

Sexual assault in Canada and Germany

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Abstract

This article examines the crime of sexual assault in Canada. It focuses on the elements of the crime and the sanctions set forth in the Canadian Criminal Code. It also analyzes the crime of sexual assault in Germany. A comparison between the definitional terms and elements of both crimes shows that there are more similarities than differences and that the existing differences are mainly differences in terminology rather than substance.

Keywords: sexual assault; comparative law; Canada; Germany

El delito de agresión sexual en Canadá y Alemania

Resumen

Este artículo examina el delito de agresión sexual en Canadá. Se centra en los elementos del delito y las sanciones establecidas en el Código Penal canadiense. También analiza el delito de agresión sexual en Alemania. Una comparación entre la tipificación de este delito en ambas jurisdicciones

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revela que existen más similitudes que diferencias y que las diferencias son principalmente diferencias de terminología más que de fondo.

Palabras clave: *agresión sexual; derecho comparado; Canadá, Alemania*

I. Introduction

The Criminal Code of Canada, as pursuant to section 265, states the following: A person commits an assault when, without the consent of another person, applies force intentionally to that other person, directly or indirectly; attempts or threatens, by an act or a gesture, to apply force to another person; has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is the act of applying force without consent, therefore, it is unwanted sexual touching. The *mens rea* is the intention to apply force, knowing of, or being reckless or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

The crime of assault occurs when a person intentionally applies force, directly or indirectly, to another person; or attempts or threatens to apply force to another person and by doing so has caused or causes another person to believe on reasonable grounds, that the person has the ability to apply said force; or while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs. The sanctions for assault are as follows: a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or b) an offence punishable on summary conviction.

II. Sexual assault - *Actus reus* - Voluntary act

The *actus reus* of sexual assault is established by proving that force was applied, the sexual nature of the contact, and the absence of consent. It is sufficient for the Crown to prove that the accused's actions were voluntary.

The voluntary actions required for sexual assault include; directly or indirectly apply force to another person; or attempt or threaten to apply force; or accosts or impedes another person or begs. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behavior as stated in *R. v. Chase*, 1987 Can LII 23 (SCC), [1987] 2S. C. R. 293. The judge stated a motive of sexual gratification was not required behavior.

III. Sexual assault - *Actus reus* - Causation

Causation of sexual assault is determined by applying the But-For test. If not for the actions of the defendant, would the claimant have suffered harm, or have believed on reasonable grounds, that there is a present ability to apply force. This is subject to an objective test, the reasonable person test, that is, would a reasonable person have believed the same given similar circumstances. Therefore, it must be considered whether harm has or may have occurred due to the actions or gestures of the defendant, it also must be considered how a reasonable person may have reacted in similar circumstances, would a reasonable person have perceived fear. There is causation where the accused causes the complainant to believe on reasonable grounds that there is a present ability to apply force, or where the accused has applied force.

IV. Sexual assault - *Actus reus* - Social harm

The social harm aspect of a crime requires that there was wrongful conduct and, or wrongful result. The victim must feel fear on reasonable grounds. The inclusion of assault and sexual assault in the Criminal Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The wrongful conduct is the act of threatening or applying force without consent, the wrongful result is fear and physical harm.

V. Sexual assault - *Mens rea*

Sexual Assault requires that a person intentionally applies or threatens to apply force without consent, to another person. This defines the element of *mens rea* for sexual assault as intent. The onus rests with the crown to prove that the actions of the accused were voluntary and that the accused had intent to cause harm by committing sexual assault.

The crime of sexual assault requires general intent as stated in *R v. Chase*.² This is consistent with the approach adopted by this Court in cases such as *Leary*,³ and *Swietlinski*,⁴ where it was held that rape and indecent assault were offences of general intent.

The test to be applied in determining whether the impugned conduct, action, or gesture, was of a sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer. The part of the body touched, the nature

² *R.v.Chase*, 1987,Can,LII 23 (SCC), [1987] 2 SCR 293.

³ *Learyv. The Queen*, [1978] S.C.R. 29.

⁴ *Swietlinskiv. The Queen*, 1980 Can LII 53 (SCC), [1980] 2 S.C.R. 956.

of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant”.⁵

This requires an objective test, the reasonable foreseeability test. The court must consider if it was reasonably foreseeable that the crime of sexual assault may occur.

The application of the *mens rea* on behalf of the complainant is relevant in the crime of sexual assault. It is necessary that the courts consider the mind of the complainant on the grounds for consent as defined under sections 265(3) and 265(4) of the Criminal Code. This means that the crown must prove that the actions or gestures of the accused were intentional, and, that the accused caused the complainant to feel fear and, or experience harm, as well that there was no valid consent.

VI. Assault grading - Aggravated assault and aggravated sexual assault

Aggravated assault is defined pursuant to section 268 of the Criminal Code of Canada, aggravated sexual assault is defined pursuant to section 273 of the Criminal Code.

