CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
INSTITUT CANADIEN D'ADMINISTRATION DE LA JUSTICE

JUDICIAL SEMINAR ON CRIMINAL LAW

COLLOQUE JUDICIAIRE SUR LE DROIT CRIMINEL

# THE NEW OFFENCES AGAINST THE PERSON
# (A COMMENTARY ON C-127)

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## A. INTRODUCTION

Slightly more than seven (7) years ago, on April 26, 1976, amendments[1] to the Criminal Code were proclaimed in force which changed, to some degree, the nature of the trial process in cases involving non-consensual sexual offences. These amendments eliminated the requirement that a trial judge caution the jury as to the danger of acting upon the uncorroborated evidence of the complainant in respect of the offences of rape, attempted rape, sexual intercourse with females under fourteen (14) years of age or, if of previous chaste character, between the ages of fourteen (14) and sixteen (16) years, and indecent assault on a female;[2] curtailed the right of cross-examination of the complainant with respect to her previous sexual conduct with a person other than the accused;[3] permitted the exclusion of the public during all or part of the proceedings;[4] and, prohibited publication of the identity and evidence of the complainant.[5] The amendments of 1976, enacted to achieve a more sensible and equitable procedural and evidential balance in the trial of sexual assault offences, did not alter the existing Code structure of sexual assaults.

On January 12, 1981, the [then] Minister of Justice and Attorney General of Canada introduced Bill C-53, a comprehensive series of proposed amendments which contemplated, inter alia, substantial changes in the underlying scheme of sexual assaults and assaultive behaviour generally. The Parliamentary process was not kind to every aspect of Bill C-53[6] and, in consequence, on August 4, 1982, the House of Commons passed a renumbered Bill C-127[7], an abbreviated version of the original Bill, which nonetheless contained amendments of consequence to the existing scheme of sexual and non-sexual assaults. Bill C-127, it was anticipated, was passed in its present form by the Senate on October 27, 1982, and later proclaimed in force on January 4, 1983. The remnants of Bill C-53, while technically alive until the conclusion of the First Session of the thirty-second Parliament, will likely be re-introduced at the next session.

At the outset and before engaging in a more detailed discussion of the apparent scope and effect of the amendments of Bill C-127, it is well to here record the asserted purpose underlying the original Bill C-53. The explanatory note which accompanied first reading of Bill C-53 on January 12, 1981, read as follows:

> "The main purposes of these amendments are to replace existing non-consensual sexual offences by the offences of sexual assault and aggravated sexual assault, to amend certain provisions of law that are prejudicial to complainants, to protect young persons against sexual exploitation and to ensure that the provisions of the Criminal Code apply equally to persons of both sexes."

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1 S.C. 1974-75-76, c. 93.

2 See, for example, Regina v. Camp (1977), 36 C.C.C. (2d) 511; 39 C.R.N.S. 164 (O.C.A.) as to the effect of the repeal of former section 142.

3 Criminal Code, section 142. See, for example, Forsythe v. The Queen, [1980] 2 S.C.R. 356; 15 C.R. (3d) 280; 53 C.C.C. (2d) 225.

4 Criminal Code, section 442(2).

5 Criminal Code, section 442(3).

6 Subsequent reference to Bill C-53 refer to the original proposals.

7 Subsequent references to Bill C-127 refer to the provisions as passed by the House on August 4, 1982.

To facilitate analysis of the new legislation it is proposed to divide the amendments into the following categories:

(a) definitions and neutering provisions;[8]
(b) offences and ancillary matters;[9]
(c) evidentiary and procedural rules;[10] and,
(d) general defences.[11]

Bill C-127, as well, contains[12] its own transitional and commencement provisions.

## B. THE DEFINITIONAL AND NEUTERING AMENDMENTS

### (1) Introduction

At present, words or phrases used in the Criminal Code, whether in respect of its substantive, evidentiary or procedural aspects, derive from

(i) general Code definitions applicable to the Act in its entirety;[13]

(ii) specific Code definitions whose application is restricted to a particular section, group of sections, Part or Parts of the Code;[14]

(iii) definitions used in other Acts of the Parliament of Canada relating to the same subject-matter, subject to specific Code provisions;[15] and,

(iv) general definitions and interpretive aids found in the Interpretation Act.[16]

### (2) The Definitional Amendments

#### (a) "Complainant": Section 2

Clause one (1) of the Bill[17] adds to present section 2 and, accordingly, to the whole of the Code, an exhaustive definition of "complainant" as "the victim of the alleged offence". Formerly the same word, similarly[18] though not identically defined, appeared in section 142(5) of the Code[19] but was limited in its operation to the sexual assault provisions[20] governed by sections 142 and 442 of the Code.

The all-encompassing nature of the definition simply provides a convenient shorthand way of describing the victim of a criminal offence. The enshrinement of the definition in the Code adds nothing to the legal lexicon, except perhaps the permanence of codification, and its use in the (sexual) assault amendments, in all likelihood, will restrict its parlance in practical terms to those offences alone.[21]

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8 Clauses 1; 2; 10; 11; 13; 19-22; 26; and, 28.

