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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.

> the accused was such that he knew or ought to have known it to be likely to induce such a struggle as occurred and that somebody's death was likely to be caused thereby and that such was the actual effect of his conduct and of the struggle.
>
> By the 1947 amendment the following further alternative condition was added to section 260:-
>
> (d) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.
>
> I find myself in respectful agreement with the argument of Mr. Common that the amendment does make a change in the law as laid down in The King v. Hughes, with the result that now if an offender during or at the time of the commission of one of the offences mentioned or during or at the time of his flight upon the commission or attempted commission thereof is using a revolver and death ensues as a consequence of its use this will be murder even although the actual discharge of such revolver was accidental in the sense above mentioned."

The appeal was dismissed.

Upon the basis of the judgment of the Supreme Court of Canada in Rowe, supra, it would appear clear that a simple display of the weapon (pulling it out and holding it in one's hand) constitutes a "use" for the purposes of section 213(d) and, further, that notwithstanding that its discharge is accidental, liability is still attracted under the subsection.[84] The display of the weapon, in any event, would probably bring D within the "carries" mode of commission of the offence in section 245.1(1)(a).

Section 83(1) of the Criminal Code provides as follows:

> 83.(1) Every one who uses a firearm
>
> (a) while committing or attempting to commit an indictable offence, or
>
> (b) during his flight after committing or attempting to commit an indictable offence,
>
> whether or not he causes or means to cause bodily harm to any person as a result thereof, is guilty of an indictable offence and is liable to imprisonment
>
> (c) in the case of a first offence under this subsection, except as provided in paragraph (d), for not more than fourteen years and not less than one year; and
>
> (d) in the case of a second or subsequent offence under this subsection, or in the case of a first such offence committed by a person who, prior to the coming into force of this subsection, was convicted of an indictable offence or an attempt to commit an indictable offence, in the course of which or during his flight after the commission or attempted commission of which he used a

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84 In the "actual murder" context an accident during the course of an unlawful act is manslaughter.

> firearm, for not more than fourteen years and not less than three years.
>
> (emphasis added)

Assault simpliciter in the new statutory scheme is, when charged,[85] an indictable offence[86] and remains so unless and until the Crown elects to proceed summarily.[87] The conjoint effect of sections 245.1 and 83(1) in cases wherein the allegation under the former is that D used the firearm is to apparently render D twice liable for what is, in reality, one and the same delict. Whether the inclusion of both charges in the same indictment or information will invoke the rule against multiple convictions remains to be seen but the situation would seem to be an open invitation to such an argument.

A further difficulty may arise in the application of the liability-expanding provisions of sections 21(1)(b), 21(1)(c) and 21(2) to the offence created by section 245.1(1). As a general rule and notwithstanding that the Code prohibitions are framed in terms of the liability of the principal in the first degree, the accessorial responsibility provisions above described are generally applicable to all offences absent limiting words or an expressed statutory intention to the contrary.[88] Indeed, had the provisions of section 245.1 appeared, as presently formed, in isolation, it would hardly seem arguable that the provisions creating accessorial liability would not be applicable. The problem arises, however, not because of the language[89] of section 245.1(1) but because of the provisions of the cognate offence enacted by section 246.2:

> "246.2 Every one who, in committing a sexual assault,
>
> (a) carries, uses or threatens to use a weapon or an imitation thereof,
>
> (b) threatens to cause bodily harm to a person other than the complainant,
>
> (c) causes bodily harm to the complainant, or
>
> (d) is a party to the offence with any other person,
>
> is guilty of an indictable offence and is liable to imprisonment for fourteen years."
>
> (emphasis added)

The underlined words would appear to reflect at least a Parliamentary concern that persons other than the principal offender be susceptible to conviction but it is difficult to envisage how it would be otherwise arguable absent paragraph (d). The language of the section is not otherwise limitative of liability to principal offenders. Unless the language of section 246.2(1)(d) was inserted ex abundanti cautela it may be arguable that the similar language in section 245.1(1), without the inclusion of paragraph (d), has the effect of limiting liability to principal offenders. Such an interpretation would produce a somewhat anomalous result: if the pre-concerted assaultive behaviour were of a sexual nature, the potential

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85 Unless the information alleges a violation of section 245(b) of the Code.

86 See the Interpretation Act, R.S.C. 1970, c. I-23, section 27(1)(a).

87 If the Crown fails to elect, semble, the procedure is deemed to have been by summary conviction. See Regina v. Robert (1973), 13 C.C.C. (2d) 43 (O.C.A.).

88 See, for example, section 214(5) and the decision in R. v. Woods and Gruener (1980), 57 C.C.C. 220; 19 C.R. (3d) 136 (O.C.A.).

89 See, R. v. Nicholson (1980), 52 C.C.C. (2d) 157 (Man. C.A.) affirmed (1982), 24 C.R. (3d) 284. See also, Matheson v. R. (1981), 22 C.R. (3d) 289 (S.C.C.).

offence liability of each participant is equal whereas in the case of non-sexual assaultive behaviour the accessories' offence liability only extends to the offence of assault simpliciter.[90] If it is the pre-concerted nature of the activity which Parliament feels warranted a more severe penalty it seems passing strange to erect a distinction based upon the sexual or non-sexual nature of the assault when the legislation has not otherwise done so.[91]

The offences of section 245.1(1) carry a maximum penalty of ten (10) years imprisonment. A conviction therefor would also animate the provisions of section 98 and require the imposition of the mandatory prohibition against possession of firearms, ammunition and explosive substances.

(d) Aggravated Assault: Section 245.2

As has already been observed the former Criminal Code did not make the degree of bodily harm suffered by V a basis upon which to distinguish the offences involving assaultive behaviour.[92] Although the causation of bodily harm is that which distinguishes common assault from the offences of section 245(2), the present formula is to distinguish the more serious offences upon the basis of the presence of an aggravated mental element, for example, an intent to kill or to wound, maim or disfigure. Indeed, in such cases bodily harm[93] need not even be occasioned the victim.

Clause 19 of Bill C-127 adds to the list of new or re-defined crimes contained in the Code the offence of aggravated assault. Section 245.2 enacts as follows:

> "245.2(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Every one who commits an aggravated assault is guilty of an indictable offence and is liable to imprisonment for fourteen years."

The provision may usefully be contrasted with present section 228 which provides:

> "228. Every one who, with intent
>
> (a) to wound, maim or disfigure any person,
>
> (b) to endanger the life of any person, or,
>
> (c) to prevent the arrest of detention of any person,
>
> discharges a firearm, air gun or air pistol at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and is liable to imprisonment for fourteen years."

---

90 Unless, of course, V's injuries bring it within section 245.2.

91 Perhaps the difference in maximum penalty reflects a Parliamentary intention to do so.

92 The degree of bodily harm suffered, however, not infrequently affords evidence of D's mental state at the relevant time and may result, for example, in a wounding charge being laid rather than one under section 245(2).

93 Except, of course, under the "bodily harm" aspect of the offence in section 228.

Under the "bodily harm" head of present section 228 it is unnecessary for the prosecution to prove that the bodily harm suffered by V amounted to a wound, maiming or disfigurement: bodily harm of any type[94] will suffice provided its infliction is accompanied by a concurrent intention to wound, maim or disfigure. Under section 245.2(1), however, the harm suffered by the complainant must amount to either a wound, maiming, disfigurement or endangering of life. Injuries falling short thereof in all likelihood fall within the definition of "bodily harm" in section 245.1(2).

"Wound", in the normal discourse of human affairs, envisages an intentional injuring in such a way as to cut or tear the flesh and is not likely a word which requires elaborate exposition for a modern day jury. It has no especial meaning in section 228(a) and is, as we have already seen, a word of common parlance.

"Maim", on the other hand, is less commonly used in everyday speech and, perhaps, requires further elucidation for a jury. Derived from the Old French "mayhem", it means "to deprive of the use of some member; to mutilate, cripple" and envisages a more permanent or lasting type of injury than that, for example, which forms part of the external circumstances of the offence of section 245(a) or the alternative head of liability under section 228.[95]

To "disfigure" means to mar the figure or appearance of; to deform, deface.[96] It, like "maim", generally denotes something more than a temporary marking, as for example a black eye, of a person's appearance.

A valuable discussion of the meaning to be attributed to the alternatives of section 228(a) may be found in the dissenting judgment of Robertson, J.A. in Regina v. Innes and Brotchie,[97] a case involving an assault upon V by the use of boots. The learned Justice of Appeal emphasized the necessity of proof of an intention of cause injury of a more permanent or lasting type.

The mental element of the crime described in section 245.2 requires brief exposition. Section 245.2 is an aggravated form of the offence described in sections 244(1) and 245 made more serious under the new scheme because of the nature of the complainant's injuries. If one were to view the offence of section 245.2 as simply an assault aggravated by certain of its external circumstances, it would be tempting to equate the mental element of the section 245.2 offence with that of the offences of sections 245, 245.1(1) and 245.3, that is to say, the intention to cause the external circumstances of assault simpliciter or reckless indifference with respect thereto. On the other hand, it may be strongly contended that the appropriate mental element is the intention to cause the external circumstances of the offence or reckless indifference thereto and, accordingly, proof need be made of D's intention to wound, maim, disfigure or endanger the life of the complainant. The latter view would more closely accord with traditional criminal law policy and have the added advantage of distinguishing amongst the assaultive offences upon the basis of a more culpable and socially dangerous mental state deserving of greater punishment.

