

The Law of Sexual Assault and Consent

OJEN SUMMER LAW INSTITUTE

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METRAC
ACTION ON VIOLENCE

About METRAC

METRAC www.metrac.org

- works to end violence against women and youth
- a not-for-profit, community-based organization

METRAC's Community Justice Program

- provides accessible legal information and education for women and service providers
- focuses on law and policy affecting women from diverse backgrounds, especially those experiencing violence or abuse

Ontario Women's Justice Network (OWJN) www.owjn.org

- legal information for women survivors of violence or abuse

Family Law Education for Women (FLEW) www.onefamilylaw.ca

- legal information on women's rights and options under Ontario family law, and at family breakdown
- in 14 languages, accessible formats, online and in print

For more information from METRAC

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Topics for discussion

1. Defining Sexual Assault
2. What is Consent under the Law
3. Sexting and the Law
4. The Court Process

This information is accurate as of August 26, 2015.

Sexual Assault

What is Sexual Assault?

Sexual Assault

- any unwanted physical contact of a sexual nature can be sexual assault
 - includes attempts and threats
- **a criminal offence**
- there is **no time limit** to make a complaint



What is Sexual Assault?

- sexual assault happens when the person being touched **does not agree** or **does not consent** to the act
- anyone can be sexually assaulted
- anyone can commit a sexual assault
 - relationship between people is not part of the legal definition of sexual assault

The big picture

- Almost **500,000** Canadian women said they were sexually assaulted in one year (2004 - Statistics Canada)
- **8%** reported/pursued by police (15,200)
- Charges were laid in about **one-third** of cases (5,544)
- **1,519** cases led to a conviction

Canadian Women's Foundation chart, adapted from Holly Johnson, "Limits of a Criminal Justice Response", 2012

The big picture

- 85% of those sexually assaulted are women/girls
- 97% of the those charged with sexual assault were men
- 80% of women are sexually assaulted by **someone they know**

Other risk factors

- **Youth** (age 15-24) are almost twice as likely to be sexually assaulted than people age 25-34
- **Aboriginal women** are victims of violence 3.5 times more than non Aboriginal women
- About 60% of **disabled women** are sexually assaulted

What is Sexual Assault?

- *Criminal Code of Canada* makes sexual assault a crime
- Canadian law changed in 1983
 - removed the word “rape”
 - rape was defined as “a man having sexual intercourse with a woman not his wife without her consent”

Review: What is Sexual Assault?

1. Is sexual assault limited to sexual penetration?
2. Can a husband be charged with sexually assaulting his wife?
3. Is sexual assault a crime only when there are physical injuries?

Legal factors for sexual assault

- The criminal offence of sexual assault requires an action and a state of mind
- **Action:** person touches you (or tries) in a sexual way and the touch is unwanted
- **State of mind:** person means to touch you and knows or ought to know that the touch is unwanted

Legal factors for sexual assault

- Sexual acts are **unwanted** when the person being touched does not voluntarily agree or “consent”
- **Consent** is what is in the mind of the person being approached or touched in a sexual way

Consent

What is Consent?

- No means No
- Only Yes means Yes
- Silence does not mean Yes
- No and Yes can be communicated by **words or conduct**
- Cannot be implied or assumed
- Consent must be given **freely**

What is Consent?

Consent must be:

- **at the time** of sexual activity
- for **every specific sexual act** during an encounter
- **ongoing** and **can be taken back** any time, even after it was given

What is Consent?

The person who is touching must take **reasonable steps** to know the other person consents.

What is Consent?

There **can't be consent** if a person:

- is drunk or drugged
- is asleep or unconscious
- abuses power, authority or trust to have sex

What is Consent?

Consent is only valid if:

- You are **able** to say yes or no
 - Someone else cannot give consent for you
- You feel you are free to say yes or no
 - Consent is not valid if you are afraid for your safety

What is Consent

Age of consent is 16

- Exceptions:
 - A person who is 14 or 15, and sexual partner is **less than 5 years older**
 - A person who is 12 or 13, and sexual partner is **less than 2 years older**
- A person under 12 years old cannot legally consent to sexual activity
- Age of consent is 18 when there is **exploitation** (e.g. pornography, or with someone of trust or authority)

Defences to a Sexual Assault Charge

- Each person involved consented
- An honest but mistaken belief that the other person consented to the sexual activity
 - defence must have an “air of reality”
 - reasonable steps to believe there was consent
- Being **impaired** is not a defence to a charge of sexual assault

Questions a student may ask

1. Do you have to report sexual assault immediately?
2. If you were drinking and flirting, can the other person still be convicted of sexual assault?
3. Once you consent to having sex, can anything that happens afterward be sexual assault?
4. If you didn't clearly say "No", can you prove sexual assault?

Example: Was it Sexual Assault?

Ani was 17 and looking for a part-time job. She met Frank at the mall, where he had a booth selling woodwork. He said he needed staff.

The next day, Ani and Frank arranged a meeting at the mall parking lot. They talked about the job, and he invited her to see more of his work inside his van. She agreed.

She thought he locked the van door. She got scared.

Example: Was it Sexual Assault?

They sat and talked inside the van for awhile. He said his shoulders were sore. They gave each other back massages. Frank started to move his hands towards Ani's breasts and she said "No". He stopped.

