Sopinka, Cory, Stevenson and Iacobucci JJ. concurred in the judgment.

[9]Gonthier J. concurred in the dissenting judgment.

[10]*Supra*, note 2 at 209. Moreover, according to Justice L'Heureux-Dubé, some exceptions were paradoxically cast too broadly permitting the admission of irrelevant evidence.

## II. The Interaction Between the Problem of Sexual Assault, Charter Rights and Criminal Law

The judgments in *Seaboyer* highlighted the complex and sometimes disharmonious interaction between the serious societal problem of conflicting *Charter* interests and criminal law norms. Sections 277 and 276 were part of a comprehensive package which sought to address a problem far broader than the misuse of sexual history evidence.

That problem concerns violence against women in general.[11] Inextricably linked to that problem is the pervasive and negative influence of rape mythology on the commission of sexual assault, the subsequent investigation, prosecution, trial, and the application of the law. In her judgment, Justice L'Heureux-Dubé describes evidence which demonstrates how myths surrounding women and sexual assault affect perceptions of the culpability of the aggressor and the credibility of the complainant. She also indicates how the law has historically incorporated these myths by means of the doctrine of recent complaint, corroboration rules, exceptions for spousal assault and the relevancy of *unchasteness* to consent and credibility.

Fortunately, these rules are no longer an express part of the law of sexual assault. However, myths about rape continue to be reflected in judgments and legal texts:

> Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she has only to keep her legs shut and she would not get it without force and there would be marks of force being used.[12]

> Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.[13]

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[11]It is recognized that not only women are victims of sexual assault, however as noted by Justice L'Heureux-Dubé, in the vast majority of cases such are the circumstances and the perpetrators are men. (98.7% of those charged with sexual assault are men): *Crime Statistics 1986* (Ottawa: Centre for Criminal Justice Statistics, 1986) cited in *supra*, note 2 at 170.

[12]Judge David Wild, Cambridge Crown Court, 1982, quoted in E. Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989) 21 Ottawa L. Rev. 741 at 741 and cited in *supra*, note 2 at 179.

[13]J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 3A, rev'd J.H. Chadbourn (Boston: Little, Brown and Co., 1970) at 736, cited in *supra*, note 2 at 180.

As a consequence, studies indicate that sexual assault, unlike other violent crimes, goes largely unreported. As well, the prosecution and conviction rates for sexual assault are among the lowest of all violent crimes. Finally, it is worth emphasizing Justice L'Heureux-Dubé's observation that "the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society."[14]

From a *Charter* perspective, it is fair to describe sexual assault legislation as a response to the s. 7 right of women to security of the person and the s. 15 right, complimented by s. 28, to equal benefit of the law. The right of complainants as a class to security of the person was recognized by the Supreme Court in *Seaboyer*.[15] At the same time, an extremely important function of the *Charter* is to balance the enormous powers of the state against individuals and to ensure that accused are presumed innocent until proven guilty and receive a fair trial. This function was the basis of the majority's decision in *Seaboyer,* that s. 276 of the *Criminal* Code violated ss. 7 and 11(d) of the *Charter.*

Sexual assault legislation starkly highlights a conflict between different, valid, societal concerns. There is, on the one hand, protection of the rights of accused from the state and, on the other, the seriously disturbing effects of rape mythology on the operation of the legal system and ultimately on the security of women. The rights stipulated in the *Charter* protect and incorporate both these concerns. However, the decision in *Seaboyer* required that a different means of balancing them be found.

## III. The Response of Bill C-49

In its response to *Seaboyer*, the government did not limit itself to the narrow issue of exclusion of sexual history evidence. Instead, it addressed the problem in its broader context of violence against women and the inadequacies in the legal system for protecting women. At the same time, it sought to assure that the rights of the accused were properly protected. Thus, all aspects of sexual assault legislation were examined.

An important aspect of the response to *Seaboyer* was that it involved broad consultations with legal, women's and other organizations. Their input was fundamental to understanding the nature of the problem, particularly as it affects disadvantaged groups, and to developing appropriate legal responses. In the end,

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[14]*Supra*, note 2 at 170.

[15]*Ibid.* at 133.

Bill C-49 contained a variety of new components, three of which are discussed below.

