

WRITTEN SUBMISSION

TO

ROYAL COMMISSION OF INQUIRY INTO THE RESPONSE  
OF THE NEWFOUNDLAND CRIMINAL JUSTICE SYSTEM TO COMPLAINTS

FROM

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## The Presenter

The Women's Legal Education and Action Fund (LEAF) is a national, federally incorporated, not-for-profit advocacy organization founded in April 1985 to secure equal rights for Canadian women as guaranteed by the Canadian Charter of Rights and Freedoms. To this end, it engages in test case litigation, research and public education.

LEAF is governed by a national Board of Directors with representatives from each province and territory, including a representative from Newfoundland.

LEAF has successfully represented women in equality rights cases before the Supreme Courts of the Yukon, British Columbia, Ontario and Prince Edward Island. LEAF has successfully intervened as an added party in the Federal Court (Trial Division), as well as on Appeal to the Federal Court of Appeal. LEAF has also intervened as a friend of the Court before the Supreme Court of British Columbia. LEAF has been granted intervenor status before the Quebec Court of Appeal and before the Admission Committee of the Law Society of Upper Canada.

The Supreme Court of Canada has accepted LEAF's intervention applications to make sex and other equality arguments in twelve cases, allowing both written and oral submissions: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143; Brooks, Allen and Dixon v. Canada Safeway et al., [1989] 4 W.W.R. 193 (S.C.C.); Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252; Borowski v. Attorney General of Canada, [1989] 1 S.C.R. 342; Canadian Newspapers Co. v. Canada (A-G), [1988] 2 S.C.R. 122; Seaboyer v. The Queen; Gayme v. The Queen; Sullivan and Lemay v. The Queen; Tremblay v. Daigle, [1989], 62 D.L.R. (4th) 634 (S.C.C.); The Queen v. Keegstra; Andrews and Smith v. The Queen; and Taylor v. The Canadian Human Rights Commission.

LEAF engages in public education and advocacy on sex equality issues in many forums, testifying before government committees and commissions, in workshops and conferences, and through publications. LEAF members have published books and numerous articles on sex equality.

LEAF is very concerned with and has developed expertise regarding the place of sexual assault in the social and legal inequality of the sexes, including unequal access to justice accorded to victims of sexual assault, in both civil and criminal legal contexts.

LEAF's intervention before the Supreme Court of Canada in Seaboyer v. Her Majesty the Queen (S.C.C. Court File No. 2066) and Gayme v. Her Majesty the Queen (S.C.C. Court File No. 20835) was granted on the basis of LEAF's special expertise in representing the interests of sexual assault victims and its unique perspective on the constitutional issues. LEAF will address the sex and age equality standards, under the Charter, which control the admission of evidence about the sexual activity and reputation of victims of sexual assault.

In a prior intervention, The Queen v. Canadian Newspapers Company Limited, supra, LEAF also argued that sexual assault is legally a sex equality issue, such that keeping the identities of sexual assault victims out of the media is an important precondition for equal access to the criminal justice system for many sexual assault survivors. The Supreme Court of Canada reached a result consistent with this argument.

LEAF successfully intervened before the Admissions Committee of the Law Society of Upper Canada in In Respect of the Application of DMP for Admission to the Law Society of Upper Canada as a Barrister and Solicitor, to address the requirements and responsibilities of members of a profession who are in a position of trust and authority (in that case the legal

profession) to ensure that professional duties are performed without subjecting clients to sexual assault. The case concerned a man who had been convicted of two counts of sexual assault of children, one his daughter and the other a hearing disabled girl.

In the civil justice context, LEAF is sponsoring the actions of two British Columbia women for damages stemming sexual abuse when they were children, addressing the limitation periods as they affect equal access to justice on the basis of sex and age.

#### Terms of Reference

Before this Royal Commission of Inquiry into the response of the Newfoundland criminal justice system to complaints (Hughes Commission), LEAF makes its submissions under Articles III and IV of the Terms of Reference. LEAF will specifically address the Charter-based equality issues raised by the criminal justice system's response to allegations of abuse, the social context in which physical and sexual abuse of women and children takes place, and the ways in which the criminal justice system can promote equality rights of victims of physical and sexual assault. LEAF sought more active involvement in the proceedings before the Hughes Commission (Application for Standing dated December 14, 1989) but was restricted to written submissions without standing to call or cross-examine evidence and witnesses.

