PRB 99-3E

Library of Parliament Bibliothèque du Parlement

CANADA'S LEGAL AGE OF CONSENT TO SEXUAL ACTIVITY

Marilyn Pilon
Law and Government Division

25 January 1999
Revised 12 April 2001

PARLIAMENTARY RESEARCH BRANCH
DIRECTION DE LA RECHERCHE PARLEMENTAIRE

The Parliamentary Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

PAGE

CANADA
LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

CANADA'S LEGAL AGE OF CONSENT TO SEXUAL ACTIVITY

This paper will review the origins of the current "age of consent" laws in Canada and discuss some of the arguments for and against raising the legal age for consent to sexual activity from 14 to 16.

LEGISLATIVE HISTORY

The history of age of consent laws in Canada has evolved considerably in the past century so that the existing *Criminal Code* prohibitions against sexual contact with children bear scant resemblance to those that were in place as recently as 20 years ago.

A. Early *Criminal Code* Offences

As pointed out in the 1984 Badgley Report on *Sexual Offences Against Children*, Canada has a long history of prohibiting sexual intercourse with young females, regardless of their consent. Only girls under 12 were absolutely unable to consent to sexual intercourse until 1890, when the age limit was raised to 14. With the advent of the *Criminal Code* in 1892, the strict prohibition against sexual intercourse was retained for girls under 14 (not married to the accused) and the law was strengthened to make an accused's belief about the young woman's age irrelevant. That age limit has not changed and remains in place today, with narrow exceptions for consensual activity between young persons less than two years apart in age.

Over time, the Canadian criminal law also provided qualified protection from sexual exploitation for females over 14. For example, the Badgley Report notes that seduction of a girl over 12 and under 16 "of previously chaste character" was made an offence in 1886. The offence was retained in the 1892 *Criminal Code*, in respect of girls between 14 and 16, and remained in force until 1920, when the offence was changed to prohibit "sexual intercourse."

After 1920, the question of who was more to "blame" became an issue that could lead to acquittal but the offence remained in force until 1988.

In addition to those offences reviewed above, the "seduction" of a female under 18 "under promise of marriage" was made an offence in Canada in 1886 and amended in 1887 to apply to females under 21. In 1920, the offence of "seduction" (without reference to promise of marriage) was made applicable to girls "of previously chaste character" between 16 and 18.

From this it will be seen that a complete ban on sexual intercourse never did apply to girls over 14.

B. Bill C-15[1]

Amendments to the *Criminal Code* in 1988 repealed the aforementioned unlawful intercourse and seduction offences. In their place, Bill C-15 created new offences called "sexual interference" and "invitation to sexual touching" that now prohibit adults from engaging in virtually any kind of sexual contact with either boys or girls under the age of 14, irrespective of consent. Introduced at the same time, the offence of "sexual exploitation" also makes it an offence for an adult to have any such contact with boys and girls over 14 but under 18, where a relationship of trust or authority exists between the adult and child.

A number of documents and publications published prior to those 1988 *Criminal Code* amendments suggest a variety of reasons for those changes in the law. Most often cited was the perceived unequal treatment of boys and girls, since the earlier offences related strictly to female victims. Furthermore, the offences of unlawful sexual intercourse did nothing to protect young women from other forms of sexual contact short of intercourse. The lack of protection for girls between 14 and 16 who were not of chaste character or who were found more to blame for an offence was also seen as a serious limitation on the law's ability to protect young women from pregnancy or to maintain standards of morality, assuming that was the motivation behind it. The kind of scrutiny that a complainant might face in testing the proof of her chaste character no doubt also contributed to the fact that few charges were being laid under that provision prior to its repeal.

---

(1) An Act to amend the *Criminal Code* and the *Canada Evidence Act (Sexual Offences)*, R.S.C. 1985, c. 19, (3rd Supp.).

The Law Reform Commission of Canada's *Working Paper 22* recommended the repeal of the seduction offences relating to young women over 18 and under 21 because they assumed "a general sexual immaturity among women" and attributed to men "the sole responsibility for making sexual decisions." The Commission said those were incorrect and unjust assumptions that should not be reflected in the criminal law. However, the Working Paper took a different view of the unlawful intercourse offence relating to those under 16. In addition to supporting the retention of a "total prohibition" of sexual intercourse with female persons under the age of 14, the Law Reform Commission expressed the view that intercourse between adults and young persons under 16 should continue to be prohibited by the criminal law. Nevertheless, the Commission recommended repeal of that offence on the grounds that the offence of contributing to juvenile delinquency was a better prohibition that accomplished the same thing in a gender-neutral way. It must be noted that contributing to delinquency has not been a criminal offence since *the Juvenile Delinquents Act* was repealed and replaced by the *Young Offenders Act* in 1984.

