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LEGISLATIVE SUMMARY

Bill C-51:
An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-51
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-51: AN ACT TO AMEND THE CRIMINAL CODE AND THE DEPARTMENT OF JUSTICE ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO ANOTHER ACT

1 BACKGROUND

Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,[1] was introduced in the House of Commons by the Minister of Justice on 6 June 2017. Following second reading on 15 June 2017, the bill was referred to the House of Commons Standing Committee on Justice and Human Rights, which reported the bill back to the House of Commons with several amendments on 20 November 2017.[2] The bill passed third reading in the House of Commons as amended on 11 December 2017.

The bill received first reading in the Senate on 12 December 2017 and second reading on 10 May 2018, when it was referred to the Standing Senate Committee on Legal and Constitutional Affairs. That committee reported the bill back to the Senate on 25 September 2018 with no amendments but with an appended observation.[3] **At third reading, two amendments were adopted on 30 October 2018,[4] before being rejected by the House of Commons on 10 December 2018. The Senate did not insist on its amendments, and the bill received Royal Assent on 13 December 2018.**

There are three aspects to Bill C-51. First, the bill amends the *Criminal Code* (Code)[5] to modify or repeal provisions that have been ruled unconstitutional by the courts or that raise risks of being contrary to the provisions of the *Canadian Charter of Rights and Freedoms* (Charter).[6] It also amends or repeals Code provisions that could be considered obsolete and/or redundant.

Second, Bill C-51 amends provisions in the Code relating to sexual offences. In particular, it sets out a procedure for determining the admissibility and use of the complainant's records when they are in the possession of the accused.

Finally, Bill C-51 amends the *Department of Justice Act*[7] to require that the Minister of Justice table a statement of a bill's potential effects on the rights and freedoms guaranteed by the Charter for every government bill introduced in either House of Parliament.

This Legislative Summary provides general background information on all three aspects. It also provides specific information on the substantive changes reflected in each of these parts, rather than examining every provision.

2 DESCRIPTION AND ANALYSIS

2.1 AMENDMENTS TO THE *CRIMINAL CODE*: UNCONSTITUTIONAL, OBSOLETE OR REDUNDANT PROVISIONS

A judicial declaration that a law is inconsistent with the Charter does not automatically remove unconstitutional provisions from the statute books, since changing the text of federal laws requires an Act of Parliament. It does mean, however, that unconstitutional provisions still found in the statute books may have no legal effect.

This part of Bill C-51 can be seen as an aspect of adhering to the rule of law, which the Charter's preamble recognizes as one of Canada's founding constitutional principles. A basic foundation of the rule of law is that laws be "knowable and accessible" to everyone.[8] Having unenforceable laws still in the statute books can lead to problems such as the conviction of Travis Vader in 2016[9] on a murder provision in the Code that had been struck down by the Supreme Court of Canada as a violation of the Charter in 1990.[10] The Supreme Court case may not be apparent to someone consulting the Code online or in a written Code that is not annotated, since the inoperative provision remains in the Code.

In the wake of *Vader*, the House of Commons Standing Committee on Justice and Human Rights wrote to the Minister of Justice, the Honourable Jody Wilson-Raybould, recommending that her department prioritize tabling a bill that would repeal "all provisions of the *Criminal Code* that have been found to be unconstitutional or inoperative." The letter went on to state that "[s]uch legislation would avoid mistrials and appeals and reduce undue delays and costs. It would also increase public confidence in the criminal justice system."[11] In a response dated 17 January 2017, the Minister of Justice indicated that she had instructed departmental officials to conduct a review of unconstitutional provisions that remain in the Code. This review was being undertaken to ensure that the Code reflects the current state of the law and upholds the rule of law.[12]

The Government of Canada has indicated that Bill C-51 seeks to promote clarity in the law and help avoid confusion and errors by ensuring that the laws on paper reflect the laws in force. It has also stated that repealing provisions that are very similar to those found unconstitutional by the courts would help to avoid expensive, time-consuming litigation to achieve the same result and may prevent court delays.[13]

In addition, Bill C-51 repeals certain sections of the Code that are thought to be no longer required. These sections are considered obsolete because they pertain to offences that are rarely, if ever, charged. They remain in the Code as part of its history but are not thought to be part of its future.

The bill also repeals other sections of the Code that are thought to be redundant. This means that the criminal activity dealt with in one section of the Code can be addressed by another section. To eliminate confusion as to which section applies, the section that sets out a specific example of a general offence is being repealed. For example, the offence of pretending to practise witchcraft can be considered a specific example of a form of fraud, so the provision is being repealed in favour of the

general fraud offence. This offence is also likely rarely charged, making it an example of the overlap between the obsolete and redundant categories of offences.

2.1.1 Reverse Onus Provisions (Clauses 5 to 7, 9, 14, 18, 26, 27, 29, 32, 34 to 38, 43, 45, 46, 48, 49, 51, 55 to 60, 62, 67, 68 and 69 to 72)

Clauses 5 to 7, 9, 14, 18, 26, 27, 29, 32, 34 to 38, 43, 45, 46, 48, 49, 51, 55 to 60, 62, 67, 68 and 69 to 72 of the bill remove "reverse onus" provisions – the requirement that an accused establish a lawful excuse or remove an inference that can lead to a finding of guilt.

A "reverse onus" in a criminal offence provision has been found by the courts to be problematic in that it can infringe section 11(d) of the Charter, which states that

> [a]ny person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The combined effect of the Supreme Court of Canada decisions in *R. v. Whyte* [14] and *R. v. Keegstra* [15] is that the real concern in reverse onus cases is that an accused may be convicted when a reasonable doubt as to the individual's guilt exists. In other words, the presumption of innocence is violated where the accused is required to prove some fact on the balance of probabilities in order to avoid conviction because it permits a conviction in spite of a reasonable doubt as to the guilt of the accused. When that possibility exists, the presumption of innocence is infringed. This infringement can be justified under section 1 of the Charter, as was the case in the *Keegstra* decision. In that case, the Supreme Court upheld the onus on the accused to prove that hateful statements were true as part of Parliament's right to strike a balance between preventing the damage caused by hate literature and the importance of freedom of expression.

The amendments listed below remove the reverse onus provision in two different ways.

The sections of the Code that are amended to remove the words "the proof of which lies on the person" (or "on him" or "on them") in reference to a lawful excuse are as follows:

- Section 82 of the Code makes it an offence to make, possess or have care or control of an explosive substance.
- Section 108 of the Code makes it an offence to tamper with the serial number on a firearm.
- Section 125 of the Code makes it an offence to influence or negotiate appointments or deal in offices.
- Section 145 of the Code makes it an offence to escape from lawful custody and be at large without lawful excuse before the expiration of a term of imprisonment.
- Section 177 of the Code makes it an offence to loiter or prowl by night near a dwelling house on another person's property.

- Section 215 of the Code makes it an offence to fail to carry out a legal duty to provide the necessaries of life.
- Section 294 of the Code makes it an offence for any person who does not have the lawful authority to do so to solemnize or pretend to solemnize a marriage.
- Section 349 of the Code makes it an offence for any person to enter into a dwelling house with intent to commit an indictable offence therein.
- Section 376 of the Code describes the offences of counterfeiting a stamp or a mark. Both “stamp” and “mark” are defined as being limited to government uses.
- Section 405 of the Code makes it an offence for any person to acknowledge an instrument in a false name. The offence is committed where a person acknowledges before a court or other authorized person any of a number of legal documents in the name of another person.
- Section 417 of the Code makes it an offence for any person to apply a distinguishing mark without lawful authority or remove, destroy or obliterate a distinguishing mark with intent to conceal Her Majesty’s ownership. It is also an offence to knowingly receive, possess, sell or deliver public stores bearing a distinguishing mark without lawful authority.
- Section 419 of the Code makes it an offence to wear a variety of military apparel, marks (including medals, ribbons or decorations), or to possess certificates, commissions and warrants without lawful authority.
- Section 450 of the Code makes it an offence for any person to buy, receive, possess or bring into Canada counterfeit money.
- Section 451 of the Code makes it an offence for any person to possess gold or silver filings, clippings, bullion or dust in any form, which has been produced by diminishing a current gold or silver coin.
- Section 452 of the Code makes it an offence for any person to utter (meaning sell, pay or tender) or offer to utter counterfeit money, or use it as though it were genuine, or export counterfeit money out of Canada.
- Section 454 of the Code makes it an offence for any person to manufacture, produce, sell or possess slugs or tokens with the intention that these items be fraudulently used in substitution for a coin or a valuable token in a coin or token-operated device.
- Section 458 of the Code makes it an offence for any person to possess, make or repair, or buy or sell any instrument, material or thing that has been used or is intended to be used to make counterfeit money or valuable tokens.
- Section 459 of the Code makes it an offence for any person to knowingly convey out of Her Majesty’s mints in Canada any machine, engine, tool, instrument, material or thing used in connection with the manufacture of coins or any coin, bullion or metal.
- Section 517 of the Code authorizes a justice dealing with a bail hearing under section 515 to make an order directing that matters not be published for a specified period. Failure to comply with such an order is an offence.

- Section 743.21 of the Code gives a sentencing court the power to make an order prohibiting the offender from communicating with any victim, witness or other person identified in the order during the custodial period of a sentence, except in accordance with any conditions specified in the order. Failure to comply with a non-communication order is an offence.