Section 272 of the Criminal Code defines sexual assault with a weapon, threats to a third party or causing bodily harm.

An assault or sexual assault becomes aggravated when, in the process of committing assault or sexual assault, wounds, maims, disfigures or endangers the life of the complainant. Everyone who commits aggravated sexual assault carries increasingly severe sanctions given the circumstances of the assault. Such factors include cases of sexual assault which consider the following; a restricted firearm or prohibited firearm is used in the commission of the offence, subsequent offences, and the age of the complainant. If the victim of an aggravated sexual assault is under the age of sixteen, the act carries a minimum sentence of imprisonment for five years, to a maximum of imprisonment for life. A first offence carries a sanction of a minimum of imprisonment for five years, whereas a subsequent offence carries a mandatory minimum sentence of seven years imprisonment.

No consent may be obtained in a case of aggravated sexual assault where the agreement or consent is expressed by words or conduct of anyone other than the complainant, the complainant was unconscious or otherwise incapable of consenting to the activity for any other reason, the accused induces the complainant to engage in the activity by abusing a position of trust or power of authority, the complainant expresses, by words or conduct, a lack of agreement to engage in the activity, or the complainant revokes consent at any point, thus expresses a lack of agreement to continue to engage in the activity. The Criminal Code of Canada states on these grounds that consent must be immediate and direct, from the complainant and no other third party, that the complainant must give consent on his or her own free will, without coercion from the defendant. Consent cannot be obtained by abusing a power of authority, for example, an employer may not threaten to fire an employee if he or

⁵ R. v. Chase, 1987 Can LII 23 (SCC), [1987] 2 SCR 293.

she does not take part in sexual activities, similarly, an employer may not offer an employee a raise in return for sexual favours or in return for engaging in sexual activities or conduct. The Criminal Code further indicates that consent may be revoked at any time prior to or while engaging in a sexual activity.

VII. Sexual assault - Consent

VII. 1. The age of consent in Canada is sixteen years of age

No consent is obtained where it is obtained by, application of force to another person, threats or fear of application of force to another person, fraudulent, exercise of authority, as pursuant to Section 265 (3) of the Criminal Code of Canada.

The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the application of force, at the time it occurred. To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or his or her conduct raises a reasonable doubt about his or her non-consent, circumstances may arise which call into question what factors prompted the apparent consent. The Criminal Code defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant's consent or participation. As defined pursuant to 265 (3), these include submission by reason of force, fear, threats, fraud or the exercise of authority, and codify that consent given under fear or duress is ineffective. Furthermore, there is no consent where there is lack of agreement, meaning consent must be expressly given, valid consent cannot be implied.

VIII. Sexual assault - Special defences - Implied consent - Accused's belief as to consent

Section 265 (4) of the Criminal Code of Canada states the following; Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief. This renders a defence where an accused was given reason to believe, on reasonable grounds, that consent was given and present.

IX. Sexual assault crime in a European civil law jurisdiction - Germany

The civil law jurisdiction of Germany derives mainly from the civil law systems of European countries,

particularly Portugal, the Napoleonic Code and the Germanic law. There are many codified statutes in force in Germany.

IX. 1. The age of consent in Germany is fourteen years of age

Provisions relating to sexual assault are defined under section 177 of the German Criminal Code, and states as follows:

Section 177; Sexual assault; sexual coercion; rape;

(1) Whoever, against a person's discernible will, performs sexual acts on that person or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person in curs a penalty of imprisonment for a term of between six months and five years.

(2) Whoever performs sexual acts on another person or has that person perform sexual acts, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person in curs the same penalty if

1. The offender exploits the fact that the person is not able to form or express a contrary will;

2. The offender exploits the fact that the person is significantly impaired in respect of the ability to form or express a will due to said person's physical or mental condition, unless the offender has obtained the consent of that person;

3. The offender exploits an element of surprise;

4. The offender exploits a situation in which the victim is threatened with serious harm in case of offering resistance or;

5. The offender has coerced the person to perform or acquiesce to the sexual acts by threatening serious harm.

(3) The attempt is punishable.

(4) The penalty is imprisonment for a term of at least one year if the inability to form or express a will is due to the victim's illness or disability.

(5) The penalty is imprisonment for a term of at least one year if the offender

1. Uses force against the victim;

2. Threatens the victim with a present danger to life or limb or;

3. Exploits a situation in which the victim is unprotected and at the mercy of the offender's influence.

(6) In especially serious cases, the penalty is imprisonment for a term of at least two years. An especially serious case typically occurs where

1. The offender has sexual intercourse with the victim or has the victim have sexual intercourse or commits such similar sexual acts on the victim or has the victim commit them on them which are particularly degrading for the victim, especially if they involve penetration of the body (rape), or;

2. The offence is committed jointly by more than one person.

(7) The penalty is imprisonment for a term of at least three years if the offender

1. Carries a weapon or other dangerous implement;

2. Otherwise carries an instrument or other means for the purpose of preventing or over coming he

resistance of another person by force or threat of force or;

3. Places the victim at risk of serious damage to health.

(8). The penalty is imprisonment for a term of at least five years if

1. The offender uses a weapon or other dangerous implement during the commission of the offence or;

2. The offender a) seriously physically abuses the victim during the offence or b) by committing the offence places the victim in danger of death.

