CANADIAN CENTRE FOR POLICY ALTERNATIVES-SK

Saskatchewan Notes

Volume 4: Issue 1 – January 2005

# The "Melfort" Rape and Children's Rights: Why *R v Edmondson* Matters to All Canadian Kids

## - by Norma Buydens

*In Sept. 2003, Saskatchewan justice received a(nother) black eye as commentators from all over responded to the conditional sentence of one year house arrest for Dean Edmondson for the sexual assault of a 12-year-old Yellow Quill First Nation girl in Sept. 2001. "Mississippi of the North", one commentator dubbed the province.[1] This tars all Saskatchewanians.*

*Many Saskatchewan citizens do not deserve to be labeled racist: more of us hit the streets to protest the adjudication of these cases than probably ever before.[2] Citizens want the reason we provoked the label of racists eradicated. We want to live in a province that will never deserve such vilification again.*

Edmondson's sentencing hearing focused on the character of the complainant, just as rape trials in the "bad old days" before the far-reaching legal reforms of the 1980s and 90s. Judge Fred Kovatch's sentencing report assessed her probability of "consenting" to sex on the basis of evidence that she may have been sexually abused in her home before the assaults.[3] But there was little evidence of her actually saying or doing anything to convey consent. And, as she had been under the age of consent of 14, whether she consented should have been irrelevant. Yet defense attorneys Hugh Harradence, Mark Brayford and Stuart Eisner argued consent on the basis of prior sexual victimization by another man.

The stark illogic of this proposition—that being sexually victimized in the past means consent to three on one sex with strangers--was minimally disguised by medical opinion which broadly pathologized victims of child sexual abuse as "usually sexually unpredictable."[4]

Saskatoon pediatrician Anne McKenna's evidence was out of step with the psychological literature—which suggests sexual acting out, seen in a minority of victims, is much less common than underdeveloped sexual desire as an outcome of abuse, so it cannot be described as "usual" at all.[5] And, McKenna's evidence was twisted by the defense: Brayford intimated "usually sexually unpredictable" meant "sexually aggressive". [6]

Kovatch's sentencing report agreed that the "unpredictable sexual behaviour" of abused children meant she was a "willing participant" or "the aggressor in the incident." [7] How the argument that sexual abuse translates directly into probable consent could square with Criminal Code sections 276 and 277--which limit evidence of prior sexual activity of complainants even when consensual—was never explained.

Fortunately, legally the matter is not closed. The story is about to heat up again. Edmondson's sentence was immediately appealed by the Saskatchewan Crown. On Nov. 25, 2004 the *Native Women's Association of Canada (NWAC)* joined the proceedings as an Intervenor: in Jan. 2005, they will

help the court understand the background to and implications of the case. Ready or not, the racial dynamic of sexual assault by white men against Aboriginal women and girls is about to be publicly explored. And NWAC is not the only important feminist organization which takes issue with Judge Kovatch's ruling.

Judge Kovatch faces a complaint before the Canadian Judicial Council (CJC) which could lose him his job. *Beyond Borders: Ensuring Global Justice for Children*, the Winnipeg-based Canadian affiliate of ECPAT [8], the leading international Non-Governmental Organization against the child sex trade, brought a complaint because Kovatch referred to the defendants, all over 20 at time of trail, as "boys" 28 times, while calling the complainant "Ms.", not "child" or "girl".[9] Beyond Borders argues that Kovatch's language is more than peculiar – it is sinister, and reveals a fundamental flaw in reasoning.

Kovatch's decision to reduce the expected term, which he and the Crown agreed was three to four years in prison[10] brings up a burning issue of legal injustice: Canadian judges do not zealously uphold the age of sexual consent to protect youth at or just after puberty. The need to make Canadian laws against sex with children actually protect them motivated Beyond Borders' CJC complaint.

Kovatch considered it likely that an 89-pound 12-year-old could "aggress" sexually against three young men at once, each of whom outweighed her—possibly doubling her weight--and each of whom was at least 7 years older than her, the oldest double her age.[11] But this could not be true—not when the young men were mobile and conscious.

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The only way to make sense of why prior sexual abuse was accepted by the judge as equivalent to proof of "aggression" is to add in the assumption that men are not responsible for restraining their sexual desires once aroused. The smaller, weaker, outnumbered, complainant's sexual "aggression" translates into mere "attractiveness".