Other sections of the Code are amended to replace the words "under circumstances that give rise to a reasonable inference" with the word "knowing" or the words "with intent to" in order to remove an inference that the device, instrument or identity document in question was used or intended to be used to commit the offence:

- Section 327 of the Code makes it an offence for a person to, without lawful excuse, manufacture, possess, sell or offer for sale or distribute any device or component that is primarily useful in the theft of a telecommunication service.
- Section 342.2 of the Code makes it an offence for a person to, without lawful excuse, make, possess, sell or offer for sale or distribute any instrument, device or component thereof, the design of which renders it primarily useful for committing an offence under section 342.1 (unauthorized use of a computer) or section 430 (mischief).
- Section 351 of the Code makes it an offence for any person to be in possession of a break-in instrument.
- Section 352 of the Code makes it an offence for any person to possess any instrument for breaking into coin-operated or currency exchange devices.[16]
- Section 402.2 of the Code makes it an offence to obtain or possess another person's identity information to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.

Other reverse onus provisions that are either being amended or repealed include the following:

- Clause 26 of Bill C-51 repeals section 279(3) of the Code. Section 279 describes the offences of kidnapping and forcible confinement. Section 279(3) states that evidence of the fact that the victim of the kidnapping or forcible confinement did not resist is not a defence unless the accused can show that the failure to resist was not caused by threats, duress or force. Clause 27 repeals section 279.1(3) of the Code which applies the section 279(3) defence to the offence of hostage taking.
- Section 429(2) of the Code states that no person shall be convicted of offences relating to wilful or forbidden acts in relation to property and animals under sections 430 to 446 where they prove they acted with legal justification or excuse and with colour of right.[17] Clause 51 of Bill C-51 removes the onus of proof placed on an accused. The words "where he proves that he acted" are replaced by "if they act."
- Clause 68 of Bill C-51 repeals section 794(2) of the Code. Section 794(1) of the Code provides that an exemption under which an accused may have a defence need not be negatived or referred to in an information charging that accused. Section 794(2) places the onus of proving the applicability of the exculpatory proviso on the accused; the prosecutor need not prove that the exculpatory proviso does not operate in favour of the accused, whether or not it is set out in the information.

2.1.1.1 Evidentiary Presumptions (Clauses 16 and 39)

A presumption is a reasoning process whereby to some degree, proof of one fact is taken as evidence of another. For example, if it is shown that a person is over 18 years of age, it is presumed that they are legally competent. Where the *Criminal Code* directs a factual inference unless there is "any evidence to the contrary," there is a mandatory presumption. These presumptions allow a prosecutor to prove an element of an offence through proof of some other fact that is not an element of the offence, but which is related to it. The legal difficulty with evidentiary presumptions is the same as for reverse onus clauses, namely that they could lead to convictions even if a reasonable doubt has been raised as to an accused's guilt. This would violate the presumption of innocence as guaranteed by section 11(d) of the Charter.

Clause 16 of Bill C-51 repeals section 198 of the Code. This section sets out a number of presumptions concerning different offences under Part VII: Disorderly Houses, Gaming and Betting. For example, there is a rebuttable presumption that a place found to contain a slot machine shall be presumed to be a common gaming house.

Clause 39 of Bill C-51 amends section 354(2) of the Code. Section 354 describes the offence of possession of property obtained by crime. Section 354(2) sets out a presumption that possession of a car or car part with an obliterated vehicle identification number is proof that the motor vehicle was obtained by crime and a presumption that the possessor knew the motor vehicle was obtained by crime. The latter presumption is removed by clause 39.

2.1.2 Other Unconstitutional Provisions

2.1.2.1 Supplying Noxious Things (Clause 28)

Clause 28 of Bill C-51 repeals section 288 of the Code. That section makes it an offence to supply or procure a drug or instrument that is to be used to cause the miscarriage of a female person. The related offence of procuring a miscarriage (abortion) in section 287 has been ruled unconstitutional.[18]

2.1.2.2 Publishing a Defamatory Libel (Clause 31)

Section 299 of the Code states, in part, that a person publishes a defamatory libel when it is shown or delivered with intent that it should be read or seen by the person whom it defames or by any other person. Clause 31 of Bill C-51 amends section 299(c) so that the intent must be that the alleged libel should be read or seen by any person other than the person whom it defames.

This amendment is being made following the decision of the Supreme Court of Canada in *R. v. Lucas* that found that the fundamental element of libel is publication to a person *other than* the one defamed and suggested that the phrase "by the person whom it defames or" be severed from section 299(c).[19] The Court found that the current wording of the provision is too broad and does little to advance the objective of protecting reputation since a person's reputation will not be damaged if the defamatory statement is published to that individual alone. Any infringement upon a Charter right, such as upon the section 2(b) right to freedom of expression in this instance, must be construed as narrowly as possible.

2.1.2.3 Evidence and Evidence of Previous Conviction (Clause 40)

Clause 40 of Bill C-51 repeals sections 359 and 360 of the Code. Section 359 sets out evidentiary provisions that a prosecutor may rely upon in proceedings under sections 342 (theft, forgery, etc., of a credit card); 354 (possession of property obtained by crime); and 356(1)(b) (possession of anything used to commit the offence of theft from mail). Under section 359, evidence that property, other than the property that is the subject matter of the offence, was found in the possession of the accused and was stolen within the 12 months prior to the beginning of the proceedings, is admissible at any stage of the proceedings and may be considered for the purpose of proving that the accused knew that the property that forms the subject matter of the proceedings was stolen. Section 360 allows the Crown to introduce evidence, in proceedings under section 354 or 356(1)(b), that the accused has been convicted, within the five years prior to the commencement of the current proceedings, of an offence involving theft or an offence under section 354. Such evidence may be considered for the purpose of proving that the accused knew that the property that forms the subject matter of the offence in the proceedings was unlawfully obtained.

Sections 359 and 360 have been the subject of a number of lower court decisions that have held that they violate section 7 of the Charter, which states that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 359 has been held to violate section 7 because evidence of bad character may be introduced even if it shows nothing other than bad character.[20] Section 360 has been held to violate section 7 because there is no logical connection between a prior conviction and the matter before the court. In addition, mention of a previous conviction can have an improper influence on a jury or even a judge.[21]

2.1.2.4 Pre-sentence Custody (Clause 66)

Section 719 of the Code sets out the time when a sentence commences and takes into account time spent in custody before a sentence is imposed. Section 719(3) sets out the general rule that a sentencing court must limit credit for pre-sentence custody to a maximum of one day for each day spent in custody. Under section 719(3.1), however, circumstances may justify a credit of 1.5 days for each day spent in custody. The sentencing court may not grant this increased credit where, in ordering the accused

to be detained, it was made clear that the primary reason for detention was a previous conviction. Enhanced credit may also not be given where the accused was ordered to be detained under section 524 of the Code for having breached a release order.

The Supreme Court of Canada examined section 719(3.1) in the case of *R. v. Safarzadeh-Markhali*.[22] In that case, a person was arrested and denied bail because he had a criminal record. The Supreme Court held that the denial of enhanced credit for pre-sentence custody to offenders who are denied bail primarily due to a prior conviction was overbroad because it caught people in ways that have nothing to do with the legislative purpose of section 719(3.1) of the Code, which is to enhance public safety and security. This meant that section 719(3.1) violated section 7 of the Charter, which guarantees the right to fundamental justice. The infringement of section 7 of the Charter was also held to be not justified under section 1 of the Charter. The Court found that the law's overbreadth meant that offenders who have neither committed violent offences nor present a risk to public safety would be unnecessarily deprived of their liberty.

Clause 66 of Bill C-51 amends section 719(3.1) to comply with the Supreme Court's ruling in *Safarzadeh-Markhali* by removing the restriction on enhanced credit where an accused is detained primarily because of a previous conviction. It also removes the restriction on enhanced credit where an accused breached a condition of bail. As amended in Bill C-51, section 719(3.1) states that, if the circumstances justify it, the maximum credit for pre-sentence custody is 1.5 days for each day spent in custody.[23]

2.1.3 Redundant or Obsolete Provisions

2.1.3.1 Acts Intended to Alarm Her Majesty or Break Public Peace (Clauses 1, 2, 63 and 65)

Clause 1 of Bill C-51 repeals section 49 of the Code. This section makes it an offence to commit acts intended to alarm Her Majesty or break the public peace. It also makes it an offence to commit an act that is intended or is likely to cause bodily harm to Her Majesty. It appears that there have been no prosecutions under this section based on a search of electronic case records. In addition, parts of section 49 are dealt with in section 46 of the Code, which makes it an offence to kill or attempt to kill or do any bodily harm to Her Majesty.

Clauses 2, 63 and 65 therefore delete references to section 49 in Code sections 55, 581(4) and 601(9), respectively. These sections refer to the need to state in the indictment every overt act that is being relied upon to support, among others, a charge under section 49.

2.1.3.2 Duelling (Clause 4)

Clause 4 of Bill C-51 repeals section 71 of the Code. This section makes it an offence to challenge or provoke another person to fight a duel or to accept a challenge to fight a duel. It is not necessary for the duel to actually take place for the offence to

be made out. This offence has fallen into desuetude and so is no longer thought to be needed.[24]

2.1.3.3 Advertising Reward and Immunity (Clause 8)

Clause 8 of Bill C-51 repeals section 143 of the Code. This section makes it a summary conviction offence to publicly advertise for the return of lost or stolen goods with a promise of reward and immunity. This is also known as the "no questions asked" provision. The Department of Justice backgrounder accompanying Bill C-51 indicates that this is one of the Code offences that has been deemed obsolete or redundant.[25]

2.1.3.4 Corrupting Morals and Tied Sales (Clauses 11 to 13)

Section 163 of the Code makes it an offence to produce, publish or distribute obscene things or crime comics. A "crime comic" is defined as follows:

> a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially
>
> (a) the commission of crimes, real or fictitious; or
>
> (b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

Clause 11 of Bill C-51 deletes the references in section 163 to crime comics. The government's backgrounder indicates that this is one of the Code offences that has been deemed obsolete or redundant. Clause 12 deletes references to crime comics in section 164 of the Code, which authorizes special search and seizure powers in relation to obscene publications (as defined by section 163(8)) and crime comics, among other materials. Clause 13 repeals section 165 which prohibits tying the sale of one publication to the sale of another publication the purchaser fears may be either obscene or a crime comic.