9 Clauses 3; 5-9; 12; 14-20; 23-25; and, 27.

10 Clauses 13; 19; 23-25; and, 29.

11 Clause 4.

12 Clauses 33 and 35. As above noted it is presently anticipated that the legislation will come into force on January 4, 1983.

13 These definitions are found presently in sections 2 and 3 of the Code.

14 See, for example, present sections 52(2), 59(2); 82(1); 142(5) and, 282.

15 Criminal Code, section 3(5).

16 R.S.C. 1970, c. I-23. See, for example, sections 3(1), 14; 26; and, 27.

17 The phrase "the Bill" refers to Bill C-127 as passed by the House of Commons on August 4, 1982.

18 The present definition in section 142(5) is identical to that proposed in Bill C-53.

19 Clause 6 of Bill C-127 repeals this provision.

20 The offences of present sections 144 (rape), 145 (attempted rape), 146(1) (sexual intercourse with female under 14), and 149(1) (indecent assault on a female).

21 See, for example, sections 244(3), 245.2(1), 246(2), and 246.6(1).

(b) The Determination of Age: Section 3(1)

Clause two (2), effects the repeal of present section 3(1) of the Code thereby making applicable the age provisions of section 25(9) of the Interpretation Act which enacts as follows:

> "A person shall be deemed not to have attained a specific number of years of age until the commencement of the anniversary, of the same number, of the day of his birth."

Apart from any substantive differences which there may be between the two (2) provisions, it is always helpful to have definitions used in a particular Act contained in the Act itself rather than in an all-encompassing statute of interpretative aids[22] which applies with equal force to statutes as diverse in their constitutional basis as the Railway Act[23] and the Holidays Act.[24]

It had apparently earlier been thought necessary to have a specific "age" provision in the Code and it would have been much preferable to simply repeal present section 3(1) and substitute therefor the wording of section 25(9) of the Interpretation Act as a new section 3(1).

(c) "Offence": Section 178.1

Section 178.1 of the Code delimits the scope of authorizable offences which may be the subject of warranted electronic surveillance under Part IV.1. Clause ten (10) of the Bill enlarges the list of authorizable offences principally, though not exclusively,[25] in consequence of the new scheme of assaultive offences. In place of the presently authorizable offences of rape and assault/causing bodily harm, the Bill substitutes the following:

(i) section 245.1 (assault with a weapon; causing bodily harm);

(ii) section 245.2 (aggravated assault);

(iii) section 245.3 (unlawfully causing bodily harm);

(iv) section 246.1 (sexual assault);

(v) section 246.2 (sexual assault with a weapon; threats to a third party; causing bodily harm); and,

(vi) section 246.3 (aggravated sexual assault).

In the former legislative scheme the only authorizable substantive[26] sexual assault was rape. The offences in section 245(2) were, formerly, authorizable.[26] The repeal of the inclusion of rape and the dual offences of section 245(2) by clause ten (10) of the Bill and its replacement with the above-listed offences, viewed both in terms of numbers of offences

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22 See, Interpretation Act, R.S.C. 1970, c. I-23, section 3(1).

23 R.S.C. 1970, c. R-2.

24 R.S.C. 1970, c. H-7.

25 The amendment also corrects an erroneous parenthetical reference to section 79. The value of descriptive cross-references is provided for in section 2.1 of the Code and discussed in R. v. Gourgon (1979), 19 C.R. (3d) 272 (B.C.C.A.).

26 Section 178.1, of course, also permits interceptional activity to be carried out in relation to a conspiracy, an attempt or being an accessory after the fact to the commission of the authorized offences.

and scope of criminal conduct authorizable under Part IV.1, potentially enlarges the use of court-ordered electronic surveillance as an investigative technique. In practical terms whether such availability is utilized is quite another matter.

(d) "Prostitute": Section 179(1)

The heretofore undefined word "prostitute" is given exhaustive definition in an amendment proposed in clause eleven (11) of the Bill. The definition applicable only to Part V, specifically ensures equality of treatment for persons of both sexes by providing that

> ""prostitute" means a person of either sex who engages in prostitution."

It would have been preferable, particularly in view of the stated exhaustive nature of the definition, to have a definition at once less circular and more illuminating than that proposed in clause eleven (11). The definition, to be certain, applies to both sexes[27] but its normal dictionary definition includes commercial activity as merely one example of offering the body for indiscriminate sexual intercourse.[28]

One of the more troublesome aspects of section 195.1, the necessity of proof of the pressing or persistent nature of the solicitation,[29] remains unaffected by the definitional addition of clause eleven (11). Equally, the conflict, insofar as the liability of the prospective customer is concerned, between the decisions in Dudak[30] and DiPaola[31] remains unresolved.

(e) "Serious Personal Injury Offence": Section 687

The conviction of an accused for a "serious personal injury offence" is one of the conditions precedent to a dangerous offender application being undertaken by the Crown.[32] "Serious personal injury offence" is presently defined by section 687 to include certain sexual offences. Paragraph (b) of the definition provided:

> "an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency)."

Clause twenty-six (26) of the Bill repeals the former definition and, in conformity with the new scheme for sexually-oriented assaults proposes the following:

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27 Semble it would have arguably done so even in the absence of the phrase "of either sex".