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94 The section describes it as ". . . causes bodily harm in any way to . . .".

95 An actual "maiming" need not of course be proven as part of the external circumstances of an offence under either head of section 228. It is only the intention of maim which is relevant.

96 Shorter Oxford English Dictionary, p. 566.

97 (1972), 7 C.C.C. (2d) 544 (B.C.C.A.).

Finally, it should be here recorded that present section 228 has not entirely disappeared from the Criminal Code. The effect of Bill C-127 is only to remove the words "or causes bodily harm in any way to", earlier described as the "bodily harm" head of liability, from section 228. The change is effective by clause 17 of the Bill:

> "17. All that portion of section 228 of the said Act following paragraph (c) thereof is repealed and the following substituted therefor:
>
> "discharges a firearm, air gun or air pistol at any person, whether or not that person is the one mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and is liable to imprisonment for fourteen years."

It remains an offence, as it is at present, to discharge a firearm, air gun or air pistol at someone with any of the proscribed mental states.

(e) Assault With Intent: Section 246(1)

Section 246(1) of the present Code makes it an indictable offence punishable by imprisonment for five (5) years to assault another "with intent to commit an indictable offence". Clause 19 of the Bill, inter alia, repeals section 246(1) and does not replace it with any similar provision. Its passing will scarcely be noticed.

(f) Assault Police: Section 246(2)

Present section 246(2) creates a series of offences short-handedly described, though not necessarily accurately, as "assault police". Bill C-127 repeals the present provisions and replaces them with a new section 246 containing cosmetic changes only. The new provisions which require no further comment are as follows:

> "246.(1) Every one commits an offence who
>
> (a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;
>
> (b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or
>
> (c) assaults a person
>
> (i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or
>
> (ii) with intent to rescue anything taken under lawful process, distress or seizure.
>
> (2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and is liable to imprisonment for five years; or

(b) an offence punishable on summary conviction."

(3) The Sexual Assault Offences: Sections 246.1, 246.2 and 246.3

(a) Introduction

It cannot be seriously contested that as amongst the amendments proposed by Bill C-53 to the present Code the most contentious and debated ones were those relating to sexual offences. The present Part IV of the Code, entitled "Sexual Offences, Public Morals and Disorderly Conduct", contained in sections 143 to 158, inclusive, the sexual offence provisions of the Code. Part VI, "Offences Against the Person and Reputation", enacted prohibitions against, inter alia, assaultive behaviour devoid of sexual connotation. The former focus upon the sexual nature of D's conduct, the latter upon its assaultive aspect.

Bill C-53 proposed extensive changes to both Part IV and Part VI by the creation of several new substantive offences with consequent evidentiary rules and procedural adjustments. Initially, the amendments removed the sexual offences presently contained in sections 138 to 158, inclusive, of Part IV from that Part and replaced them with new crimes prohibiting sexual exploitation of the young. Of the present offences contained in Part IV, only incest[98] and a slightly modified gross indecency[99] were to survive. Sexual intercourse was all but removed as a focal point of the legislation.

It may also be observed at the outset that the central focus of the C-53 amendments to Part IV was upon an undefined and exceedingly vague concept of "sexual misconduct" whereas that of Part VI was upon a "sexual assault". Apparently "sexual misconduct" was something less than assaultive behaviour in a sexual context but how much less and what was left at large by the legislation. An act of non-consensual intercourse could be at once "sexual misconduct", if performed upon a member of a protected age group, and a "sexual assault" or even an "aggravated sexual assault" provided serious bodily harm[100] was occasioned an youthful complainant.

The proposed amendments in Bill C-53 to Part IV of the Code,

(i) repealed the present heading of the Part and replace for purposes here relevant, "Sexual Offences" with "Sexual Exploitation of Young Persons";

(ii) repealed the several substantive crimes enacted in sections 138 to 158, inclusive, leaving only, so far as Part IV is concerned, incest and a modified offence[101] of gross indecency;

(iii) repealed sections 166 to 168 inclusive, substituting therefor new offences described by the subheading "Sexual Exploitation of the Young"; and,

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98 Present section 150.

99 Present sections 157; 158.

100 Or in the event that a weapon is used: s. 246.2(1)(a).

101 The modifications are to the exemption in present section 158 and are contained in proposed 169.1(2).

(iv) described the offences thus created in terms such as to ensure equality of treatment of persons of both sexes.

It should be here noted that the proposals of the Bill left untouched sections 159 to 165, inclusive, the obscenity provisions, sections 169 to 174, inclusive, and sections 176 to 178, inclusive. The repeal of section 175 removed the last vestige of the vagrancy section from the Code.[102]

The proposed provisions focussed upon the sexual nature of the misconduct and the age of the complainant rather than upon the need to demonstrate either the improper application of force, the lack of consent, or the necessity of sexual intercourse.

The sweeping proposals of Bill C-53 have not all been carried forward into Bill C-127. New offences of sexual assault (section 246.1), sexual assault with a weapon, accompanied by threats to a third party, causing bodily harm to the complainant or being a party to such offence (section 245.2), and aggravated sexual assault (section 246.3) are added to Part VI of the Code[103] and the present offences of rape,[104] attempted rape,[105] sexual intercourse with the feeble-minded,[106] indecent assault upon a female[107] and indecent assault upon a male[108] are repealed without substitution. The other sexual offences of Part IV remain,[109] presumably to be repealed and replaced by the remnants of Bill C-53 upon its passage by Parliament.

It is now proposed to examine in some detail the new offences created by sections 246.1, 246.2 and 246.3 and inserted into Part VI of the present Code.

(b) Sexual Assault: Section 246.1

It may be recalled that the assault offences amendments of Bill C-127 enact a trilogy of offences which have as a basic unit or common denominator an "assault" as defined by section 244 and are distinguished, broadly speaking, by the degree or severity of harm suffered by the complainant. A not dissimilar structure is contemplated for sexually assaultive behaviour although the distinguishing features are not confined exclusively to the nature or severity of the harm suffered by the complainant. A "sexual assault" is at once the basic unit and the least serious offence in the scheme just as is the case with an "assault" in the earlier mentioned structure.

Section 246.1(1) provides as follows:

> "246.1(1) Every one who commits a sexual assault is guilty of
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> (a) an indictable offence and is liable to imprisonment for ten years; or
>
> (b) an offence punishable on summary conviction."

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102 The other portions, section 175(a) to (c), inclusive, had been repealed in 1972.

103 See Clause 19.

104 Sections 143 and 144.

105 Section 145.

106 Section 148.

107 Section 149.

108 Section 156.

109 The offences of section 146 (sexual intercourse with a female under 14, or between 14 and 16 if of previous chaste character), 150 (incest), 151 (seduction of a female between 16 and 18), 152 (seduction under promise of marriage), 154 (seduction of female passengers), 155 (buggery and bestiality), and 157 (gross indecency).

The prohibition, cast in the neutral "every one who . . ." mould, comports with one of the basic principles of the legislation namely that the substantive offences thereby enacted should be of equal application to persons of both (either) sex(es). In order to fall within the prohibition, the impugned conduct must at once constitute an "assault" as defined in section 244(1) and be "sexual"[110] in nature. The wide sweep of the prohibition would appear to comprehend both heterosexual and homosexual activity, whether or not it involves an act of intercourse, provided it is non-consensual in nature, and would embrace at least the former offences of rape, attempted rape and indecent assault.[111]

Procedurally, the offence of section 246.1(1) is one that may be prosecuted either by indictment or upon summary conviction. In the former case it carries a maximum penalty of ten (10) years imprisonment. The indictable maximum represents a doubling of the present penalty for indecent assault upon a female,[112] the identical penalty as for attempted rape and indecent assault upon a male[113] and a marked reduction of the maximum in the case of rape.[114] The disparity between the indictable and summary conviction maximum is of first incidence in our criminal law[115] and has the effect of permitting the awarding of an absolute discharge[116] or the holding of D's trial in absentia[117] for an offence which presently carries a maximum penalty of life imprisonment.[118]

The assaultive nature of the offence of section 246.1 would, upon general principle, require the acquittal of D in the event of a reasonable doubt as to the complainant's consent to the impugned conduct or at least as to D's honest belief therein. Section 246.1(2) at once restricts the consent defence and provides for such defence based upon a restricted age differential between the parties. Section 246.1(2) provides as follows:

> "246.1(2) Where an accused is charged with an offence under subsection (1) or section 246.2 or 246.3 in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant."
>
> (emphasis added)

In other words, the consent of a complainant under fourteen (14) years of age[119] only amounts to a defence in respect of the trilogy of sexual assault offences for an accused who is less than three (3) years older than the complainant.