Clause 11 also repeals sections 163(2)(c) and 163(2)(d), which contain prohibitions on offers to sell or advertising any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, as well as the prohibition on advertising any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

2.1.3.5 Obstructing or Violence to or Arrest of Officiating Clergyman (Clauses 13.1 to 14)

Section 176(1) of the Code sets out the offence of unlawfully obstructing, being violent toward or arresting an officiating clergyman, while the offence of disturbing religious worship or certain meetings is found in section 176(2). The version of the bill introduced in the House of Commons repealed section 176. Two reasons for repeal were provided by the Minister of Justice: first, the underlying activity was

already covered by other criminal offences in the Code and second, the offence was under-inclusive since it protected only Christian clergy.[26]

Following amendments made at the Committee stage, clause 13.1 of Bill C-51 amends sections 176(1)(a) and 176(1)(b) of the Code to replace the reference to any "clergyman or minister" with a reference to an "officiant." The amendment also removes the reference to a "divine service" and replaces it with a reference to a "religious or spiritual service." These changes are intended to widen the scope of the offence to ensure that it prohibits the disruption of religious and spiritual ceremonies of all faiths. The language of the offence is also now gender-neutral in English.

Section 176(2) of the Code remains unchanged.

2.1.3.6 Blasphemous Libel (Clauses 30 and 64)

Clause 30 of Bill C-51 repeals section 296 of the Code. That section makes it an indictable offence to publish a blasphemous libel. The term "blasphemous libel" is not defined. It is specified that no person will be convicted of this offence if that person expresses an opinion or establishes an argument in good faith and in decent language on a religious topic. Clause 64 deletes the reference to blasphemous libel in section 584(1) of the Code, which provides that a count for publishing or selling a libel or obscenity does not need to contain the specific words complained of.

This section is likely being repealed for two reasons. One is that it has yielded no criminal conviction since the case of *R. v. Rahard* in 1935.[27] The second is that it could be construed by a court as a violation of the guarantee of freedom of expression as set out in section 2(b) of the Charter.

2.1.3.7 Pretending to Practise Witchcraft (Clause 41)

Clause 41 of Bill C-51 repeals section 365 of the Code. This section makes it an offence to fraudulently pretend to practise witchcraft, sorcery, enchantment or conjuration, to tell fortunes for money, and to pretend to discover, through the use of the occult, the location of a lost or stolen article or the manner in which it may be found. Given the paltry number of prosecutions, this offence has likely been deemed obsolete. It could also be considered redundant, as section 380 of the Code defines the general offence of fraud as defrauding the public of property or money by deceit, falsehood or other fraudulent means. Section 365 can, therefore, be seen as one specific example of the general fraud offence.

2.1.3.8 Counterfeit Proclamation and Message in False Name (Clause 42)

Clause 42 of Bill C-51 repeals sections 370 and 371 of the Code. Section 370 describes the offence of knowingly printing a document and causing it falsely to purport to have been printed by the Queen's Printer. Section 371 describes the offence of sending messages in a false name. Both offences have likely been

the subject of few prosecutions. In addition, both resemble the offences of forgery (section 366) and use, trafficking or possession of forged document (section 368). Forgery is described as the making of a false document, knowing it to be false, with the intent that it should be used as genuine to the prejudice of another person. Section 368 sets out the offence of using, dealing with or acting upon a document known or believed to be forged.

2.1.3.9 Trader Failing to Keep Accounts (Clause 44)

Clause 44 of Bill C-51 repeals section 402 of the Code. This section makes it an offence to fail to keep accounts. Any trader who owes more than $1,000, cannot pay his or her creditors in full, and has not kept ordinary books of account, commits an indictable offence. The section provides a defence that is made out if the accused can account for their losses and show that the failure to keep books was not fraudulent, or where the failure to keep books occurred more than five years prior to the inability to pay creditors.

This clause can be seen as the repeal of an offence that is unduly specific and deals with conduct that, if necessary, can be addressed effectively by other Code provisions. In this case, the general fraud provision in section 380 of the Code could apply, along with sections 392 (disposal of property to defraud creditors) and 397 (falsifying books and documents).

Section 402 is also an example of a problematic “reverse onus” provision that requires an accused to prove or disprove something. Such a provision can result in a conviction where a reasonable doubt exists as to the accused’s guilt, thereby infringing an accused’s Charter section 11(d) right to be presumed innocent until proven guilty beyond a reasonable doubt.

2.1.3.10 Personation at Examination (Clause 46)

Clause 46 of Bill C-51 repeals section 404 of the Code. This section makes it an offence to impersonate a candidate at an examination held under the authority of law or in connection with a university, college or school, with intent to gain advantage for oneself or some other person. This is another section of the Code that is very specific and can be addressed by other Code provisions. In this instance, the section 404 offence could be addressed by the general identity fraud offence set out in section 403 of the Code.

2.1.3.11 Falsely Claiming Royal Warrant (Clause 47)

Clause 47 of Bill C-51 repeals section 413 of the Code. This section makes it an offence to falsely claim that goods are made by a person holding a royal warrant, or for the service of Her Majesty, a member of the Royal Family, or a public department. This is another section of the Code that is very specific and can be addressed by other

Code provisions. In this instance, the section 413 offence could be addressed by the general fraud offence set out in section 380 of the Code.

2.1.3.12 Issuing Trading Stamps (Clauses 43.1 and 50)

Clause 43.1 of Bill C-51 amends section 379 of the Code by repealing the definition of "trading stamps." In addition, clause 50 of the bill repeals section 427 of the Code, which makes it an offence to give, sell, or issue trading stamps to a merchant or dealer in goods for use in their business. It is also an offence for a merchant or dealer in goods to distribute trading stamps to purchasers. Given the paltry number of prosecutions under the provision, this offence has likely been deemed obsolete.

2.1.3.13 Injuring or Endangering Animals (Clauses 52 to 54)

The offences of injuring or endangering animals are divided into offences against cattle and offences against other animals. Bill C-51 eliminates this division by repealing section 444, which relates to cattle, and changing the title before section 444 from "Cattle and Other Animals" to "Animals." The bill also changes the definitions of the animals protected under section 445 of the Code to eliminate the reference to animals "that are not cattle." Finally, the sentence imposed for endangering cattle is removed as a reference point from the ability to order prohibition or restitution set out in section 447.1.

2.2 Amendments to the *Criminal Code*: The Law of Sexual Offences

This part of the Legislative Summary provides general background information concerning the evolution of sexual assault law in Canada, followed by a discussion of specific amendments set out in Bill C-51 dealing with consent, rape shield laws, third-party records and admissibility of records relating to the complainant that are in the possession of the accused.

2.2.1 The Evolution of Sexual Offence Law in Canada

Women and children are overwhelmingly the victims of sexual offences. Historically, the criminal law enshrined a number of discriminatory myths regarding these crimes that violate the right of women and children to equal protection and benefit of the law under section 15 of the Charter, as well as under section 28 of the Charter, which provides that all of the rights and freedoms it contains are guaranteed equally to male and female persons.

2.2.1.1 Major Legislative Reforms

Major reforms to sexual offences contained in the *Criminal Code* were undertaken in 1975, 1982, 1985, 1987, 1992 and 1997.[28] These reforms made a number of changes to repeal discriminatory sexual offence provisions and replace them with gender-neutral sexual offences against children and adults. For example, the offence

of rape, which required that the Crown prove beyond a reasonable doubt that a man sexually penetrated a woman, was repealed in the 1982 amendments to the Code. In its place, gender-neutral offences of sexual assault were introduced, requiring the Crown to prove sexual touching without consent (as well as any associated violence, if relevant to the offence).

In addition, these legislative reforms:

- removed the requirement for corroborating evidence in sexual offence prosecutions, which required additional evidence in support of a sexual offence complainant's testimony;[29]
- abrogated the doctrine of "recent complaint,"[30] which allowed judges and juries to draw an adverse inference regarding the credibility of a complainant if the complainant did not make a statement disclosing the attack at the first opportunity after the offence which reasonably offered itself;[31]
- criminalized "marital rape," which reversed the common law rule that a man could not rape his wife because she had permanently consented to sexual intercourse as part of the contract of marriage;[32] and
- added greater specificity to the definition of consent in the context of sexual assault, specifying that consent required the voluntary agreement of the complainant to engage in the sexual activity in question.[33]

Provisions were also enacted preventing complainants from being examined on their sexual history "solely to support the inference that the complainant is by reason of such conduct (a) more likely to have consented to the sexual conduct at issue on the trial; or (b) less worthy of belief as a witness" (rape shield provisions).[34] As well, a legislative scheme was established to govern requests from the defence to access the private records of sexual offence complainants[35] in the hands of third parties (for example, records of counselling made by psychologists). These proceedings are referred to as third-party records applications.