28 The Shorter Oxford English Dictionary.

29 See, Hutt v. The Queen, [1978] 2 S.C.R. 476; 1 C.R. (3d) 164; 38 C.C.C. (2d) 418; R. v. Whitter; R. v. Galjot (1981), 64 C.C.C. (2d) 1 (S.C.C.).

30 R. v. Dudak (1978), 3 C.R. (3d) 68; 41 C.C.C. (2d) 31 (B.C.C.A.).

31 R. v. Di Paola; R. v. Palatics (1978), 4 C.R. (3d) 121; 43 C.C.C. (2d) 199 (O.C.A.).

32 See, Criminal Code, sections 688 and 689(1).

> 26. Paragraph (b) of the definition "serious personal injury offence" in section 687 of the said Act is repealed and the following substituted therefor:
>
> "(b) an offence or attempt to commit an offence mentioned in section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault)."

The effect of this amendment is to permit a dangerous offender application to be grounded, in part at least, upon conviction for a primary offence created by the new legislation.[33]

Under the earlier formula one of the primary or underlying offences, a conviction of which could serve to animate a dangerous offender application, was gross indecency. Bill C-53 proposed the repeal[34] of present section 157, its replacement by a new section 169.1[35] with a different excepting clause,[36] and its inclusion as a primary offence in the section 687 definition. Bill C-127, however, does not repeal section 157 but excludes it as a primary offence for the purpose of dangerous offender proceedings taken under paragraph (b) of the definition of "serious personal injury offences". Conduct presently constituting gross indecency is probably cognizable as a sexual assault under section 246.1(1) or as an aggravated sexual assault under section 246.2 under Bill C-127 but the continued and coincident existence of present section 157 as well as the principle against redundant or superfluous legislation would seem to militate against its prosecution as such and reliance thereupon as a foundation for a dangerous offender application.

(f) "Guardian": Section 249(2)

Clause twenty (20) of the Bill contains an expansive definition of "guardian" whose application is limited to the abduction offence amendment provisions. Section 249(2) enacts as follows:

> "249(2) In this section and sections 250 to 250.2, "guardian" includes any person who has in law or in fact the custody or control of another person."

It is appropriate to here set down three (3) brief observations about the definition in section 249(2). In the first place, its expansive nature permits a certain degree of flexibility to include as guardians those who do not, upon a strict construction of the section, so qualify. Secondly, the expansive terms of the section permit proof of guardianship to be made upon a showing of any of the following

(i) factual custody;
(ii) legal custody;
(iii) factual control; or,
(iv) legal control.

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33 For the other pre-requisites see section 689(1).

34 By clause five (5).

35 By clause seven (7).

36 The consenting age was reduced to eighteen (18) years and the number of persons involved not limited to two (2) years.

The prosecution, to put the matter somewhat differently, need not prove both custody and control in law and in fact.

Finally, it may be pointed out that the amendment wrought by section 249(2) would, it appears, operate within a comparatively narrow compass. Section 196, unrepealed by the Bill, already furnishes a definition of "guardian" applicable to all of Part VI which differs only in its use of "a child" instead of "another person" as used in section 249(2). The class of victims described in the abduction offences of sections 249, 250, 250.1 and 250.2 of the Bill might generally be characterized as "children" so that the need for section 249(2) might be questioned. Its insertion, to be certain, does little practical harm.

(3) The Neutering Provisions

(a) Introduction

In some of its clauses Bill C-127 effects no change of substance in the essential elements of the liability-creating or defining sections of the Code but rather converts into sexually-neutral language[37] present references to, for example, "male person", "female person" and "wife". In large measure the prohibitions of present Part IV are enacted in respect of male principals in the first degree[38] while the liability of female participants fails to be established, if at all, in accordance with the liability-expanding provisions of sections 21(1)(b), 21(1)(c), 21(2) and 22.[39] In addition to neutering those sexually-oriented crimes in Part IV whose continued existence has been affirmed by Bill C-127, the Bill, by the usage of neutral terms such as "every one"[40] in its liability-creating or defining provisions, eliminates the distinction presently drawn on a sexual footing in respect of principals in the first degree and permits the liability of either sex to be proven as a principal in the first degree. The liability of an accused of either sex can, of course, continue to be proven upon an accessorial basis.

The lack of any substantive change in the neutered provisions renders comment thereon somewhat superfluous. The provisions are simply set out below with the neutering words underlined.

(b) Procuring: Section 195

Clause thirteen (13) is apposite:

Present Code

195.(1) Every one who

(a) procures, attempts to procure or solicits a female person to have illicit sexual intercourse with another person, whether in or out of Canada,

(b) inveigles or entices a female person who is not a common prostitute or a person of known immoral character to a common bawdy-house or house of assignation for the purpose of illicit sexual intercourse or prostitution,

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37 The language used is "person", "spouse" and words of similar import.

