

# Investigator's Guide to Sexual Offence Legislation in Canada

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## Sexual Offence Legislation

This article is intended primarily for Canadian Police Officers called upon to investigate sexual crimes. It may also assist Crown Prosecutors who deal with these types of offences as well as Child Protection workers and Victims Assistance personnel who are often tasked with explaining the vagaries of the Canadian Judicial System to those who have been abused.

In the last few decades, the provisions of the Canada Evidence Act and the Criminal Code relating to sexual offences, have undergone momentous changes. In this paper, I will not only review the current laws governing sexual crimes, but will also deal with past legislation and how those provisions might still be applied to “historical cases” that come to the attention of authorities, years after the actual offence occurred. A table of current laws is followed by a list of historical offences. Each item will have a brief definition along with an outline of the penalties associated to each charge.

For the investigator, knowing what charge might be appropriate is not the whole story. It is essential that we are aware of the “elements of the offence” in each case and that we are able to ensure that our investigation encapsulates these essential elements. By way of example, many lay people believe that a charge of ***Incest*** would be appropriate for any type of sexual activity occurring between members of an immediate family. In reality, a charge of ***Incest*** can only be laid when there is penile-vaginal intercourse between direct blood relatives. A biological father engaging in anal sex with his teenaged son is not committing ***Incest*** (although he may well be committing the offence of ***Anal Intercourse***). The investigator who fully appreciates the essential elements of these offences will ensure that they are explored, both during the initial interview of the victim and the subsequent interview of the offender. By identifying and covering off these elements of the offence, the investigator will provide the Crown Prosecutor with a solid foundation upon which to proceed.

## **A Brief History of Sexual Offences in Canada**

The year 1983 was a watershed for sexual offence legislation in Canada. Prior to that date, sexual crimes were almost exclusively concerned with male perpetrators. The wording, "**Any male person who**," preceded almost all sexual offences. Obviously the legislators of the day had never envisioned the possibility of a female sexual offender.

The emphasis in legislation was also clearly focussed on the sexual aspects of the offence, with the most serious unlawful sex act being **Rape**. The essential elements of this crime were, forced penile-vaginal penetration by an offender with a victim who wasn't his wife. If the sexual misconduct did not include penile-vaginal penetration, the appropriate pre-1983 charge was **Indecent Assault of a Female** or **Indecent Assault on a Male**. By contrast, the 1983 introduction of three levels of **Sexual Assault** was less concerned with penetration and shone the spotlight primarily on the assaultive nature of the illegal conduct.

In 1988, sexual offence legislation underwent another massive change. New laws were added to the Criminal Code that specifically targeted sexual violations committed against children. In addition, the Canada Evidence Act was revised to allow for the taking of videotaped statements of child victims, which could then be used in court proceedings. It is important to note that these videotaped statements are to be used to augment, but not replace, the child's testimony.

In the decades that followed, the rules covering illegal sexual acts gradually evolved in response to legislative changes and precedent setting court decisions. Laws covering **Child Pornography** came into force in 1993, while **Voyeurism** and **Sexually Exploiting the Disabled**, officially became crimes in 2005. Arguably, the most significant change occurred in May 2008 when the **Age of Consent**, was raised from fourteen years to sixteen years. Amendments to the Criminal Code were made in 2012 that brought in mandatory minimum sentences for many child sexual abuse offences.

These reforms however, are more than just interesting historical trivia, for today's investigator needs to be aware of these legislative changes in order to respond appropriately to historical sexual offence complaints. If a victim comes forward today to report a sexual crime that occurred in the past, we can only lay charges that refer to the Criminal Code provisions in place at the time of the offence.

This work is a depiction of Canadian Sexual Offence legislation as of March 2016. It is written by a retired police officer and is intended primarily for the use of police officers. Lawyers, may take issue with some of my paraphrasing or interpretation of the law, but that is understandable. It is in their nature to argue the minutiae of the legislation.

## Gender Issues

During my career I dealt with both male and female victims of sexual crimes, but the majority were female. I also arrested both male and female sex offenders, but the vast majority of the offenders were male. In this paper, I refer to “victims” rather than “survivors.” I realize that the term “survivor” is now preferred by some, however the Uniform Crime Report still lists Witnesses, Suspects, Victims, etc. With all due respect to those who have been sexually abused, I only use these terms in order to avoid confusion. I also refer to victims and non-offending spouses in the female gender and to suspects in the male gender. Again, I’ve done this deliberately, for the sake of simplicity and in no way do I wish to add to the stereotype that all victims are female and all offenders are male.

## Elements of the Offence

What are the necessary ingredients for each of the sexual offences? Some violations still occur only when sexual penetration occurs, such as penile-vaginal penetration in a charge of **Incest**, or penile-anal penetration in a case of **Anal Intercourse**. Some of these crimes contain a victim age requirement, such as **Sexual Interference** and **Invitation to Sexual Touching**, where a charge can only be made out if the victim was under the age of sixteen.

