

Canada: Rape as Part of Broader Definitions of Sexual Assault

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Speaking Notes

I am here to comment on the gap between Canada's legal regime and the experiences of survivors of sexualized violence.

I acknowledge the background research of the Barbra Schlifer Clinic, of which I was formerly the Executive Director, and of the Canadian Centre for Legal Innovation in Sexual Assault Response, of which I am an advisory member in what I am going to share today.

I believe I was selected to speak to this question because of the unique legal framework in Canada. Conceptually, Canadian law has moved away from the sexual and phallogocentric definition of rape, linking severity with penetration, and is thus an interesting example in comparative law for this discussion.

However, the gap between Canada's seemingly progressive legal regime and its effects on the social problem of sexual harm, as well as the almost uniformly negative experiences of survivors of sexualized violence when they turn to the criminal process or demand state protection, is stark.

The *Criminal Code* prohibits all non-consensual sexual activity, provides a clear definition of consent, identifies when consent cannot be obtained, and sets out rules for the admissibility of certain types of evidence to deter the introduction of discriminatory myths and stereotypes about how survivors of sexual assault are expected to behave.

I will explain this legal context briefly and then discuss its disappointing results.

Principally, the themes identified for this session hold true in Canada:

- Low reporting rates
- Weak prosecution
- Low conviction numbers
- Loss of faith in the responses of criminal law
- A culture of impunity

I would add to this a persistent culture imbuing criminal defense and embedded in legal education, that persists to destroy “witnesses” (i.e. survivors) as part of a rigorous defense ethic that is convinced of its legally ethical duty to mount the best defense at all costs.¹

- This has masked the inclusion of outdated rape myths, ignorance or outright defiance of trauma-informed research on how memory works and has been tolerated by the bench and imbues the investigation process to this day. This includes a failure to properly interpret Canada’s Rape Shield Laws.²
- While there are some areas for reform in the law left to be addressed in Canada, I would venture that with the rates of reporting, feminists have started to give up on the criminal system and are angling for alternative forms of resolution, including variations on restorative justice. This turn away from criminal law is concerning, as it cedes state protection of Charter rights effectively to the accused.

Legal Context: Sexual Assault/Not Rape

- There is no rape classification in Canada. The law of sexual assault is used analogously to the crime of rape.
- Sexual assault in Canada as defined in the Canadian Criminal Code is fundamentally different than equivalent offences as defined in many other developed nations. The factors that determine what level of sexual assault charge (or the equivalent in other nations) is given also differ.
- By the definition in the Canadian Criminal Code what would be defined as rape in other countries (and what used to be defined as rape in Canada) could fall under the Criminal Code’s sexual assault level 1, sexual assault level 2, or sexual assault level 3, depending on the severity of the physical aspects of the assault.
- A man who commits forced penetration, formerly legally known as rape, can be charged and prosecuted under any of these sections, including 271 if it is determined that the attack did not involve a weapon, bodily harm, or multiple assailants³.

¹ Elaine Craig: Elaine Craig, [“The Ethical Identity of Sexual Assault Lawyers”](#) (2016) 47:1 Ottawa L Rev 73; and, Elaine Craig, [Putting Trials on Trial: Sexual Assault and the Failure of the Legal System](#), McGill-Queens University Press (2018).

² Elaine Craig, [“Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada’s Rape Shield Provisions”](#) (2016) 94 Can Bar Rev 1.

³ https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr14_01/p10.html

Meaning of "consent"

"consent" means, the voluntary agreement of the complainant to engage in the sexual activity in question.

Consent must be present at the time the sexual activity in question takes place.

Question of law

The question of whether no **consent** is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

No consent obtained

(2) For the purpose of subsection (1), no **consent** is obtained if

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

(a.1) the complainant is unconscious;

(b) the complainant is incapable of **consenting** to the activity for any reason other than the one referred to in paragraph (a.1);

(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.

Subsection (2) not limiting

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

*Where belief in **consent** not a defence*

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

(i) the accused's self-induced intoxication,

(ii) the accused's recklessness or wilful blindness, or

(iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no **consent** is obtained;

(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**; or

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct

Sentencing

Sentencing is set in law as a range, that corresponds with the presence or absence of a weapon: Generally, minimums for a first offence is set at 4 years, 7 years for a second, and not to exceed 14 years, in some exceptional cases to life.