Since 2000, new legislation has been introduced to criminalize human trafficking, and major changes to Canada's prostitution laws have also been adopted.[36]

The coming into force of the equality guarantees in section 15 of the Charter in 1985 was a significant factor behind Parliament's legislative changes to sexual offence law. All of these reforms were aimed at ensuring women's equality, privacy and security rights by countering myths and stereotypes about sexual assault complainants. These myths include deeply rooted beliefs about how a "real" victim reacts to sexual assault (e.g., by fighting back and by making an immediate complaint to authorities), and myths about the reliability and vindictiveness of women who make sexual assault complaints (e.g., the "unchaste mind" is disordered and, therefore, inherently unreliable; women are prone to accuse men of rape out of spite; women are hysterical and prone to exaggeration). Other myths relate to the sexual availability of women who have intimate relationships outside marriage (e.g., a woman who has sexual relations outside marriage is of bad character and is, therefore, inherently unreliable; a woman who consents to sex with one person is likely to have consented to sex with others;

"promiscuous" women and prostitutes "deserve" to be sexually assaulted or are perceived to be responsible for their own victimization).

2.2.1.2 Constitutional Litigation Related to Sexual Offences

The legislative reforms discussed above were subject to extensive constitutional litigation, which provided the Supreme Court with an opportunity to develop the legal relationship between the right of an accused to make full answer and defence on the one hand, and the equality and privacy rights of sexual offence complainants on the other.[37]

The Supreme Court's jurisprudence on sexual offences over the last 30 years has made it clear that evidence based on rape myths and stereotypes is not admissible because it distorts the truth-seeking purpose of a criminal trial. The equality and privacy rights of sexual offence complainants must be considered and protected. That said, the Supreme Court has stressed that an accused's right to make full answer and defence is paramount. Trial judges must have discretion to weigh competing constitutional rights in the specific factual context of the case and make case-specific determinations about relevance and admissibility.

Despite legislative reforms and decisions from the Supreme Court holding that rape myths and stereotypes have no place in a criminal trial, concerns continue to be raised about the continued prevalence of myths and stereotypes in sexual offence proceedings.[38] Some academics have also expressed the view that the criminal justice system as a whole gives insufficient weight to women's equality rights. Specific areas where commentators argue that myths and stereotypes still find their way into judicial reasoning include the following:

- assessments of complainants' credibility;
- interpretation and proof of consent, including the defence of honest but mistaken belief in consent;
- inferences about the truthfulness of a complaint based on its timeliness;
- the judicial treatment of spousal and intimate-partner sexual assaults, as well as assaults on women who are members of marginalized groups;
- sentencing decisions; and
- continuing attempts by defence counsel to exploit sexual assault myths and stereotypes to discredit complainants during cross-examination.

2.2.2 Provisions Dealing with Consent

Under section 265(1)(a) of the Code, a person commits an assault when "*without the consent* of another person, he applies force intentionally to that other person, directly or indirectly." [Authors' emphasis] In Canadian law, the concept of "force" includes touching and can include complainants being required to touch accused persons against their will.

The crimes of sexual assault (section 271 of the Code), sexual assault with a weapon, threats to a third party or causing bodily harm (section 272 of the Code) and aggravated sexual assault (section 273 of the Code) are crimes of assault that are committed in circumstances of a sexual nature.

Since an assault is defined in the Code as the intentional application of force without consent, if the accused can raise a reasonable doubt about whether the complainant consented to the application of force, no assault has occurred. In the context of sexual assault, consent means "the voluntary agreement of the complainant to engage in the sexual activity in question,"[39] which means that consent is required for "each and every sexual act," at the time it occurs, with the particular person involved.[40] Moreover, consent may be revoked at any time.

The Code provides a non-exhaustive list of circumstances where no consent is obtained, including if consent is given by a person other than the complainant; situations involving an abuse of trust, power or authority; if the complainant expresses lack of consent or lack of continued agreement to engage in the activity; and if the complainant is incapable of consent.[41]

Whether or not consent was, in fact, given in a particular case is judged subjectively from the complainant's point of view at the time the touching was occurring. As the Supreme Court explained in *R. v. Ewanchuk*, in the context of sexual assault, "'consent' means that the complainant in her mind wanted the sexual touching to take place."[42] This is the physical element, or *actus reus*, of the offence.[43]

Canadian criminal law also requires the Crown to prove that the accused intended to commit a crime; that is to say, that the accused had a guilty mind. In the case of sexual assault, the accused must have intended to do sexual acts in question without the complainant's consent. This is the mental element of an offence, or the *mens rea*.

Accused persons may argue in defence that they had an honest but mistaken belief that the complainant consented to the sexual acts in question. However, the Code specifies that this defence will not apply to accused persons who believed the complainant consented as a result of their own self-induced intoxication, recklessness, wilful blindness, or failure to take reasonable steps to find out whether the complainant consented.[44]

When the defence of an honest but mistaken belief in consent is raised by the accused, the judge or jury must consider the presence or absence of reasonable grounds for this belief.[45] An accused has no defence of honest but mistaken belief in consent if the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.[46] Canadian courts have clarified that the focus of the inquiry should be "on whether the complainant positively affirmed her willingness to participate in the subject sexual activity as opposed to whether she expressly rejected it."[47]

The concept of "consent" in the law of assault, therefore, has both a legal component (how consent is defined) and a factual component (whether the complainant subjectively consented and whether the accused had an honest but mistaken belief in

consent). The amendments in clauses 10, 19 and 20 of Bill C-51 aim to clarify both of these components.

2.2.2.1 The Supreme Court of Canada's Decision in *R. v. J.A.*

The amendments in clauses 10 and 19 described in section 3.2.2 of this Legislative Summary are intended to reflect the Supreme Court's decision in *R. v. J.A.* (2011). This section, therefore, summarizes the reasoning, conclusions and alternatives presented in the majority and dissenting opinions.

In *R. v. J.A.*, the Supreme Court interpreted the existing text of section 273.1 of the Code. Chief Justice McLachlin identified the key issue in the case as "whether a person can perform sexual acts on an unconscious person if the person consented to those acts in advance of being rendered unconscious."[48]

She answered this question in the negative, holding that under section 273.1 of the Code,

> an individual must be conscious throughout the sexual activity in order to provide the requisite consent. Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.[49]

The "conscious agreement of the complainant to engage in every sexual act in a particular encounter" is required.[50] This consent must be given by an "operating mind."[51] Therefore, she held that an individual cannot give consent in advance to a certain type or range of sexual activity to be engaged in while unconscious.[52]

The Chief Justice concluded her judgment with the following remarks about the role of Parliament:

> Parliament has defined sexual assault as sexual touching without consent. It has dealt with consent in a way that makes it clear that ongoing, conscious and present consent to "the sexual activity in question" is required. This concept of consent produces just results in the vast majority of cases. It has proved of great value in combating the stereotypes that historically have surrounded consent to sexual relations and undermined the law's ability to address the crime of sexual assault. In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it is inappropriate for this Court to carve out exceptions when they undermine Parliament's choice. In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.[53]

Justice Fish, writing in dissent, held that the majority decision "would deprive women of their freedom to engage by choice in sexual adventures that involve no proven harm to them or to others."[54] He commented on the importance of privacy and sexual autonomy of consenting adults, stating:

> I am unable to conclude that Parliament, in protecting the right to say no, restricted the right of adults, female or male, consciously and willingly to say yes to sexual conduct in private that neither involves bodily harm nor exceeds

> the bounds of the consent freely given. The right to make decisions about one's own body clearly comprises both rights.[55]

Justice Fish also expressed concern that the majority's interpretation of section 273.1 "would criminalize kissing or caressing a sleeping partner, however gently and affectionately"; he saw this as an absurd result that Parliament could not have intended.[56] He suggested that Parliament could enact "an evidential presumption of non-consent in favour of the Crown where it has proved that the accused engaged in sexual contact with an unconscious person."[57] Under such a rule, an unconscious complainant would be presumed not to have consented to sexual activity unless the defence provided evidence proving that it was more likely than not that the complainant had given consent.[58]

2.2.2.2 Changes to Consent Provisions (Clauses 10, 19 and 20)

The *Criminal Code* defines "consent" in the same way for offences of sexual assault (section 273.1 of the Code) as for the offence of sexual exploitation of a person with a mental or physical disability (section 153.1 of the Code). Under both sections, "consent" means the voluntary agreement of the complainant to engage in the sexual activity in question. Both sections also provide identical, non-exhaustive lists of circumstances under which no consent is obtained, including where the complainant is incapable of consenting to the activity (sections 273.1(2) and 153.1(3), respectively).

Bill C-51 makes amendments to state explicitly that consent must be present at the time the sexual activity in question takes place (clause 10(1) adding new section 153.1(2.1) and clause 19(1) adding new section 273.1(1.1)).

In addition, clauses 10(1) and 19(1) make explicit that the question of whether no consent is obtained under sections 153.1(3), 153.1(4), 265(3) or 273.1 is a question of law (new sections 153.1(2.2) and 273.1(1.2)).

The bill makes clear that no consent is obtained where a person is unconscious (clause 10(2.1) adding new section 153.1(3)(a.1) and clause 19(2.1) adding new section 273.1(2)(a.1)).

Clauses 10(2.1) and 19(2.1) also amend current sections 153.1(3)(b) and 273.1(2)(b), which state that no consent is obtained where the complainant is incapable of consent, to clarify that unconsciousness is not the only situation in which an individual could lack capacity to give consent to sexual activity.