Phases I and II of the Commission of Inquiry have examined the criminal justice system's response to allegations of child abuse at Mount Cashel Orphanage and in foster homes in the province of Newfoundland. Phase III invites comment on more general questions of the administration of justice and its response to allegations of crime other than those involving children. LEAF submits that the systemic lack of responsiveness of the system to child abuse at Mount Cashel is an indication-not an anomaly- of the system's inadequate response to allegations by women and children of violence against them.

## Submissions

### A. Introduction

In the past ten to fifteen years, society has finally seen, and acknowledged, the horrors of child sexual abuse and violence against women. More and more is becoming known about child sexual abuse, as victims break their silence and old patterns of suppressing the victim and protecting the offender begin to break down. More is becoming known about violence against women in the home, and about other physical and sexual assault against women, as stereotypes and discriminatory assumptions begin to be exposed and challenged. The ethical and legal framework of the criminal justice system and professions must adapt to these understandings.

While the allegations of child sexual abuse examined by this Commission of Inquiry in Phases I and II involved more cases of sexual abuse against boys than girls, this is not representative of the dominant trends in Canada, or by inference, in Newfoundland. The victims of sexual assault in Canada are overwhelmingly female; the perpetrators of sexual assault are overwhelmingly adult and male (Canadian Urban Victimization Survey (CUVS)). Most of the sexual assaults which are not committed against adult women are committed by men against children. On average, three out of four victims of child sexual abuse are girls.

Sexual Offences Against Children and Youth "Badgley Report", 1984, pp. 213-215 and pp. 196-198.

### B. Equality as a Guiding Principle for Analysis

Equality is one of the fundamental values of society, against which the objects and effects of all governmental action must be measured.

R. v. Oakes, [1986] 1 S.C.R. 103, at p. 136.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at p. 185.

Equality has been recognized by the Supreme Court of Canada as an "all-encompassing right governing all legislative action" and "to approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or group concerned".

Reference re an Act to Amend the Education Act, (1986), 53 O.R. (2d) 513, at p. 554.

Andrews, supra, at p. 165.

The Supreme Court of Canada has recognized the importance of promoting equality of disadvantaged groups. In the words of Wilson, J., "s. 15 [of the Charter] is designed to protect those groups who suffer social, political and legal disadvantage in our society".

Andrews, supra, at p. 154.

R. v. Turpin, [1989] 1 S.C.R. 1296 at p.1333.

True equality before the law and true equality in benefit and protection of the law requires that government respond to the needs of disadvantaged groups. Equality often mandates positive action on the part of government, rather than an abdication of responsibility which reinforces inequality.

Schachter v. Canada, (1988) 52 D.L.R. (4th) 525 (FCTD) at pp. 542-547. Affirmed by the Federal Court of Appeal, February 16, 1990.

Andrews, supra at pp. 167-169 and p.171.

Sexual assault has been recognized as a sex equality issue by the Supreme Court of Canada in a case which addressed that allegations of sexual harassment are allegations of sex discrimination under the Manitoba Human Rights Code.

Janzen v. Platy Enterprises Ltd. [1989] 1 S.C.R. 1253.

All provincial legislation, policy and administrative action, therefore, must promote equality for those guaranteed freedom from discrimination pursuant to the Charter.

Disadvantage on grounds of sex, age, marital status, and disability may not be exacerbated by government action or inaction.

Women are properly regarded as a disadvantaged or disempowered group for whose protection section 15 guarantees were in part enacted. Acknowledged indices of systemic discrimination such as unequal pay, lack of credibility, deprivation of social voice, and physical victimization have led to societal recognition that women as a group are often socially unequal to men.

Accordingly, the Saskatchewan Court of Appeal in rejecting the claim that the former s. 146(1) of the Criminal Code violated the accused man's equality rights pursuant to s. 15 of the stated that,

When one examines the 'larger social and political context' one quickly concludes that to characterize either adult males generally, or more specifically, adult males who are potential accused under s. 146(1)... as a 'discrete and insular minority', a disadvantaged group in need of society's protection or nature borders on the alarming if not preposterous...

...it can hardly be said that males are a group of stereotyped, historically disadvantaged or vulnerable to political prejudice. To hold in favour of the appellant on this point would not only 'overshoot the actual purpose of the right or freedom in question' ... but it would fly in the face of and mock the underlying purpose of s. 15.

