



Review Article

Women in the Context of Canadian Criminal Offences

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Abstract: This paper explores the role and place held by women in the context of Canadian criminal offences. The offences that will be examined involve women either as victims (sexual assault, voyeurism and domestic violence), as offenders (infanticide and abortion), or both (prostitution). While this paper solely constitutes an overview of this immense topic, the author brings a critical, social and historical perspective to some of the issues raised by these criminal offences.

Keywords: Women, criminal law, Canada.

1. Introduction

The recent passing, on September 18, 2020, of Ruth Bader Ginsburg, a judge of the United States Supreme Court and a women's rights icon makes, unfortunately, the topic of women in criminal law quite relevant. Rosalie Silberman Abella wrote about her, a few days after her passing: for Justice Ginsburg, "there was no justice without respect for rights, no

respect for rights without access to inclusion and no access to inclusion without compassion. Through her, the public saw how fragile the safety of their rights could be" [1]. This obviously includes women. What also makes this topic relevant is that on October 1, 2020 Phumzile Mlambo-Ngcuka stated regarding women's rights, "All in all, progress, but not yet enough, and too slow" [2].

"But first, what is a woman?" [3], asked Simone de Beauvoir in *The Second Sex*. Beverley McLachlin, former Chief Justice of Canada - the first woman to hold that position and the longest-serving chief justice in Canadian history, recalled in a speech given in 2003 titled *The Civilization of Difference*: "Yet for much of Canadian history, women have been relegated to an inferior status in society. Why? Again the familiar premise - women are different" [4]. Nevertheless, Simone de

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Beauvoir wrote, “woman like man is a human being; but such an assertion is abstract; the fact is that every concrete human being is always uniquely situated” [5]. Justice McLachlin, as she then was, also addressed more specifically in a different paper what she described as “feminine crimes”, i.e. “those committed mainly if not exclusively by women, like infanticide, abortion and prostitution” [6].

These last criminal offences but also additional ones, all being mainly related to women, either as victims or offenders or both, will be discussed in this paper, more specifically in light of the role and place held by women in the context of criminal offences in Canada.

2. Sexual Assault

For those who may think that Canada is a promised land for women in general, the author will say this: it may well be, to a certain extent, but there is still a lot of work and education to do about women, including education for some judges of criminal courts in Canada. For example, a Canadian judge said during the hearing of a sexual assault case where the accused was 49 years old: “She’s a young girl, 17. Maybe she’s a little overweight but she has pretty face, no?” [7]. The Guardian also reported about this case, “The judge also suggested that trying to kiss someone may be acceptable but that a different level of consent would be needed for anything more”. Beyond being undoubtedly unacceptable morally speaking in so many respects, this comment from a Canada criminal law judge is wrong in law; “[i]t is a fundamental principle of Canadian law that a person is entitled to refuse sexual contact” [8].

It is certainly quite troubling to see that the case discussed above is not the only one of its kind. Indeed, “These are two of at least 10 cases winding their way through Canada’s court systems in 2019 that demonstrate how some judges continue to rely on stereotypes and rape

myths when informing their decisions, or make significant mistakes on issues of consent” [9]. These stereotypes and rape myths could stem from the objectification of women; as Simone de Beauvoir wrote, “She becomes an object” [10]. This is illustrated, for example, in *R. v. Alakoozi* where the accused in this sexual assault case saw “women strictly as sexual objects” [11].

“Sexual assault” is currently provided by section 271 of the Criminal Code [12]. Now, “the sexual assault provisions in the Criminal Code,... create a framework that appears to vindicate women’s rights to equality, autonomy, dignity and privacy” [13]. These rights are protected by the Canadian Charter of Rights and Freedoms (hereinafter “Charter”) [14], more specifically by sections 7 (security), 8 (privacy [15]), 15 (equality) and 28 (rights equally guaranteed to both sexes). “The Charter did not bring to life the existence in Canada of human rights and fundamental freedoms in the courts” [16], but it gave them a constitutional status and a fundamental protection.