In the Offences sections, I have included a brief outline of the elements of the offence as it relates to each specific crime. For a more detailed explanation, please refer to the appropriate Criminal Code sections. For police officers, it is essential that they are aware of the specific elements of the offence during their investigations and that they strive to cover off these requirements during the interviews of victims, witnesses and suspects. **Example: 16 year old Mary states that her father, Fred, had sexual intercourse with her. The officer interviewing Mary needs to ensure that she unequivocally describes the penile-vaginal penetration act of sexual intercourse. Vague euphemisms such as, “he screwed me,” are not precise enough for the courts. The investigator would then interview Mary’s mother, and make certain that she confirms that Fred is the biological father of Mary. During the suspect interrogation, Fred will admit that he put his penis in Mary “just a little” but then pulled out.** These three statements would then provide us with the essential elements for a charge of **Incest**: Penile-vaginal intercourse with a direct blood relative.

## Consent

Sexual offences that do not include an age limitation, often have Consent as the most important Element of the Offence. Sex is really the only human activity that can be both the ultimate expression of love and pleasure, or a degrading, humiliating crime. The difference between these two extremes is mediated primarily by Consent. The most common sexual offence charge in Canada is **Sexual Assault**. This charge combines the definition for a simple **Assault**: an intentional application of force against a person without that person's consent, with the further requirement that the action is done for a sexual purpose, or that it violates the victim's sexual integrity.<sup>1</sup>

Consent is the voluntary agreement to engage in sexual activity. There is no consent if:

- The agreement is expressed by someone other than the complainant.
- The complainant is unable to give full consent because they are intoxicated, drugged, unconscious, or mentally unstable.<sup>2</sup>
- The offender abused a position of power, trust, or authority.
- The complainant initially agreed to the sexual activity and then expressed by word or conduct that she no longer wished to continue to engage in the activity,

Consent is related to the complainant's state of mind at the time of the activity. Her testimony that she didn't consent is a matter of credibility for the courts. There is no defence of implied consent and the state of mind of the suspect is not relevant.

Alcohol use by either the victim or the suspect is often a factor in sexual assault cases. If a victim cannot clearly recall the events leading up to the initiation of the sexual acts, authorities in the past have been reluctant to proceed with charges because of a lack of evidence regarding consent. An investigator who takes the time to speak to other witnesses, friends, bartenders, taxi drivers, etc. and inquire about the victim's visible behaviour (slurred speech, falling down, vomiting) can paint a more accurate picture of the victim's lack of sobriety and consequently, her inability to have actually consented. Offenders will often declare that they "can't remember" engaging in sexual activity with the victim because they were drunk. If this excuse is raised, the investigator should give the suspect the opportunity to assert this in a detailed statement, which can often be as powerful as a full confession. Section 33.1 of the Criminal Code precludes the accused from relying on self-induced intoxication to claim that he honestly, but mistakenly, believed that the complainant consented to sexual activity.

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<sup>1</sup> R.v. Chase [1987] 2 S.C.R. & R. v. Ewanchuk [1999] 1 S.C.R. 330

<sup>2</sup> R. v. J.A. [2011] 2 S.C.R. 440

## Current Sexual Offences (As of March 2016)

Offence Section Year of enactment	Indictment, Dual Procedure or Summary	Elements of Offence	Penalties
<p>Sec. 151: Sexual Interference</p> <p>1988 - Year of enactment</p> <p>2008 - Year of change to statute. Prior to that date the age of Consent was 14.</p>	<p><b>Dual Procedure</b></p>	<p>The offender touches a child under the age of 16 yrs for a sexual purpose.</p>	<p><b>Indictment:</b> Max: 14 yrs. Min: 1 yr.  <b>Summary:</b> Max: 2 yrs less a day. Min: 90 days, if the offence occurred after July 17, 2015.</p> <p>If the offence occurred between Aug 9, 2012 and July 16, 2015:  <b>Indictment:</b> Max: 10 yrs. Min: 1 yr.</p>
<p>Sec. 152: Invitation to Sexual Touching</p> <p>1988 - Year of enactment</p> <p>2008 - Year of change to statute. Prior to that date the age of Consent was 14.</p>	<p><b>Dual Procedure</b></p>	<p>The offender invites, counsels, or incites a child under the age of 16 yrs to touch anyone (including herself) for a sexual purpose.</p>	<p><b>Indictment:</b> Max: 14 yrs. Min: 1 yr.  <b>Summary:</b> Max: 2 yrs less a day. Min: 90 days, if the offence occurred after July 17, 2015.</p> <p>If the offence occurred between Aug 9, 2012 and July 16, 2015:  <b>Indictment:</b> Max: 10 yrs. Min: 1 yr.</p>