They kept talking, and he started massaging her back again. She said, "No, don't". And he stopped.

Example: Was it Sexual Assault?

Then he started rubbing her feet instead, and then her thighs. She was afraid he would get mad, so she didn't say anything. He then lay down ontop of her. They were both dressed and he ground his groin into hers.

He undid his pants and exposed himself and she said "No, stop". He did.

Example: Was it Sexual Assault?

Each time she said stop, he did. He said, “See, I’m a nice guy, I wouldn’t hurt you.”

He gave her \$100 and she left the van and went home.

The next day, she called the police. She told them what happened, and said she didn’t want Frank to know she had been scared, so she had tried to appear comfortable and relaxed.

Was it sexual assault?

Example: Was it Sexual Assault?

Yes.

The Supreme Court of Canada ruled that this was sexual assault.

R. v Ewanchuk (1999)

Example: Was it Sexual Assault?

Reasons:

- He meant to touch her in a sexual way
- She did not want him to
- She said no, but he continued
- She didn't say no or push him away every time because she was afraid
- It was not reasonable to think her silence was consent

Sexting and the Law

Sexting and the law

- Sending sexually explicit photos by internet may lead to criminal charges:
 - Child pornography (making, possessing, distributing)
 - Threatening
 - Extortion
 - Criminal harassment
 - Sexual assault

Sexting and the law

- New criminal offence (as of March 2015):
 - to knowingly publish or distribute an intimate image of a person, knowing the person in the image did not give their consent
- New Peace Bond
 - to prevent the publishing or distribution of an intimate image without consent
 - where there is a reasonable fear

Court Process

Legal terms

- the “**complainant**” is the person who says she/he has been sexually assaulted
- the “**accused**” or “**defendant**” is the person who is charged with sexual assault
- the “**offender**” or “**convicted**” is the person who is found guilty, when a criminal charge of sexual assault has been proved in Court “**beyond a reasonable doubt**”

In Court

- The complainant is a witness
- The Crown Counsel prosecutes the case, but is not the complainant's lawyer
- A Victim/Witness Assistance Program (V/WAP) worker will help the complainant through the process
- Crown Counsel and V/WAP must tell all relevant information to the defence (“disclosure”)

In Court

- Defence may ask for third party records (diaries, doctor/therapist/counsellor files) but have to prove relevance first
- The complainant's past sexual activity can only be used in Court in special circumstances and cannot be used:
 - to show she probably consented
 - to suggest she shouldn't be believed

In Court

- Sexual assault complainants must testify in Court
 - in some cases, behind a screen
- Courtrooms are open to the public
 - may be closed to the public in rare cases

Publication Bans

- The Court must consider a complainant's **right to privacy**
- Judge **must** order a publication ban if requested by a sexual assault complainant (and all victims of crime under age 18)

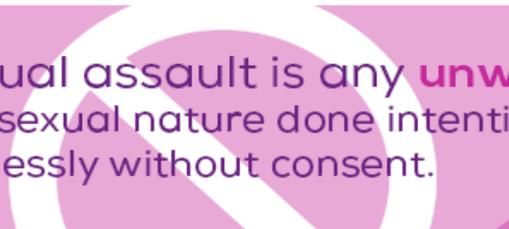
Publication Ban

- A Court Order that prevents the media from identifying the complainant, including:
 - name
 - description that identifies complainant
 - name of accused and relation to complainant
- Does not prevent media/public from attending Court, reporting on case and evidence

In Court

- The complainant should ask:
 - does she have to testify in open Court
 - will there be a publication ban on identifying her outside of Court
 - questions about anything she don't understand
 - if she prefers to speak French or another language
 - If she needs an interpreter or any accommodation

Sexual assault, consent, the law



Sexual assault is any **unwanted touch** of a sexual nature done intentionally or recklessly without consent.



Sexual assault is a crime. So are **attempts** and **threats** of sexual assault.



Only yes = consent. No means no and a clear **yes** – by words or actions – means **yes**. For every sexual act.



Silence alone does not mean yes. The person who touches has to take **reasonable steps** to know the other person consents.



Sexual assault does **not** have to cause cuts or bruises.



Yes to sex while you are **impaired** is not consent.



Consent means you're able to say no at **any time**. Consent because you're afraid isn't consent.



Being persuaded to say yes to a person with **power** or **authority** or in a role of **trust** is not consent.

Additional Resources

What Can You Do?

- Contact local sexual assault crisis centre
- Ontario Coalition of Rape Crisis Centres

www.sexualassaultsupport.ca

- Go to the hospital
- Network of Sexual Assault/Domestic Violence Treatment Centres

www.sadvtreatmentcentres.net/en/view.php?key=34&lang=en

- Call the Assaulted Women's Helpline www.awhl.org
 - 24 hours/7 days a week; multiple languages
 - 1-866-863-0511 (toll free); 1-866-863-7868 (TTY)

What Can You Do?

- Call Victim Services Toronto 416-808-7066 (24 hours/7 days)
www.victimservicesutoronto.com
- Call Victim Crisis Assistance and Referral Services (VCARS)
 - immediate, on-site service to victims of crime 24 hours/7 days
 - 416-314-2447 (Toronto); 1-888-579-2888 (toll free)
- Call the police (911)
- Talk to someone you trust

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