In *R. v. Ewanchuk*, the Supreme Court of Canada (hereinafter “Court”) defined, “The actus reus of sexual assault is established by the proof of three elements: i) touching; ii) the sexual nature of the contact; and iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused’s actions were voluntary. 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 behaviour” [17]. In *R. v. Chase*, the Court had already previously stated, “the test for the recognition of sexual assault does not depend solely on contact with specific areas of the human anatomy” [18]. In a nutshell, “Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy.

The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force." [19] "Any non-consensual contact" not only covers a full-on sexual intercourse, but also includes kissing, and "trying to kiss someone", as in the case mentioned above. In other words, "even mild non-consensual touching of a sexual nature can have profound implications for the complainant" [20].

In addition, as recalled in *R. v. Rafuse*: [21]

Parliament has codified the meaning of consent in relation to sexual activity in 273.1 (i) of the Criminal Code which states that, "consent is the voluntary agreement of a complainant to engage in the sexual activity in question". Section 273.1 (ii)(e) goes on to say that the complainant, having consented to engage in sexual activity, expresses, by word or conduct, a lack of agreement to continue to engage in the activity then there no longer remains consent. Simply put, no means no. Further, no means no at any stage of sexual activity.

In *R. v. J.A.*, a case where the Court had to resolve the issue of whether a person can perform sexual acts on an unconscious person if the person consented to those acts in advance of being rendered unconscious, it stated, "The [Canadian] jurisprudence has consistently interpreted consent as requiring a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act", and "[w]hile the issue of whether advance consent can suffice to justify future sexual acts has not come before this Court prior to this case, the tenor of the jurisprudence undermines this concept of consent" [22]. The Court restored the conviction of the accused for sexual assault.

This last case also calls for the question of the existence of "particular circumstances as exceptions to the conscious consent paradigm of the Criminal Code" but the Court made clear that the view that "consent in the context of sexual assault has no place in relationships of mutual trust, like marriage,... run[s] counter to Parliament's clear rejection of defences to

sexual assault based on the nature of the relationship" [23]. This was not always so: "In 1982, the Canadian Criminal Code still contained the offence of rape [that] was defined in such a way that married men could not be convicted of - or even charged with - raping their wives" [24]. Marriage (or any relationship) is not and must never be a license to sexually abuse your beloved one: for example, in *R. v. R.(M.)* [25], a case that went before the Ontario Court of Appeal, the accused pleaded guilty to sexually assault his wife and causing bodily harm. In that respect, Canada must be distinguished from its neighboring country, the United States, since "only a minority of American States have abolished the marital rape exemption in its entirety and that it remains in some form or other in all the rest,... in most American States, resistance requirements still apply and that even where a woman say no, the use of some force to procure intercourse does not generally constitute rape" [26]. However, in Canada, "[i]t is a fundamental principle of the law governing sexual assault,... that no means "no" and only yes means "yes" [27], in all circumstances, including between spouses.

Before, "A man accused of rape could be acquitted on the basis that he mistakenly believed that the complainant had consented to sexual activity, even where his belief was unreasonable" [28]. This clearly left room for abuse, sexual abuse. Now, "before a court should consider honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence" [29].

3. Voyeurism

In 2005, Parliament enacted a new criminal offence called voyeurism in s. 162(1) of the Criminal Code. In 2019, in *R. v. Jarvis* [30], the accused was charged with voyeurism, more specifically contrary to s. 162(1)(c), after he used a camera concealed inside a pen to make video recordings of female students at the high

school where he was a teacher. Most of the videos focused on the faces and upper bodies of female students, particularly their chests. The students did not know that they were being recorded. The offence provided by s. 162(1) is committed where a person surreptitiously observes or makes a visual recording of another person who is in circumstances that give rise to a reasonable expectation of privacy, and paragraph c) relates to the observation or recording that is done for a sexual purpose: “[a]t trial, Jarvis was acquitted because the trial judge was not satisfied beyond a reasonable doubt that the videos were recorded for a sexual purpose” [31].