(9) In less serious cases under subsections (1) and (2), the penalty is imprisonment for a term of between three months and three years, in less serious cases under subsections (4) and (5) imprisonment for a term of between six months and 10 years, and in less serious cases under subsections (7) and (8) imprisonment for a term of between one year and 10 years.⁶

Subsequently followed by section 178 reads as follows:

Section 178 Sexual assault, sexual coercion and rape resulting in death;

If, by committing sexual assault, sexual coercion or rape (section 177), the offender causes the victim's death at least recklessly, the penalty is imprisonment for life or imprisonment for a term of at least 10 years.

X. Sexual assault crime in a European civil law jurisdiction - Germany

X. 1. *Actus reus*

The voluntary act of this crime is performing sexual acts on that person or has that person perform sexual acts on them. Similar to the voluntary act of sexual assault under the Criminal Code of Canada, applying force without consent, this act requires the accused performing physical acts against the free will of another person.

X. 2. *Mens rea*

The *mens rea* pursuant to the German Criminal Code requires that the action is against a person's discernible will or if the offender exploits the fact that the complainant is not capable of forming or expressing a contrary will. These mimics the notion of consent under the Criminal Code of Canada. In both jurisdictions, the crime relies heavily on the mental state and perception of the victim. The German Criminal Code, however, does not specify or define a specific element of *mens rea* for this

⁶ *German Criminal Code*; Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844).

crime, the German Criminal Code requires and assumes intention as the active element of *mens rea*, where an element of *mens rea* is not specifically defined or stated. Whereas the Criminal Code of Canada does require intent. Section 178 of the German Criminal Code states that the *mens rea* for sexual assault, sexual coercion and rape resulting in death, must require, at least, the element of recklessness.

XI. Sexual assault crime in a European civil law jurisdiction Germany assault grading

Similar aggravating circumstances are a factor under the Criminal Code of Canada and the German Criminal Code, such as carrying a weapon, the age of the victim, and the abuse of power or authority. Such circumstances carry more severe sanctions in both jurisdictions. Both jurisdictions define and separate aggravating circumstances such as Section 178 of the German Criminal Code which sanctions Sexual assault, sexual coercion and rape resulting in death, similar to Section 272 (1) of the Criminal Code of Canada which sanctions Sexual assault with a weapon, threats to a third party or causing bodily harm.

Each jurisdiction so carries sanctions separately for sexual crimes on minors such as Section 176a of the German Criminal Code which sanctions aggravated sexual abuse of children, or Section 273 (2) (a.2) which sanctions penalties for sexual assaults on persons under the age of sixteen years.

XII. Comparison with the sexual assault offence in Canada

The age of consent is higher in Canada, sixteen years of age, as opposed to that in Germany, where the age of consent is fourteen years of age. Each jurisdiction carries the age of legal responsibility at the age of eighteen years of age.

The crimes in each jurisdiction carry similar sanctions depending on similar aggravating circumstances. Each jurisdiction defines a threat as a possible act of assault or similar sexual crime based on the relevant Code. Each jurisdiction carries its own terminology for the crime of sexual assault. In Canada, the crime is defined under the Criminal Code as sexual assault, whereas Germany defines the crime as sexual assault, sexual coercion, and rape, as pursuant to Section 177 of the German Criminal Code.

Other specific similar factors among aggravating and mitigating factors for these crimes such as age, consent, will, weapons, violence, and among other factors, are outlined in previous paragraphs and in the following concluding paragraphs.

XIII. Conclusions and comparison

The crime of sexual assault requires that a person intentionally, directly or indirectly, applies force or threatens to apply force, to another person, without the valid consent of the other party. The sanctions for this crime vary depending on various mitigating and aggravating circumstances such as consent, age, weapons, bodily harm, maiming, and other factors which come into force upon determining the presence and severity of the crime of sexual assault.

Throughout the studies of various jurisdictions, it is apparent that different jurisdictions carry similar provisions and sanctions for similar actions, these provisions are similarly sanctioned, however, they were defined differently pursuant to their relevant Codes, under different terms and vocabulary. For example, whereas the Criminal Code of Canada enforces the notion of consent, Germany substitutes this notion of consent for what is defined as the notion of discernable will. Although, these jurisdictions carry different terms and definitions for the crime of sexual assault, the provisions and sanctions therein carry similar notions and morals.

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