<p>Sec. 153(1): Sexual Exploitation</p> <p>1988 - Year of enactment</p> <p>2008 - Year of change to statute. Prior to that date the age of Consent was 14.</p>	<p><b>Dual Procedure</b></p>	<p>The victim is between the age of 16-18 yrs. The offender is in a position of trust or authority or the victim is in a relationship of dependency or is in an exploitative relationship. The offender touches the victim sexually or incites her to sexually touch anyone.</p>	<p><b>Indictment:</b> Max: 14 yrs. Min: 1 yr. <b>Summary:</b> Max: 2 yrs less a day. Min: 90 days, if the offence occurred after July 17, 2015.</p> <p>If the offence occurred between Aug 9, 2012 and July 16, 2015: <b>Indictment:</b> Max: 10 yrs. Min: 1 yr.</p>
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<p>Sec 153.1: Sexual Exploitation of a person with a disability</p> <p>2005</p>	<p><b>Dual Procedure</b></p>	<p>The offender is in a position of trust or authority or the victim is dependant upon the offender due to mental or physical disability. The offender counsels or incites the victim (without her consent) to touch herself or others for a sexual purpose.</p>	<p><b>Indictment:</b> Max: 5 yrs. <b>Summary:</b> Max: 18 months.</p>
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<p>Sec 155: Incest</p> <p>1953</p>	<p><b>Indictment</b></p>	<p>The offender has penile vaginal intercourse with a direct blood relative: Parent, child, brother, sister, half brother, half sister, grandparent, or grandchild.</p>	<p>Max: 14 yrs. If the victim is under the age of 16, the Minimum sentence: 5 yrs.</p> <p>Prior to Aug 9, 2012, there was no minimum sentence.</p>
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Sec 159: Anal Intercourse  1985 Previously known as Buggery  1953	<b>Dual Procedure</b>	The offender has penile-anal intercourse with a non-consenting victim. The age of consent for anal intercourse is 18 yrs.	Max: 10 yrs.
Sec 160(1): Bestiality  1953	<b>Dual Procedure</b>	The offender touches an animal for a sexual purpose. <sup>3</sup>	Max: 10 yrs.
Sec 160(2) Compelling the Commission of Bestiality  1985	<b>Dual Procedure</b>	The offender compels the victim to engage in acts of bestiality.	Max: 10 yrs.
Sec 160(3): Bestiality in the Presence of a Child or Incites a Child to Commit Bestiality  1985	<b>Dual Procedure</b>	The offender commits bestiality in the presence of a child under the age of 16 or incites someone under the age of 16 to commit bestiality.	<b>Indictment:</b> Max: 14 yrs. Min: 1 yr. <b>Summary:</b> Max: 2 yrs less a day. Min: six months. if the offence occurred after July 17, 2015.  If the offence occurred between Aug 9, 2012 and July 16, 2015: <b>Indictment:</b> Max: 10 yrs. Min: 1 yr.

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<sup>3</sup> This charge does not require penetration as an element of the offence. “In my view bestiality means touching between a person and an animal for the person’s sexual purpose.” R. v. D.L.W. [2013] B.C.S.C. 1327.