R. v. M. (W.A.), (Sask. C.A.), November 15, 1989.

Sexual assault has a unique place in women's unequal social status, and the laws of sexual assault and wife assault have played a unique role in the history of women's oppression. Sexual assault and wife assault cannot be treated as just another "gender neutral" crime, but command special scrutiny under s.15.

Given that sexual and wife assault are gender crimes which both are largely perpetrated on women, they require the necessary action to achieve for women the level of equality afforded men.



Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1253, at pp. 1290-1291.

Such equality would include equality in personal security, institutional credibility, respect, dignity, sexual integrity, autonomy and equal access to justice for violation.

Children are also protected under section 15 of the Charter. Children are disadvantaged relative to adults in physical strength and size, psychic vulnerability to adult authority, economic dependence, social power, relative lack of credibility and deprivation of social voice.

It is therefore important for this Commission to examine the unequal consequences on women and children of laws, administrative, prosecutorial and judicial systems which do not equally protect them because they are young and/or female.

To the extent that the criminal justice system fails to protect women and children in family and institutional settings from violence, the system fails to meet the guarantees of the Charter and the Supreme Court of Canada's interpretation of the true meaning of equality under the Charter. Any policy or practice which is based on sexual stereotypes or which deprives women and children of equality violates the Charter.

### C. Relationships of Unequal Power

The allegations of child abuse which gave rise to this Commission of Inquiry took place in one institutional context, a context in which some in the position of authority abused the power they wielded over children who reported being physically and sexually assaulted. The reported incidents of child abuse at Mount Cashel Orphanage involved specific relationships of trust and power as between the Christian Brothers and the children in

their care. The boys at Mount Cashel Orphanage were highly vulnerable because of their age and isolation.

See discussion in "Institutional Breach of Trust: A M.E.T.R.A.C. Comment", June, 1990.

Mount Cashel Orphanage is only one example of a context in which relationships of power could be abused through physical or sexual assault of those under supervision. Phase II of this Inquiry has examined a second such context of power: foster home care. Foster parents similarly stand in a position of authority and power over the children in their homes. The relationship of trust that almost necessarily exists between foster parent and child can be exploited due to the child's vulnerability.

Symons and Marshall, "Breach of Trust in Sexual Assault: A Statement of the Problem; Part One: Review of Canadian Sentencing Decisions", unpublished, March 1990, at p.4.

Professional and family relationships are other important contexts in which certain members, predominantly men, are in a particular position of trust and power over other members, predominantly women and children. For example, professionals are entrusted with authority by both society and those seeking their assistance (M.E.T.R.A.C. Comment). In familial situations, men often dominate and abuse their spouse and children economically, psychologically and physically. Wife assault and child sexual abuse taking place in the home testifies to the extent of this problem (Badgley Report).

MacLeod, Battered But Not Beaten: Preventing Wife Battering in Canada (Canadian Advisory Council on the Status of Women (CACSW)), 1987

The unequal position of women relative to men in society is replicated and perpetuated by sexual and physical assault of women by men. As in the above-noted contexts of abuse of power, sexual and physical violation of women exploits men's relative power over women. Such violent practices against women most

often take place not between strangers but between family members and acquaintances. Men use their economic, political and other social advantage to victimize women.

Clark and Lewis, Rape: The price of coercive sexuality, Toronto: The Women's Press, 1977.

Relationships of unequal power must be situated in the larger social context in which power in relationships is manipulated and exploited; this larger context includes the institutional context of Mount Cashel Orphanage, foster homes, professional relationships, the family, and society. In each situation an absence of equal power between the perpetrator and the victim exists. This dynamic of unequal power may again be apparent when the victim seeks to redress the crime and is faced with a criminal justice system whose doctrines are based on myths and stereotypes about women, sexuality, and violence: police officers reluctant to charge the offender, Crown attorneys reluctant to prosecute, Judges reluctant to convict or adequately sentence the accused (see: Symons and Marshall, 1990), and society unwilling to condemn violence, especially sexual violence, against women and children.

The history of sexual and wife assault is a history of inequality. This is in large part because the legal principles and procedures have failed to recognize the social context of powerlessness in which sexual assault occurs. Further, legal principles historically have been based on beliefs about women's sexuality that are stereotypical, disrespectful and erroneous. Indeed, legal doctrine and institutions have tended to replicate the social inequality.