These amendments aim to incorporate the decision of the Supreme Court in the case of *R. v. J.A.*, which requires "actual active consent throughout every phase of the sexual activity."[59]

Sections 153.1(5) and 273.2 of the Code currently list circumstances under which an accused's belief in consent does not provide a defence (e.g., self-induced intoxication, recklessness or wilful blindness). Clauses 10(5) and 20(2) of the bill add new sections 153.1(5)(a)(iii) and 273.2(a)(iii), respectively, to provide that an accused's belief in consent does not provide a defence in any circumstance referred to in

sections 153.1(3), 153.1(4), 265(3), 273.1(2) or 273.1(3) of the Code "in which no consent is obtained"; namely:

- the agreement is expressed by the words or conduct of a person other than the complainant (sections 153.1(3)(a) and 273.1(2)(a));
- the complainant is unconscious (clause 10(2.1), creating new section 153.1(3)(a.1) and clause 19(2.1), creating new section 273.1(2)(a.1));
- the complainant is incapable of consenting to the activity for any reason other than the one referred to in new section 153.1(3)(a.1) (clause 10(2.1), amending section 153.1(3)(b) and clause 19(2.1), amending section 273.1(2)(b));
- the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority (sections 153.1(3)(c) and 273.1(2)(c));
- the complainant expresses, by words or conduct, a lack of agreement to engage in the activity (sections 153.1(3)(d) and 273.1(2)(d));
- the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity (sections 153.1(3)(e) and 273.1(2)(e));
- other circumstances in which no consent is obtained that are not listed in section 153.1(3) or section 273.1(2) (clause 10(5) adding new section 153.1(5)(a)(iii) and clause 20(2) adding new section 273.2(a)(iii));
- the application of force to the complainant or to a person other than the complainant (section 265(3)(a));
- threats or fear of the application of force to the complainant or to a person other than the complainant (section 265(3)(b));
- fraud (section 265(3)(c)); or
- the exercise of authority (section 265(3)(d)).

Sections 153.1(4) and 273.1(3) specify that the circumstances in which no consent is applied are not limited to those set out in sections 153.1(3) and 273.1(2) and that are listed above.

Clauses 10(6) and 20(3) of the bill create an additional category of circumstances in which there can be no reasonable but mistaken belief in consent: where there is "no evidence that the complainant voluntarily and affirmatively expressed consent by words or actively expressed consent by conduct" (new sections 153.1(5)(c) and 273.2(c)). This requirement reflects the Supreme Court's holding in *R. v. Ewanchuk*, where Justice Major held, for the majority, that where the defence raises

> the honest but mistaken belief in consent … "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused."[60]

Justice Major clarified that "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence."[61]

2.2.3 Rape Shield Provisions

Bill C-51 amends several sections of the Code with respect to the admissibility of sexual activity evidence that together are commonly referred to as the "rape shield" provisions (current sections 276 to 276.5). The rape shield provisions require an accused to make an application before a judge to determine the admissibility of evidence "that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person" in a trial for specified sexual offences.[62] The Supreme Court has considered the constitutionality of the rape shield regime twice, striking down the initial version of section 276 in *R. v. Seaboyer* in 1991, but upholding the amended procedure currently found in the Code in *R. v. Darrach* in 2000.[63]

In *R. v. Darrach*, the Court found that the current version of section 276 does not violate an accused's right to fundamental justice under section 7 of the Charter or the right to a fair trial under section 11(b), holding as follows:

> [T]he legislation enhances the fairness of the hearing by excluding misleading evidence from trials of sexual offences. It preserves the accused's right to adduce relevant evidence that meets certain criteria and so to make full answer and defence.[64]

Current section 276(2) of the Code bars the accused from leading evidence "that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person" (sexual activity evidence). Under section 276(1) of the Code, such evidence cannot be admitted to support prohibited reasoning based on stereotypes about sexual assault; in particular, that the complainant "is more likely to have consented to the sexual activity that forms the subject-matter of the charge" or that the complainant "is less worthy of belief." These two prohibited inferences are often referred to as the "twin myths." The Supreme Court has held that they "are simply not relevant at trial" because "they are not probative of consent or credibility and can severely distort the trial process."[65]

Section 276(1) was found by the Supreme Court to properly exclude "all discriminatory generalizations about a complainant's disposition to consent or about her credibility based on the *sexual nature* of her past sexual activity on the grounds that these are improper lines of reasoning."[66] [Emphasis in the original] The Court went on to hold that

> [t]he phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the *sexual nature* of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted.[67] [Emphasis in the original]

Other situations in which evidence of a complainant's sexual history might be relevant to an issue at trial and where the probative value of the evidence is not outweighed by the potential prejudice to the complainant could include situations where an accused claims an honest but mistaken belief in consent based on past sexual encounters with the complainant; where the evidence in question may tend to show that the complainant had a motive to fabricate the complaint; or where the defence presents an alternative explanation for the presence of physical evidence.[68]

The accused in *Darrach* also argued that the admissibility hearing procedure in section 276 forced him to disclose his case to the Crown in advance of the trial. The Supreme Court dismissed this contention, stating:

> Section 276 does not require the accused to make premature or inappropriate disclosure to the Crown. … [T]he accused is not forced to embark upon the process under s. 276 at all. … [I]f the defence is going to raise the complainant's prior sexual activity, it cannot be done in such a way as to surprise the complainant. The right to make full answer and defence does not include the right to defend by ambush.[69]

The Court's reasoning, however, applies to disclosure of the defence case to the Crown, whose responsibility in a criminal prosecution is to seek justice, not to secure a conviction. The Court did not consider a situation where the complainant, represented by independent counsel, would have standing to participate in the hearing.

2.2.3.1 Admissibility of Sexual Activity Evidence (Clause 21)

Current section 276(2) of the Code bars an accused from presenting sexual activity evidence unless the evidence:

> (a) is of specific instances of sexual activity;
>
> (b) is relevant to an issue at trial; *and*
>
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. [Authors' emphasis]

Clause 21(1) of Bill C-51 amends section 276(2) to add a new criterion that must be satisfied before any sexual activity evidence can be admitted in a sexual offence proceeding, i.e., the evidence is not being led to support an inference "that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or is less worthy of belief" (clause 21(1), new section 276(2)(a) of the Code).[70]

Section 276(3) of the Code lists the factors that a judge must consider in determining whether the evidence of sexual activity sought to be admitted meets the criteria in section 276(2). These factors remain unchanged.

Clause 21(3) of the bill extends the definition of "sexual activity" in section 276 to which the rape shield provisions apply to include "any communication made for a sexual purpose or whose content is of a sexual nature." This section would capture, for example, emails, videos and other images that form part of a communication, if made for a sexual purpose or if their content is sexual in nature (new section 276(4)). As a result, some types of sexual activity evidence may meet the definition of record contained in clause 23, which amends current section 278.1 of the Code.

Where sexual activity evidence is found in a record that is not in the hands of the accused, the admissibility rules under section 276(2) and the factors listed under section 276(3), discussed above, apply.

However, if the record relating to the complainant that is in the possession of the accused, in determining admissibility, the judge must take into account the factors listed in new section 278.92(3) of the Code (clause 25), rather than those listed in Code section 276(3). This change means that judges will need to consider one additional factor when determining the admissibility of records in the hands of the accused that meet the definition of sexual activity evidence: "society's interest in encouraging the obtaining of treatment by complainants of sexual offences" (new section 278.92(3)(c)). These provisions are discussed in more detail in section 3.5.2 of this Legislative Summary.

2.2.3.2 Admissibility Applications and Hearings for Sexual Activity Evidence (Clauses 22, 23 and 25)

Current sections 276.1 to 276.5 of the Code set out the procedures for applications to admit sexual activity evidence and related matters. These sections are repealed by clause 22 and replaced with new sections 278.93 to 278.97 (clause 25).

New sections 278.93 and 278.94 replace existing sections 276.1 and 276.2, respectively. The new sections set out a two-step process to be followed whereby the defence seeks to introduce sexual activity evidence. First, the defence must make an application to hold a hearing (new section 278.93). If the application satisfies specific criteria and is granted by the court, then an admissibility hearing will be held to determine whether the sexual activity evidence may be admitted at trial (new section 278.94).

With respect to the first step in this process, new section 278.93 reproduces the substantive provisions in existing section 276.1, detailing the contents of the application and the requirements for granting the application to hold an admissibility hearing.

The bill makes substantive amendments only to the provisions governing the second step in the process: the admissibility hearing itself. In addition to restating the existing rule that the complainant is not a compellable witness at the hearing, new section 278.94(2) specifies that a complainant may appear and make submissions in such admissibility hearings. Moreover, new section 278.94(3) for the first time gives any participating complainant a right to be represented by counsel in rape shield proceedings and requires that the judge inform complainants of this right as soon as feasible (clause 22, repealing existing section 276.2; and clause 25 adding new section 278.94). Similar provisions already appear in the Code in the context of applications for the production of complainants' private records held by third parties under sections 278.4(2) and 278.4(2.1). However, complainants have not previously had the right to appear and make submissions in rape shield hearings.

The remaining rape shield provisions of the Code relating to publication bans, jury instructions and appeals (sections 276.3 to 276.5) are repealed (clause 22) and replaced with sections 278.95 to 278.97 (clause 25). These new provisions do not make substantive changes to the rape shield regime.

The extension of the definition of "sexual activity" in new section 276(4) to include "any communication made for a sexual purpose or whose content is of a sexual nature," raises the possibility that such communications may also meet the definition of a "record" (clause 23, amending the definition of record in section 278.1). The same procedures govern the accused's application for an admissibility hearing, regardless of whether the sexual activity evidence meets the definition of a "record" (new section 278.93). The rules for determining the admissibility of such evidence are discussed above, in section 3.3.1. If the accused is applying for the production of a record containing sexual activity evidence, the procedure is set out in current sections 278.1 to 278.91 of the Code. The bill's amendments to these provisions are discussed below in section 3.4.