<p>Sec 161: Breach of a Court Order for a Child Sexual Offender (Victim Under 16 yrs.)</p> <p>1993</p>	<p><b>Dual Procedure</b></p>	<p>The offender is first convicted or is discharged on conditions outlined in a probation order for a child sexual offence and is then prohibited from attending parks, schools, pools, etc. The order may also prohibit the use of computers or the Internet. This charge arises when offender breaches one or more of these conditions.</p>	<p><b>Indictment:</b> Max: 4 yrs.  <b>Summary:</b> Max: 18 months, if the offence occurred after July 17, 2015.</p> <p>Between Dec 6, 2014 and July 16, 2015: Max: 2 yrs.</p>
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<p>Sec 162: Voyeurism</p> <p>2005</p>	<p><b>Dual Procedure</b></p>	<p>The offender surreptitiously observes or visually records the victim, who is nude or semi-nude &amp; has a reasonable expectation of privacy. The offence is done for a sexual purpose. Anyone who gains a recording, knowing it was surreptitiously obtained and copies or distributes the recording is also guilty of Voyeurism.</p>	<p>Max: 5 yrs.</p>
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<p>Sec 162.1: Publishing an Intimate Image Without Consent</p> <p>2014</p>	<p><b>Dual Procedure</b></p>	<p>The offender publishes, distributes, sells, transmits, etc. an intimate image (where the victim's genitals, breasts, or anal area is exposed or the victim is engaged in sexual activity) knowing that she didn't give her consent to have the image taken and/or published.</p>	<p>Max: 5 yrs.</p>
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<p>Sec 163.1(2): Making Child Pornography</p> <p>1993</p>	<p><b>Indictment</b> as of July 17, 2015.</p> <p>Prior to that date this was a <b>Dual Procedure</b> Offence and the sentence that can be imposed now depends upon the penalties that were in place at the time of the offence.</p>	<p>The offender makes, prints or publishes any child pornography (the depiction, for a sexual purpose, of the sex organs, breasts, or anus of a child who is or who appears to be less than 18 yrs or a child engaged in explicit sexual activity).</p>	<p>Max: 14 yrs. Min: 1 yr. If the offence occurred after July 17, 2015.</p> <p>Between Aug 9, 2012 and July 16, 2015: Max: 10 yrs. Min: 1 yr.</p>
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<p>Sec 163.1(3) Distribution of Child Pornography</p> <p>1993</p>	<p><b>Indictment</b> as of July 17, 2015.</p> <p>Prior to that date this was a <b>Dual Procedure</b> Offence and the sentence that can be imposed now depends upon the penalties that were in place at the time of the offence.</p>	<p>The offender transmits, distributes, imports, exports, sells, etc. any Child Pornography.</p>	<p>Max: 14 yrs. Min: 1 yr. If the offence occurred after July 17, 2015.</p> <p>Between Aug 9, 2012 and July 16, 2015: Max: 10 yrs. Min: 1 yr.</p>
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<p>Sec 163.1(4) Possession of Child Pornography</p> <p>1993</p>	<p><b>Dual Procedure</b></p>	<p>The offender has Child Pornography in his actual possession or in any place for the benefit of himself or another person.</p>	<p><b>Indictment:</b> Max: 10 yrs. Min: 1 yr. <b>Summary:</b> Max: 2 yrs less a day. Min: six months if the offence occurred after July 17, 2015.</p> <p>Between Aug 9, 2012 and July 16, 2015: Max: 5 yrs. Min: 6 months.</p>
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<p>Sec 163.1(4.1): Accessing Child Pornography</p> <p>1993</p>	<p><b>Dual Procedure</b></p>	<p>The offender knowingly causes Child Pornography to be viewed or transmitted to himself.</p>	<p><b>Indictment:</b> Max: 10 yrs. Min: 1 yr. <b>Summary:</b> Max: 2 yrs less a day. Min: six months if the offence occurred after July 17, 2015.</p> <p>Between Aug 9, 2012 and July 16, 2015: Max: 5 yrs. Min: 6 months.</p>
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<p>Sec 170: Parent or Guardian Procuring Sexual Activity</p> <p>1985 (Previously known as Parent or Guardian Procuring Defilement)</p> <p>1953</p>	<p><b>Indictment</b></p>	<p>The parent or guardian of a victim under the age of 18, procures that person to engage in any illicit sexual activity with someone other than the parent or guardian.</p>	<p>Max: 14 yrs. Min: 1 yr. if the offence occurred after July 17, 2015.</p> <p>Between Aug 9, 2012 and July 16, 2015: Max: 10 yrs. Min: 1 yr. if the victim was under the age of 16. If the victim was between 16 and 18 yrs. the Max: was 5 yrs and the Min: was 6 months.</p>
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<p>Sec 171: Householder Permitting Prohibited Sexual Activity</p> <p>1985 (Previously known as Householder Permitting Defilement)</p> <p>1953</p>	<p><b>Indictment</b></p>	<p>The offender is the owner, manager or is controlling the premises and knowingly permits a person under the age of 18 to engage in any prohibited sexual activity.</p>	<p>Max: 14 yrs. Min: 1 yr. if the offence occurred after July 17, 2015.</p> <p>Between Aug 9, 2012 and July 16, 2015: Max: 5 yrs. Min: 6 months if the victim was under 16 yrs. If the victim was between 16 and 18 yrs. the Maximum penalty was 2 yrs and the Minimum penalty was 90 days.</p>
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<p>Sec 171.1: Making Sexually Explicit Material Available to a Child</p> <p>2012</p>	<p><b>Dual procedure</b></p>	<p>The offender shows, transmits, makes available, etc. sexually explicit material to a child under the age of 18 yrs. for the purpose of facilitating illicit sexual activity.</p>	<p><b>Indictment:</b> Max: 14 yrs. Min: 6 months.  <b>Summary:</b> Max: 2 yrs less a day. Min: 90 days if the offence occurred after July 17, 2015.</p> <p>Between Dec 6, 2014 and July 16, 2015: Max: 2 yrs. Min: 90 days.</p>
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<p>Sec 172: Corrupting Children Under 18</p> <p>1953</p>	<p><b>Indictment</b></p>	<p>The offender indulges in adultery, sexual immorality, habitual drunkenness or any other vice that endangers the morals of a child.</p>	<p>Max: 2 yrs.</p> <p><b>This charge can only be laid with the consent of the Attorney General or a designated Child Protection Agency.</b></p>
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<p>Sec 172.1: Luring a Child</p> <p>2002</p>	<p><b>Dual Procedure</b></p>	<p>An offender uses a telecommunication device with a person that he believes to be under the age of 18 in order to facilitate illegal sexual activity.</p>	<p><b>Indictment:</b> Max: 14 yrs. Min: 1 yr.  <b>Summary:</b> Max: 2 yrs less a day. Min: 6 months if the offence occurred after July 17, 2015.</p> <p>If the offence occurred between Dec 6, 2014 and July 16, 2015: Max:10 yrs. Min: 1 yr.</p>
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<p>Sec 172.2: Agree or Arrange to Engage in Illegal Sexual Activity with a Child</p> <p>2012</p>	<p><b>Dual Procedure</b></p>	<p>An offender uses a telecommunication device to make arrangements with a person to engage in illegal sexual activity with a child less than 18.</p>	<p><b>Indictment:</b> Max: 14 yrs. Min: 1 yr.  <b>Summary:</b> Max: 2 yrs less a day. Min: 6 months if the offence occurred after July 17, 2015.</p> <p>If the offence occurred between Dec 6, 2014 and July 16, 2015:  Max: 10 yrs.  Min: 1 yr.</p>
<p>Sec 173(1) Indecent Acts</p> <p>1953</p>	<p><b>Dual Procedure</b></p>	<p>The offender commits an indecent act, in public with intent to offend or insult.</p>	<p><b>Indictment:</b> Max: 2 yrs.  <b>Summary:</b> Max: 6 months if the offence occurred after Aug 08, 2012.</p> <p>Prior to Aug 08, 2012 this was a Summary Offence.</p>
<p>Sec 173(2) Exposure of Genitals to a Child Under the Age of 16 years</p> <p>1988 - Year of enactment</p> <p>2008 - Year of change to statute. Prior to that date the age of Consent was 14.</p>	<p><b>Dual Procedure</b></p>	<p>The offender exposes his genitals to a victim less than 16 yrs for a sexual purpose.</p>	<p><b>Indictment:</b> Max: 2 yrs. Min: 90 days.  <b>Summary:</b> Max: 6 months. Min: 30 days if the offence occurred after Aug 08, 2012.</p> <p>Between Aug 08, 2012 - April 15, 2011, Max: 2 yrs.</p> <p>Prior to April 15, 2011, this was a Summary Offence</p>