MacKinnon, "Rape: On Coercion and Consent", in Toward a Feminist Theory of the State, London: Harvard University Press, 1989, at pp. 171-183.

Boyle, "The Historical Setting", in Sexual Assault, Toronto: Carswell Company Limited, 1984, at pp. 3-42.

R. v. Lavallee, (S.C.C. Court File No. 21022), May 3 1990.

The criminal justice system ought to redress the inequalities of power which allow for victimization of women and children in society. The criminal justice system must aim to eliminate the social inequalities which allow for the victimization of women and children. The guarantees of Charter-based equality require that government promote equality including equal access to justice for women and child victims of crime.

(i) Sexual Assault of Women

Sexual assault of women by men is both an indication and a practice of inequality between the sexes. Women are singled out for sexual assault; their accusations and their claims of injury are systematically disbelieved because of their gender. Women are relegated to an inferior social status as female, including being socially defined as appropriate targets for forced sex. As a result, women are made socially vulnerable to sexual assault.

MacKinnon, supra, at pp. 175-176.

On a conservative estimate, at least one in four Canadian women will be sexually assaulted at least once in her life. (Brickman and Briere, ). According to the 1985 Canadian Urban Victimization Survey (CUVS), 49.5% of women victims are under the age of 17 when sexually assaulted. The CUVS also stated that women are seven times as likely as men to experience a sexual attack.

Rape, and fear of rape, function cross-culturally as a mechanism of social control of women, enabling men to assert dominance over women and maintaining the existing system of gender stratification, in which women occupy a disadvantaged status as victims and targets of sexual aggression. Rape operates as both a symbol and a reality of women's subordinate social status to men.

In societies of sex inequality, both sexes are taught to accept sexual aggression by men against women as normal to some

degree. Male sexual exploitation of women is fostered by traditional gender roles in which male sexuality embodies the role of aggressor, female sexuality embodies the role of victim, and some force is romanticized as acceptable. Sexual assaults frequently occur in the context of 'normal' social events, often by an assailant who is known to the victim (CUVS). A third of men surveyed in a series of studies in 1980-81 indicated some likelihood that they would rape a woman if they could be assured they would not get caught.

Malamuth, "Rape Proclivity Among Males", in Journal of Social Issues, Vol. 37, No. 4., 1981, 138, at p.140

Women with disabilities are also singled out for sexual assault because of their disability: the social context in which persons with disabilities live is one of relative vulnerability, accessibility, lack of credibility and powerlessness. From the little that we know about abuse of the disabled, it can be said that they are acutely vulnerable to sexual abuse. A recent University of Alberta survey has shown that people with disabilities are at least 150% as vulnerable as individuals of the same sex and similar age without disabilities.

Sobsey, "Sex Offences and disabled victims: Research and research implications", Vis-a-Vis: A National Newsletter on Family Violence, Vol. 6, No.4 (Winter 1988), p.1.

The same study showed that 30% of the offenders were friends or acquaintances of the victim; and 27% of the offenders were special service providers; the more severely disabled victims were, the more likely they were to be abused by a service provider.

Public policy and official practices often tend to reinforce rather than resist this social reality. Only a fraction of rapes are reported (Marshall, 1988). Only a fraction of reported sexual assault cases are prosecuted (Minch and Linden, 1987). Only a fraction of prosecuted sexual assaults result in

convictions (Minch and Linden, 1987). Sentences for rape are often short (Marshall, 1988). Sentences for child sexual abuse are often short.

The Supreme Court of Canada in the Canadian Newspapers case concluded that "of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment."

Parents often discourage prosecution which would expose their children to the criminal justice system as they fear their children will be subjected to humiliating, disrespectful, and emotionally harmful treatment.

In sum, victims of sex crimes, largely women, are disadvantaged relative to the perpetrators of sex crimes, largely men. A systemic situation of inequality between the sexes thus exists in the social practice of sexual violence, the victims of which are women, and in the operation of the criminal justice system, which de jure outlaws sexual violence but de facto permits men to engage in it on a wide scale.