The effect of section 246.1(2) is essentially to add another entry to the field of legally ineffectual consents. Section 244(3) is of general application to all forms of assault and, as earlier discussed, delineates those circumstances in which non-resistance or submission will not amount to an effectual consent in law. Section 246.1(2) renders legally ineffectual a consent, even if it otherwise qualifies,[120] given by a member of a particular age group save in the excepted circumstances. The consent defence based on age is new to our law and arguably encourages or, at least, does not discourage adolescent sexual experimentation.

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110 As was the case with the "indecent" element of indecent assault, the "sexual" element of the offences of sections 246.1, 246.2 and 246.3 is not defined in the legislation.

111 Semble the prohibition would also cover the (presently) unrepealed crime of buggery.

112 Section 149(1).

113 Sections 145 and 156.

114 Life imprisonment: Section 144.

115 The usual situation is to provide for an indictable maximum of either two (2) or five (5) years as, for example, in present ss. 233(2) and 245(2).

116 The reduction of the penalty on prosecution by indictment to ten (10) years would achieve this result in any event: see, section 662.1(1).

117 Criminal Code, sections 735(2), 738(3).

118 The amendment to the definition of "serious personal injury offence" in section 687 permits a dangerous offender application to be taken in respect of an offence and that may be prosecuted summarily!

119 A similar provision making legally ineffectual the consent of a complainant under fourteen (14) years of age is contained in present section 140.

120 In the sense that it is not vitiated by section 244(3).

(c) Sexual Assault With Weapons, Threats to a Third Party, Causing Bodily Harm etc.: Section 246.2

Section 246.2 enacts the second most serious form of sexual assault in the following terms:

> 246.2 Every one who, in committing a sexual assault,
>
> (a) carries, uses or threatens to use a weapon or an imitation thereof,
>
> (b) threatens to cause bodily harm to a person other than the complainant,
>
> (c) causes bodily harm to the complainant, or
>
> (d) is a party to the offence with any other person,
>
> is guilty of an indictable offence and is liable to imprisonment for fourteen years.

The section, it may be noticed, lists essentially three (3) elements of the external circumstances of an otherwise sexual assault as aggravating factors:

(i) the carriage, use or threatened use of a real or imitation weapon;

(ii) the threat[121] or causing of bodily harm; and

(iii) joint participation.

The "weapon" aspect of the section 246.2 offence has already been discussed in connection with the provisions of section 245.1(1)(a) and its repetition here would serve no useful purpose. A similar observation may be made in connection with the "bodily harm" aspect delineated in paragraph (c).[122]

The initial component of the "bodily harm" subdivision, "threatens to cause bodily harm to a person other than the complainant", deserves further elucidation. A threat to cause bodily harm to the complainant does not bring the case within section 246.2[123] although, for example, a threat to do so in connection with a member of her family not present at the time and place of the offence would do so.[124] Equally, if the complainant's child happened to witness the offence and was actually beaten by D thereby suffering bodily harm D's crime in relation to the complainant would only be a breach of section 246.1.[125]

The underlying spirit which animated the enactment of section 246.2(d), the joint venture component of the section, would appear to be a concern about pre-concerted sexual attacks by multiple ravagers. At present these cultural forms are referred to as "gang rape" although they frequently encompass further crimes. Bill C-127 makes it an offence, a more serious form of sexual assault in terms of potential penalty, to be a party to a sexual assault with another person. No weapon need be carried, used or threatened. No bodily

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121 The threat must relate to a person other than the complainant.

122 See the earlier discussion of sections 245.1(1)(b) and 245.3.

123 Causing bodily harm to the complainant would: section 246.2(c).

124 Such a threat would also vitiate the complainant's consent under section 244(3)(b).

125 A threat to cause bodily harm to the complainant also does not fall within section 246.2. In the event that the expressed intention is carried out, section 246.2(c) would apply.

harm need be caused to the complainant nor threatened to another. The prohibition is attracted by the joint nature of the venture: the external circumstances of sexual assault simpliciter are only varied to the extent that there is more than one accused. Let us suppose A, B & C serially have non-consensual intercourse with V. Unknown to B and C, A threatens to kill V's young child should she resist their advances. Neither B nor C do anything which would otherwise bring them within section 246.2.[126] A is liable under section 246.2(b) as a principal offender irrespective of the number of persons involved in the attack. In the event that the jury were to find that B and C were otherwise culpable under section 246.1, their joint participation (with each other and/or A) enlarges their offence liability to that of section 246.2 in virtue of section 246.2(d). Neither B nor C would have to know of A's threat to V in order for the prosecution to make its case under 246.2(d): multiple participation in the sexual assault will suffice and that participation need not be in the offence of section 246.2.[127]

(d) Aggravated Sexual Assault: Section 246.3

The most serious degree of sexual assault created by Bill C-127 is the offence described in section 246.3 which enacts as follows:

> "246.3(1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Every one who commits an aggravated sexual assault is guilty of an indictable offence and is liable to imprisonment for life."

The external circumstances of the crime are those of a sexual assault coupled with the type of bodily harm or endangerment of life.[128] The earlier discussion of these added external circumstances in connection with the offence of section 245.2 renders further reference thereto unnecessary at this juncture.

(e) The Unrepealed Provisions

Although the provisions of C-127 effect substantial changes in the "Sexual Offences" component of Part IV of the Code it is well to recall and to here record those offences which remain in their present state unaffected by the Bill:

(i) section 146: sexual intercourse with female under fourteen (14) years or, if of previous chaste character, between 14 and 16 years;

(ii) section 150: incest;

(iii) section 151: seduction of female between 16 and 18 years of age;

(iv) section 152: seduction under promise of marriage;

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126 That is to say nothing that would otherwise make them a principal under paragraphs (a), (b) or (c) of section 246.2.

127 That is not, of course, to say that one may not otherwise be a party to the offence of s. 246.2. There is nothing in the section to suggest that joint participation in any of the other modes of commission will do otherwise than attract liability therefor.

128 Quaere whether any bodily harm need be occasioned the complainant in order to establish liability under this head?

(v) section 153: sexual intercourse with stepdaughter etc.;

(vi) section 154: seduction of female passengers;

(vii) section 155: buggery, bestiality;

(viii) section 157: gross indecency.

(4) The Abduction Offences

(a) Introduction

The final sub-group of offences amended by C-127 is the "Kidnapping and Abduction" portion of Part VI. The former constitutent offences in the sub-group, according to their descriptive cross-references,[129] were as follows:

(i) kidnapping: section 247(1);

(ii) unlawful confinement, imprisonment or forcible seizure: section 247(2);

(iii) abduction of female (for marriage or illicit sexual intercourse purposes): section 248;

(iv) abduction of females under sixteen: section 249;

(v) abduction of children under fourteen: section 250.

Clause twenty (20) of C-127, while leaving the offences of present section 247 intact, repeals sections 248 to 250 inclusive, of the former Code and substitutes therefor a series of new[130] or re-defined[131] offences the essential characteristic or gravamen of which is an unlawful dealing[132] with children of a prohibited age. Specific defences available to accused charged with breaches of the statutory prohibitions so enacted are contained in sections 250.3 to 250.5,[133] inclusive.

Common to each of the offences, except the re-enacted section 249(1), are certain elements of the external circumstances of the crime. The prohibited conduct in each case must amount, inter alia, to an unlawful

(i) taking;

(ii) enticing away;

(iii) concealing;

(iv) detaining;

(v) receiving; or,

(vi) harbouring

of a member of the prohibited class. There must exist concurrently with the external circumstances of the crime the prohibited state of mind, an ulterior intention to deprive the custodian of possession of V.[134]

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129 See section 2.1 of the Code for the effect of such cross-references.

130 For example, sections 250.1 and 250.2.

131 For example, sections 249(1) and 250.

132 The offence may be committed by an unlawful taking ("takes, entices away"), concealment, detention or receipt ("receives or harbours") of the child.

133 Section 250.5 might better be described as a "non-defence".

134 The mental element of the crime in section 249(1) does not, apparently, require such proof. The offence there provided for is made out upon proof of the intention to commit the prohibited act or, at least, recklessness with respect thereto.

The words used to describe the various modes whereby the offence may be committed are ones which, for the most part, are commonplace in English usage and ought to be construed in accordance with their normal natural everyday meaning. "Entices" connotes an allurement or attraction by the hope of pleasure or profit[135] and "harbours", the notion of providing a lodging or shelter.[136]

One further general observation as to the character of the taking . . . necessary to be proven is here apposite. The sections are aimed at preventing a taking . . . without the consent of the custodian of the children. It is a defence to each, whether by express enactment[137] or a negation of one of the essential elements of the offence,[138] that what occurred, prima facie in breach of the legislation, happened with the consent of the custodian of the victim.[139] It should be emphasized that it is the custodian's consent that is relevant and material and not the consent of the victim.[140]

(b) Abduction Under Sixteen: Section 249

The initial abduction offence contained in clause twenty (20) represents a re-enactment of present section 249(1) devoid of the current reference to "female" and "her" and without any change in penalty. The new provision, identical to the proposal in clause 19 of Bill C-53 enacts as follows:

> "249(1) Every one who, without lawful authority, takes or causes to be taken an unmarried person under the age of sixteen years out of the possession of and against the will of the parent or guardian of that person or of any other person who has the lawful care or charge of that person is guilty of an indictable offence and is liable to imprisonment for five years."