The Court turned its mind to the interpretation to be given to “circumstances that give rise to a reasonable expectation of privacy” [32], and provided a non-exhaustive list of considerations that may assist a court in making that assessment [33]:

- i) The location the person was in when she was observed or recorded.
- ii) The nature of the impugned conduct, that is, whether it consisted of observation or recording.
- iii) Awareness of or consent to potential observation or recording.
- iv) The manner in which the observation or recording was done.
- v) The subject matter or content of the observation or recording.
- vi) Any rules, regulations or policies that governed the observation or recording in question.
- vii) The relationship between the person who was observed or recorded and the person who did the observing or recording.
- viii) The purpose for which the observation or recording was done.
- ix) The personal attributes of the person who was observed or recorded.

The Court also examined “a number of principles established in the jurisprudence on s. 8 of the Charter and the broader privacy jurisprudence, that [it] consider[ed] relevant to interpreting the meaning of “reasonable expectation of privacy” in s. 162(1) of

the Criminal Code.” [34] However, to discuss this section of the Charter in that context would go beyond the scope of this paper.

The Court concluded that Jarvis acted contrary to the reasonable expectations of privacy in the circumstances of this case [35], summarized above. It allowed the appeal and entered a conviction against him.

In short, in this case, the Court “adopted a sexual integrity analysis of sexual offences” [36].

4. Prostitution

The following heartfelt words of Nelly Arcand, a French-Canadian novelist who was published in France, shed light to one dimension of prostitution: “I ... decided to write what I had muted so firmly, to finally say what was hidden behind the requirement to seduce that did not want to let go, and that threw me into the excess of prostitution, requirement to be what is expected by the other” [37]. As the expression goes, ‘Beauty is in the eye of the beholder’ but the beholder, here “the other”, becomes with his or her eyes a possible executioner, as expressed, in different circumstances, by Jean-Paul Sartre, a French philosopher and novelist: “The executioner is each of us for the other two” [38]. Said otherwise, the violence suffered by sex workers is not only physical but also psychological. The psychological dimension of the impact of prostitution described above is just one of many.

Graham Hudson and Emily van der Meulen argued, “On the surface, criminal laws notionally protected prostitutes, and other women for that matter, from exploitation and physical abuse at the hands of male spouses, customers, and/or procurers. From 1892 to 1953-54, for example, the Criminal Code contained offences pertaining to living on the avails of prostitution and procuring. However, these same provisions were, and continue to be, used against sex workers’ family members, loved ones, and others as decided by the police and judiciary” [39]. In addition, Susan Dewey, Tiantian Zheng and Trenea Orchard noted,

“Women involved in street-based prostitution also face a high risk of premature death and murder, which includes the significant number of Aboriginal women who are missing or have been murdered, many of whom were involved in the sex trade in different parts of Canada” [40]. The most infamous Canadian cases that illustrate such tragic and horrible outcomes are the cases involving Robert Pickton, a serial killer who was convicted in 2007 of the second-degree murders of six women. He was also charged in the deaths of an additional twenty women [41], many of them sex workers and drug users from Vancouver’s Downtown Eastside.

In Downtown Eastside [42], the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers, have launched a broad constitutional challenge to the prostitution provisions of the Criminal Code. The Court found that that they should be granted public interest standing to pursue this challenge. In short, “[a]s a result, despite the fact that individual sex trade workers could challenge the legislation when faced with prosecution,..., the Court permitted a public interest group whose object was to improve the lot of female sex trade workers to challenge Criminal Code provisions dealing with different aspects of prostitution” [43].

In Bedford [44], current or former sex workers, brought an application seeking declarations that three provisions of the Criminal Code [45] which criminalize various activities related to prostitution. They claimed that these provisions infringe their rights under s. 7 of the Charter, which provides for “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”, and that they are then unconstitutional. In that case, “the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution - itself a legal activity” [46] in Canada. The Court concluded that the three above-mentioned prohibitions of

the Criminal Code imposes “dangerous conditions on prostitution; they prevent people engaged in a risky - but legal - activity from taking steps to protect themselves from the risks” [47]. More specifically, these provisions of the Criminal Code “impacts the security of the person” [48]. They were deemed to infringe s. 7 of the Charter and were not saved under its s. 1, also commonly called the “Oakes test” [49, 50]

However, this was not the end of the story [51]:

Parliament responded to Bedford by enacting Bill C-36. This new sex work law adopts a variant of what has been called “the Nordic model”. The centerpiece of the legislative scheme is the new offence of obtaining sexual services for consideration; but only the purchaser and not the seller of sexual services can be prosecuted for this offence. By enacting Bill C-36, Parliament has for the first time since the enactment of the first Criminal Code in 1892 criminalized the act of prostitution between adults.”