38 See, for example, sections 143, 146(1), 146(2), 148 etc.

39 For example, a gang rape situation with a male principal and female aiders or abettors.

40 The language, of course, is used in other parts of the Code to create liability.

(c) knowingly conceals a female person in a common bawdy-house or house of assignation,

(d) procures or attempts to procure a female person to become, whether in or out of Canada, a common prostitute,

(e) procures or attempts to procure a female person to leave her usual place of abode in Canada, if that place is not a common bawdy-house, with intent that she may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,

(f) on the arrival of a female person in Canada, directs or causes her to be directed, or takes or causes her to be taken, to a common bawdy-house or house of assignation,

(g) procures a female person to enter or leave Canada, for the purpose of prostitution,

(h) for the purposes of gain, exercises control, direction or influence over the movements of a female person in such manner as to show that he is aiding, abetting or compelling her to engage in or carry on prostitution with any person or generally,

(i) applies or administers to a female person or causes her to take any drug, intoxicating liquor, matter, or thing with intent to stupefy or overpower her in order thereby to enable any person to have illicit sexual intercourse with her, or

(j) lives wholly or in part on the avails of prostitution of another person,

(k) [Repealed, 1972, c. 13, s. 14.]

is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) Evidence that a male person lives with or is habitually in the company of prostitutes, or lives in a common bawdy-house or house of assignation is, in the absence of any evidence to the contrary, proof that he lives on the avails of prostitution.

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"195.(1) Every one who

(a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,

(b) inveigles or entices a person who is not a prostitute or a person of known immoral character to a common bawdy-house or house of assignation for the purpose of illicit sexual intercourse or prostitution,

(c) knowingly conceals a person in a common bawdy-house or house of assignation,

(d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,

(e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,

(f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house or house of assignation,

(g) procures a person to enter or leave Canada, for the purpose of prostitution,

(h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,

(i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or

(j) lives wholly or in part on the avails of prostitution of another person.

is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) Evidence that a person lives with or is habitually in the company of prostitutes, or lives in a common bawdy-house or house of assignation is, in the absence of any evidence to the contrary, proof that he lives on the avails of prostitution."

(c) Procuring Feigned Marriage: Section 256(1)

Clause 21 repeals present section 256(1) of the Code and substitutes therefor the sexually neutral provision set out below:

Present Code

256.(1) Every male person who

(a) procures, or

(b) knowingly aids in procuring,

a feigned marriage between himself and a female person is guilty of an indictable offence and is liable to imprisonment for five years.

Bill C-127

"256.(1) Every person who procures or knowingly aids in procuring a feigned marriage between himself and another person is guilty of an indictable offence and is liable to imprisonment for five years."

(d) Intimidation: Section 381(1)(a)

Clause 22 of the Bill repeals the provisions of present section 381(1)(a)[41] of the Code substituting the word "spouse" for the present "wife":[42]

Present Code

381.(1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing

(a) uses violence or threats of violence to that person or to his wife or children, or injures his property,

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted upon him or a relative of his, or that the property of any of them will be damaged,

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22. Paragraph 381(1)(a) of the said Act is repealed and the following substituted therefor:

"(a) uses violence or threats of violence to that person or his spouse or children, or injures his property."

(e) Sureties to Keep the Peace: Section 745(1)

Clause 28 of the Bill repeals the provisions of present section 745(1) and substitutes therefor a provision cast in sexually neutral terms:

Present Code

745.(1) Any person who fears that another person will cause personal injury to him or his wife or child or will damage his property may lay an information before a justice.

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"745.(1) Any person who fears that another person will cause personal injury to him or his spouse or child or will damage his property may lay an information before a justice."

C. OFFENCES AND ANCILLARY MATTERS

(1) Introduction

A substantial part of Bill C-127 is taken up with the repeal of present offence-creating or defining sections and their replacement by newly defined prohibitions. The new (or

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41 This provision is contained in Part VIII of the Code; "Fraudulent Transactions relating to Contracts and Trade".

42 Clause 22 only repeals paragraph (a) of section 381(1) not the body of the section.

re-defined) offences may be grouped as follows:

| | |
|---|---|
| assaults: | clauses 17 to 19 |
| sexual assaults: | clause 19 |
| abduction offences: | clause 20. |

In addition, clauses 6, 8, 9, 12, 14 and 23 repeal presently existing substantive or procedural provisions without enacting any replacement therefor. Clauses 15 and 16 contain consequential amendments to the constructive murder provisions of sections 213 and 214(5) made necessary by the statutory reconstruction of certain of the underlying or primary crimes.[43] Clause 24 serves as a procedural adjunct to the substantive provisions adding the offences of sections 246.1, 246.2, and 246.3[44] to the list of offences triable in accordance with the provisions of section 429.1 of the Code.

(2) The Assault Offences

(a) Introduction

Bill C-127, contrary to popular conception, is not restricted in its impact to the sexual offence provisions of Part IV of the Code. The Bill, equally, alters the existing state of the law in respect of certain non-fatal[45] offences against the person which are not sexual in origin.[46] The legislation might more accurately be described as one relating to non-fatal offences against the person.

Clauses seventeen (17) to nineteen (19) of the Bill redefine an assault and create certain other assaultive offences which attract more substantial penalties.