The bill does not amend the list of offences in section 276(1) to include historical offences within the ambit of the rape shield provisions. In contrast, a historical offence provision is included in the existing third-party records application regime and in the bill's new regime governing the admissibility of private records relating to the complainant that are in the hands of the accused, including those that meet the definition of sexual activity evidence in section 276(4).[71]

2.2.4 Third-Party Records Applications

Currently, in sexual offence proceedings, the accused may seek to raise a reasonable doubt about the credibility of complainants by using information contained in private records in the hands of third parties. For example, the defence may seek to cross-examine a woman who is the complainant in a sexual assault trial on the notes made by her rape crisis counsellor and produced to the accused prior to trial, indicating that the complainant said she believed that she had behaved in a manner that could have led the accused to believe she consented to sex. Such information could be useful to the accused, for example, as evidence that he had an honest but mistaken belief in consent.

In 1995, the Supreme Court set out a procedure through which the defence could access the private records of complainants in the hands of third parties in *R. v. O'Connor*.[72] Justice L'Heureux-Dubé wrote a dissenting opinion, arguing that the process created by the majority gave insufficient weight to the equality and privacy rights of the complainant. The majority decision was controversial and in response, Parliament enacted a legislative scheme in 1997 governing the production of third-party records that substantially adopted the approach advocated by Justice L'Heureux-Dubé (current sections 278.1 to 278.91 of the Code).[73] The constitutionality of the statutory scheme was upheld by the Supreme Court in *R. v. Mills*.

The scheme in the Code sets out a two-stage process. At the first stage, the defence must apply to a judge for an order requiring a record holder to produce a complainant's private records to the judge for review following a hearing. At the second stage, the judge will rule on whether the record will be produced to the accused.

2.2.4.1 Extended Notice Period (Clause 24)

Clause 24 amends section 278.3(5) of the Code, setting the notice period that the prosecutor, complainants, record-holders and other interested parties receive in relation to applications to produce third-party records. The notice period is increased from 14 to 60 days before a hearing will be held to determine whether the record-holder will be required to produce the record to the judge for review.

2.2.5 Private Records Relating to the Complainant in the Possession of the Accused

The provisions of Bill C-51 creating a regime to determine the admissibility of private records relating to a complainant are closely related to both the rape shield regime and the production of third-party records regime that already exist in the Code. The Supreme Court has held that rape shield and third-party records hearings are analogous in many ways and are motivated by many of the same policy considerations.[74] In both types of proceedings, the Court has held that

> the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.[75]

There are critical differences, however, between a proceeding to decide whether to compel the production of records and a proceeding that seeks to determine the admissibility of evidence. These differences were discussed by the Supreme Court in *R. v. Shearing*, in which an accused sought to cross-examine a complainant on the contents of her diary, which was already in his possession. In that case, the majority of the Supreme Court held that the third-party records regime in sections 278.1 to 278.9 of the Code did not apply to the use or admissibility of records already in the hands of the accused.[76] The proper test for admissibility, according to the Court, was found in *R. v. Osolin* and *R. v. Seaboyer*. In *Osolin*, Justice Cory stated:

> Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which might flow from it. Cross-examination for the purposes of showing consent or impugning credibility which relies upon “rape myths” will always be more prejudicial than probative. Such evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility.

Restricting the admissibility of a complainant’s records in the hands of the accused presents special challenges. In *Seaboyer*, the majority held that

> Canadian courts … have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted.

Nevertheless, the defence case may be subject to certain limits in order to advance important policy goals and safeguard the truth-seeking purpose of a criminal trial. In *Shearing*, Justice Binnie explained:

> While in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness, sexual assault cases pose particular dangers. … [T]hese cases should be decided without resort to folk tales about how abuse victims are expected by people who have never suffered abuse to react to the trauma.
>
> This does not turn persons accused of sexual abuse into second-class litigants. It simply means that the defence has to work with facts rather than rely on innuendoes and wishful assumptions. This means, in turn, that the defence should not be prevented from getting at the facts.[77]

Like section 276, the new process set out in new section 278.92 for determining the admissibility of complainants' private records in the hands of the accused is exceptional in that it requires the defence to disclose elements of its case, thus losing the tactical advantage of surprise. The procedure governing the admissibility hearings for complainants' private records in the hands of the accused may result in the defence disclosing evidence in its possession, as well as the relevance of that evidence, to the complainant and the complainant's counsel because the complainant will now have standing to participate in the admissibility hearing. It remains to be seen whether this provision will be found to be constitutional in a situation where complainants' private records in the hands of the accused are sought to be tendered for a legitimate purpose, such as impeaching a complainant's credibility through a prior inconsistent statement.

2.2.5.1 Definition of Record (Clause 23)

Clause 23 of the bill amends the sections of the Code to which the definition of a record in section 278.1 of the Code applies. Currently, section 278.1 defines a "record" for the purposes of third-party records applications. Clause 23 extends this definition to new section 278.92, which governs the admissibility of records "relating to a complainant that is in the possession or control of the accused" in a range of proceedings related to offences that have a sexual component (clause 25).[78]

2.2.5.2 Admissibility of Private Records Relating to the Complainant in the Possession of the Accused (Clause 25)

Clause 25 of Bill C-51 establishes a set of procedures with respect to applications and hearings on the admissibility of private records related to the complainant that are held by the accused.

Where the record in question does not constitute sexual activity evidence under section 276(4) of the Code, new section 278.92(2)(b) applies existing rules of evidence to prevent the admission unless the evidence is relevant to an issue at trial and it has significant probative value that is not outweighed by its prejudicial

effect. In determining admissibility, the court must consider the list of factors in new section 278.92(3):

> (a) the interests of justice, including the right of the accused to make a full answer and defence;
> (b) society's interest in encouraging the reporting of sexual assault offences;
> (c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
> (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
> (e) the need to remove from the fact-finding process any discriminatory belief or bias;
> (f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
> (g) the potential prejudice to the complainant's personal dignity and right of privacy;
> (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
> (i) any other factor that the judge, provincial court judge or justice considers relevant.

This list includes all of the factors that must currently be considered by judges during rape shield proceedings (existing section 276(3)), with the addition of one new factor: "society's interest in encouraging the obtaining of treatment by complainants of sexual offences" (new section 278.92(3)(c)).

New section 278.92(2)(a) provides that if a record constitutes evidence of sexual activity under section 276(4), the record is only admissible if the court determines that it meets the conditions set out in amended section 276(2), while taking account of the factors listed in section 278.92(3), above. The admissibility requirements for sexual activity evidence are discussed in more detail in section 3.3.1 of this Legislative Summary.

2.2.5.3 Admissibility Applications and Hearings for Private Records Relating to the Complainant in the Possession of the Accused

The provisions contained in new sections 278.93 to 278.97, which govern rape shield applications and hearings, also apply to a complainant's private records that are held by the accused. The process requires that an application be made to the judge hearing the case (new section 278.93(1)) and specifies that the application must set out "detailed particulars" of the evidence the accused wants to introduce, as well as the relevance of the evidence to an issue at trial (new section 278.93(2)). If the application has been properly made at least seven days in advance (or a shorter interval, with leave) *and* if the evidence is capable of being admissible (i.e., it complies with the general rules governing admissibility), the application must be granted and a hearing held.

The hearing on the application and the admissibility hearing itself are held *in camera* (new section 278.94(1)). Complainants cannot be compelled to appear as witnesses but may appear and make submissions; they must also be informed by the judge of their right to be represented by counsel (new section 278.94(3)). The court must provide reasons for its decision regarding the admissibility of the evidence in question, specifying why the evidence is admissible, the statutory factors that affected the determination, and the expected relevance of any admissible evidence to an issue at trial (new section 278.94(4)). A transcript of the judge's reasons must be entered in the record or written reasons must be provided (new section 278.94(5)). A publication ban covers the proceedings, including the decision and reasons for judgment unless the judge makes an order permitting publication (new section 278.95).

The procedures for applications and hearings on the admissibility of private records relating to the complainant in the hands of the accused are not the same as the current application and hearing process for the production of third-party records, in line with the Supreme Court's decision in *Shearing*.

2.3 Amendment to the *Department of Justice Act*: *Canadian Charter of Rights and Freedoms* Statements

The *Department of Justice Act* creates the Department of Justice and outlines the powers, duties and functions of the Minister of Justice and the Attorney General of Canada. Section 4.1 of the *Department of Justice Act* requires the Minister of Justice to examine every government bill introduced in the House of Commons (as well as regulations transmitted to the Clerk of the Privy Council for registration) to identify any inconsistency with the purposes and provisions of the Charter. Any such inconsistencies are to be reported to the House of Commons. To date, this has never been done.[79] The *Canadian Bill of Rights*[80] and the *Statutory Instruments Act*[81] (as applied to the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice) have similar provisions to review legislation and regulations (as the case may be) for consistency with protected rights and freedoms.[82]

In 2012, a Department of Justice lawyer initiated an action against the Attorney General of Canada concerning the standard used for reviewing legislation for compliance with the Charter. The plaintiff argued that the "credible argument" standard used by the department (a standard that an argument needs to be credible, bona fide, and capable of being successfully argued before the courts) was too low. He argued for a "more likely than not inconsistent" standard (one based on an argument that a provision in a bill is more likely than not inconsistent with guaranteed rights). The lawsuit was dismissed at trial and on appeal.[83]

Nonetheless, calls for increased Charter scrutiny of bills have come from several quarters. The Canadian Civil Liberties Association intervened in the case mentioned above and produced a report entitled *Charter First: A Blueprint for Prioritizing Rights in Canadian Lawmaking*. Recommendation 1 stated:

> Parliament should amend the ineffective section 4.1 of the *Department of Justice Act* such that the Minister of Justice is required to issue a detailed statement of Charter compatibility when a government bill is introduced in Parliament. The statement should lay out the government's principled position regarding how, on a balance of probabilities, the bill complies with the purposes and provisions of the Charter. This should include an acknowledgement of which rights, if any, are engaged by the bill; the government's justification for any potential infringements under section 1 of the Charter; the "tests," factors, or reasonable alternatives considered to reach the conclusion; reference to jurisprudence and relevant judicial precedents; and an acknowledgement if the bill contradicts existing norms or precedents.[84]

James B. Kelly, an expert on human rights and legislative processes and a professor at Concordia University, has called for similar changes.[85]

The Minister of Justice has tabled Charter Statements for bills she has introduced in the House of Commons on a voluntary basis.[86] Charter Statements have not been issued for bills introduced by other ministers. A Charter Statement sets out the key considerations that informed the review of a bill for consistency with the Charter. A statement identifies Charter rights and freedoms that may potentially be engaged by a bill and provides a brief explanation of the nature of any engagement, in light of the measures being proposed.