In summary then, except for the offences of buggery and gross indecency, the age of consent for sexual activity has at no time been set higher than 14 in Canada, although prior laws did make men vulnerable to prosecution for sexual intercourse with a girl under 16, 18, or even 21 in certain qualified circumstances. As noted above, the 1988 amendments to the *Criminal Code* repealing those provisions were contained in Bill C-15, which was introduced by the then Justice Minister, Ramon Hnatyshyn. Although a bill introduced in 1981 by previous Justice Minister Jean Chrétien had also proposed the repeal of the seduction offences, it would have retained a broader, gender-neutral version of the prohibition against sexual activity with a young person between 14 and 16. However, Bill C-53 was never passed and a later version, in the form of Bill C-127,[(2)] bought about significant changes to the criminal law in the area of sexual offences but did not specifically address the sexual exploitation of young persons.

CURRENT LAW

The *Criminal Code* does not now criminalize consensual sexual activity with or between persons 14 or over, unless it takes place in a relationship of trust or dependency, in

(2) S.C.1980-81-82-83, c. 125.

which case sexual activity with persons over 14 but under 18 can constitute an offence, notwithstanding their consent. Even consensual activity with those under 14 but over 12 may not be an offence if the accused is under 16 and less than two years older than the complainant. The exception, of course, is anal intercourse, to which unmarried persons under 18 cannot legally consent, although both the Ontario Court of Appeal(3) and the Quebec Court of Appeal(4) have struck down the relevant section of the *Criminal Code*.

PENALTIES (OLD AND NEW)

Prior to passage of Bill C-15, section 153(1) of the *Criminal Code* made it an indictable offence for any male person to have sexual intercourse with a female under 14 who was not his wife, whether or not he believed she was at least 14; the maximum penalty upon conviction was life imprisonment. Males under 14 were exempted from liability for this offence. Sections 151 and 152 now prohibit virtually all kinds of sexual contact with children under 14 and the defence of consent is unavailable for those offences as well as for any sexual assault offences in respect of both male and female victims under 14. The maximum available penalty for "sexual interference" or "invitation to sexual touching" is ten years for those prosecuted by way of indictment.

Also prior to Bill C-15, a male person who had sexual intercourse with a female not his wife who was over 14 but under 16, and "of previously chaste character," was guilty of an indictable offence, and liable to a maximum of five years' imprisonment, whether or not he believed she was 16. Consent was not specifically precluded as a defence, however, and failure to prove that the accused was more to blame than the female person could result in acquittal. Once again, males under 14 were not open to prosecution for this offence. Section 153 now prohibits "sexual interference" or "invitation to sexual touching," in respect of a young person over 14 but under 18, where the accused is in a relationship of trust or authority towards the complainant or the complainant is in a relationship of dependency with the accused. Previous

---

(3) *R.* v. *M.* (*C.*) (1995), 23 O. R. (3d) 629. Two judges found that s.159 of the *Criminal Code* infringed s.15 of the Charter by discriminating on the basis of age, while the third judge found discrimination on the basis of sexual orientation. All three agreed that the law could not be saved as a "reasonable limit" under s.1 of the Charter.

(4) *R.* v. *Roy* (1998), 101 D.L.R. (4th) 148.

sexual experience and/or consent are no longer relevant where this special relationship exists. The maximum available penalty is five years' imprisonment for those prosecuted by way of indictment.

POLICY CONSIDERATIONS

Because different individuals will reach physical and/or psychological maturity at different times, setting an age under which individuals cannot validly consent to sexual activity is an exercise that will be arbitrary to some extent. However, the public and the courts have thus far accepted that it is also a valid exercise of Parliament's legislative powers.