(b) Assault Simpliciter

The principal definition or basic unit[47] of the new assaultive behaviour offences inserted in Part VI of the Code is an "assault" as defined in section 244(1) as follows:

> "244(1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs." (emphasis added)

A similar provision appeared as clause eighteen (18) in Bill C-53 and differs from the present section 244 only in its deletion of the phrase "or with consent, where it is obtained by fraud," in paragraph (a) and its use of the disjunctive "or" in paragraph (c).

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43 Sections 246.1 (sexual assault); 246.2 (sexual assault with a weapon, threats to a third party, causing bodily harm); and, 246.3 (aggravated sexual assault).

44 Section 429.1(b) also includes attempts to commit such offences among the list of section 429.1 crimes.

45 The amendments to sections 213 and 214(5) are only consequential upon the redefinition of the non-fatal offences.

46 The substance of the Bill, of course, is to remove the "sexual offences" from Part IV, their present situs, and add them to Part VI, "Offences Against the Person".

47 See section 244(2).

Section 244(3) of the Bill declares that certain de facto consents are insufficient in law to excuse from liability otherwise proven. The provision, arguably extending somewhat existing law, enacts as follows:

> "244(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority."

The conjoint effect of subsections (2) and (3) makes such consents ineffectual for the purpose of any and all of assaultive offences of Part VI.

Section 244(3) had no counterpart in the present Code[48] and its reference to "a person other than the complainant" is broader than C-53 which contained no such reference.[49] A commonplace example will suffice to illustrate a inlegally effectual consent: in a case of sexual assault under section 246.2, $V_1$'s submission is obtained in consequence of the threatened application of force to her friend, $V_2$.

There can be little complaint as to the efficacy of articulating in the statute what is legally ineffectual (and by inference what is effectual) to found a consent defence in crimes involving an assault as an essential element. On the other hand, it is difficult not to envisage that difficulties will not occur having regard to the substance of the provisions. Is the application or threatened application of any degree of force, however trivial, sufficient? Does its application and/or victim have to be proximate in time, place or circumstance? In the teacher-pupil or parent-child context, how does section 43 of the Code[50] interact with section 244(3)(d)? What is the nature of the fraud that will vitiate V's consent?[51]

The amendments to section 244 also make provision for a defence of honest belief in consent. Section 244(4) enacts as follows:

> "244(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief."

The defence afforded by section 244(4) and the evidentiary basis upon which it may be grounded would appear to originate in the decision of McIntyre, J. on behalf of the majority of the Supreme Court of Canada in Pappajohn.[52] In Pappajohn D's conviction for rape had

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48 As to the nature of the consent presently required see, for example, R. v. Dix (1972), 10 C.C.C. (2d) 324 (O.C.A.) and R. v. Stanley (1977), 36 C.C.C. (2d) 216 (B.C.C.A.).

49 Bill C-53 contained no reference to any person (even the complainant) as the subject of the application of force, fear thereof or threats.

50 See, for example, R. v. Ogg-Moss (1981), 24 C.R. (3d) 264 (O.C.A.) currently on appeal to the S.C.C.

51 See, for example, the provisions of former section 143(b)(ii) and (iii).

52 Pappajohn v. The Queen, [1980] 2 S.C.R. 120; 14 C.R. (3d) 243; 52 C.C.C. (2d) 481.

been upheld on appeal to the British Columbia Court of Appeal. On further appeal to the Supreme Court of Canada it was argued that the learned trial Judge had erred in law in failing to instruct the jury upon the defence of mistake of fact, that is to say, that if the appellant entertained an honest though mistaken belief that V was consenting to the acts of intercourse he was entitled to be acquitted on the ground that the necessary mental element had not be proven.[53] In considering the standard to be applied in determining whether to put a defence, McIntyre, J. for the majority[54] held at page 127 S.C.R.:

> "What is the standard which the judge must apply in considering this question? Ordinarily, when there is any evidence of a matter of fact, the proof of which may be relevant to the guilt or innocence of an accused, the trial judge must leave that evidence to the jury so that they may reach their own conclusion upon it. Where, however, the trial judge is asked to put a specific defence to the jury, he is not concerned only with the existence or non-existence of evidence of fact. He must consider, assuming that the evidence relied upon by the accused to support a defence is true, whether that evidence is sufficient to justify the putting of the defence. This question has been considered frequently in the courts: See Wu v. The King[5] and Kelsey v. The Queen[6]. The test to be applied has, in my opinion, been set down by Fauteux J., as he then was, in Kelsey v. The Queen.
>
> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.
>
> In addition, I would refer to the words of Judson J., speaking for the majority, in R. v. Workman and Huculak[7] where he said:
>
> . . . I can see no possible ground for any instruction that, on any view of the evidence Huculak could be an accessory after the fact and not a principal. Before this could be done, there must be found in the record some evidence which would convey a sense of reality in the submission (Kelsey v. The Queen, 105 C.C.C. 97 at p. 102, [1953] 1 S.C.R. 220 at p. 226, 16 C.R. 119 at p. 125). Failure of counsel to raise the matter does not relieve the trial judge of his duty to place a possible defence before the jury but there must be something beyond fantasy to suggest the existence of the duty."
>
> (emphasis added)

The majority rule in Pappajohn would appear to contemplate a two (2) step inquiry by the trial judge.