### 1. Exclusion of Sexual History Evidence

Under the new legislation, sexual activity evidence is admissible if it meets the relevancy test and if its relevance is not substantially outweighed by prejudice to the proper administration of justice.[16] In making such a determination, trial judges are required to consider a series of guidelines based on those delineated by Justice McLachlin in *Seaboyer*.[17] This amendment addresses the concern of the majority in *Seaboyer* that judges have discretion to allow sexual history evidence where necessary for the accused's right to a fair trial.

At the same time, procedural protections for the complainant were included to avoid the abusive use of sexual history evidence. These protections also seek to assure complainants that the reporting of sexual assault will not lead to their own re-victimization. These procedural protections include:

- a preliminary application by the accused as to the relevancy of specific sexual history evidence, and if the judge determines that "the evidence sought to be adduced is capable of being admissible,"[18] the judge shall hold a hearing on admissibility,
- the judiciary's obligation to provide detailed reasons for their determination on the admissibility of sexual history evidence[19] which will hopefully provide a means to check and challenge decisions based on rape mythology,
- the complainant is not a compellable witness,[20]
- the public is excluded from applications and hearings on admissibility,[21] and publication bans are imposed on all aspects of the application and hearing subject to two exceptions. Judges may decide their reasons are publishable after considering the complainant's right to privacy and the interests of justice. Secondly, the judge's reasons are published if the evidence is declared admissible.[22]

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[16] *Supra*, note 3 at s. 276(2)(c).

[17] *Ibid.* at s. 276(3).

[18] *Ibid.* at s. 276.1.

[19] *Ibid.* at s. 276.2(3).

[20] *Ibid.* at s. 276.2(2).

[21] *Ibid.* at ss. 276.1(3) and 276.2(1).

[22] *Ibid.* at s. 276.3.

With respect to the safeguards of publication bans and *in camera* hearings, *Charter* issues clearly arose. The guarantee of free expression in s. 2(b) of the *Charter* has been interpreted very broadly by the Supreme Court of Canada. It includes the public's right to access the judicial system and to know what transpires before the courts.[23] If publication bans and *in camera* hearings are to be sustainable, they will likely have to be justified under s. 1 of the *Charter*.

However, similar safeguards have been upheld by the Supreme Court. It recognized that limits on free expression may be justifiable to protect a complainant's privacy,[24] to avoid prejudicial publicity,[25] and to promote the proper administration of justice. This latter objective was advanced by addressing victims' concerns about exposing themselves to unwanted media publicity, which in turn encourages victims to report crimes.[26]

### 2. Defining Consent

A second and especially important aspect of Bill C-49 is its definition of conduct which constitutes "consent" in sexual assault cases[27] and its identification of situations in which consent is not possible. For example, where sexual activity results from abuse of a position of trust or authority, consent is impossible.[28]

Consent is defined in the Act as "the voluntary agreement of the complainant to engage in the sexual activity in question." The central importance of this provision becomes clear when one considers the "theory of implied consent." To date, courts generally have not required the accused to ensure that consent was obtained prior to sexual touching. Rather, courts have started from the premise that consent is present or implied in the absence of clear and unequivocal non-consent, which usually must take the form of physical resistance.[29]

The continued prevalence of this theory is exemplified in two recent cases. In *R.* v. *Edgar*,[30] the accused undressed the sleeping complainant and assaulted her. He was acquitted on the ground that he mistakenly believed the complainant was another woman. Mistake aside, the judge never considered how the accused could

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[23]See *Edmonton Journal* v. *Alberta (A.G.)* (1989), 64 D.L.R. (4th) 577 (S.C.C.).

[24]See *ibid.*; *supra*, note 2; *Canadian Newspapers Co.* v. *Canada (A.G.)*, [1988] 2 S.C.R. 122.

[25]*Supra*, note 2; *Southam Inc.* v. *Coulter* (1990), 75 O.R. (2d) 1 (C.A.).

[26]*Canadian Newspapers Co.*, *supra*, note 24; *Edmonton Journal*, *supra*, note 23.

[27]*Supra*, note 3 at s. 273.1(1).

[28]*Ibid.* at s. 273.1(2).

[29]R. Cornaviera, "The Reform of Sexual Assault Laws: Bill C-49" [unpublished].