For example, in 1978, the Law Reform Commission of Canada said that, because children under 14 "may not have the experience or the maturity to make decisions in their own best interests about their own sexuality, a case can reasonably be made to prevent their exposure to sexual activity regardless of their purported consent."(5) Because of the potential for physical and emotional harm from such experiences, the Supreme Court of Canada has also accepted that protecting female children from premature sexual intercourse "is a pressing and substantial concern."(6)

The 1986 Badgley Report also agreed that "society has a vital interest in ensuring that its naturally weaker members are protected by legal safeguards against the naturally stronger, and particularly, that the welfare and advantage of its children and youths will be protected and fostered." However, the same Report noted that "perhaps the most difficult legal issue is whether the criminal law strikes an appropriate balance between protecting children from sexual abuse and exploitation, on the one hand, and permitting the sexual expression of young persons as they proceed through adolescence into young adulthood, on the other."

A. In Support of the *Status Quo*

Perhaps the strongest policy argument against raising the age of consent from 14 to 16 is that it would place unprecedented limits on the sexual freedom of young persons. Hence, proponents of such a change may be challenged to provide empirical evidence

(5) Law Reform Commission of Canada, Working Paper 22, *Criminal Law: Sexual Offences*, at p. 26.

(6) *R*. v. *Hess and Nguyen*, [1990] 2 S.C.R. 906 at p. 920.

demonstrating that adolescents under 16 are being sexually exploited or, alternatively, that the incidence of pregnancy or sexually transmitted diseases among that age group calls for an expansion of the existing prohibitions. It must be noted that simply raising the age of consent to 16 would criminalize sexual activity between adolescents that is now legal. Because the modern sexual assault provisions of the *Criminal Code* no longer depend upon proof of intercourse, such an amendment could allow a 16-year-old to be prosecuted for virtually any sexual contact with a 15-year-old boyfriend or girlfriend.

B. In Support of Raising the Age of Consent

Concerning the sexual activity of those between 14 and 16 years of age, the Law Reform Commission of Canada expressed the view in 1978 that "the state and the public have an interest in controlling the sexual behaviour in this age group."(7) Furthermore, the Commission made clear that it was in favour of retaining gender-neutral protection for this group, if necessary through an amendment to the *Criminal Code* targeting adults who contribute "through sexual interaction, to the delinquency of young persons under the age of sixteen."(8)

Other groups have also made recommendations for raising the age of consent because of concerns about the potential for sexual exploitation of young persons by adults. For example, in its submission to the Standing Committee on Justice and Legal Affairs during consideration of Bill C-27,(9) the Canadian Association of Chiefs of Police urged the federal government "to define 18 years and over as the age of consent for sexual encounters with adults." Similarly, during the four-year review of Bill C-15, Citizens Against Child Exploitation argued that the age of consent for sexual activity should be raised to 16, with three years being the permissible age difference between consenting adolescents.(10)

---

(7) Working Paper 22 (1978), at p. 26.

(8) At the time, legislative proposals to replace the *Juvenile Delinquents Act* did not preserve the offence of contributing to juvenile delinquency.

(9) *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation*), S.C. 1997, c. 16.

(10) *Four-Year Review of the Child Sexual Abuse Provisions of the Criminal Code and the Canada Evidence Act*, June 1993, p. 5. Citing insufficient evidence "to justify changing the age limits currently established by the legislation," the Committee recommended that s. 150.1 of the *Criminal Code* be retained in its present form.

PROPOSED LEGISLATIVE AMENDMENTS

Private Member's bill C-278, proposed by Mr. Hanger, had first reading on 26 February 2001. Bill C-278 would amend *Criminal Code* provisions dealing with prohibited sexual acts committed with children, or in the presence of children, by raising the age of those affected from 14 to 16.

Bill C-278 would also amend subsections 150.1(1) and (2) to remove the defence of consent where the complainant was under the age of 16, rather than 14 as is now the case. As with the existing legislation, an exception to that rule would be retained for an accused who was under 16 and less than two years older than the complainant. However, it must be noted that the present legislation can exempt 14- and 15-year-olds from liability, presumably to avoid criminalizing sexual activity between peers. In order to continue a similar exemption for an accused who was over 16 but less than two years older than the complainant, that age limit would have to be raised accordingly. That would require amendment to section 150.1(2)(a) to allow for the defence of consent where an accused was over twelve "but under the age of eighteen years."

CONCLUSION

Any change in the age of consent in section 150.1 would also have to take into account the scheme of sexual offences currently found in Part V of the *Criminal Code*, as Bill C-278 appears to have done. However, as previously mentioned, Parliament may prefer to retain an exemption from liability for those engaging in consensual sex with persons under the legal age of consent, where the difference in age is less than two years.