(i) a determination of whether there is any evidence of the asserted defence; and,

(ii) assuming there to be some such evidence and it to be true, whether such evidence is sufficient to justify the putting of the defence.

The initial determination, semble, involves a question of law alone while the latter appears

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53 See Leary v. The Queen (1977), 33 C.C.C. (2d) 473; 37 C.R.N.S. 60.

54 Martland, Pigeon, Beetz and Chouinard, JJ. concurring. The dissenting judges (Dickson and Estey, JJ.) do not appear to differ with McIntyre, J's legal conclusion only with his conclusions as to the existence of a sufficient evidentiary basis.

to involve a quasi-qualitative assessment of the cogency or sufficiency of such evidence. The second aspect of the inquiry has traditionally, at least in the larger sense, been reserved for the trier of fact.

In order to command the exercise of the judicial duty articulated in section 244(4) there must first be raised an allegation that D believed that V consented to the allegedly criminal conduct. Presumably the allegation of belief as to consent may emerge from either or both a statement of D filed as part of the prosecution's case or from D's own testimony[55] at trial. Assuming the allegation to be made it then devolves upon the trial judge to decide

(i) whether there is sufficient evidence of the defence; and,

(ii) whether, in the event that such evidence were believed by the jury, it would constitute a defence [in law].[56]

In the event that both issues are resolved in favour of the accused the trial judge would then be obliged to put the defence of belief as to consent to the jury. The leaving of the defence embraces an instruction

(i) that an honest belief by D that V consented to the allegedly unlawful activity or a reasonable doubt upon the issue entitles D to an acquittal;

(ii) as to the evidence relating to the determination of the honesty of D's belief; and,

(iii) that, in determining the honesty of such belief, the presence or absence of reasonable grounds therefor is a relevant factor.[57]

The instruction required by section 244(4) does not materially differ from the present law upon the subject which has developed principally in cases of rape.[58] The pivotal issue in the mistake of fact cases is not the reasonableness of the mistaken belief but rather the honesty with which it is held: its reasonableness or the lack thereof merely constitutes evidence of the honesty (or lack thereof) with which the asserted belief is held.[59] Although the mistaken belief need not be at once honest and reasonable, it cannot be seriously contested that the reasonableness of the belief is a most significant factor in its acceptance by the trier of fact. It is unlikely that a trier of fact would accede to any such defence absent cogent objective support therefor and counsel would be well advised to concentrate his efforts upon such issue.

Finally, from the point of view of substantive criminal law, the defence discussed in section 244(4) applies to all forms of assault described in the new statutory scheme enacted by Bill C-127.

Assault simpliciter is made a dual procedure offence for which the maximum penalty, upon indictment, is five (5) years imprisonment. In the event that the prosecution proceeds by indictment D has an election as to his mode of trial.[60]

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55 The burden is evidentiary rather than persuasive in nature.

56 For example, if the defence were legally ineffectual in view of the provisions of section 244(3).

57 See, for example, D.P.P. v. Morgan, [1975] 2 W.L.R. 913; 2 All E.E. 347; 61 Cr. App. R. 136 (H.L.); Regina v. Baxter (1975), 27 C.C.C. (2d) 96; 33 C.R.N.S. 22 (O.C.A.).

58 See, for example, D.P.P. v. Morgan, supra; Pappajohn v. The Queen; R. v. Plummer and Brown (1975), 24 C.C.C. (2d) 497; 31 C.R.N.S. 220 (O.C.A.).

59 Section 244(4) is somewhat unclear as to the evidentiary value of evidence of "the presence or absence of reasonable grounds for that belief". The jury are to be told to consider such evidence in determining the honesty of such belief but the section is silent, for example, as to whether the presence of such grounds is a positive factor and its absence negative upon the issue.

60 Common assault, formerly a summary conviction offence, disappears under the Bill but that which formerly amounted to such an offence becomes an assault (simpliciter) in virtue of sections 244(1) and 245.

(c) Causing Bodily Harm and Assaults With Weapons: Sections 242(3)(b); 245.1 and 245.3

(i) Introduction

One of the factors of which the former Criminal Code took cognizance in determining whether an accused had committed an aggravated form of assault was the extent to which harm was suffered by the victim.[61] Bill C-127 perpetuates the incidence of bodily harm as a relevant aggravating[62] circumstance but, apparently for the first time, distinguishes amongst the degrees thereof.[63] The Bill, as well, adds the carriage and use, actual or threatened, of a weapon or imitation thereof as a further circumstance warranting a more substantial penalty.[64]

(ii) Causing Bodily Harm: Sections 245.1(1)(b) and 245.3

Former section 245(2) created the offences of unlawfully causing bodily harm and committing an assault that caused bodily harm,[65] a duality that is perpetuated in terms not materially different from the present in Bill C-127.

Section 245.1(1)(b) of the Bill enacts as follows:

> "245.1(1) Every one who, in committing an assault,
>
> . . .
>
> (b) causes bodily harm to the complainant,
>
> is guilty of an indictable offence and is liable to imprisonment for ten years."