[30](1991), 10 C.R. (4th) 67 (B.C. Prov. Ct.).

have obtained consent from any sleeping woman. For some reason, both the judge and accused presumed consent would have existed had the accused picked the right woman, presumably because they had earlier sexual relations. *R.* v. *Letendre*[31] illustrates the approach to sexual assault in what is probably a far more common factual scenario. The accused and complainant initially met each other in a bar one lunch hour and then spent many hours talking. They went back to the complainant's apartment around dinner time and had more drinks. The accused made sexual advances. She pushed him away when he tried to kiss her and kept on asking him why he was doing this. She said that she helped him take off her pants because she was scared, although he did not overtly threaten her. When he went to the bathroom, she fled the apartment and ran to the caretaker for help. The judge concluded that there had been consent. He stated that:

> The mating practice ... is a less than precise relationship. At times no may mean maybe, or wait awhile, the acts of one of the participants may be easily misinterpreted, a participant may change his or her mind, one way or another part way through it, and co-operation as well as enjoyment may be faked for a number of reasons. In my opinion, in the interests of both participants, it is one which demands clear and unequivocal communication between the parties, particularly if one of them does not want to participate in it.[32]

The judge stated that both parties must clearly communicate consent, but in effect the "communication" he sought was from the complainant and it was to show non-consent, rather than an agreement to participate in sexual activity with the accused. In other words, the judge implied that consent was present on the part of the complainant unless she said or did enough to indicate refusal according to the judge's terms. When one reads the decision in full, it is evident that the judge was looking for threats and physical resistance; he gave little credence to the argument that a complainant might not physically resist out of fear.

Bill C-49's definition of consent assists in providing clarity, both for those initiating sexual advances and for those responding to them. More importantly, an express definition in legislation should render the issue of consent a question of law. Thus, a mistaken belief that certain conduct constitutes consent becomes a mistake of law rather than fact. As a general rule, mistake of law is not a defence to a crime. Only time will tell if this definition will assist in countering the problem of sexual assault.

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[31](1991), 5 C.R. (4th) 159 (B.C.S.C.).

[32]*Ibid.* at 173.

### 3. Mistaken belief must be based on reasonable steps

Prior to Bill C-49, an accused who honestly, but *wrongly* believed that a complainant was consenting to sexual activity was considered innocent. The reasonableness of the accused's mistaken belief was irrelevant.[33]

The defence of honest mistake, when combined with the absence of a clear definition of consent, was especially problematic. It permitted an aggressor to assume consent based on a victim's acts or attitudes which in the aggressor's mind were indicative of consent (for example, an invitation in for a drink). Clearly, this left women vulnerable. In *R.* v. *Weaver*,[34] the complainant had been very drunk at a party, vomited and passed out in one of the bedrooms. The accused entered the bedroom, spoke to the complainant and she made some response. He had sexual intercourse with her, returned an hour later and had sexual intercourse again. The complainant was so drunk that she had little recollection of the first instance and absolutely none of the second. The trial judge concluded that the complainant had clearly not consented. However, he acquitted the accused on the basis that he had an honest but mistaken belief in consent.

Bill C-49 alters the state of the law. Mistaken belief in consent is no longer a defence unless the accused took reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.[35] It should be noted that this provision may not have a significant impact due to the addition of an express definition of consent in Bill C-49. The defence of mistaken belief relates to questions of fact, and because consent is now expressly defined; in my view, it amounts to a question of law for which there is no defence of mistake.

The setting of a standard which requires reasonable steps raises an issue under s. 7 of the *Charter* regarding acceptable fault levels. The standard is largely an objective one, except for the requirement that the trier take into account "the circumstances known to the accused at the time."

The Supreme Court has clearly established that s. 7 of the *Charter* demands that some level of moral fault be an element of an offence where there is a potential deprivation of liberty.[36] However, there has been no conclusive determination on the minimum level of fault required for a conviction generally,

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[33]*R.* v. *Pappajohn*, [1980] 2 S.C.R. 120. Reasonable grounds were only relevant in the assessment of whether the accused honestly held the belief.

[34](1990), 80 C.R. (3d) 396 (Alta. C.A.).