Sec 174: Nudity 1953	<b>Summary</b>	The offender is nude or so clothed as to offend public decency.	No maximum or minimum penalties. <b>This charge can only be laid with the consent of the Attorney General.</b>
Sec 177: Trespass at Night 1953	<b>Summary</b>	The offender prowls at night near a dwelling house.	No maximum or minimum penalties.
Sec 246: Overcoming Resistance to the Commission of an Offence 1953	<b>Indictment</b>	The offender enables himself or an accomplice to commit an indictable offence by choking, suffocating, or administering a drug to a victim in order to render her unconscious or incapable of resistance.	Max: Life imprisonment.  No minimum penalty.

<p>Sec 271: Sexual Assault</p> <p>1983</p>	<p><b>Dual Procedure</b></p>	<p>The offender uses force against a victim without her consent and does so for a sexual purpose and/or violates her sexual integrity.<sup>4</sup></p>	<p><b>Indictment:</b> Max: 10 yrs. If the victim is under 16 the Max is 14 yrs and the Min is 1 yr.</p> <p><b>Summary:</b> Max: 18 months. If the victim is under 16, the Max is 2 yrs. less a day and the Min is 6 months. This is if the offence occurred after July 17, 2015.</p> <p>If the offence occurred between Aug 9, 2012 and July 16, 2015: Max: 10 yrs. and if the victim is under 16, then the Min: 1 yr.</p>
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<sup>4</sup> “The conduct of the accused in grabbing his young child’s genitals as a form of discipline was an aggressive act of domination which violated the sexual integrity of the child which could be found to be a sexual assault.” R. v. V. (K.B.) (1992), 71 C.C.C. (3d) 65, 13 C.R. (4<sup>th</sup>) 87 (Ont. C.A.), affd {1993} 2 S.C.R. 857, 82 C.C.C. (3d) 382.



<p>Sec 272: Sexual Assault with a Weapon, Threats to a Third Party or Causing Bodily Harm</p> <p>1983</p>	<p><b>Indictment</b></p>	<p>1. The offender carries, uses or threatens to use a weapon or an imitation of a weapon in carrying out a sexual assault.</p> <p>2. The offender threatens to cause bodily harm to someone other than the victim in order to get the victim to engage in sexual activity.</p> <p>3. The offender causes more than a transient physical or psychological injury to the victim during a Sexual Assault.<sup>5</sup></p> <p>A victim cannot legally “consent” to being bodily harmed.<sup>6</sup></p>	<p>Max: 14 yrs. If a prohibited/restricted firearm is used, or if any firearm is used in association with a criminal organization. Min: 5 yrs for a first offence and 7 yrs for a subsequent offence. If any other firearm is used: Max: 14 yrs. Min: 4 yrs.</p> <p>If the victim is less than 16: Max: Life and the Min: is 5 yrs, if the offence occurred after July 17, 2015.</p> <p>If the offence occurred between Aug 9, 2012 and July 16, 2015 the only difference is for offences with victims less than 16: Max: 14 yrs.</p>
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<sup>5</sup> “Bodily harm can include psychological harm” *R.v. Mathieu* [1996] 111 C.C.C. (3d) 291, 187 A.R. 351 (C.A.)

<sup>6</sup> *R. v. Welch* (1995), 101 C.C.C. (3d) 216, 43 C.R. (4<sup>th</sup>) 225 (Ont. C.A.)

