AN INCONVENIENT RIGHT: WOMEN'S EQUALITY, VIOLENCE AND THE SUPREME COURT OF CANADA

DR. KERRI A. FROC

Dr. Kerri A. Froc is an Associate Professor in the Faculty of Law at the University of New Brunswick. This article was written while Dr. Froc was the H. Robert Arscott Law Foundation Chair at the College of Law at the University of Saskatchewan, and she expresses gratitude for support from both the College of Law and the Law Foundation of Saskatchewan.

For much of the Supreme Court of Canada's 150-year existence, its jurisprudence concerning violence against women reflected an understanding of relevant legal rights as those possessed by men exclusively: under the common law; under the Canadian Bill of Rights, federal legislation passed in 1960; and later under the Canadian Charter of Rights and Freedoms of 1982. The law of sexual assault was characterized by "ambivalence… a shifting compromise between the values perceived as important," though protection of women from sexual assault has played a minor (and typically, incidental) role (Boyle, 1984). The Court's jurisprudence reflects this ambivalence pre and postCharter. Over the years, the Supreme Court either reaffirmed discrimination embedded in the criminal law concerning male violence against women, or took tentative, insufficient steps to mitigate it. Feminist advocacy spurred Parliament to coursecorrect, repeatedly.

The irony is that after the Charter, the Court could not ignore women's equality rights, but its interpretation and application of the Charter impeded efforts to hold perpetrators of violence against women (VAW) accountable. It therefore also impeded advancements in women's rights – to equality under section 15, and to equal rights to bodily integrity and to fair trials under sections 7 and 28. Women's equality became visible in its jurisprudence – but often as an inconvenient right, dispatched before it addressed the "real issue": men's rights to fair trial and presumption of innocence. What I discuss below are non-exhaustive illustrations of this phenomenon in the Supreme Court's history.

In the late 19th and early 20th century, the Court held that men accused of rape had a legal right to put questions to complainants about their prior sexual history. Rape victims on the stand correspondingly had a "right" (really, a prerogative) not to answer. However, courts were not necessarily obliged to tell witnesses of this right in every instance (Boyle, 1984). Further, once the witness provided testimony regarding prior sexual history, it could be contradicted by introducing evidence of general reputation for promiscuity though not to establish specific instances of past sexual conduct (*R v Laliberté* (1877) 1 S.C.R. 117; Benedet & Grant, 2025).

Parliament attempted in 1976 to put some constraints on defence cross-examination of complainants on their prior sexual history. The Supreme Court then interpreted the law to strip from them even this historically granted protection – the right of refusal, and not to have their testimony contradicted by evidence led by the accused about their sexual conduct with others (*R v Forsythe*, [1980] 2 S.C.R. 268).

No pre-Charter Supreme Court of Canada decision refers to complainants in rape trials having legal rights (to equality or otherwise), in the same register as men's legal rights to a fair trial and the presumption of innocence. Until patriation in 1982, a central preoccupation was corroboration in rape trials. For instance, *Warkentin v The Queen* [1977] 2 SCR 355 involved the brutal gang rape of a young Indigenous woman. One issue before the Court was whether forensic evidence and evidence from a couple in a vehicle who picked up the distraught victim, constituted corroboration. Justice Dickson in dissent said the evidence lent credibility to the complainant's story but was not sufficiently "independent" to constitute corroboration. De Grandpré J, for the majority, found instead that corroboration is a matter of "common sense" and that it should not be interpreted in a narrow, legalistic way. Whether in dissent or majority in these cases, however, no judge gave thought to the discriminatory nature of the corroboration requirement; the need for corroboration was simply accepted, as was, by implication, the diminished weight of complainants' testimony, simply as a function of their status qua rape complainants. Released the same day as Warkentin, *R. v Murphy*, [1977] 2 SCR 603, again involved a multi-perpetrator rape of a young Indigenous woman with the Court providing similar reasons.

The technicalities of applying the corroboration doctrine facilitated the Court's ability to ignore the racist and sexist discourses already working in sexual assault law, and the significance to the accused's motivation of these places being already marked as those in which colonial, sexualized violence could occur with impunity (Razack, 2002). Of note is that Gloria Moody from Williams Lake (where the men in Warkentin committed rape) was found murdered in 1969, the first of the unsolved murders associated with the "Highway of Tears" (IACHR, 2014).