Aggravated sexual assault involves wounding, maiming, disfiguring or endangering the life of the complainant.

Rates, Undercharging and Underreporting

- In 2017, there were 24,672 incidents of sexual assault recorded in official crime statistics (levels 1, 2 and 3), and police categorized 98% of these as level 1.
 - This represents an increase from 22,246 incidents in 2006. From 2006-2016, the quantity of incidents reported by police fluctuated slightly.
 - However, from 2016 to 2017 the number of police-reported level 1 sexual assaults increased 14% (from 21,072 to 24,094), the number of level 2 sexual

assaults increased 6% (from 395 to 417), and the number of level 3 sexual assaults increased 44% (from 112 to 161).

The proportion of the total number of all sexual assaults reported to police that were cleared by charge was mostly constant from 1998 to 2015, varying from 41% to 46%.

Canada's Advocate Case Review expert, who has adapted the Philadelphian model to the Canadian context, has found higher rates:

- She calls these "**case attrition**" (e.g. from the number of survivors reporting to what actually results in a charge. Case attrition is often around 80 to 85% of reports, although results vary wildly). This problem is obviously directly tied to another descriptor, "**charge rates**".
- In the past two years, the Police are reporting cleared-by-charge rate dropped considerably to 37% in 2016 and 34% in 2017.
- In 2017, a higher proportion of sexual assault incidents level 2 (55%) and level 3 (64%) were cleared by charge than level 1 incidents (34%).
- For the 2016/2017 fiscal year, 42% of all sexual assault case decisions (levels 1, 2, and 3) in adult criminal court resulted in a finding of guilt.
- The percentage of sexual assault cases that resulted in a guilty decision has remained stable over the past 10 years.
- For the 2016/2017 fiscal year, 59% of accused found guilty of sexual assault (levels 1, 2, and 3) in adult court were ordered a custodial sentence and 19% were ordered probation as the most serious sentence.

Under Reported Sexual Violence⁴

- Sexual assault is one of the most under reported crimes in Canada.
- It is estimated that only one in 20 cases reach the attention of police or other authorities.
- The General Social Survey (GSS) on Canadians' Safety on victimization lists the following most common reasons women did not report sexual assault to the police:
 - Perception that the crime was minor and not worth taking the time to report (71%)
 - The feeling that the matter was of a personal/private nature and handling it privately would be better (67%)
 - Perception that no one was harmed during the incident (63%)
 - An apprehension or mistrust about the justice system procedure, including not wanting to communicate with law enforcement (45%)
 - Perception that the police would not consider the sexual assault of enough importance (43%)
 - A belief that the offender/perpetrator would not receive the adequate punishment (40%)

⁴ <https://scics.ca/en/product-produit/reporting-investigating-and-prosecuting-sexual-assaults-committed-against-adults-challenges-and-promising-practices-in-enhancing-access-to-justice-for-victims/#a44>

All the reasons law has failed sexual assault survivors that we have discussed in the global context, also obtain in Canada, despite the progressive legal regime.

Another reason victims do not report sexual assault is due to fear. They fear retaliation from the offender/perpetrator, the negative impact on their jobs, and/or facing the perpetrator and being subject to cross-examination during criminal proceedings.

- Some victims do not report because they are unaware that the context of their assault is a crime. For example, victims that are married and experience sexual assault within their marital relationship may not be aware that their spouse can face criminal sanctions.
- Further, when the assault comes from an intimate partner, victims may avoid reporting because they do not want the perpetrator to be arrested and sanctioned.
- This is further complicated as victims of sexual assault are sometimes financially dependent on their abusers.
- Estimates indicate that less than 1% of sexual assaults end in a conviction of the perpetrator. This estimate relies on data from a 2012 analysis of self-reported data and court statistics.⁵
- Survivors of sexual assault are also prevented from reporting because after an assault they may experience a large range of psychological responses that prevent them from reporting.⁶
- These can include anger, fear, denial, shock, embarrassment, shame, and guilt. The internalization of feelings like shame, stigma, guilt, and the belief by victims that they will receive blame, be revictimized, dismissed, or not believed and treated disrespectfully are key contributing factors in the underreporting of sexual assault to police.⁷
- A sexual assault is a traumatic experience and it can trigger Post-Traumatic Stress Disorder in women, where the process of reporting to authorities feels like they are being victimized again.⁸
- Movements such as #MeToo and Time's Up have triggered public discussions and responses to sexual violence in the last few years.⁹
- Police Data collected from the Uniform Crime Reporting (UCR) Survey indicates that there was a significant increase in the number of sexual assaults reported to police after the #MeToo movement first went viral. Despite this increase, sexual assault is still one