In addition, Justice McLachlin, as she then was, noted, “Typically the law has focussed on the person offering sexual services - usually a woman” [52], i.e. until Parliament responded to Bedford. Indeed, in Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), the Court pointed out that, at the time this decision was rendered, in 1990, “prostitution [was] not illegal in Canada”, then the Court observed that “we [then found] ourselves in an anomalous, some would say bizarre, situation where almost everything related to prostitution has been regulated by the criminal law except the transaction itself” [53].

Susan Dewey, Tiantian Zheng and Treena Orchard noted, “Globally, approaches that criminalize the purchase of sex are often referred to as the “Swedish Model” or the “Nordic Model” as a result of their Scandinavian origins or as “End Demand” because they place male clients under the criminal justice system’s purview” [54]. Therefore, some would say that the Parliament’s action in Canada to change the

Criminal Code regarding prostitution offences filled a gap, others would say that it represented a shift; both would be right.

5. Domestic Violence

Statistical data regarding domestic violence in Canada are alarming: “one woman is every 10 is beaten by her male partner, two-thirds of all Canadian marriages experience at least one occurrence of domestic violence” [55]; “there are a million women in Canada who have been victims of domestic violence” [56].

Frances Salvaggio observed, “In domestic cases, the criminal law is engaged procedurally at three discrete, but related points of discretionary power: the decision of the police to arrest and/or charge, the decision of the Crown to prosecute, and the decision of the court to impose a sentence if the case is made.” [57] While it may sound obvious for some that the police may arrest a person who is alleged to have committed a domestic assault, and while Canadian courts consider all types of domestic violence very seriously [58] - even if it has not always been the case [59] -, some countries currently do not share that view. For instance, in 2017, Russia decriminalized domestic violence in cases where it does not cause “substantial bodily harm” (such as broken bones or a concussion), and does not happen more than once a year [60].

Nancy Gertner argued, “It is not unusual to see women defendants who have been subject to coercion, abuse, and even battering” [61], and then “[t]he real issue is whether it is entirely appropriate to treat women offenders differently. Are the sources of women’s crime different? Do different factors trigger their crime [...]? The answer is yes” [62]. For example, in *Lavallee* [63], a battered woman killed her partner late one night by shooting. The shooting occurred after an argument where she had been physically abused and was fearful for her life. She had frequently been a victim of his physical abuse. This is the first case in Canada where the “defence” of “battered” woman syndrome was successfully raised [64].

As recalled by the Court in *Mallott*, a case where the basic facts are similar to *Lavallee*, “The relevance of evidence on battered woman syndrome to the issue of self-defence was recognized in *Lavallee*” [65]. This decision “represents an important step towards making the law of self-defence responsive to the life experiences of women” [66], and “is a clear statement that it will be reasonable for battered women to act in self-defence in circumstances and in ways that the law would not consider reasonable for the ubiquitous (and fictitious) “reasonable man” [67].

6. Abortion

Justice McLachlin commented, “Criminal laws against abortion offer [an] example of attempts to enforce sexual morality through the criminal law” [68]. Section 223(1) of the Criminal Code defines “when child becomes human being”: “when it has completely proceeded, in a living state, from the body of its mother, whether or not it has breathed; it has an independent circulation; or the navel string is severed.”

A few years after the historical decision in *Roe v. Wade* [69] was rendered by the United States Supreme Court, the Court in Canada also considered the issue of abortion in *R. v. Morgentaler* (1976) [70]. *Morgentaler* was prosecuted for openly providing abortions. The Court held that the abortion provisions were still valid as there was still a criminal law purpose in prohibiting abortion even without there being a danger to women.