Parliament abolished corroboration as a Criminal Code requirement in 1975. However, a contemporary commentator remarked that while corroboration was not a mandatory requirement, courts could (and did) refuse to convict without it and caution juries about the danger of convicting without corroboration (O'Sullivan, 1977). In 1983, Parliament barred such cautions. The 1983 suite of criminal justice reforms also replaced rape and indecent assault with sexual assault and revised the proto-"rape shield" law undermined by the Court in Forsythe (what became known as Criminal Code section 276).

With the Charter, the Court had to contend with constitutionally entrenched women's equality rights, with their comprehensive wording designed to overcome its earlier cramped reading of equal protection under the Canadian Bill of Rights. At times, the Court took women's equality seriously in its criminal law jurisprudence. It regarded equality as its own principle of fundamental justice, or at the least, an important contextual factor when examining men's fair trial rights under Charter section 7. Other times, it regarded equality as a subordinate, "societal interest" that it could disregard when faced with what it has perceived as its central task of protecting innocent men from wrongful conviction.

For instance, McLachlin J. (as the future chief justice then was), struck down section 276 of the Criminal Code in *R v Seaboyer*; *R v Gayme* [1991] 2 SCR 577. Section 276 put strict limitations on the ability of the defence to lead evidence of the complainant's sexual activity to support an inference of consent in the instance before the court or that the complainant was more likely to lie (the "twin myths"), and section 277 precluded evidence of the complainant's sexual reputation. The justice mentioned women's section 15 and 28 equality rights only briefly as part of the "variety of societal and individual interests" reflected in section 7's "fundamental justice."

However, their consideration was to be completely overborne by the accused's rights, because she stated that "a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event."

An amended rape shield law was reviewed again by the Court a decade later, in *R v Darrach* [2000] 2 SCR 443. In upholding the provision, the Court took equality more seriously in the constitutional analysis. Even though the law had the potential of excluding relevant evidence (if the prejudicial effect was more than the probative value), it implicitly recognized women's equality rights as a principle of fundamental justice. Women's equality, accordingly, had an influence on the interpretation of the principle concerning the right to a fair trial (Froc, 2025).

Similarly, the Court upheld Criminal Code s.278's restrictions and procedural requirements for production orders relating to complainants' personal records from third parties. It held in *R v Mills*, [1999] 3 SCR 668 that fair trial rights ought to be interpreted in a "contextual manner," which meant "privacy and equality considerations may require that it be more difficult for accused persons to gain access to therapeutic or other records." Section 278 and Mills followed R v O'Connor [1995] 4 SCR 411, in which the Court established a discretionary regime for records production that "precipitated a period of wide-open access to complainant records" (Gotell, 2008).

Even when upholding protections by invoking equality, some argue the Court diluted them into a simulacrum of the old common law (Coughlan, 2000; Gotell, 2006).

The Court's jurisprudence regarding *mens rea* ("guilty mind") for violent crimes shows similar ambivalence: articulations of discriminatory common law rules, legislative responses, and then constitutional review. *R v Pappajohn* [1980] 2 SCR 120, permitted accused men to argue that they had an "honest but mistaken belief in consent," even where the belief was unreasonable. Pappajohn had lured a real estate agent to an unoccupied home, restrained and raped her. While Pappajohn's conviction was restored, the

Court held that all that was required for a mistaken belief defence was that there be an "air of reality" about it.

Parliament once again stepped in and imposed a requirement that an accused cannot rely on his belief in consent unless he demonstrates he took reasonable steps to ascertain it. On the one hand, the Court fended off defence calls to create a potential loophole in the "reasonable steps" requirement, refusing to recognize the defence of "implied consent" in *R v Ewanchuk*, [1999] 1 SCR 330. It did so in part based on the concept being offensive to women's equality. However, in *R v Morrisson* (2019 SCC 15), the Court significantly undermined the "reasonable steps" requirement. It ruled the Crown cannot rely on the accused's lack of reasonable steps to prove *mens rea* to commit sexual assault, unless he relies on mistake of fact as a defence. In other words, the Court essentially ruled that where the evidence shows the accused gave "no thought" to consent (instead of mistakenly believing in consent), he is entitled to an acquittal despite it being "precisely… where failure to take reasonable steps should count as a form of fault sufficient for conviction" (Stewart, 2019).