⁵ <https://www.canadianwomen.org/wp-content/uploads/2017/09/Facts-About-Sexual-Assault-and-Harassment.pdf>

⁶ <https://www.canadianwomen.org/wp-content/uploads/2017/09/Facts-About-Sexual-Assault-and-Harassment.pdf>

⁷ <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

⁸ <https://www.canadianwomen.org/wp-content/uploads/2017/09/Facts-About-Sexual-Assault-and-Harassment.pdf>

⁹ <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

of the most underreported crimes in Canada, a finding further confirmed by data collected for the Survey of Safety in Public and Private Spaces (SSPPS).

- The survey confirmed that the majority of women who were victims of sexual assault did not report the most serious incident to the police.
- Self-reported data has shown that two thirds of sexual assaults are not reported to police because the victim believed the assault was minor and not worth reporting, it was a private/personal matter, and better handled personally because no one was harmed.¹⁰
- Victims of sexual assault find their aversion to reporting to police is reinforced by the negative experiences that other victims have described when getting involved with the justice system.
- When a sexual assault is reported to the police experiences of belief, validation, and no judgement can and do impact disclosure by victims positively. However, even when these positive experiences occur victims can still be unsatisfied and negatively affected by the other parts of the criminal justice system, such as long court processes and unmet expectations about the outcomes of reporting the crime.¹¹
- Further, victims of sexual assault are most likely to delay in reporting the occurrence of a crime, which can occur for a few reasons, including the emotional trauma from the assault.¹²

Additional Barriers to Reporting Rape and Sexual Violence: Women with precarious status in Canada face additional barriers to reporting

- In Canada, we need an especial focus on Indigenous women, whose rates of sexual assault are 3x that of the general population and on women with disabilities, 4x that of able-bodied women (<https://www.dawncanada.net/main/wp-content/uploads/2014/03/English-Violence-January-2014.pdf> for the sexual violence against disabled women stat (page 2, source at footnote xvi=Martin, S. L., Ray, N., Sotres-Alvarez, D., Kupper, L. L., Moracco, K.E., Dickens, P. A., Scandlin, P., & Gizlice, Z. (2006). Physical and sexual assault of women with disabilities. *Violence Against Women*, 12, 823-837.)

This takes place in the context of the National Inquiry on Missing and Murdered Indigenous Women which found that police are perpetrators of sexualized violence against Indigenous women and therefore cannot, in their current form, be any part of a reliable protection against it.

Many women in Canada may have no legal status or precarious status. Women who have no immigration status are deemed to be non-status. This term encompasses women whose refugee claims have been rejected, whose immigration sponsorship has failed, victims of

¹⁰ <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

¹¹ <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

¹² <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>

human trafficking, those whose visas or permits to stay in the country have expired, and undocumented entrants to Canada.¹³ There is no statistical evidence to suggest that immigrant and refugee women experience more violence than women in the general population of Canada. However, current research suggests that immigrant and refugee women who are victims of violence are faced with additional barriers to reporting the violence and accessing support and assistance. These barriers include but are not limited to social isolation, language issues, immigration and sponsorship barriers, and economic vulnerability.¹⁴

Law Enforcement

One of the main reasons women avoid reporting sexual violence to the police is a fear that they will receive poor treatment from law enforcement and the court system. These barriers continue to persist even in the face of police training, specialized sexual assault police units, and improved coordination between police and sexual assault support centers in many communities.¹⁵ When sexual assault is reported police have broad discretion to drop complaints that they believe are unfounded even when there are grounds for a criminal charge and a suspect is identified. Depending on the jurisdiction in question, between 2% and 51% of sexual assault complaints are dismissed by police as unfounded.¹⁶ In the cases that are considered legitimate, less than 50% result in charges against a suspect. Due to media attention to this research, police were pressured to review how they handled cases of sexual assault that resulted in dismissal. Some police agencies that had higher than average rates of dismissals conducted case reviews. These were done behind closed doors and resulted in proclamations that there were no problems with the investigations. However, this process offered no transparency or accountability. This allows police to avoid scrutiny.¹⁷ While Advocate Case Review can address a lack of monitoring for law enforcement, not all law enforcement agencies have or intend to implement the model, and there exists no monitoring and reporting of the conduct of officers of the Court and Judiciary in sexual assault proceedings.