Thirteen years later, and after the enactment of the Charter, *Morgentaler* came back to the Court, and then successfully challenged these provisions in *R. v. Morgentaler* (1988) [71]. While the issue of abortion may now be considered settled in Canadian law where abortion is considered legal, it was “still hotly debated within the Canadian community” [72] in the 80s. This decision has been one of “the most publicized and most controversial Charter decision[s]” [73]. Prior to this decision, the

Criminal Code allowed for abortions to be performed only at accredited hospitals with the proper certificate of approval that women had to obtain first. Doctors, including Morgentaler, set up an abortion clinic for the purpose of performing abortions on women who could not obtain that certificate. They were claiming that women should have complete control over the decision on whether to have an abortion. This decision did not declare a constitutional right to abortion nor a “freedom of choice”.

Later, this time in 1993, Morgentaler came back again before the Court and then successfully challenged a provincial attempt to regulate abortion [74].

7. Infanticide

Constance Backhouse recalled, “Infanticide was an unsavory but surprisingly common feature of daily life in nineteenth century Canada. It was one of the tragic, but historically inevitable responses to the overwhelmingly problems posed by unwanted pregnancies.” [75] Justice McLachlin, as she then was, also recalled [76]:

The earliest attempts to regulate procreation were not through abortion, but through the criminalization of infanticide. Today we view infants as human beings, entitled to the full protection of the law. However this has not always been so. Infanticide was morally and legally acceptable as a means of controlling population size in pre-Christian and non-Christian societies, societies as admired as ancient Greece and Rome. Why, we ask ourselves, is it necessary to have a special offence of infanticide? Do not the offences of murder and manslaughter suffice to cover those cases where a mother kills her infant? The reasons, historically, are two: first, to stiffen the offence by making conviction easier; and second, in later years, to ease the penalty for infant killings which were really a product of a strict morality which condemned a woman who had a child out of wedlock and the desperate economic situation of many women.

She also wisely noted, “The history of the crime of infanticide illustrates how the criminal law sometimes places the burden of social and moral problems involving both sexes on the backs of women” [77]. The offence of infanticide “has been part of the criminal law of Canada for over 60 years” [78], and is provided by Section 233 of the Criminal Code. It “applies in the narrow set of circumstances where: i) a mother, by a wilful act or omission, kills her newborn child (under one year of age, as defined by the Criminal Code, s. and, ii) at the time of the act or omission, the mother’s mind is “disturbed” either because she is not fully recovered from the effects of giving birth or by reason of the effect of lactation” [79]. Justice Doherty of the Ontario Court of Appeal stated regarding the willfulness of this offence: “Wilful” is a strong mens rea word and can be understood to require proof of an intention to bring about the prohibited consequence, e.g. death” [80].

This offence has been revisited in 2016 by the Court in *R. v. Borowiec* [81] where it “explore[d] a particularly dark corner of the criminal law” with a focus on the legal meaning of the phrase “her mind is then disturbed” in the context where a legal test was needed for when a woman’s mental state is sufficiently disturbed.

The facts of *Borowiec* are sordid and saddening. Between 2008 and 2010, the Respondent, gave birth to three babies inside her home. After giving birth, she wrapped each baby in a towel, placed each baby in a garbage bag, tied the bag, then unceremoniously disposed of each newborn in a garbage dumpster outside her apartment. The first two babies were not recovered. The third baby was discovered and rescued from the dumpster.

The Court observed in that case that “[t]he Canadian jurisprudence establishes that there is a “very low” or “fairly low” threshold for a finding of mental disturbance and that it does not require evidence that the accused has a mental disorder” [82]. It also stated, among other important listed items, that “[t]here is no requirement to prove that the act or omission was caused by the disturbance. The disturbance

is part of the *actus reus* of infanticide, not the *mens rea*" [83].

Sullivan [84] is not an infanticide case but a case where two midwives were charged under sections 203 and 204 of the Criminal Code (now sections 220 and 221, respectively the offence of "causing death by criminal negligence" and "causing bodily harm by criminal negligence") after a baby they were attempting to deliver died while still in the birth canal. The author still considers this case relevant to be discussed in this section, mostly because of its facts.

The Court held in that decision that a foetus is not a person for the purposes of these sections and affirmed the "born alive rule", i.e. for a foetus to become a person was the requirement that it be completely extruded from its mother's body and be born alive [85]. Both midwives were acquitted.