In other countries, such as the United Kingdom, New Zealand and Australia, there is a practice of requiring the government to provide rights-based analyses to the legislature when it proposes legislation.[87] In New Zealand, for example, section 7 of the *New Zealand Bill of Rights Act 1990* requires the Attorney General to "bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in [the] Bill of Rights."[88] While this appears to be comparable to current section 4.1 of Canada's *Department of Justice Act*, in New Zealand, detailed reports (referred to as section 7 reports) are provided to the House of Representatives and made public. In addition, where it is found that a bill is consistent with the *New Zealand Bill of Rights Act 1990*, advice given to the Attorney General by public servants has been made public since 2003.[89] These practices apply to both government and other bills.

In the United Kingdom, section 19 of the *Human Rights Act 1998* includes a similar requirement to make a statement of compatibility with that Act.[90] Explanatory Notes associated with each government bill and some private members' bills include analyses of compatibility with the country's *Human Rights Act 1998*, though the information provided appears to be more limited than in New Zealand.

In Australia, section 8 of the *Human Rights (Parliamentary Scrutiny) Act 2011* includes a provision requiring the person introducing legislation to certify that it is compatible with human rights.[91] The State of Victoria in Australia includes a clause requiring a statement as to whether a bill is compatible with human rights (as protected by certain international human rights treaties) in section 28 of its *Charter of Human Rights and Responsibilities Act*. The provision requires more detail than similar laws in other jurisdictions; namely, an explanation of how a bill is compatible with human rights and, where any part is incompatible, the nature and

extent of the incompatibility (though such an explanation seems to be the practice nonetheless in the other jurisdictions). It also makes clear that a statement of compatibility is not binding on courts and tribunals.[92]

2.3.1 New Requirement for Charter Statements (Clause 73)

Clause 73 of Bill C-51 adds new section 4.2 to the *Department of Justice Act*. This new section imposes a requirement on the Minister of Justice to table a Charter Statement setting out any potential effects on Charter rights and freedoms of each government bill introduced in either the House of Commons or the Senate. Such a statement is required regardless of whether the Minister has identified any inconsistencies with the Charter, as required in section 4.1. The purpose of the statement is to inform members of the Senate and House of Commons, as well as the public, of any potential effects on Charter rights and freedoms. The new section does not provide further details about what is to be included in such a statement. Clause 75 of the bill ("Transitional Provisions") makes clear that the requirement for a Charter Statement only applies to bills introduced after section 4.2 comes into force. That section will come into force one year after the day on which Bill C-51 receives Royal Assent.

NOTES

1. Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, 1st Session, 42nd Parliament **(S.C. 2018, c. 29)**.
2. House of Commons, Standing Committee on Justice and Human Rights [JUST], *Seventeenth Report*, 1st Session, 42nd Parliament.
3. Senate, Standing Committee on Legal and Constitutional Affairs, *Twenty-Seventh Report*, 1st Session, 42nd Parliament, 25 September 2018. The observation states:

   > The deletion of provisions known to be unconstitutional or obsolete is an important first step in the revision and modernization of the *Criminal Code*, but much remains to be done to make the Code clear, coherent, and comprehensive. The committee calls upon the Government of Canada, as it has done emphatically in the past, to undertake a more thorough reform and modernization of the *Criminal Code*.

4. **Senate, *Debates*, 1st Session, 42nd Parliament, 30 October 2018. Proposed by the Honourable Senator Pate, these amendments were intended to clarify the concept of consent in sections 153.1 and 273.1 of the *Criminal Code*, and more specifically, the notion of incapacity to consent to sexual activity.**
5. *Criminal Code* [Code], R.S.C. 1985, c. C-46.
6. *Canadian Charter of Rights and Freedoms* [Charter], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
7. *Department of Justice Act*, R.S.C. 1985, c. J-2.
8. Kathleen Harris, "Federal government to axe 'zombie laws' from Canada's Criminal Code," *CBC News*, 7 March 2017, quoting professor Stephen Coughlan, Schulich School of Law, Dalhousie University.

9. On 15 September 2016, Travis Vader was convicted of second degree murder under section 230 of the *Criminal Code*. That section states that causing the death of a person is murder when the death is caused during the commission of certain offences – like sexual assault or robbery – even if the accused did not intend to cause the other person's death or did not know death was likely to result from their behaviour. On 13 September 1990, however, the Supreme Court struck down section 230 as being in violation of the Charter. On 31 October 2016, Justice Thomas reversed his original conviction, and Vader was convicted of manslaughter. On 25 January 2017, Vader was sentenced to a single term of life in prison, with parole eligibility after seven years. See *R. v. Vader*, 2016 ABQB 625.

10. *R. v. Martineau*, [1990] 2 SCR 633.

11. Rachel Aiello, "Justice Committee calls on Wilson-Raybould to clean up 'hodgepodge' Criminal Code," *Hill Times*, 17 October 2016.

12. Bill C-39, introduced on 8 March 2017, and Bill C-75, introduced on 29 March 2018, have similar goals to those of Bill C-51. See Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts, 1st Session, 42nd Parliament; and Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, 1st Session, 42nd Parliament.

13. Department of Justice Canada, "Cleaning up the *Criminal Code*, Clarifying and Strengthening Sexual Assault Law, and Respecting the Charter," Backgrounder, 7 June 2017.

14. *R. v. Whyte*, [1988] 2 SCR 3.

15. *R. v. Keegstra*, [1990] 3 SCR 697.

16. In both sections 351 and 352, the words "without lawful excuse, the proof of which lies on them" are replaced by "without lawful excuse." This is in addition to removing the inference provision.

17. In *R. v. Simpson*, Justice Moldaver, citing *R. v. DeMarco*, adopted the following definition of the term "colour of right" and explained how it relates to the burden of proof in a criminal trial:

> One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right," even though it may be unfounded in law or in fact. … The term "colour of right" is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done. … The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact.

Justice Moldaver went on to say:

> To put the defence of colour of right into play, an accused bears the onus of showing that there is an "air of reality" to the asserted defence – i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right. … Once this hurdle is met, the burden falls on the Crown to disprove the defence beyond a reasonable doubt.

See *R. v. Simpson*, 2015 SCC 40, paras. 31–32. See also *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.), p. 372.

18. *R. v. Morgentaler*, [1988] 1 SCR 30. It should be noted that clause 16 of Bill C-39 and clause 113 of Bill C-75 both propose to repeal section 287 of the Code.

19. *R. v. Lucas*, [1998] 1 SCR 439.

20. *R. v. Guyett* (1989), 51 CCC (3d) 368 (Ont. C.A.).

21. *R. v. Hudyma* (1988), 46 CCC (3d) 88 (Ont. Dist. Ct.).

22. *R. v. Safarzadeh-Markhali*, [2016] 1 SCR 180.

23. Clause 298 of Bill C-75 makes the same amendment and includes clauses that coordinate the coming into force of the identical provisions in that bill and in C-51 (cls. 406(25) to 406(28)). Clause 20 of Bill C-39 also amends section 719(3.1) by removing the restriction on enhanced credit where an accused is detained primarily because of a previous conviction.

24. Department of Justice Canada (2017).

25. Ibid.

26. JUST, *Evidence*, 1st Session, 42nd Parliament, 18 October 2017 (Hon. Jody Wilson-Raybould, Minister of Justice).

27. *R. v. Rahard*, [1936] 3 DLR 230 [Que. C.S.P.], 1935.

28. *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93; *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 19 (in force 1983); *An Act to amend the Criminal Code and the Canada Evidence Act (Sexual Offences)*, R.S.C. 1985, c. 19 (3rd Supp.) (in force 1988); *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24; *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38; and *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30. In addition, anal intercourse between consenting adults over the age of 21, in private, was decriminalized in 1968 in the *Criminal Law Amendment Act, 1968–69*, S.C. 1968-1969, c. 38. For a discussion of these changes, see Alan W. Mewett, "The Canadian Criminal Code, 1892–1992," *The Canadian Bar Review*, Vol. 72, No. 1, 1993; Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900–1975*, Irwin Law, Toronto, 2008, p. 5, note 2; Constance Backhouse, *A History of Canadian Sexual Assault Legislation 1900–2000*; and Christine L. M. Boyle, *Sexual Assault*, Carswell, Toronto, 1984.

29. *Criminal Law Amendment Act, 1975*; and *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, s. 19. The removal of this requirement for corroboration is now codified in section 274 of the Code.

30. *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, s. 19. The abrogation of the recent complaint provision is set out in section 275 of the Code.

31. The rule was exceptional in the common law because it singled out a particular group of complainants – alleged victims of sexual offences. In a trial for any other crime or with any other type of witness, testimony could not be buttressed by the party calling the witness by proving that the witness had made a prior consistent statement. Furthermore, the doctrine of recent complaint was an exception to the common law approach that regards the assertions of a witness in general as being true, until there is some reason to consider them as false. See Boyle (1984), pp. 151–155.