The specific defence available, apart from want or insufficiency of proof of any of the essential elements of the offence of section 249(1), is one afforded by section 250.4 which enacts as follows:

> "250.4 No one shall be found guilty of an offence under sections 249 to 250.2 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm."

Shortly stated the defence is rooted in necessity: the necessity to protect the victim from the danger of imminent harm.[141] The nature of the harm to be suffered is not described otherwise than as "imminent" and apparently, in the absence of limiting words, would include psychological as well as physical harm. The obligation upon D to satisfy the court of the necessity for his taking . . . of V would appear to affix upon D the burden of proving the defence upon a balance of probabilities.[142] One further observation upon the defence of section 250.4 is here apposite and that concerns the nature of the necessity

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135 The Shorter Oxford English Dictionary, Vol. I, page 664.

136 Ibid at page 925.

137 See, for example, sections 250.3 and 250.4.

138 See, for example, section 249(1).

139 Semble, an honest belief in such consent may also afford a defence.

140 See, section 250.5.

141 The imminent harm presumably originates from the custodian or, at least, from someone against whom the custodian affords V inadequate protection.

142 See also the defence in section 250.3 where D is excused if he "establishes" the consent of V's custodian to the taking . . .

defence. The section requires that the asserted necessity be at once of the required type and to the satisfaction of the judge. Is the test subjective, objective or a little of each? Suppose D honestly believed that the requisite necessity existed but, as it turned out, it did not? There would seem to be no reason in principle that the mistake of fact defence[143] cannot be engrafted upon the provisions of section 250.4 to exculpate D who honestly believes that the circumstances are sufficiently necessitated to justify what would otherwise be an indictable taking . . .. Insofar as necessity, viewed objectively, is concerned, it would at once afford cogent evidence upon the honesty of D's belief and have persuasive force upon the trial judge on the section 250.4 issue.

A final observation need be made as to the comparative scope of the "non-defences" material to a determination of D's liability under the section. Present section 249(2) enacts as follows:

> "249(2) For the purpose of proceedings under this section it is not material whether
>
> (a) the female person is taken with her own consent or at her own suggestion, or
>
> (b) the accused believes that the female person is sixteen years of age or more."

On the other hand, section 250.5 of Bill C-127 provides:

> "250.5 In proceedings in respect of an offence under sections 249 to 250.2, it is not a defence to any charge that a young person consented to or suggested any conduct of the accused."

The effect of the repeal of present section 249(2)(b), its replacement by the new section of the same number and the inclusion of section 250.5, it is submitted, is to remove the immateriality of the mistaken belief in V's age from the offence of section 249(1). It would appear that without present section 249(2)(b) an honest belief by D that V was beyond the prohibited age would afford a defence to a charge under section 249(1). The effect of section 249(2)(b) of the present Code is to remove the defence from consideration but the failure or omission to re-enact it as part of section 250.5 would appear to leave it open now to an accused to assert an honest belief of such a state in answer to a charge under section 249(1).[144]

The offence of the re-defined section 249(1) remains indictable and punishable by a maximum term of five (5) years imprisonment.

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143 The defence is a general one applicable to offences under the Code unless expressly excluded.

144 Or, for that matter, under any of the abduction offences created by the Bill.

(c) Abduction Under Fourteen: Section 250

Section 250 of the former Code enacted as follows

> 250.(1) Every one who, with intent to deprive a parent or guardian or any other person who has lawful care or charge of a child under the age of fourteen years of the possession of that child, or with intent to steal anything on or about the person of such a child, unlawfully
>
> (a) takes or entices away or detains the child, or
>
> (b) receives or harbours the child,
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.
>
> (2) This section does not apply to a person who, claiming in good faith a right to possession of a child, obtains possession of the child.

It may be observed that the class of persons who may be principals in the first degree[145] to this offence is unrestricted and could include, for example, one of V's parents.[146] The present formula, in detailing the external circumstances of the offence, does not include concealing the abducted child with the requisite mental element.[147]

> "250. Every one who, not being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, unlawfully takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian or any other person who has the lawful care or charge of that person of the possession of that person is guilty of an indictable offence and is liable to imprisonment for ten years."
>
> (emphasis added)

"Receives" has been added as one of the means whereby the offence may be committed and the principal offenders have been limited to those who are not the "parent, guardian or person having the lawful care or charge" of the victim.[148]

The external circumstances of the offence described in section 250 must, in accordance with general principle, be accompanied by a prohibited state of mind or mental element. The mental element of which proof need be made transcends the mere intention to cause the external consequences of the offence or reckless indifference with respect thereto and necessitates proof of an ulterior mental element, viz., the intent to deprive the custodian of the possession of the child.

In defence to a charge under section 250 D may assert specifically that he had the consent of the child's custodian[149] to the prima facie unlawful conduct or that the taking . . . was necessary to protect V from the danger of imminent harm.[150] In each case it would appear that D bears an evidentiary onus in order to succeed.[151] The defence of

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145 Section 21(1)(a) of the Code.

146 See, for example, R. v. Kosowan (1980), 54 C.C.C. (2d) 571 (Man. Cty. Ct.) as to the inadequacy of the present statutory scheme to guard against parental self-help.

147 Quaere whether "harbours" in present section 250(1)(b) covers substantially the same ground?

148 The "custodian" offences are set out in sections 250.1 and 250.2 discussed infra.

149 Section 250.3.

150 Section 250.4.

151 In section 250.3 "establishes" and in section 250.4 "satisfied" is used to describe the quantum of proof necessary.

present section 250(2) has not been re-enacted by Bill C-127 but it would scarcely seem arguable that an honest but mistaken belief of the type there contemplated would not afford a defence to a charge under the revised section 250. Such an honest albeit mistaken belief in a right to possession, or at least a reasonable doubt with respect thereto, would, it is submitted, negate the prohibited state of mind necessary to establish liability.

Section 250.5 makes it equally not a defence to a charge under section 250 that V suggested or consented to D's conduct.

(d) Abduction by Custodians: Sections 250.1 and 250.2

Under the former Code no distinction is drawn nor specific offence created for the conduct of parents, guardians or other child custodians. Their liability, accordingly, fails to be determined in accord with the general prohibition of section 250.

Bill C-127 creates specific offences rendering liable as principals in the first degree the custodians of V. The relevant provisions are those of sections 250.1 and 250.2 which enact as follows:

> "250.1 Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada to deprive a parent or guardian or any other person who has the lawful care or charge of that person of the possession of that person is guilty of
>
> (a) an indictable offence and is liable to imprisonment for ten years; or
>
> (b) an offence punishable on summary conviction."
>
> "250.2(1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in relation to whom no custody order has been made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of
>
> (a) an indictable offence and is liable to imprisonment for ten years; or
>
> (b) an offence punishable on summary conviction."

It may be at once observed that the acquisitive means of these offences does not differ materially from the offence of section 250 although the range of principals in the first degree is markedly so. The essential distinction[152] between the offences of sections 250.1 and that of section 250.2 is that in the former D's conduct is a breach of "the custody provisions of a custody order",[153] whereas in the latter no such order has been made.

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152 In terms of the differences in the external circumstances or mental element. Section 250.2(1) requires the consent of the Attorney General or his counsel to the commencement of proceedings.

153 Quaere whether "custody" includes breach of the "access" provisions as well? The matter may well be of no practical significance, apart from the timing of the issuance and/or execution of the arrest warrant, in that a breach of the former is frequently followed by a breach of the latter.

Both prohibitions are directed at those who are minded to adopt their own approach to child custody and, in the case of section 250.1, are not too particular what view the courts take up upon the issue. Procedurally both sections create dual procedure or hybrid offences with a maximum indictable penalty of ten (10) years.

It is a defence to a charge under either section that the acquisition was made with the consent of the legal custodian[154] or necessary to protect V from danger of imminent harm.[155] The operation of the consent defence of section 250.3 may be illustrated by way of example. A, in breach of the custody provisions of a custody order awarding exclusive custody of V to B, spirits V away to A's own lodging and there detains him. Absent any consent by B to the conduct and assuming that the requisite mental element has been proven, A is liable under section 250.1. The exclusive custody provisions of the order make the only material consent that of B: it is irrelevant that A, equally a parent but with no custody rights, consents to the acquisition. On the other hand, in a case where there has been no custody order, as for example the situation where both parents are living together and have joint custody of the child, and one parent simply takes the child and leaves, an issue may arise as to whose consent is material. Section 250.3 refers to the consent of "the parent . . . having the lawful possession, care or charge of . . . V". The absconding parent has by his act converted joint possession into exclusive possession prima facie in breach of section 250.2(1) and will hardly be permitted to rely on his own consent in exculpation. To interpret the section otherwise would render the section meaningless.