In the alternative, "even if", according to Sheilah L. Martin [86] and Murray Coleman, "the wording of a particular prohibition may allow the assimilation of an unborn foetus to the position of a born child, the court must consider whether the purpose of the provision was to criminalize the conduct of pregnant women" [87].

8. Conclusion

After having examined the role and place held by women in the context of Canadian criminal offences, one conclusion must be drawn: the scope of this topic is so wide and rich that it can hardly be reduced to an overview. That being said, what was briefly studied in this paper allows the author to state with confidence that there is still a lot of progress that remains to be accomplished for women in general, and also in the field of criminal offences in Canada more specifically, for example with respect to how women are perceived and considered.

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- [19] *R. v. Ewanchuk*, supra, para. 28 (emphasis added).
- [20] *R. v. J.A.*, supra, para. 63 in fine.
- [21] *R. v. Rafuse*, 2019 NSPC 66, para. 23 (bold characters added). Section 273.1(2) also provides a non-exhaustive list of circumstances in which no consent is obtained: (a) the agreement is expressed by the words or conduct of a person other than the complainant; (a.1) the complainant is unconscious; (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1); (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) 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.
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- [37] Nelly Arcand, *Putain [Whore]*, Éditions du Seuil, Paris, France, 2002. “J’ai alors décidé d’écrire ce que j’avais tu si fort, dire enfin ce qui se cachait derrière l’exigence de séduire qui ne voulait pas me lâcher et qui m’a jetée dans l’excès de la prostitution, exigence d’être ce qui est attendu par l’autre” (translated in English by Sébastien Lafrance).
- [38] Jean-Paul Sartre, *Huis Clos [Behind Closed Doors]*, Folio/Gallimard, 1943, p. 42 : “Le bourreau, c’est chacun de nous pour les deux autres” (translated in English by Sébastien Lafrance).
- [39] Graham Hudson & Emily van der Meulen, *Sex Work, Law, and Violence: Bedford v. Canada and the Human Rights of Sex Workers*, (2013) 31(1) *Windsor Yearbook on Access to Justice* 115, p. 125.
- [40] Susan Dewey, Tiantian Zheng & Treena Orchard, ‘Law, Public Policy, and Sex Work in North America and China’ in Susan Dewey, Tiantian Zheng & Treena Orchard (eds), *Sex Workers and Criminalization in North America and China – Ethical and Legal Issues in Exclusionary Regimes*, Springer, 2016, p. 3.
- [41] *R. v. Pickton*, [2010] 2 SCR 198, para. 2.
- [42] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524.
- [43] Robert J. Sharpe, ‘Access to Charter Justice’, (2013) 63 *Supreme Court Law Review* 3, p. 5.
- [44] *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101.
- [45] Section 210 (The Bawdy-House Prohibition); section 212(1)(j) (Living on the Avails of Prostitution); and section 213(1)(c) (Communicating in Public for the Purposes).
- [46] *Bedford*, supra, para. 59. At para. 61: “It is not an offence to sell sex for money. The bawdy-house provisions, however, make it an offence to do so in any “place” that is “kept or occupied” or “resorted to” for the purpose of prostitution (ss. 197 and 210(1) of the Code). The reach of these provisions is broad.”
- [47] *Bedford*, *ibid.*, para. 60.
- [48] *Ibid.*, paras. 65, 67 & 72.
- [49] Summarily, “[t]he analysis for assessing whether or not a law violating the Charter can be saved as a reasonable limit under s. 1 is set out in *Oakes*. A