Section 245.3 makes unlawfully causing bodily harm an indictable offence in the following terms:

> "245.3 Every one who unlawfully causes bodily harm to any person is guilty of an indictable offence and is liable to imprisonment for ten years."

Under the original Bill C-53 the offences of sections 245.1(1)(b) and 245.3 required proof of serious bodily harm whereas under both the present Code and C-127 "bodily harm" will suffice. Presently undefined in codified form, section 245.1(2) sets out the nature of the injuries that must be proven under the new legislation:

> "245.1(2) For the purposes of this section and sections 245.3 and 246.2, "bodily harm" means any hurt or injury to the complainant that interferes with his or her health or comfort and that is more than merely transient or trifling in nature."

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61 See, for example, section 245(2). D's mental state is also relevant in aggravation: see, for example, section 228.

62 "Aggravating" is here used in its normal, natural everyday meaning. It forms part of the description of the offences in sections 245.2(1) and 246.3(1).

63 See, for example, section 245.2(1), discussed infra.

64 See, for example, sections 245.1(1)(a) and 246.2(a).

65 R. v. Prpich (1971), 4 C.C.C. (2d) 325 (Sask. C.A.).

The present phrase "bodily harm" replaces "actual bodily harm" used in section 295 of the 1927 Code in contradistinction to section 274 of the same statute. It would appear that the effect of the deletion of the word "actual" has not made a material difference in the section. Although it has been said that "bodily harm" needs no explanation,[66] "actual bodily harm" has been said to include any hurt or injury calculated to interfere with the health or comfort of V. The hurt or injury need not be permanent but must be more than transient or trifling.[67] It would appear clear that the degree of bodily harm occasioned need not be of the degree that had been earlier required to establish "grevious bodily harm".[68]

It is submitted that "bodily harm" includes any hurt or injury, whether internal or external, physical or psychical[69] temporary or permanent, calculated[70] to interfere with the health or comfort of V.[71] The phrase does not imply wounding, injury of serious type or, it is submitted, even a breaking of the skin.[72]

To qualify as "bodily harm" for the purposes inter alia, of sections 245.1(1)(b) and 245.3 the complainant must suffer

| | | | | |
|---|---|---|---|---|
| | hurt | | | |
| and | or | ; | | |
| | injury | | | |
| | | | health | |
| that interferes with his | | | or | ; and, |
| | | | comfort | |
| | | transient | | |
| is more than merely | | or | | in nature. |
| | | trifling | | |

Proof of no lesser injury will suffice; proof of no greater injury is required.

The inclusion of the exhaustive definition of "bodily harm" in section 245.1(2) would appear to involve little, if any, change in existing law. In many if not most cases the evidence of the complainant will suffice while in others medical evidence will be required as, for example, in connection with the nature[73] of injury suffered. The question of whether psychological harm of an appropriate degree is cognizable by the definition in section 245.1(2) is not expressly dealt with in the section although the indefinite "any" used in modification of the disjunctive "hurt" and "injury" is arguably sufficiently expansive to cover psychic as well as physical harm. The issue is, in all likelihood, not of great practical significance in prosecutions for non-sexual assaults: its repetition, however, in section 246.2(c) in relation to sexual assaults may be quite a different matter.

Presently the cognate crimes of section 245(2) are dual procedure offences punishable, upon indictment, with a maximum penalty of five (5) years imprisonment. Sections 245.1(1)(b) and 245.3, on the other hand, are exclusively indictable offences punishable by a maximum penalty of ten (10) years imprisonment.[74]

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66 See, D.P.P. v. Smith, [1961] A.C. 290 at 334 (H.L.).

67 R. v. Donovan (1934), 103 L.J.K.B. 683; R. v. Miller, [1954] 2 Q.B. 282. Similar language has been used to describe "grievous bodily harm": R. v. Ashman (1858), 1 F. and F. 88; R. v. Cox (1818), Russ. and Ry. 362.

68 "Grievous" means "really serious": D.P.P. v. Smith, supra. See, also R. v. Zyla (1910), 17 W.L.R. 258 (Sask. C.A.).

69 See, for example, R. v. Miller (1954), 30 Cr. App. R. 1 (C.C.A.). Quaere whether this permits an assault under s. 244(1)(b) to form the basis of a prosecution under s. 245.1(1)(b).

70 The word "calculated" is not used so as to import an additional mental element into the offence.

71 See, R. v. Hostetter (1902), 7 C.C.C. 221 (N.W.T. C.A.); see, also Regina v. Maloney (1976), 28 C.C.C. (2d) 323 (Ont. Cty. Ct.).

72 Smithers v. The Queen, [1978] 1 S.C.R. 506; 34 C.C.C. (2d) 427.

73 Whether the injury, for example, is beyond the "transient or trifling" degree excluded from the definition. Quaere whether the more serious injuries will result in a prosecution under 245.2(1)?

74 Clause 18 of the Bill makes causing bodily harm in the context of former section 242(3)(b) an offence under section 245.3 punishable by ten (10) years imprisonment.