<p>Sec 273: Aggravated Sexual Assault</p> <p>1983</p>	<p><b>Indictment</b></p>	<p>The offender commits a sexual assault and in so doing, wounds, maims, disfigures or endangers the life of the victim.</p>	<p>Max: Life. If a prohibited/restricted firearm is used or if any firearm is used in association with a criminal organization, the Minimum is 5 yrs for a first offence and 7 yrs for a subsequent offence. If any other firearm is used the Max: Life. Min: 4 yrs. If the victim is under 16, Min: is 5 yrs.</p>
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<p>Sec 279.01: Trafficking in Persons</p> <p>2005</p>	<p><b>Indictment</b></p>	<p>The offender recruits, transports, holds, conceals, or exercises control over a victim for the purpose of exploiting her.</p>	<p>Max: Life. Min: 5 yrs. if the offender Murders, Kidnaps or commits Aggravated Sexual Assault during the Trafficking. Otherwise, Max: 14 yrs. Min: 4 yrs. Prior to Dec 05, 2014, no minimum.</p>
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<p>Sec 279.011: Trafficking in Persons Under 18</p> <p>2010</p>	<p><b>Indictment</b></p>	<p>The offender recruits, transports, holds, conceals, or exercises control over a victim less than 16 yrs. for the purpose of exploiting her.</p>	<p>Max: Life. Min: 6 yrs. if the offender Murders, Kidnaps or commits Aggravated Sexual Assault during the Trafficking. Otherwise, Max: 14 yrs. Min: 5 yrs.</p>
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<p>Sec 286.1(1) Obtaining Sexual Services for Consideration</p> <p>2014</p>	<p><b>Dual Procedure</b></p>	<p>The offender buys or attempts to buy any sexual services. It is now legal to sell sexual services, however purchasing sexual services is illegal.</p>	<p><b>Indictment:</b> Max: 5 yrs. If the offence occurs in close proximity to a place where children under 18 yrs. are likely to be found, the Minimum penalty is a fine of \$2000.00 for a first offence and a fine of \$4000.00 for any subsequent offence.</p> <p><b>Summary:</b> Max: 18 months. If the offence occurs in close proximity to a place where children under 18 yrs. are likely to be found, the Minimum penalty is a fine of \$1000.00 for a first offence and a fine of \$2000.00 for any subsequent offence</p>
<p>Sec 286.1(2) Obtaining Sexual Services of a Person Under 18 for Consideration</p> <p>2014</p>	<p><b>Indictment</b></p>	<p>The offender buys, or attempts to buy any sexual services from a child under the age of 18 years.</p>	<p>Max: 10 yrs. Min: 6 months for a first offence and 1 yr. for each subsequent offence.</p>

## Age Parameters for Consensual, Adolescent Sexual Activity

In order not to criminalize normal, adolescent, consensual sexual behaviour, Canadian lawmakers included provisions that are often somewhat confusing.

The 1988 legislation contained a provision that no offender who was under the age of fourteen could be charged with Sexual Interference, Invitation to Sexual Touching, or Exposure of Genitals to a Child, unless they were in a position of trust or authority at the time of the offence, such as acting as a babysitter, camp counsellor, etc. This provision is still in effect as of March 2016.

Between 1988 and 2008, an accused who was between the age of 12 -16 charged with Sexual Assault relating to a child, could raise the defence that the acts were consensual if there was not more than two years difference in the age of the complainant and the accused. Once again this required that the accused was not in a position of trust or authority at the times the acts took place. (***A 14 year old boy who was caught having sex with his 13 year old girlfriend would not be charged, if she consented to the sexual activity***).

On May 01, 2008, the age of consent to engage in sexual activity was raised from 14 to 16 years. Now a person under the age of 16 years cannot legally consent to sexual activity with anyone else.

### **There are two exceptions to the age of consent rule:**

1. If the complainant is 12 or 13 years old and the accused is less than two years older than the complainant, and is not in a position of trust or authority over the complainant and the sexual activity is consensual, then the acts are legal.

2. If the complainant is 14 or 15 years old and the accused is within five years of age, and is not in a position of trust or authority and the sexual activity is consensual, then the acts are legal. (***Eg. An eighteen year old boy having consensual sex with his fifteen year old girlfriend would not be committing an offence.***)

## Consecutive Sentencing for Child Sexual Offences

On July 23, 2015, legislation was passed regarding the use of consecutive sentencing for Child Sexual Offences:

<b>Sec 718.3(7): Cumulative Punishment for Sexual Offences Against Children</b>	<b>Sentences of imprisonment for Child Pornography Offences and any other Child Sexual Abuse Offence are to be served consecutively if they relate to more than one victim.</b>
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## Dealing With Historical Sexual Offence Reports

As noted previously, and as we have seen in the tables above, sexual offence legislation has evolved over the years. Certain laws and punishments have been amended or repealed. At the same time, case law has evolved and provisions of the Canada Evidence Act have been modernized. For the investigator, the relevance of these changes can best be described as follows: We are governed, on what charge can be laid by the Criminal Code offence that was in place at the time of the incident, but the current Canada Evidence Act and case law, govern the way the evidence is put before the court. As an investigator, you may find yourself responding to a victim who wishes to report a sexual crime that occurred years or even decades ago. A violent **Rape** of a victim that occurred in 1982 can still be investigated today, even if the victim has never reported the crime previously. This will not be a Sexual Assault complaint however, because the crime of Sexual Assault didn't exist until 1983. In order to conduct a thorough investigation you will have to determine if there was forced, penile-vaginal intercourse. In addition, you will need to ask the victim if she was married to her assailant at the time, or after the attack, as it was not a crime for a man to sexually assault his wife until 1983. If all of these components are present, then you will have the basic elements necessary to proceed with a charge of **Rape**. If the attack didn't result in penile-vaginal penetration, then the most appropriate charge will likely be **Indecent Assault on a Female**.