Although it is not part of the legislative scheme erected by Bill C-127 it is appropriate to here mention that in prosecutions under section 250.1 where it is necessary to prove the making of a custody order and its terms assistance may be furnished by the provisions of section 23 of the Canada Evidence Act which enacts as follows:

> "23.(1) Evidence of any proceeding or record whatever of, in, or before any court in Great Britain or the Supreme or Exchequer Courts of Canada, or any court in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country, or before any justice of the peace or coroner in any province of Canada, may be given in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever.
>
> (2) Where any such court, justice or coroner has no seal, or so certifies, such evidence may be made by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner, without any proof of the authenticity of the signature, or other proof whatever."

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154 Section 250.3.

155 Section 250.4.

Proof would also need to be made of the identity of V as the subject of such an order but no especial rules are applicable in that regard.

(5) The Consequential Amendments

(a) Introduction

In consequence of the substantive amendments already discussed certain further amendments[156] were required to related Code provisions. The length of the preceding discussion and the consequential nature of the amendments serve to shorten the ensuing discussion.

(b) The Murder Amendments: Sections 213 and 214(5)

It is the present scheme of the constructive murder provisions of sections 213 and 214(5) of the Code to list certain substantive offences, by section number and descriptive cross-reference, as primary crimes so that a death occurring during their commission is at once a culpable homicide and murder. Of the present "sexual offences" constituent of Part IV, the offences of rape, attempted rape and indecent assault qualify as primary crimes. In consequence of the repeal of these offences and their replacement by the new scheme of sexual assaults in Bill C-127, the list of primary crimes has been amended to delete the present references and replace them with the sexual assaults trilogy of the Bill.

Clause fifteen (15) of the Bill replaces the body of present section 213 with the following:

> "213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), section 246 (assaulting a peace officer), section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if"
>
> . . .
>
> (emphasis added)

The remainder of the section is left intact.

Clause sixteen (16) of the Bill repeals the present constructive first degree murder provisions of section 214(5) and substitutes therefor the following:

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156 Some of the definitional amendments might equally be referred to as "consequential": for example, the definition of "offence" in section 178.1 and of "serious personal injury offence" in section 687.

"214.(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76.1 (hijacking an aircraft);

(b) section 246.1 (sexual assault);

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

(d) section 246.3 (aggravated sexual assault); or

(e) section 247 (kidnapping and forcible confinement)."

(emphasis added)

(c) Offences Against Internationally Protected Persons: Section 6(1.2)

Present section 6(1.2) is a section which deems certain offences against "internationally protected persons"[157] to have been committed in Canada. Clause three (3) of Bill C-127 repeals the body of the present section 6(1.2) which includes reference to the offences of present sections 245 to 247 inclusive and replaces it with a more lengthy catalogue of the new assault, sexual assault and abduction offences included in the Bill. The new provision is as follows:

"(1.2) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in section 387.1 (attack on official premises, etc.) used by him that if committed in Canada would be an offence against that section or section 218 (murder), 219 (manslaughter), 245 (assault), 245.1 (assault with a weapon or causing bodily harm), 245.2 (aggravated assault), 245.3 (unlawfully causing bodily harm), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping), 249 to 250.2 (abduction and detention of young persons) or 381.1 (threats against internationally protected persons) shall be deemed to commit that act or omission in Canada if"

(emphasis added)

(d) Apprentice or Servant Amendment: Section 201

Section 201 of the present Code creates an indictable offence in the following terms:

201. Every master who

(a) unlawfully does, or causes to be done, bodily harm to his apprentice or servant so that his life is endangered or his health is or is likely to be permanently injured, or

(b) omits, without lawful excuse, to provide necessaries of life

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157 See section 2 of the Criminal Code for a definition.

> for an apprentice or servant in accordance with any contract that he has entered into with respect to that apprentice or servant,
>
> is guilty of an indictable offence and is liable to imprisonment for two years.

Clause fourteen (14) of the Bill repeals the section without specific substitution.[158]

(e) Adulterous and Fornicatious Conspiracy: Section 423(1)(c)

Section 423(1)(c) of the former Code, a provision applicable in the absence of any other express enactment, provided:

> "423(1)(c) every one who conspires with any one to induce, by false pretences, false representations or other fraudulent means, a woman to commit adultery or fornication, is guilty of an indictable offence and is liable to imprisonment for two years;"

Clause twenty-three (23) of the Bill repeals the paragraph without substitution.

6. Ancillary Matters

(a) Introduction

The amendments of Bill C-127 which materially alter the present assault and sexual assault provision of the Code also require that certain adjustments be made in the adjectival law applicable to the trial of such offences. Little need be said of these consequential enactments.

(b) Offence Jurisdiction: Section 429.1

Formerly rape and attempted rape are offences listed in section 429.1 of the Code thereby at once giving D an election as to mode of trial under section 464 or 484 and, in the event of an election of trial by judge and jury, the right to consent to a trial before a jury presided over by a judge other than a judge of the superior court of criminal jurisdiction.

Clause twenty-four (24) of the Bill deletes the reference in sections 429.1(a)(ii) and (iii) as well as section 429.1(b) to the offences of rape and attempted rape and substitutes therefor the sexual assault trilogy of sections 246.1, 246.2 and 246.3.[159] In consequence the scope of section 429.1 has been enlarged to encompass offences which, though not amounting to rape or attempted rape under the present law, constitute one of the forms of sexual assault[160] nder the new scheme.

(c) Exclusion of the Public and Non-Publication: Section 442

Section 442 of the present Code gives the presiding judge, magistrate or justice the authority to exclude all or any members of the public from the courtroom for all or part of

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158 Semble the section has fallen into desuetude or it was felt that the new scheme of assault offences was sufficiently wide to cover the factual situation envisaged by section 201.

159 Attempts to commit such offences are also included in virtue of section 429.1(b).

160 Idem.

the proceedings. In the case of certain sexual offences, the provisions of former sections 442(2) to (5) inclusive enact as follows:

> (2) Where an accused is charged with an offence mentioned in subsection 142(1) and the prosecutor or the accused makes an application for an order under subsection (1) of this section, the presiding judge, magistrate or justice, as the case may be, shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.
>
> (3) Where an accused is charged with an offence mentioned in subsection 142(1), the presiding judge, magistrate or justice shall, if application therefor is made by the prosecutor, make an order directing that the identity of the complainant and her evidence taken in the proceedings shall not be published in any newspaper or broadcast.
>
> (4) Every one who fails to comply with an order made pursuant to subsection (3) is guilty of an offence punishable on summary conviction.
>
> (5) In this section, "newspaper" has the same meaning as it has in section 261.

Clause twenty-five (25) of the Bill repeals sections 442(2) and (3) and substitutes therefor the following:

> "442(2) Where an accused is charged with an offence mentioned in section 246.4 and the prosecutor or the accused makes an application for an order under subsection (1), the presiding judge, magistrate or justice, as the case may be, shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.
>
> (3) Where an accused is charged with an offence mentioned in section 246.4, the presiding judge, magistrate or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast."

The effect of the amendment is to make the provisions applicable to all forms of sexual assault created by the Bill[161] as well as the unrepealed offences of incest[162] and gross indecency[163] thereby permitting the relevant orders to be made in relation to a greater variety of offences than is at present possible.

A new section, 442(3.1), casts upon the presiding judge, magistrate or justice an obligation to inform the complainant of the right to make an application for a section 442 order. The provision enacts that:

> (3.1) The presiding judge, magistrate or justice shall, at the first reasonable opportunity, inform the complainant of the right to make an application for an order under subsection (3)."

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161 Sections 246.1, 246.2 and 246.3.

162 Section 150.

163 Section 157.

It would seem preferable that the information be given to the complainant in the absence of the jury to guard against there being taken from the making of the application an inference[164] adverse to the credibility of the complainant.

D. EVIDENTIARY AND PROCEDURAL RULES

(1) Introduction

An integral part of the new scheme created by Bill C-127 is the enactment of the complementary evidentiary and procedural rules apparently designed to expedite, simplify and modernize the trial of offences involving allegations of sexual assault. The initial step in the process was taken in 1976 with the repeal of the cautionary corroboration instruction of former section 142[165] and its replacement by the present section 142 which limited the right to cross-examine the complainant about her previous sexual conduct with persons other than D. Bill C-127 goes much further in its repeal of the presently existing evidentiary rules applicable in cases of sexual assault and its further limitation upon the right to cross-examine the complainant upon her previous sexual conduct.

(2) The Abolition of Corroboration: Section 246.4

The elimination in 1976 of the cautionary corroboration requirement of former section 142[166] left present section 139 as the only corroboration requirement of Part IV.[167] Section 139(1) provides as follows:

> "139(1) No accused shall be convicted of an offence under section 148, 150, 151, 152, 153, 154, or 166 upon the evidence of only one witness unless the evidence of the witness is corroborated in a material particular by evidence that implicates the accused."

Clause five (5) of the Bill repeals, inter alia[168] section 139 so that the mandatory corroboration, heretofore required because of the (sexual) nature of the offence charged, has been abolished.[169] Unlike the situation with the repeal of the cautionary corroboration requirement of former section 142, Parliament has attempted to reinforce the abolition of section 139 by the enactment of section 246.4 which provides:

> "246.4 Where an accused is charged with an offence under section 150 (incest), 157 (gross indecency), 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), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration."