(iii) Assault With a Weapon: Section 245.1(1)(a)

Part VI of the Code did not apparently distinguish between assaultive behaviour accompanied by the use of a weapon and that which was not.[75] Bill C-127 does. Section 245.1(1)(a) provides as follows:

> "245.1(1) Every one who, in committing an assault,
>
> (a) carries, uses or threatens to use a weapon or an imitation thereof, or
>
> . . .
>
> is guilty of an indictable offence and is liable to imprisonment for ten years."

It may be first noticed that section 245.1(1)(a) specifies three (3) alternative modes by means of which the offence there described may be committed. An accused who

carries;

uses; or

threatens to use

a weapon,[76] whether real or imitation, in committing[77] an assault is liable to be convicted. It should be noted that neither actual use nor, a fortiori, bodily harm thereby occasioned are conditions precedent to liability.[78] In a case where reliance is placed on the "threatens to use" mode of commission of the offence, it is at least open to question whether D even need be in possession of the weapon whose use is threatened in committing the assault. It would seem clear that to carry or use the weapon or imitation actual possession[79] is necessary: to threaten its use, it is submitted, does not.

In attributing meaning to "uses" in section 245.1(1)(a)[80] a brief reference to the decision in Rowe[81] is here apposite. In that case it may be recalled that D, together with an accomplice, committed an armed robbery at Windsor and engaged a taxi driver to drive them to London. The driver, suspicious of his passengers, drove into a gas station in Chatham in an attempt to telephone the police but was not successful. A similar attempt in London met with only limited success. D then herded everyone, at gunpoint, into the grease-pit area. The driver escaped through a rear door slamming it behind him. A bullet discharged from D's gun, passed through the doorway and struck V whose presence was unknown to the appellant. D asserted that the gun accidentally discharged when he stepped on the floor of the grease-pit. D's conviction for murder was sustained. On behalf of the majority of the Court, Kerwin, J., as he then was (Rinfret, C.J., Taschereau, Estey and Fauteux, JJ. concurring) observed:[82]

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75 Bill C-53 in its general (non-sexual) assault provisions did not make especial reference to assaults with weapons nor create a specific offence in that respect. The use of a weapon during or at the time of a sexual assault made the crime aggravated sexual assault under section 246.2(1).

76 For a definition of "weapon" see section 2 of the Code.

77 Quaere whether the use of "in" in reference to committing the offence is any different than the similar usage of "while" in section 213 and 214(5)?

78 Compare section 213(d).

79 Quaere whether "carries" limits liability to those who actually (as opposed to constructively) have possession of the weapon?

80 See also section 246.2(a).

81 Rowe v. The King, [1951] S.C.R. 713.

82 Rowe v. The King, supra, at 717.

> "One of the offences mentioned in the opening paragraph, "robbery", had been committed by Rowe at the Brown house in Windsor. The contention that he did not use Exhibit 13 at the London service station and that Galbraith's death did not ensue as a consequence of its use cannot be sustained. Section 260(d) was enacted as a result of the decision in Hughes v. The King (1), and its provisions are met in this case by the facts that Rowe not only had the Colt upon his person but pulled it out and held it in his hand. That was a use, under any definition of that very ordinary word, and the death of Galbraith ensued as a consequence."

Cartwright, J., as he then was, who dissented on another point, arrived at the same conclusion by an historical analysis of the provisions:[83]

> "It is, I think, of assistance to consider the state of the law immediately prior to the amendment. The common law is, I think, correctly stated in the following passage in Archbold's Criminal Pleading, 32nd Edition (1949) page 910:-
>
> > If a person, while in the act of committing a felony involving violence, e.g., rape, kills another without having the intention of so doing, the killing is murder. A person who uses violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those measures result, even inadvertently, in the death of the victim. For this purpose, the use of a loaded firearm in order to frighten the victim into submission is a violent measure. If the act is unlawful but does not amount to felony, the killing, generally speaking, is manslaughter.
>
> The common law in this regard was carried in a somewhat modified form into section 260 of the Criminal Code as it read prior to the 1947 amendment. For felonies involving violence Parliament substituted the offences enumerated in the opening words of the section and, where the offender neither meant death to ensue nor knew that it was likely to ensue as a result of his conduct, required as a condition of his conviction of murder proof either of the intention to inflict grievous bodily harm or of the administration of a stupefying or overpowering thing or of the stopping of the breath of a person, for the purpose, in each case, of facilitating the commission of one of the specified offences or the flight of the offender upon the commission or attempted commission thereof.
>
> In this state of the law The King v. Hughes (1) was decided, the unanimous judgment of this court being delivered by Sir Lyman Duff, C.J.C. We are, of course, bound by that judgment except in so far as its effect may have been abrogated or modified by the amendment referred to. It appears to me to have decided that when an accused, who is in the course of committing a robbery accompanied by violence, is using a pistol and such pistol is discharged during a struggle and the death of another person is caused thereby and there is some evidence that such discharge was accidental, the trial judge must instruct the jury that if they reach the conclusion that the pistol went off by accident - in the sense that it was not discharged by any act of the accused done with the intention of discharging it - (or are not satisfied that it did not go off in that manner) they should find a verdict of manslaughter unless they are satisfied that the conduct of

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83 Ibid at 723-4.