    The doctrine of recent complaint was discussed by Justice L'Heureux-Dubé in her dissenting judgment in *R. v. Seaboyer*. In that opinion, she explained:

    > If evidence of a recent complaint existed, the complainant had to surmount onerous requirements restricting its admissibility. If admissible, such evidence was tendered to show that the complainant's testimony was consistent but was not admitted to show the truth of its contents. The importance of the rule at common law lay not in its ability to enhance the credibility of the complainant, but rather in its ability to counter the presumption that the complainant was lying. Thus, to a large degree, the myth that complainants in sexual assault cases fabricate their allegations informed the doctrine of recent complaint.

    See *R. v. Seaboyer; R. v. Gayme*, [1991] 2 SCR 577. See also *Timm v. The Queen*, [1981] 2 SCR 315, wherein the principles regarding this doctrine are fully discussed. More recently, see *R. v. D.D.*, [2000] 2 SCR 275, para. 65.

32. *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*. The Code provision covering sexual assault in marriage is now set out in section 278.

33. *An Act to amend the Criminal Code (sexual assault)*, s. 1. These consent provisions are now codified in sections 273.1 and 273.2 of the Code.

34. *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, held to be unconstitutional by the Supreme Court of Canada in *R. v. Seaboyer; R. v. Gayme*. Parliament responded by amending the rape shield provisions of the Code in 1992. See *An Act to amend the Criminal Code (sexual assault)*. The constitutionality of the new scheme was upheld in *R. v. Darrach*, [2000] 2 SCR 443. The rape shield provisions are found in sections 276 to 276.5 of the Code.

35. *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*.

36. *An Act to amend the Criminal Code (trafficking in persons)*, S.C. 2005, c. 43; and *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, S.C. 2014, c. 25. Other Acts have also made various amendments to the Code in respect of trafficking in persons (sections 279.01 to 279.04) and prostitution (sections 213 and 286.1 to 286.5).

37. See, for example, *R. v. Seaboyer; R. v. Gayme*; *R. v. Osolin*, [1993] 4 SCR 595; *R. v. Esau*, [1997] 2 SCR 777; *R. v. Ewanchuk*, [1999] 1 SCR 330; *R. v. Mills*, [1999] 3 SCR 668; *R. v. D.D.*; *R. v. Darrach*; *R. v. Shearing*, [2002] 3 SCR 33; *R. v. J.A.*, [2011] 2 SCR 440; and *R. v. Quesnelle*, 2014 SCC 46.

38. For example, see Canadian Judicial Council, *In the Matter of Section 65 of the Judges Act, R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Robin Camp of the Federal Court: Report of the Canadian Judicial Council to the Minister of Justice*, Ottawa, 8 March 2017. A number of court decisions have raised the issue. See *R. v. Barton*, 2017 ABCA 216 (leave to appeal to Supreme Court of Canada granted 8 March 2018 [Docket 37769]); *R. v. A.D.G.*, 2015 ABCA 149; *R. v. Adepoju*, 2014 ABCA 100; *R. v. C.M.G.*, 2016 ABQB 368; and *R. v. J.R.*, 2016 ABQB 414. For media coverage of the persistence of these stereotypes, see, for example, "Justice minister denounces judge's comments on teen sexual assault victim's weight," *CBC News*, 25 October 2017; "La ministre de la Justice demande une enquête sur les propos du juge Braun," *ICI.Radio-Canada.ca*, 25 October 2017; and David Burke, "Complaints about N.S. judge who said 'a drunk can consent' will be investigated," *CBC News*, 7 September 2017.
39. Code, s. 273.1(1).
40. *R. v. J.A.*, para. 34; and *R. v. Barton*, para. 183.
41. Code, s. 273.1(2).
42. *R. v. Ewanchuk*, para. 48.
43. Ibid., paras. 25–26; and *R. v. J.A.*, para. 23.
44. Code, s. 273.2.
45. Ibid., s. 265(4).
46. Ibid., s. 273.2(b).
47. *R. v. Barton*, para. 179.
48. *R. v. J.A.*, para. 1.
49. Ibid., para. 3.
50. Ibid., para. 31.
51. Ibid., para. 36.
52. Ibid., para. 43.
53. Ibid., para. 65.
54. Ibid., para. 73. In paragraph 72, Justice Fish stressed that the purpose of the sexual assault provisions in the Code is to "safeguard and enhance the sexual autonomy of women, and not to make choices for them."
55. Ibid., para. 114.
56. Ibid., para. 117.
57. Ibid., para. 141.
58. See, for example, United Kingdom, *Sexual Offences Act 2003*, 2003, c. 42, s. 75(2)(d).
59. *R. v. J.A.*, para. 66.
60. *R. v. Ewanchuk*, para. 49.
61. Ibid., para. 51. See also *R. v. J.A.*, para. 48.
62. Code, ss. 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or 160(3), or ss. 170, 171, 172, 173, 271, 272 or 273.
63. The amendments were contained in *An Act to amend the Criminal Code (sexual assault)*.
64. *R. v. Darrach*, para. 21.

65. Ibid., para. 33. See also *R. v. Seaboyer; R. v. Gayme*.

66. *R. v. Darrach*, para. 34.

67. Ibid., para. 35.

68. *R. v. Seaboyer; R. v. Gayme*, per McLachlin, J.

69. *R. v. Darrach*, para. 55.

70. Clause 21(1) amends section 276(2)(a) to prohibit the admission of evidence being adduced to support one of the inferences listed in section 276(1) of the Code. The requirement that the evidence relate to "specific instances of sexual activity," which is currently found in section 276(2)(a) is retained but becomes paragraph (c). The existing requirement in paragraph (c) that the evidence have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" becomes paragraph (d).

71. Existing section 278.2(1)(b) (third party records applications) and new section 278.92 (complainant's records in the hands of the accused) apply to "any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day" (clause 25, new section 278.92(1)(b)).

72. *R. v. O'Connor*, [1995] 4 SCR 411.

73. *An Act to amend the Criminal Code (production of records in sexual offence proceedings*, s. 1. For an overview of *R. v. O'Connor* and the jurisprudential and legislative history of these provisions, see Senate, Standing Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the* Act to amend the Criminal Code (production of records in sexual offence proceedings): *Final Report*, 1st Session, 41st Parliament, December 2012; and Lyne Casavant, Christine Morris and Julia Nicol, *Legislative Summary of Bill C-32: An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, Publication no. 41-2-C32-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2014. See section 2.2.3.1, "The Disclosure of Third Party Records to the Accused in Sexual Offence Cases (Clauses 5–10)."

74. *R. v. Mills*., para. 26.

75. Ibid., para. 94. See also *R. v. Darrach*, para. 42.

76. *R. v. Shearing*, para. 94.

77. Ibid., paras. 121–122.

78. The new regime for private records will apply to prosecutions for offences under sections 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3. It will also apply to historical criminal offences if the conduct alleged would be an offence under one of these sections. This list is the same as the list of offences to which the third-party records application provisions apply, except that it does not include section 159 (anal intercourse), an offence that will be repealed if Bill C-39 or Bill C-75 come into force (see clause 4 of Bill C-39 and clause 56 of Bill C-75).

79. For a more detailed discussion, see Charlie Feldman, "Legislative Vehicles and Formalized Charter Review," *Constitutional Forum*, Vol. 25, No. 3, 2016, pp. 79–89.

80. *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 3.

81. *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 3.

82. There has been only one instance of a report to Parliament under the *Canadian Bill of Rights* (report on 27 March 1975 concerning a non-government amendment to the *Feeds Act*). This report on a private member's bill concluded that an amendment was inconsistent with the presumption of innocence. This inconsistency was corrected at committee. See House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Agriculture*, 1st Session, 30th Parliament, No. 63, 18 November 1975, pp. 19–27.

83. *Schmidt v. Attorney General of Canada*, 2016 FC 269; and *Schmidt v. Canada (Attorney General)*, 2018 FCA 55.

84. Canadian Civil Liberties Association, *Charter First: A Blueprint for Prioritizing Rights in Canadian Lawmaking*, September 2016.

85. James B. Kelly, "The Charter of Rights and the Minister of Justice: Why Section 4.1.1 of the Department of Justice Act needs to be rethought and reformed," *Séamus in Irish*, Blog, 18 December 2015.

86. The Minister of Justice tabled a Charter Statement for Bill C-51 on 6 June 2017. The statement makes clear that it is not intended to be a comprehensive overview of all conceivable Charter considerations. Additional considerations relevant to the constitutionality of a bill may also arise in the course of parliamentary study and amendment of a bill. It also makes clear that a statement is not a legal opinion on the constitutionality of a bill. See *Charter Statement – Bill C-51:* An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, 6 June 2017.

87. For more information about the systems in other countries, see Government of New Zealand, "Bill of Rights compliance reports," *Constitutional Issues & Human Rights*; and Janet L. Hiebert, "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, Vol. 58, Article 3, 2012.

88. New Zealand, *New Zealand Bill of Rights Act 1990*, 1990, s. 7.

89. Government of New Zealand, "Advice on consistency of Bills with the Bill of Rights Act," *Constitutional Issues & Human Rights*.

90. United Kingdom, *Human Rights Act 1998*, 1998, c. 42, s. 19.

91. Australia, *Human Rights (Parliamentary Scrutiny) Act 2011*, No. 186, 2011. For samples of statements, see Australian Government, Attorney General's Department, *Statements of Compatibility templates*.

92. Australia (State of Victoria), *Charter of Human Rights and Responsibilities Act 2006*, No. 43, 2006.