[35]*Supra*, note 3 at s. 273.2(b).

[36]*Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

nor on the precise level of fault required for particular kinds of criminal offences. There is a significant amount of support in the Supreme Court's case law to suggest that as a general rule, where an accused faces possible imprisonment, objective fault or negligence is the minimum fault level.[37] Thus, "reasonable steps," which represents an objective or negligence standard, would not at a general level fall below the minimum fault requirements of the *Charter*.

This answer does not end the inquiry because the Supreme Court has also stated that for a very few *Criminal Code* offences, a special subjective *mens rea* is required. According to the Court, these offences are identifiable by the stigma associated with conviction and, to a lesser extent, the available penalties.[38] To date, the Supreme Court has identified murder, attempted murder and surprisingly, theft, as offences which require proof of a subjective *mens rea* because of their special stigma.[39] In contrast, the Supreme Court recently found that unlawfully causing bodily harm did not require subjective fault.[40]

In the context of Bill C-49, the issue becomes whether sexual assault is an offence of such stigma as to require subjective fault. Does the stigma preclude reliance on a "reasonable steps" standard? Lower court decisions on the question of stigma are varied. Stigma is an elusive concept whose application has not followed any clear or logical criteria. Moreover, it appears that while lip service continues to be paid to this notion, the Supreme Court has become increasingly reluctant to label offences as having special stigma.[41] Consequently, I believe few offences will be added to the limited "stigma" crimes already identified.

In assessing the constitutionality of a "reasonable steps" standard for sexual assault, a number of factors are relevant. Key among these are the nature of the problem of sexual assault and the aim of the corrective legislation. A defence confined solely to "honest, even if unreasonable mistake" defines culpability according to the accused's state of mind, regardless of whether the victim consents. Consequently, previous law effectively required women to resist, at a risk to

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[37]*R.* v. *Wholesale Travel Group Inc.* (1991), 84 D.L.R. (4th) 161 (S.C.C.) per Lamer C.J.C.; *R.* v. *Hess* (1990), 79 C.R. (3d) 332 (S.C.C.); *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636; See also *ibid.*

[38]*R.* v. *Vaillancourt*, *ibid.*; *R.* v. *Martineau* (1990), 79 C.R. (3d) 129 (S.C.C.). It is not clear from the majority decision in *Martineau* whether all forms of subjective *mens rea* (i.e. intention, knowledge, wilful blindness and recklessness) will satisfy s. 7 where a conviction for a stigma offence, such as murder, is being sought. Lamer C.J.C. states that "the stigma and punishment attaching to the most serious crime, murder, should be reserved for those who *either intend to cause death or who intend to cause bodily harm that they know will likely cause death*" [emphasis added]. It is not clear whether by this statement, Lamer C.J.C. is seeking to exclude wilful blindness and recklessness.

[39]*R.* v. *Vaillancourt*, *supra*, note 37; *R.* v. *Martineau*, *ibid.*; *R.* v. *Logan* (1990), 79 C.R. (3d) 169 (S.C.C.)

[40]*R.* v. *DeSousa* (1992), 15 C. R. (4th) 66 (S.C.C.), aff'g (1990), 1 O.R. (3d) 152.

[41]*Ibid.*

physical safety, to relay non-consent to the accused in a manner which could hold the accused liable.[42] As well, remember that very little is required of an individual to act reasonably in the context of sexual assault. If one is doubtful, consent can be easily ascertained through verbal inquiry. Clearly, these and other factors will be relevant to future judicial consideration of whether the new law is consistent with s. 7 of the *Charter*.

## IV. Conclusions

Despite the outcry from some sectors concerning Bill C-49, its contents are not revolutionary. Definitions of consent and other procedural protections have been part of the law of many U.S. states for a significant number of years. The law alone cannot cure the problem of violence against women. It is but one component of a broader strategy. Other measures such as shelters, support systems and public education in schools and at home are essential. It was hoped that with the last set of amendments the problem of sexual assault would be alleviated. That did not happen. Time and watchful eyes will judge Bill C-49.

[42]E. Sheehy, *supra*, note 12; T. Pickard, "Culpable Mistake and Rape: Relating *Mens Rea* to the Crime" (1980) 30 *U.T.L.J.* 75.