Also, once the percentages of "unfounded" cases became public knowledge, police began announcing drastic decreases in "unfounded" cases within months. In fact, this was a bureaucratic maneuver that simply otherwise halted investigations under different categories.

¹³ <https://policyoptions.irpp.org/magazines/february-2020/sexual-assault-policy-must-better-protect-migrant-women/>

¹⁴ https://endingviolence.org/files/uploads/Lit_Review_Binder_IWP_for_website_Apr2010.pdf

¹⁵ <https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/>

¹⁶ <https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/>

¹⁷ <https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/>

The "unfounded" language was too specific to one designation for not following through on an investigation, so now we trace "all sexual assaults administratively dismissed".

Further dismissals of sexual assault cases continue throughout the justice system, where only 50% of suspects face prosecution and only half of these prosecutions result in convictions. In reality, false reports of sexual assault are no higher than any other crime. Police decisions are influenced by preconceived notions about real rape or genuine victims and who deserves the protection of the police.¹⁸

The Court System:

The first rape shield laws were enacted in Canada in 1982; they were designed to shield complainants of sexual assault from courtroom tactics that relied on the prevalence of rape myths. These laws say that the sexual history of sexual assault complainants could only be used as evidence in very limited circumstances, such as when the sexual history is central to the accused's right to a fair trial. Despite these laws, complainants are not always protected in the courtroom. Scholars from Dalhousie University and the University of Alberta describe this as the "justice gap."¹⁹ This means that even though rape shield laws exist on paper, in practice criminal defence lawyers have managed to get permission to introduce sexual history of complainants for misleading purposes.

The law does not address misogynistic views that are held by judges and counsel. In 2019, a Saskatchewan court permitted a defence lawyer to ask questions such as why she "did not fight back" and "why she did not report the assault right away." He also asked questions about the woman's "style of scream."²⁰ The Supreme Court of Canada and federal law reform has formally rejected a number of rape myths about sexual violence against women, however these myths are still in existence. There are incorrect ideas that women who are "promiscuous" or of "unchaste" character are not trustworthy and more likely to have consented to the sexual acts they are reporting were assault. These are the twin myths that are addressed by the rape shield provisions in the *Criminal Code of Canada*. Research in this area indicates that women who experience sexual assault are still subject to social pressures to respond in particular ways to "prove" that they are real victims and possess credibility.²¹

¹⁸ Beverly Bain, Amanda Dale and Jane Doe "A New Chapter in Feminist Organizing: The Sexual Assault Audit Steering Committee", with, *CJWS [Women Resisting Rape: Feminist Law, Practice, Activism]* (Fall 2009/Winter 2010) Volume 28, No 1, 6-15.
[https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/;](https://policyoptions.irpp.org/magazines/february-2020/rape-myths-and-sexism-still-cloud-police-responses-to-sexualized-violence/)

¹⁹ <https://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568>

²⁰ <https://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568>

²¹ Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal System*, McGill-Queens University Press (2018).

Women who do not provide the expected scripts of their assault are still subject to sceptical and suspicious treatment from police and court rooms. They are still questioned on whether they were actually sexual assaulted and if they are the ones to blame for their own victimization.²²

Additional reforms called for by CCLISAR/Elaine Craig²³

[...]

During its first mandate, the Trudeau government took some steps that responded to this public dissatisfaction. Those steps should be applauded. For the first time in over 25 years, significant, substantive changes to the law of sexual assault were adopted through [amendments](#) to the *Criminal Code*. These include clarifying that intimate sexual communications between a complainant and her alleged abuser should be protected by our rape shield provisions; creating a process to determine whether private records in the accused's possession, such as texts or Facebook messages between him and the complainant, are legitimately necessary for the defence (rather than introduced solely to humiliate, or discriminate against, the complainant); and permitting complainants or their lawyers to have a say on whether evidence of their other sexual activities, unrelated to the alleged sexual assault, should be introduced at trial.

These provisions are being challenged under the *Charter*. [Some](#) trial judges have upheld their constitutionality. [Others](#) have struck them down, despite the Supreme Court of Canada having already ruled on the [constitutionality of laws of this nature](#).