Perhaps you will be called upon to deal with a former boy scout who reports that in 1986, his scout master coerced him into games involving mutual masturbation and oral sex. Since the conduct in question may not qualify as a **Sexual Assault** and **Sexual Interference** and **Invitation to Sexual Touching** were not available charges until 1988, the most appropriate charge will probably be **Gross Indecency**.

Listed below are the relevant historical sexual offences, the year they were repealed, the elements of the each offence and the accompanying penalties.

<b>Offence Section Year of repeal</b>	<b>Indictable, Dual Procedure or Summary</b>	<b>Elements of Offence</b>	<b>Penalties</b>
Sec 144: Rape  1983	<b>Indictment</b>	An offender had forcible, penile-vaginal intercourse with a victim who was not his wife.	Max: Life
Sec 145: Attempted Rape  1983	<b>Indictment</b>	An offender attempted to have forcible, penile-vaginal intercourse with a victim who was not his wife.	Max: 10 yrs.
Sec 146(1): Sexual Intercourse with a Female Under the Age of 14 yrs.  1988	<b>Indictment</b>	An offender had penile-vaginal intercourse with a victim who was not his wife and was less than 14 yrs.	Max: Life
Sec 146(2) Sexual Intercourse with a Female Between the Age of 14-16 yrs.  1988	<b>Indictment</b>	An offender had penile-vaginal intercourse with a victim, who was a virgin, was not his wife and was between 14-16 years of age.	Max: 5 yrs.

Sec 148: Sexual Intercourse with the Feeble Minded  1983	<b>Indictment</b>	An offender had sexual intercourse with a victim who was not his wife and was severely mentally disabled.	Max: 5 yrs.
Sec 149: Indecent Assault on a Female  1983	<b>Indictment</b>	The male offender touched his victim in a sexual manner. This offence did not include penile-vaginal or penile-anal penetration.	Max: 5 yrs.
Sec 156: Indecent Assault on a Male  1983	<b>Indictment</b>	The male offender touched his male victim in a sexual manner. Offence did not include anal intercourse.	Max: 10 yrs.
Sec 157: Gross indecency  1988	<b>Indictment</b>	The offender could be male or female. The offender committed sexual acts with the victim (not covered by other specific laws) that were "a marked departure from decent conduct." <sup>7</sup>	Max 5 yrs.

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<sup>7</sup> R. v. St. Pierre (1974) 17 C.C.C.(2d) 489, 3 O.R. 642 (Ont, C.A.)

## Specific Provisions for Child Sexual Abuse

In 1988, Parliament enacted laws that allowed child victims or witnesses to be interviewed on video and then have that tape played at any subsequent court proceeding to augment their testimony. Laws were later passed to allow for the videotaping of other vulnerable victims and witnesses who suffer from a mental or physical disability that would make it difficult for them to testify in court. Section 715.1 and 715.2 lists the following prerequisites for the admission of a videotaped statement into court proceedings.

- The video recording must be made within a reasonable time after the alleged offence.
- The victim or witness must describe, in the video, the acts that constitute the offence.
- The victim or witness must adopt the contents of the video.

There is no specific definition of what constitutes “within a reasonable time after the alleged offence.” The circumstances relating to the delay and any adverse effects upon the child’s memory will play a major role in determining whether the videotape can be entered into evidence. In one case, involving a four year delay, the trial judge excluded the video, because it was felt that the passage of so much time affected the child’s memory.<sup>8</sup> In another case, the court ruled that a three year delay was “within a reasonable time of the alleged offence, having regard to the reasons for the delay and the impact of the delay on the child’s ability to accurately recall the events.”<sup>9</sup>

The requirement that the child describe the acts that form the basis of the complaint, re-emphasizes the point made earlier, that it is imperative that the investigator cover off the essential elements of the offence during the interview.

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<sup>8</sup> R. v. B. (A.G.), (2011), 280 C.C.C. (3d) 85 (Alta. Prov. Ct.)

<sup>9</sup> R. v. G. (S.) (2007), 222 C.C.C. (3d) 439 (Ont. S.C.J.)



## Canada Evidence Act

On the following pages we will examine two areas of the Canada Evidence Act that can have a direct affect on Child Sexual Abuse investigations.

### Spousal Testimony

In intrafamilial child sexual abuse investigations, investigators may find themselves dealing with an offender who is reluctant to admit that he sexually abused his child, but they may also engage with a non-offending spouse who defends her abusive husband. In the past, the Canada Evidence Act made it difficult if not impossible, to obtain spousal testimony in a criminal case. Over the years, changes made to the Canada Evidence Act made allowances for spouses to testify against one another if the alleged offence related to some forms of child abuse. (For some reason, until recently a wife could still not testify against her husband if the case involved child pornography.)