This is the evidence of the girl's sexual behaviour: Edmondson testified that she sat on his lap, kissed him, and told him she loved him and wanted to live with him.[12] The complainant's testimony of what happened, at the same time that Edmondson said she engaged in petting, was that she was asleep.[13] Even if she could be held responsible for her "sexual" kissing, all she had done was arouse Edmondson; she did not "force" him to do anything.

Everyone, even the bar owner[14] testified that the girl looked too young to be served alcohol. When she left the Mistatim Hotel she could hardly stand[15]; later, on the side of the road, her lack of conscious memory may be consistent with a memory blackout caused by alcohol.

Intoxication invalidates even unambiguous sexual consent given by an adult, under Criminal Code section 273.1 (b). How much more should a 12-year-old be protected in the face of the compounded vulnerability of age, smallness, inexperience, and alcohol? As the *Star Phoenix* editorial staff unanimously stated on Sept. 5, 2003: "When adults, no matter what their level of sobriety, provide a minor with enough alcohol that she has trouble standing up, there should be no debate about her consent or willingness to participate in sex".[16]

Child sexual abuse cases should not be defeated by the fact that a young person is sexually attractive to an adult. We need a ban on sex between adults and children because some adults do find children sexually attractive; children are damaged by sex with adults because they are too physically, socially and emotionally immature and weak, and because they usually cannot assert their sexual integrity against adults.

The press reported Dr. McKenna's opinion that the complainant had reached "full physical maturity" and was "very attractive".[17] Kovatch believed this made the men's reliance on her telling them she was older than she was—another completely normal adolescent behaviour--"reasonable", as required by section 150.1 (5) of the Criminal Code, which disallows the excuse of mistaken belief that the complainant was older "unless the accused took all reasonable steps to ascertain the age of the complainant".

Earlier cases on section 150.1 (5) reduced the "reasonableness" requirement from looking at identification to judging age on "physical

appearance, behaviour,…the relevant activities", "association…with older persons,…and…lack of curfew"[18]. So a child who dresses provocatively, hangs around adults late, and is presented as sexually attractive—like a child on a sex trade strip—can be treated as an adult. In this case, even a child who was not dressed provocatively or seen late on a disreputable street was treated as an adult because she was "attractive" and post-pubertal.

*Beyond Borders* argues that what went wrong in the Edmondson case was systematic: blaming young victims happens regularly in Canadian courts, to youth of both genders, all racial and ethnic and socioeconomic backgrounds. To *Beyond Borders*, the main issue is the failure to protect children's rights to be free from sexual abuse and exploitation by adults.[19]

To require 12-year-olds past puberty, with the judgment of their age, to not engage in kissing before they can get the protection of the law, is to make the law not apply to most 12-year-olds. If we look at this complainant as a girl among all other girls, the unfairness of calling her sexually aggressive is stark. Her sexual behaviour was completely normal, although engaged in with an untrustworthy man under circumstances which increased her vulnerability to sexual assault. Her increased vulnerability was not her fault.

***This case reduced the rights of children to below adult complainants, and makes a mockery of our most strongly held moral convictions: the Convention on the Rights of the Child was the most widely and most quickly ratified international human rights provision.***

The law requires that she be given increased protection even if she unambiguously consented. She was judged not worthy of protection though her behaviour showed she did not consent. This case reduced the rights of children to below adult complainants, and makes a mockery of our most strongly held moral convictions: the *Convention on the Rights of the Child* was the most widely and most quickly ratified international human rights provision. No wonder Kripa Sekhar, of the Saskatchewan Action Committee on the Status of Women, said: "This is a travesty of justice. This is a verdict against all children in Canada".[20]

The complainant's case broke down on evidence of incestuous abuse. But many commentators argued that "someone who sexually assaults a child whom the court has reason to believe is already a victim of abuse should have it count against him as an aggravating factor in sentencing, not a mitigating one.[21] To suggest that gang rapists who attack abused kids are not guilty of doing substantial harm is to deny the rights of children to the children who need it the most: those who may not have the family support which is the right of all children.

Beyond Borders argues for a rise in the age of sexual consent to 16 years from 14, so that more immature people with "fully developed" bodies can be protected against adults interested in exploiting their naivete. It is time for the courts to be clear that adults are the ones who have to prove they are responsible in their actions towards children, and not children who have to prove that they are "good enough" to deserve protection from adult sexuality.

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