

40-41 ELIZABETH II

CHAPTER 38

An Act to amend the Criminal Code (sexual assault)

[Assented to 23 June, 1992]

WHEREAS the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children;

WHEREAS the Parliament of Canada recognizes the unique character of the offence of sexual assault and how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada;

WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;

WHEREAS the Supreme Court of Canada has declared the existing section 276 of the *Criminal Code* to be of no force and effect;

AND WHEREAS the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence;

NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. *The Criminal Code is amended by adding thereto, immediately after section 273 thereof, the following sections:*

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

2. *Section 276 of the said Act is repealed and the following substituted therefor:*

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or

(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

276.1. (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

(2) An application referred to in subsection (1) must be made in writing and set out

- (a) detailed particulars of the evidence that the accused seeks to adduce, and
- (b) the relevance of that evidence to an issue at trial,

and a copy of the application must be given to the prosecutor and to the clerk of the court.

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

(4) Where the judge, provincial court judge or justice is satisfied

- (a) that the application was made in accordance with subsection (2),
- (b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and
- (c) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),

the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

276.2. (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

(2) The complainant is not a compellable witness at the hearing.

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

- (a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
- (b) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and
- (c) where all or any part of the evidence is to be admitted, the reasons must

state the manner in which that evidence is expected to be relevant to an issue at trial.

(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

276.3 (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:

- (a) the contents of an application made under section 276.1;
- (b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2;
- (c) the decision of a judge, provincial court judge or justice under subsection 276.1(4), unless the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published; and
- (d) the determination made and the reasons provided under section 276.2, unless
 - (i) that determination is that evidence is admissible, or
 - (ii) the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

276.4 Where evidence is admitted at trial pursuant to a determination made under section 276.2, the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

276.5 For the purposes of sections 675 and 676, a determination made under section 276.2 shall be deemed to be a question of law.

3. *This Act or any provision thereof, or any provision of the Criminal Code as enacted by this Act, shall come into force on a day or days to be fixed by order of the Governor in Council.*