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165 See, R. v. Camp (1977), 36 C.C.C. (2d) 511; 39 C.R.N.S. 164 (O.C.A.); R. v. Firkins (1977), 37 C.C.C. (2d) 227 (B.C.C.A.).

166 Section 134 of the Code of 1953-54.

167 That is not, of course, to say that corroboration might not also have been required upon other grounds, for example, of the unsworn evidence of a child of tender years.

168 It also repeals section 140.

169 Of the offences listed in section 139 only that of section 148 is repealed by the Bill.

The catalogue of offences to which the provisions of section 246.4 are applicable represents a curious admixture of offences included in former section 139,[170] an offence which was not before the subject of either a section 139 or 142 (as it then was) instruction[171] and the sexual assault trilogy of Bill C-127.[172] Apparently the new offences were included so as to preclude an argument, founded upon common law principle, that the sexual nature of the attack renders corroboration desirable though not mandatory.[173] The rationale underlying the inclusion of incest and gross indecency is somewhat more difficult to determine. Gross indecency was not contained in either section 139 or section 142 before its replacement by the present provision and, notwithstanding authority to the contrary,[174] in view of the previous legislative history and the nature of the Code, it is difficult to see why its inclusion in section 246.4 was necessary.[175] Apparently incest was included ex abundanti cautela so that an argument could not be raised that the simple repeal of section 139 restored at least the cautionary corroboration instruction of the common law. If such be the true rationale underlying the inclusion of section 150, it seems somewhat incongruous that the other offences listed in present section 139 and left unrepealed as crimes by C-127[176] would also not be so included. The failure to so include those offences may leave open an argument, fortified by a submission of expressio unius est exclusio alterius,[177] that the sexual nature of the attack requires a cautionary instruction[178] by the trial Judge in such cases.

It should be noticed that apart altogether from any problems which may ensue in consequence of the admixture of offences contained in section 246.4, the repeal of section 139 together with the retention of sections 146, 151, 152 and 153 as substantive crimes has the effect of depriving the Crown of the advantage presently conferred by subsection (3) and (4) of section 139. The former provisions are as follows:

> "139(3) In proceedings for an offence under subsection 146(2) or section 151, 152 or paragraph 153(b) the burden of proving that the female person in respect of whom the offence is alleged to have been committed was not of previously chaste character is upon the accused.
>
> (4) In proceedings for an offence under subsection 146(2) or under section 151 or paragraph 153(b), evidence that the accused had, prior to the time of the alleged offence, sexual intercourse with the female person in respect of whom the offence is alleged to have been committed shall be deemed not to be evidence that she was not of previously chaste character."

and have the effect, in the case of subsection (3), of shifting the onus of disproving chaste character or, put differently, of proving non-chastity of character, to D and, in the case of subsection (4), of making previous connection between V and D no evidence of lack of chaste character. The repeal of subsection (3), semble, would have the effect of

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170 Criminal Code, section 150 (incest).

171 Criminal Code, section 157 (gross indecency).

172 Sections 246.1, 246.2, and 246.3.

173 A similar argument was made in Camp, supra, where it was asserted that the repeal of section 142 re-vivified the common law rule of practise.

174 See, for example, R. v. Cullen (1975), 26 C.C.C. (2d) 79 (B.C.C.A.) c.f. R. v. Camp (1977), 36 C.C.C. (2d) 571 (O.C.A.).

175 Especially in view of the failure to include buggery which equally was not included in either section 139 or the repealed section 142.

176 For example, the seduction offences of sections 151 to 154, inclusive, and procuring defilement under section 166.

177 This additional argument was not available in connection with the amendments which repealed former section 142.

178 In such cases corroboration, though desirable, is not essential. As to the meaning of corroboration, see Warkentin, Hanson and Brown v. The Queen, [1977] 2 S.C.R. 355; 35 C.R.N.S. 21; 30 C.C.C. (2d) 1.

requiring D to prove the nature of V's character as part of its case-in-chief rather than having it presumed in the absence of evidence contra. The repeal of subsection (4), on the other hand, would appear to leave it open to D to dispute V's chastity based solely upon his previous connection with her.

In practical terms the repeal of subsections (3) and (4) of section 139 may not be of great significance. The offences of sections 151 and 152 are of comparatively infrequent occurrence and that of section 153(1)(b) only marginally more so. In cases of non-consensual conduct the sexual assault trilogy of sections 246.1, 246.2 and 246.3 may be relied upon. It is only in the event that D's sexual behaviour is at once not assaultive and constitutes the external circumstances of the offence of section 145(2) that P has been disadvantaged by the repeal.

In the event that D is being tried for an offence listed in section 246.4 it has ceased to become either desirable or mandatory that corroboration of V's evidence be furnished.[179] The trial judge is expressly enjoined from instructing the jury that it is unsafe to convict in the absence of corroboration. It does not, of course, follow that the trial Judge may not, in the course of his authority to comment upon factual matters, include comments as to the credibility of V having regard to the peculiar facts of the case. It equally does not follow from the enactment of section 246.4 that a trial Judge is permitted to instruct the jury that

(a) it is safe to find D guilty in the absence of corroboration; or,

(b) it is safe to find D guilty in the presence of corroboration.

In conclusion it should be remembered that although the mandatory rule of section 139 is repealed by Bill C-127 and the cautionary instruction of former section 142 has long since departed our law, the Bill leaves untouched the mandatory corroboration requirement in respect of the evidence of an unsworn child complainant of tender years.[180] In such cases it is the immaturity of years rather than the sexual nature of the attack which is said to demand confirmation. Equally, the caution in respect of sworn witnesses of tender years[181] remains unaffected by C-127.

(3) Recent Complaints: Section 246.5

It has been recently said that the law relating to the reception of evidence of recent complaint, at least in some of its aspects, is fraught with great uncertainty and in need of reconsideration.[182] Upon reconsideration Parliament has enacted section 246.5 which provides as follows:

> "246.5 The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated."

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179 Even though the corroboration required is of V's evidence, the confirmation may come from D.

180 Criminal Code, section 586; Canada Evidence Act, section 16(2).

181 See, for example, Horsburgh v. The Queen, [1967] S.C.R. 746, 2 C.R.N.S. 228; [1968] 2 C.C.C. 288; R. v. Tennant and Naccarato (1975), 7 O.R. (2d) 687; 28 C.C.C. (2d) 80; 31 C.R.N.S. 1 (C.A.).

182 See, for example, Timm v. R. (1981), 21 C.R. (3d) 209 at 214-5 per Lamer, J.

"Abrogate", derived from the past participle of the Latin abrogare, to cancel or repeal, means to repeal, annul, abolish authoritatively, to do away with or put an end to something.

To apprise the jury of a complaint made by the alleged victim of a sexual assault constitutes an exception to the common law rule that a witness' testimony in-chief may not be buttressed by the party tendering the witness proving that the witness has made a prior consistent statement.[183] The exception has always been viewed having a life of its own independent of the doctrine of recent fabrication and was perceived necessary to negate the adverse effect V's silence might have upon her credibility when relating the circumstantial facts surrounding the commission of the offence including, where material, the absence of consent.[184] The potential adverse effect is predicated upon the assumption that the true victim of a sexual assault will, as a general rule, complain at the first reasonable opportunity: the evidence of early complaint thereby negating the adverse inference otherwise drawn in accordance with the assumption.[185]

It should be noticed that in the presently existing state of the law the recent complaint doctrine embraces

(a) a ruling as to the admissibility of evidence of recent complaint; and,

(b) an instruction to the trier of fact, in consequence of the evidentiary ruling, as to the use that can or might be made of the presence or failure of recent complaint.

Presently, silence is considered to be of same probative value adverse to V and early complaint of corresponding probative value in her favour.

The apparent intention of Bill C-127 in enacting section 246.5 would appear to be to eliminate the recent complaint exceptions to the rule respecting previous consistent statements in both its aspects and to bring the law in such cases in accord with the general rules of evidence. Put differently, the purpose appears to be to leave to the doctrine of recent fabrication[186] that which is presently dealt with under the recent complaint rationale.

It is a comparatively safe assumption in view of the legislative history of Bill C-127 that section 246.5 was inserted, inter alia, to ameliorate the plight of the complainant in sexual assault offences and to simplify the conduct of the trial. In cases where V had made a recent complaint its introduction into evidence formed a not insignificant part of the prosecutor's case and probably weighed substantially in her favour with the jury. Equally, the want of recent complaint, especially if unexplained, was of no little significance to D's position before the jury particularly where his defence was founded upon V's consent or his honest belief therein. The repeal of the doctrine, accordingly, is unlikely to receive the unqualified support of either of the parties most directly affected thereby. Where a

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183 Timm v. R., supra at 215.