Legislation removing spousal immunity was enacted on July 23, 2015. Section 4 of the Canada Evidence Act addresses spousal testimony. Now a spouse is a competent and compellable witness in any criminal or civil case. There is still one exception to this rule. No one can be compelled to disclose any communication made by their spouse during their marriage. As an example; ***Julie caught her husband Ray, fondling their 14 year old daughter's breasts. Julie is competent (spousal immunity no longer exists) and she is compellable, because she actually witnessed the illegal offence of sexual interference. If however, Julie had not actually witnessed the act, but Ray had told her that he had fondled their daughter, Julie could refuse to testify in court about this "communication made during the marriage."*** This rule only applies to "legally married" spouses (common law spouses don't have this privilege).<sup>10</sup>

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<sup>10</sup> R. v. Nguyen, 2015 ONCA 278

## **Testimony of Children and Witnesses with Disabilities**

Section 16 of the Canada Evidence Act outlines the rules regarding the testimony of disabled and child witnesses in court.

A witness over the age of fourteen is expected to give their testimony under oath or solemn affirmation. If the subject's mental capacity is challenged however, the court will conduct an inquiry to determine if they:

- a) Understand the meaning of an oath or solemn affirmation.
- b) Can communicate their evidence.

If the witness meets both these criteria then they will be allowed to testify. If the individual does not understand the meaning of the oath or solemn affirmation, but can still communicate, they will still be allowed to testify, if they promise to tell the truth.

A child under the age of fourteen shall not give evidence under oath or solemn affirmation, but will be allowed to give evidence if they can understand and respond to questions and they promise to tell the truth.

Those witnesses whose mental capacity is challenged or are under the age of fourteen are presumed to have the capacity to testify and will be allowed to do so once they have promised to tell the truth. In 2005, the Canada Evidence Act was amended to include the provision that these special witnesses will not be "asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court."

Some child interview formats still include a credibility assessment step where the investigator engages the child in a discussion about telling the truth. The most simplistic form of this questioning revolves around asking the child if they would be telling a lie if they said that their (blue) shirt was actually red. Researchers have repeatedly found that this type of truth-lie discussion does not predict or promote truth telling during an interview with a child. I would go further and suggest that introducing the topic of truth and lies can often be detrimental to an interview. This is especially true if the victim has been repeatedly told by the offender that if they report the abuse to the police, they will not be believed. Suggesting that the child might be preparing to tell a false story may dissuade the often reluctant victim from disclosing their abuse.

Now that the Canada Evidence Act has been amended to prohibit prosecutors or defence counsel from asking children in court if they know the difference between a truth and a lie, I would strongly urge investigators to refrain from asking these types of questions during their interviews.

## Index

**Accessing Child Pornography: p. 11**

**Age of Consent: p. 3 & 20**

**Aggravated Sexual Assault: p. 18**

**Agree to Engage in Illegal Sexual Activity With a Child: p. 14**

**Alcohol Use: p. 5**

**Anal Intercourse: p. 4 & 8**

**Assault: p. 5**

**Attempted Rape: p. 22**

**Bestiality: p. 8**

**Breach of Court Order for a Child Sex Offender: p. 9**

**Brief History of Sexual Offences in Canada: p. 3**

**Canada Evidence Act: p. 26 & 27**

**Child and Disabled Witness Testimony: p. 27**

**Child Pornography: p. 3**

**Consecutive Sentencing for Child Sexual Offences: p. 21**

**Consent: p. 5 & 20**

**Corrupting Children: p. 13**

**Distribution of Child Pornography: p. 11**

**Elements of the Offence: p. 4**

**Exposure of Genitals: p. 14**

**Gender Issues: p. 4**

**Gross Indecency: p. 21 & 23**

**Historical Sexual Offence Reports: p. 21**

**Householder Permitting Prohibited Sexual Activity: p. 12**

**Incest: p. 2, 4 & 7**

**Indecent Acts: p. 14**

**Indecent Assault on a Female: p. 3, 21 & 23**

**Indecent Assault on a Male: p. 3 & 23**

**Invitation to Sexual Touching: p. 4, 6 & 21**

**Luring a Child: p. 13**

**Making Child Pornography: p. 10**

**Making Sexually Explicit Material Available to a Child: p. 13**

**Nudity: p. 15**

**Obtaining Sexual Services: p. 19**

**Overcoming Resistance to the Commission of an Offence: p. 15**

**Parent or Guardian Procuring Sexual Activity of a Child: p. 12**

**Possession of Child Pornography: p. 11**

**Publishing an Intimate Image Without Consent: p. 10**

**Rape: p. 3, 21 & 23**

**Sexual Assault: p. 3 & 16**

**Sexual Assault With a Weapon, Threats to a Third Party, Cause Bodily Harm: p. 17**

**Sexual Exploitation: p. 7**

**Sexual Exploitation of the Disabled: p. 7**

**Sexual Intercourse With a Female Under the Age of 14: p. 22**

**Sexual Intercourse With a Female Between the Ages of 14 - 16: p. 22**

**Sexual Intercourse With the Feebleminded: p. 23**

**Sexual Interference: p. 6**

**Spousal Testimony: p. 25**

**Trafficking in Persons: p. 18**

**Trespass by Night: p. 15**

**Videotaped Interviews: p. 24**

**Voyeurism: p. 3 & 9**

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