The previous government also supported several promising policy initiatives aimed at improving our response to sexual violence. For example, the government [funded](#) the development of pilot projects to provide state-funded independent legal advice for sexual assault survivors in several provinces. Similarly, as part of its Strategy to Prevent Gender Based Violence, the federal government provided the National Judicial Institute (which trains judges) with money to develop judicial training that focuses on gender-based violence including sexual assault.

Despite these positive changes, there have been missed opportunities. For instance, when given the chance to clarify and improve the legal definition of capacity to consent to sexual touching through a proposed Senate amendment to Bill C-51, the Minister of Justice [refused](#). At what point of intoxication is someone too drunk to consent? This is a frequent, inconsistently answered question in sexual assault trials. Instead of resolving the matter, Bill C-51 added an unnecessary and [potentially problematic](#) provision reiterating that unconscious people cannot consent to sex – a point about which judges were not confused.

[...]

²² [Ibid.](#)

²³ Elaine Craig, "How the Minority Parliament Can Help respond to Sexualized Violence", Policy Options (January 27 2020) at <<https://policyoptions.irpp.org/magazines/january-2020/how-the-minority-parliament-can-help-respond-to-sexualized-violence/>>.

Most obviously, additional revisions to the *Criminal Code* should be introduced. Courts require guidance in adjudicating sexual assault cases involving severely intoxicated complainants. The previous government [committed](#) to working on this issue. In [many cases](#), women who are too intoxicated to walk, speak, or dress themselves properly are not found to be too drunk to consent. The *Criminal Code* should include a definition of capacity to consent that requires more than the bare consciousness or “[minimal capacity](#)” currently required by many courts. The previous government eliminated preliminary inquiries in many sexual assault cases. [Bill C-75](#) restricted the availability of preliminary inquiries to those offences liable to a maximum sentence of 14 years or more. This is a positive development for sexual assault law in part because it means that most sexual assault complainants over the age of 16 will not have to undergo the ordeal of testifying and being cross-examined twice.

But, because sexual assaults involving complainants under the age of 16 expose an accused to a sentence of up to 14 years, preliminary inquiries are still available in cases involving children. The new government should amend the *Criminal Code* so that children – some of our most vulnerable sexual assault complainants – are not forced to go through a process we now protect most adult complainants from enduring.

There are also, of course, countless steps beyond revisions to the *Criminal Code* that the federal government should take, many of which were called for in CEDAW Country Observations and in the SRVAW’s report on her visit to Canada.

- Federal funding for independent legal aid programs should be made permanent.
- A strategy for prevention and provision of services and dedicated funding for responding to sexualized violence in Canada’s north, where rates of sexualized violence are more than [seven times higher](#) than in the south, should be implemented.
- The Canadian military, which, given the Supreme Court of Canada’s decision in [R v Stillman](#), will continue to run its own sexual assault trials, should be required to respond to the failings within its legal system identified by the [auditor-general](#) and others.
- The Missing and Murdered Indigenous Women and Girls’ [Calls for Justice](#) should be answered with money and action.
- The funding commitments related to the [Strategy to Prevent and Address Gender Based Violence](#) should be revisited and renewed.
- Resources should be devoted to supporting better research on the vital gaps in our justice system that lead to costly harms, often borne by those who are most vulnerable.

Key to the success of any of these efforts will be the government’s willingness to consult and work with sexual assault experts – front-line workers, academics and practitioners.

In Budget 2017, the Government provided the Canadian Judicial Council with \$2.7 million over five years, and \$0.5 million per year thereafter, to ensure that more judges have access to professional development, with a greater focus on gender and culturally-sensitive training.

Social context education is designed to teach awareness and skills for judges to ensure that all people who come into the courtroom are treated respectfully, fairly and equally.²⁴

In sum, the administration of law in Canada reproduces the very attitudes and results that the reforms to the black letter law was intended to correct. Therefore, focus on legal reform cannot be successful without corollary and deep reform to the institutions that teach, investigate and play a role in administering remedy to the harm of sexual assault/rape.

²⁴ <https://www.canada.ca/en/departement-justice/news/2020/02/government-of-canada-introduces-legislation-to-ensure-judges-participate-in-training-on-sexual-assault-law-and-social-context.html>