184 Ibid.

185 Timm v. R., supra at 215-6.

186 For a thorough analysis of the doctrine and the difficulties of its application, see Regina v. Campbell (1977), 17 O.R. (2d) 673; 1 C.R. (3d) 309; 38 C.C.C. (2d) 6 (C.A.).

complaint has been made but evidence thereof not admitted, V's credibility is tarnished and, conversely, where no complaint has been made D's position is prejudiced somewhat by the non-introduction into evidence of that fact. The situation is exacerbated when the jury, as quite conceivably could occur, as "Did V complain about this to anybody?" or, more pointedly, "Why didn't V say something to her husband when she came home?" A simple response advising the jury to decide the case on the evidence or pointing out the obvious, "There is no evidence of that", does not materially assist either party.

Although the language of section 246.5 is uncharacteristic in its simplicity, its practical application may be quite another matter. Quite independent of the operation of the recent complaint doctrine, a material consideration for the trier of fact is whether D complained of the alleged offence, to whom and how soon thereafter. Is Crown counsel debarred from asking any questions which show consistency of conduct? May defending counsel, quite independently of an imputation of recent fabrication, not enquire as to the failure of complaint? A total prohibition against such questioning would scarcely assist the jury's resolution of the vital factual issue yet if some be permitted, where is the line to be drawn? The area in which potential unfairness may arise occurs in the event that the permitted cross-examination does not amount to an allegation of recent fabrication thereby leaving only re-examination rather than the rehabilitative effect of previous consistent statements to put the credibility issue fairly before the jury.

The unqualified language of section 246.5, applied literally, may well create intractable practical problems and thereby leave the trier of fact to decide the single most important issue in most sexual assault cases, credibility, upon an inadequate factual basis.

(4) Evidence of Previous Sexual Conduct: Section 246.6

Under our present Code attempts by D to make relevant inquiries into V's sexual conduct with someone other than D are regulated by the provisions of section 142(1) of the Code. That section enacted as follows:

> "142(1) Where an accused is charged with an offence under section 144 or 145 or subsection 146(1) or 149(1), no question shall be asked by or an behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless
>
> (a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the court; and
>
> (b) the judge, magistrate or justice, after holding a hearing in camera in the absence of the jury, if any, is satisfied that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant."

The standard of admissibility is whether "the weight of the evidence [of other sexual conduct] is such that to exclude it would prevent the . . . just determination of an issue of fact in the proceedings, including the credibility of the complainant." No closed list of instances of admissibility is furnished by the legislation but rather the matter is left to the discretion of the learned trial Judge, admissibility in any given case being gauged against the enacted statutory standard. Section 246.6 of the Bill follows a more restrictive or structured approach to essentially[187] the same subject matter. The section enacts, in part, as follows:

> "246.6 (1) In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless
>
> (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
>
> (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
>
> (c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.
>
> (2) No evidence is admissible under paragraph (1)(c) unless
>
> (a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and
>
> (b) a copy of the notice has been filed with the clerk of the court.
>
> (3) No evidence is admissible under subsection (1) unless the judge, magistrate or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met."[188]

In the first place it may be noticed that the section, like its predecessor,[189] does not apply to all sexual offences but rather is limited in its application to the sexual assault trilogy of sections 246.1, 246.2 and 246.3. Bill C-127 does not repeal the offence of section 146(1), sexual intercourse with a female under 14 years of age, and, accordingly, though subject to the stringencies of present section 142, those charged with the offence after January 4, 1983, escape the rigours of section 246.6. As a practical matter, in such cases as would factually fall within section 146(1) of the Code, Crown counsel would, in all

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187 See also section 246.7 discussed infra.

188 For a discussion of the procedure to be followed and issues raised by the present section, see Forsythe v. The Queen, [1980] 2 S.C.R. 356; 15 C.R. (3d) 280; 53 C.C.C. (2d) 255.

189 Section 142(1) applies to the offences of 144, 145, 146(1) and 149(1).

likelihood, proceed under either 246.1 or 246.2 and advantage himself of the restrictions of the new section 246.6.

Parliament has also changed the language of the prohibition from the present "No question shall be asked . . ." to "No evidence shall be adduced . . ." and from "sexual conduct" to "sexual activity" but neither change would appear to be one of substance.

The first substantial changes effected by section 246.6(1) are in

(a) the exhaustive listing of the exceptions to the general exclusionary rule;[190] and,

(b) the substance of the exceptions.

The first exception permits defending counsel to introduce evidence, otherwise caught by the prohibition, in reply to or rebuttal of evidence adduced by the prosecution of V's sexual activity or lack thereof. To fail to admit such evidence in response to that preferred by the prosecution would, it is submitted, leave the jury with an entirely distorted picture upon a relevant issue and lead to an unjust factual determination.[191] Procedurally, no notice need be given to the prosecution of D's intention to adduce such evidence[192] but a subsection (3) hearing must be held to determine the admissibility issue.

The second exception may be shorthandedly described as the "mistaken identity" exception and allows evidence of specific instances of V's sexual activity with others provided it tends to establish the identity of V's assailant as alleged in the indictment or count. To put the matter somewhat differently, section 246.6(1)(b) allows defending counsel, without notice to the Crown but after a subsection (3) hearing, to adduce evidence which tends to show the identity of V's assailant (alleged to be D) by reference to her previous sexual activity with such a person. On a charge of sexual assault laid against him D_1 is permitted to show that D_2 was the perpetrator because of previous sexual activity between V and D_2.

The final exception, that of section 246.6(1)(c), is inextricably intertwined with the defence of honest but mistaken belief in consent. In asserting that he honestly believed that V was consenting to that which is said to constitute the external circumstances of his crime, D is permitted to adduce evidence of V's contemporaneous sexual activity with another or others in support of such defence.[193] The introduction of this evidence, upon notice and after a subsection (3) hearing, provides evidentiary support for the defence of mistaken belief in that it makes plain the circumstantial facts surrounding D's participation and enables the jury to decide as to the honesty of D's belief.[194]

In the case of each of the exceptions to the exclusionary rule described in subsection (1) the burden rests upon defending counsel to "satisfy" the presiding judge, justice or magistrate that "the requirements of this section are met".

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190 Present section 142(1) makes no attempt to compile an exhaustive list of the situations in which evidence may be admitted.

191 In another context, see R. v. McMillan (1975), 29 C.R.N.S. 191; 23 C.C.C. (2d) 160 (O.C.A.); R. v. Martin (1980), 53 C.C.C. (2d) 425 (O.C.A.).

192 Since the evidence is only admissible in answer to that of the prosecution, it was probably felt that no notice was required.

193 For a typical fact situation in which the defence may be raised, see R. v. Plummer and Brown (1975), 24 C.C.C. (2d) 497; 31 C.R.N.S. 220 (O.C.A.).

194 See, section 244(4) in clause 19 of the Bill.

The second principal change effected by section 246.6(3) in the declaration that V is not a compellable witness on the in camera hearing held under the subsection. This provision effects a statutory reversal of Forsythe v. The Queen,[195] supra, upon this issue assuming it withstands an inevitable Charter onslaught. The complainant, of course, is a competent witness on the hearing but is unlikely to be willing to give the type of evidence sought to be adduced under subsection (1) in the absence of compulsion to do so. Counsel will be obliged to make his case upon the admissibility issue, for all practical purposes, upon the testimony of persons other than V.

Subsections four (4) to six (6), inclusive, of section 246.6 reproduce present sections 142(2) to (4), inclusive, and require no further explanation. The sections enact as follows:

> "(4) The notice given under subsection (2) and the evidence taken, the information given or the representations made at a hearing referred to in subsection (3) shall not be published in any newspaper or broadcast.
>
> (5) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (4) is guilty of an offence punishable on summary conviction.
>
> (6) In this section, "newspaper" has the same meaning as in section 261."

(5) Evidence of Sexual Reputation: Section 246.7

It may be recalled that under section 142(1) there is specific mention made of credibility as one of the factual issues the just determination of which may require the introduction of evidence of V's sexual conduct with someone other than D. The basis upon which evidence of other sexual activity may be led under section 246.6, although incidentally affecting V's credibility, are essentially confined to substantive issues raised by the conduct of the defence.[196] In respect of credibility issues a further prohibition is enacted by section 246.7:

> "246.7 In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant."

At the outset it should be once again observed that the prohibition only applies to prosecutions for the sexual assault trilogy of sections 246.1, 246.2 and 246.3 so that the trial of any other sexual offence not repealed by the Bill falls outside the scope of the prohibition and is left to be determined in accordance with general principles of the law of evidence.

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195 See also R. v. Moulton (1979), 51 C.C.C. (2d) 154; 13 C.R. (3d) 143 (Alta. C.A.).

196 For example, consent or honest belief therein.

Secondly, the prohibition enjoins the introduction of a certain type of evidence, that of sexual reputation, whose asserted relevance is limited to a particular issue, namely, the support of or challenge to V's credibility. It is perhaps difficult to envisage how evidence of sexual reputation, general or specific, would be more than incidentally relevant to V's credibility in any event. If the evidence were tendered for admission under both section 246.6(1) and 246.7, the trial judge would be obliged to exclude it on the credibility issue because of the scope of the prohibition under section 246.7 but could conceivably permit it under 246.6.