(ii) Wife Assault

It is estimated that one in ten Canadian women is battered (House of Commons, Debates, May 12, 1982). Much of the analysis of sexual assault of women is equally applicable to wife abuse: it is a method of social control and dominance exercised by men over women; wife abuse was not historically recognized as a crime; women are often disbelieved or their injuries trivialized; and myths which contribute to discriminatory treatment of victims of spousal abuse continue to exist.

R. v. Lavallee, supra.

Spousal violence against women also goes largely unreported and unsuccessfully prosecuted. While in 1983 the Ministry of the Solicitor General established a national charging policy to encourage police to lay charges in wife assault cases, there remains to be uneven implementation and understanding of the policy (MacLeod, 1987). Many women, too, do not see the criminal justice system as a sympathetic and effective means of protection from further violence (MacLeod, 1987, at pp. 87-88). It is estimated that, on average, a woman is beaten 35 times before reporting to the police.

In the recent unanimous decision of the Supreme Court of Canada in R. v. Lavallee, the Court acknowledged that there are many myths and stereotypes around battery of women in the home. Specifically, Wilson J., writing for the Court, stated that

The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law has historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his 'right' to chastise her...

Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day...

... a woman who comes before a judge or jury with the claim that she has been battered... faces the prospect of being condemned by popular mythology about domestic violence. (emphasis supplied)

R. v. Lavallee, (S.C.C. Court File No. 21022), as yet unreported decision, May 3, 1990.

(iii) Child Sexual Abuse

Children are singled out for sexual assault because of their age and sex, that is because of their vulnerability, accessibility, powerlessness, and perceived lack of credibility. In sexual assault against children, the vulnerability of the victim and the relationship of trust between perpetrator and victim coexists with the abuse and facilitates it, whether or not the abuse is incestuous in nature.

The Royal Commission on Sexual Offences Against Children and Youth [The Badgley Report] found that sexual assaults against children and youth are overwhelmingly committed by adult males, from 97% to 99% of the time (Badgley, pp. 213-215).

D. Summary

Women and girls experience dramatically disproportionate victimization at the hands of men in Canadian society. The context in which such sexual and physical abuse occurs is one of unequal power and often of trust. The criminal justice system has not met the needs of women and children who are victims of physical and sexual crimes; police officers, Crown prosecutors, judges and other service providers have often further stigmatized victims thereby deterring reporting and undermining the integrity of the administration of justice.

The guarantees enshrined in the Charter mandate that the justice system meet the needs of those in positions of relative disadvantage; in the matter before this Commission of Inquiry, those are women and children who have been sexually or physically assaulted. Legislative initiatives, policies and practices must promote equality for women and children.

Recommendations

As the deadline for LEAF's submission predates evidence to be presented on aspects of the system's response to allegations of crime other than those involving children, LEAF does not have the benefit of the evidentiary record of Phase III when submitting its written brief. LEAF therefore respectfully requests an opportunity to respond to that evidence, and make recommendations based on that evidence, in the context of an equality analysis.



As stated above, the criminal justice system must meet the constitutional standards articulated in the Charter. LEAF respectfully submits that the criminal justice system must promote the equality of women and children who are victims of physical and sexual abuse through an interpretation and application of the criminal law which incorporates the experiences of those who are vulnerable to victimization. To do otherwise is inconsistent with the Charter.

LEAF submits that the experiences of women and children, experiences which have been traditionally silenced and trivialized, must be afforded legitimacy and respect. Treating victims of violence with respect can take many forms: sensitive police response to allegations of abuse, adequate and appropriate prosecution of crimes involving women and children, criminal sentences in proportion to the crime, and financial and institutional support for social service agencies which provide essential services for survivors of sexual and physical assaults.

To further break down the myths and stereotypes which remain around child sexual abuse and violence against women, the actors in the criminal justice system must be further sensitized and educated about the dynamics and effects of abuse on disadvantaged members of society in Canada and in Newfoundland. LEAF applauds the initiatives which have been undertaken in this regard in Newfoundland and encourages further education of police officers, Crown Attorneys, Judges, and the general public.

It is respectfully requested that LEAF be given the opportunity to make specific recommendations concerning the administration of justice in Newfoundland and the ways in which the criminal justice system can promote equality rights of victims of physical and sexual assault.

All of which is respectfully submitted,

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ANNIE BUNTING, STAFF LAWYER

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SHEILA GREENE, LEAF NFLD

(BOOK OF AUTHORITIES TO FOLLOW.)