In *R v Daviault*, [1994] 3 SCR 63, the Court overturned common law doctrine precluding voluntary, self-induced intoxication from acting as a defence for crimes of general intent, including sexual assault. The case involved a man who had sexually assaulted his neighbour, who was partially paralyzed and used a wheelchair, after consuming a significant amount of alcohol. He asserted his intoxication made him enter a state akin to automatism. Despite the connection between violence against women and men's intoxication, there is no reference to women's rights in the judgement whatsoever (Froc & Sheehy, 2022). Public outcry and feminist activism led to a legislative response. Criminal Code section 33.1 precluded such defences when the accused "departs markedly from the standard of reasonable care generally recognized in Canadian society." The law defined "marked departure" as an accused voluntarily becoming so intoxicated that he becomes "unaware of, or incapable of consciously controlling, their behaviour" and as a result commits a crime of violence.

R v Brown, 2022 SCC 18, invalidated section 33.1 on the basis that it violated accused men's section 7 rights and was inconsistent with the principle of fundamental justice that the "morally innocent" should not be convicted. The Court found that section 33.1 made the commission of extremely intoxicated violence a strict liability offence. All of the accused men had consumed massive amounts of intoxicants and had seriously injured their victims (all of whom, except one, were women). Justice Kasirer, for the Court, refused to follow Mills (and ignored Darrach), stating that women's equality rights were a mere "social interest" that should be disregarded under fundamental justice.

Kasirer J. objected to the notion that this meant they were of "second order importance," because they could receive due consideration under section 1. As in every s. 7 case, however, it ruled the violation could not be justified under section 1's Oakes test. Parliament subsequently reintroduced a new version of s.33.1 that made clearer that it required a minimal standard of fault (criminal negligence) for men to be convicted for crimes of violence involving extreme intoxication. However, feminist scholars have raised concerns about the requirement of foreseeability of violence in the new provision. In their view, it will be unlikely the Crown will be able to invoke it where

a defendant has either never consumed that combination of intoxicants or had done so before and not been violent (Canada, 2023).

Confusingly, in the subsequent case of *R v J.J.*, 2022 SCC 28, the Court brought women's equality back in to "contextualize" the rights to a fair trial and full answer and defence under section 7. The Court upheld the "Ghomeshi amendments" to the Criminal Code that provides procedural protections concerning how complainants' private records in the possession of the accused can be used at trial.

Given this history, one may be forgiven for having a certain degree of cynicism about whether the Court has come to grips with violence against women as a practice of discrimination, its systemic nature, and its contribution to women's second-class status as rights holders.

Its jurisprudence reveals an ambivalence as to whether pursuant to Charter section 28 women are entitled to equal rights, at least when it comes to their treatment as complainants in the criminal justice system. True, they are not the ones who face a criminal record and jail time. However, VAW affects women's freedom to live without violence and curbs their physical liberty to carry on their lives in the world freely. They continue to be subject to revictimization in the trial process (Craig, 2018). The Supreme Court of Canada must reckon with its legacy, and whether its interpretation of rights reflects the whole image of the Charter, including the rights of both men and women, or is simply a failure of imagination.

REFERENCES

Benedet, Janine & Grant, Isabel, "Section 276 Applications in Intimate Partner Sexual Assault Cases: The Impact of R v Goldfinch" (2025) 58 *UBC Law Review 43*.

Canada, Senate, Self-Induced Extreme Intoxication and Section 33.1 of the Criminal Code: Report of the Standing Senate Committee on Legal and Constitutional Affairs (Chair: The Honourable Brent Cotter; April 2023).

Coughlan, Steve. "Complainants' Records After Mills: Same As It Ever Was," (2000) 33 *Criminal Reports* (5th) 300.

Craig, Elaine, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen's University Press, 2018).

Froc, Kerri A. "Women as Subjects of the Rights of Man, or Subjected to the Rights of Man? The Supreme Court of Canada's Interpretation of Fundamental Justice and Equal Rights," forthcoming.

Froc, Kerri A. & Elizabeth Sheehy, "Last Among Equals: Women's Equality, R v Brown, and the Extreme Intoxication Defence" (2022) 73 UNB *Law Journal 268*.

Gotell, Lise. "Tracking Decisions on Access to Sexual Assault Complaints' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the Criminal Code" (2008) 20 *Canadian Journal of Women and the Law* 111.

Gotell, Lise. "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 *Alberta Law Review* 743.

Inter-American Commission on Human Rights, Missing and Murdered Indigenous Women in British Columbia, Canada (Report No. 30/14, OEA/Ser.L/V/II, doc. 30/14, 21 Dec. 2014).

Razack, Sherene H. "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" in Sherene H. Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 123.

Stewart, Hamish, "Fault and 'Reasonable Steps': The Troubling Implications of Morrison and Barton" (2022) 70 *Criminal Law Quarterly* 4.