Let us suppose V's credibility is being attacked upon the basis that she has recently fabricated her complaint of sexual assault because of sexual fantasy in which she indulges. In rebuttal of the allegation Crown counsel could probably introduce evidence of any previous consistent statements by V but quaere whether he would be permitted under section 246.7 to introduce evidence of V's sexual reputation as supportive of her credibility. To put the matter somewhat more generally, neither the credibility attack nor support may constitute evidence of sexual reputation, whether general or specific.

(6) Spousal Competence and Compellability

In consequence in part at least upon the amendment of section 246.8 which makes spouses, whether living together or not, liable for spousal sexual assaults, C-127 amends the provisions of section 4 of the Canada Evidence Act to broaden the number and nature of offences upon which a spouse may be a competent and compellable prosecution witness. Section 4(2) of the Act is repealed and replaced by a new section bearing the same number:

> "(2) The wife or husband of a person charged with an offence or attempt to commit an offence against section 33 or 34 of the Juvenile Delinquents Act or with an offence against any of sections 146, 148, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 246.1, 246.2, 246.3, 249 to 250.2, 255 to 258 or 289 of the Criminal Code, is a competent and compellable witness for the prosecution without the consent of the person charged."

The amendment changes little of substance and is mainly consequential upon the new sexual assault and abduction scheme created by the Bill.[197]

A new sub-section, 4(3.1) is added by Bill C-127 to provide for spousal competency and compellability at the instance of the Crown in respect of certain listed offences where V is under the age of fourteen (14) years. The section enacts as follows:

> "(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 218, 219, 220, 222, 223, 245, 245.1, 245.2 or 245.3 of the Criminal Code where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged."

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197 The section applies to the substantive crimes and also to attempts to commit them but not conspiracies to commit such offences.

It may be noticed that of the new offences created by the legislation the assaultive scheme of sections 245, 245.1, 245.2 and 245.3 is included in the provision.

In summary the provisions of sections 4(2) and 4(3.1) provide for spousal competence and compellability at the instance of the prosecution

(a) in the case of sexually assaultive behaviour and the abduction offences irrespective of the status or age of V; and,

(b) in the case of assaultive behaviour devoid of sexual connotation, only in the event that V is under 14 years of age.

E. (GENERAL) DEFENCES

(1) Introduction

As we have already seen, it is the principal purpose or focus of Bill C-127 to create a series of new offences[198] involving non-fatal assaultive and sexually assaultive behaviour. Consequential definitional, evidentiary and procedural provisions are enacted, the necessary adjectival law to implement the substantive changes. The Bill, almost incidentally, also re-enacts existing defences in respect of unrepealed sexual offences and, arguably, expands to scope of the defence or excuse of compulsion.[199]

(2) Consent: Section 140

Section 140 of the present Criminal Code, applicable in prosecutions for having sexual intercourse with a female under fourteen (14) years of age or, if of previous chaste character, between fourteen (14) and sixteen (16) years, and indecent assault,[200] enacts as follows:

> 140. Where an accused is charged with an offence under section 146, 149 or 156 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge.

Bill C-127 repeals the indecent assault offences of sections 149 and 156 and re-enacts section 140 to apply only to the offences of section 146.

> "140. Where an accused is charged with an offence under section 146 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge."

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198 The legislation, of course, also provides for specific defences to the new offences. See, for example, sections 244(4) and 246.1(2).

199 Criminal Code, sections 17, 18.

200 On victims of either sex.

Under the new legislation the indecent assault offences of present sections 149 and 156 will, in all likelihood, be prosecuted as some variety of sexual assault.[201] The assaultive elements of the crime would normally make V's consent[202] or an honest belief therein[203] a defence to D but in the case of sexual assaults,[204] section 246.1(2) limits the defence substantially:

> 246.1(2) Where an accused is charged with an offence under subsection (1) or section 246.2 or 246.3 in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

Shortly stated the effect of section 246.1(2) is to render the consent of a complainant under fourteen (14) years of age legally ineffectual in sexual assault cases[205] unless D is less than three (3) years V's elder.

The re-enactment of section 140[206] and the enactment of section 246.1(2) only changes the present state of the law in respect of the narrow class of perpetrators excepted from the rule of section 246.1(2), namely, those less than three (3) years older than V engaging in consensual behaviour of a sexual nature with V.

(3) Age: Section 147

The general rules of our present Code relating to the legal responsibility of those of tender years are set out in sections twelve (12) and thirteen (13) of the Code which enact as follows:

> 12. No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years.
>
> 13. No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

In the case of certain sexual offences having intercourse or an attempt thereat as an essential element a more specific rule is enacted by former section 147. It provided as follows:

> "147. No male person shall be deemed to commit an offence under section 144, 145, 146 or 150 while he is under the age of fourteen years."[207]

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201 Sections 246.1, 246.2 and 246.3.

202 Sections 244(2) and (3). Subsection (3) says nothing about V's age.

203 Section 244(4).

204 The section applies to all three (3) forms or degrees of sexual assault.

205 Idem.

206 Deleting the reference to indecent assault.

207 Section 148, sexual intercourse with the feeble minded, is not included in section 147. Other sexual offences of which intercourse is an essential element are defined in terms of principals who would be beyond the age of fourteen (14) years.

The repeal of sections 144 and 145 leaves section 146 and incest as the only listed offences of present section 147 to survive the amendment process. In consequence, section 147 of Bill C-127 enacts as follows:

> "147. No male person shall be deemed to commit an offence under section 146 or 150 while he is under the age of fourteen years."

By excluding from the new section 147 any reference to the sexual assault trilogy created by the Bill, Parliament has left those previously entitled to assert a legal disability in answer to a charge of what will be sexual assault to place reliance upon the general provisions of section 13. The diminution of the specifically protected class is unlikely to cause any serious practical consequences.

(4) Compulsion: Section 17, 18

The defence or excuse[208] of duress or compulsion is presently provided for in section 17 and 18 of the Criminal Code. Section 17 codifies the common law defence only insofar as it relates to principals in the first degree[209] and provides as follows:

> 17. A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

Included amongst the excepted offences are "assisting in rape"[210] and "causing bodily harm".

The substantial revision of the assault and sexual assault provisions of the Code by C-127 necessitated a revision of the list of excepted offences in section 17. The new section provides as follows:

> "17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully

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208 "Excuse" is arguably a better term since the effect is to excuse from responsibility an offender whose liability is proven.

209 See R. v. Paquette (1976), 30 C.C.C. (2d) 417 (S.C.C.).

210 See, Bergstrom v. The Queen, [1981] 1 S.C.R. 539; 59 C.C.C. (2d) 481; 20 C.R. (3d) 347.

causing bodily harm, arson or an offence under sections 249 to 250.2 (abduction and detention of young persons)."

(emphasis added)

The effect of the substituted section is essentially twofold: it expands the scope of the excuse by enlarging the type or nature of threat which may give rise thereto and, at the same time, reduces the number of substantive offences that may be thereby excused by inflating the number of excepted offences.

Under the present Code it is only a threat "of immediate death or grievous bodily harm" that will animate the excuse whereas under the Bill a threat of "bodily harm" will suffice. It seems passing strange why such a substantial change in the scope of the defence would be effected without any apparent need therefor.

Of the excepted offences added to section 17, only the offence of assault simpliciter is not included with the result that compulsion affords no excuse to principals in the first degree charged with those offences.

Section 18 re-enacted by the Bill simply repeats the present formula in sexually neutral terms:

> "18. No presumption arises that a married person who commits an offence does so under compulsion by reason only that the offence is committed in the presence of the spouse of that married person."

F. TRANSITIONAL PROVISIONS

Clause thirty-three (33) of the Bill enacts as follows:

> "33. An offence committed prior to the coming into force of this Act against any provision of law affected by this Act shall be dealt with in all respects as if this Act had not come into force."

As a general rule of statutory construction, substantive amendments are prospective in their operation whereas procedural ones are retrospective.[211] Evidentiary rules, in most cases are procedural.[212] The inclusion in clause thirty-three (33), however, of the phrase "in all respects" would appear to require

(a) that offences committed before proclamation (irrespective of when proceedings are commenced) are dealt with substantively and procedurally[213] under the present law;

(b) that offences committed after proclamation are tried in accord with the new provisions in its substantive, evidentiary and procedural aspects.

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211 See, for example, Regina v. Lesarge (1975), 26 C.C.C. (2d) 388 (O.C.A.); R. v. Irwin (1976), 32 C.R.N.S. 398 (O.C.A.).

212 Ibid. See also, R. v. Demeter (1975), 6 O.R. (2d) 83; 19 C.C.C. (2d) 321 (H.C.J.).

213 Including the evidentiary rules applicable at the hearing.

The relevant date for trial purposes is the date of the offence and not the date on which the information is laid or, more generally, proceedings are commenced.[214]

214 The "proceedings are commenced" language has been frequently used in other transitional provisions, for example, in sections 26 and 27 of the Criminal Law Amendment Act (No. 2), 1976. S.C. 1974-75-76, c. 105.