- limit on Charter rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the Oakes test for establishing that the limit is reasonably justifiable in a free and democratic society": Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 SCR 391, para. 138. See also R. v. Oakes, [1986] 1 SCR 103.
- [50] The Court noted that "[t]he Attorneys General have not raised any other arguments distinct from those considered under s. 7. I therefore find that the impugned laws are not saved by s. 1 of the Charter" (para. 163).
- [51] Hamish Stewart, 'The Constitutionality of the New Sex Work Law', (2016) 54(1) Alberta Law Review 69, p. 70.
- [52] McLachlin (1991), supra, p. 11.
- [53] [1990] 1 SCR 1123 (emphasis in the original).
- [54] Susan Dewey, Tiantian Zheng & Treena Orchard, supra, p. 1-2.
- [55] Frances Salvaggio, 'K Court: The Feminist Pursuit of an Interdisciplinary Approach to Domestic Violence', (2002) 8 Appeal: Review of Current Law and Law Reform 6, p. 6.
- [56] R. v. Fleiger, 1991 CanLII 2673 (NB QB), p. 426.
- [57] Frances Salvaggio, supra, p. 9.
- [58] "domestic violence ... is taken very seriously in Canada and in other countries": Ahmed v Canada (Citizenship and Immigration), 2019 CanLII 127414 (CA IRB), para. 9.
- [59] For discussion of the Criminal Code's exemption of husbands from rape convictions in 1892, see Constance Backhouse, 'Nineteenth-Century Canadian Rape Law 1800-92' in David H. Flaherty (ed.), Essays in the History of Canadian Law, vol. II, Toronto, The Osgoode Society, 1983, p. 200.
- [60] Doug Stanglin, 'Russian parliament votes 380-3 to decriminalize domestic violence' (27/1/2017). <https://www.usatoday.com/story/news/2017/01/27/russian-parliament-decriminalizes-domestic-violence/97129912/>
- [61] The Honorable Nancy Gertner, Women Offenders and the Sentencing Guidelines, (2002) 14 Yale J.L. & Feminism 291, p. 293.
- [62] Nancy Gertner, 'Women and Sentencing', (2020) 57 Am Crim L Rev 1401, p. 1402.
- [63] R. v. Lavallee, [1990] 1 SCR 852.
- [64] Lee Stuesser, 'The "Defence" of "Battered Women Syndrome" in Canada', (1990) 19(1) Manitoba Law Journal 195.
- [65] R.v. Mallott, [1998]1 SCR 123.
- [66] Martha Shaffer, "R.v. Lavallee: A Review Essay", (1990) 22(3) Ottawa Law Review 607, p. 609.
- [67] Ibid, p. 610.
- [68] McLachlin (1991), supra, p. 6.
- [69] Roe v. Wade, 410 U.S. 113.
- [70] Morgentaler v. The Queen, [1976] 1 SCR 616.
- [71] R. v. Morgentaler, [1988] 1 SCR 30.
- [72] Linda Long, The Abortion Issue: An Overview, (1985) 23(3) Alberta Law Review 453, p. 453.
- [73] Peter H. Russell, Rainer Knopff & Frederick Lee, Federalism and the Charter: Leading Constitutional Decisions, Carleton University Press, Ottawa, Canada, 1989, p. 515.
- [74] R. v. Morgentaler, [1993] 3 SCR 463.
- [75] Constance Backhouse, 'The Shining Sixpence: Women's Worth in Canadian Law at the End of the Victorian Era', (1995) 23 Manitoba Law Journal 556, p. 556.
- [76] McLachlin (1991), supra, p. 2.
- [77] Ibid.
- [78] R. v. L.B., 2011 ONCA 153, para. 1. See also para. 65: "Infanticide first appeared in the Criminal Code in 1948."
- [79] R. v. Borowiec, [2016] 1 SCR 80, para. 13.
- [80] L.B., supra, para. 108.
- [81] R. v. Borowiec, supra, para. 1.
- [82] Ibid, para. 34. See also R. v. Coombs, 2003 ABQB 818, para. 14: "a very low threshold, certainly far below that required for an individual to be regarded as not criminally responsible".
- [83] Ibid, para. 35(e).
- [84] R. v. Sullivan, 1 SCR 489, 1991.
- [85] Even if the decision of the Court in Tremblay v. Daigle, [1989] 2 SCR 530 is not a criminal law decision, it is key to mention that the Court established in that decision that a foetus has no legal status in Canada as a person in common law or in Quebec statutes (Quebec is the only Canadian province that uses civil law).
- [86] She was appointed to the Supreme Court of Canada on December 18, 2017.
- [87] L. Sheilah, Martin, Murray Coleman, "Judicial Intervention in Pregnancy", McGill Law Journal 40(4) (1995) 947-991.