SUBMISSION OF: WOMEN'S LEGAL EDUCATION AND ACTION FUND

TO: THE LEGISLATIVE COMMITTEE OF PARLIAMENT ON BILL C-49, AN ACT RESPECTING SEXUAL ASSAULT

I. INTRODUCTION

The Women's Legal Education and Action Fund (LEAF) is a national organization whose Board of Directors includes representatives of each province and territory of Canada. LEAF was born on April 17, 1985, the day s. 15 of the Canadian Charter of Rights and Freedoms, the equality rights provision, came into effect. LEAF's purpose is to achieve equality for the women of Canada by asserting constitutional and human rights guarantees in court actions, by conducting public education programs regarding equality rights, and by making its research and analysis available to governments in the process of law reform.

LEAF's litigation has taken many forms. LEAF has assisted group and individual litigants. It has also been granted intervenor status by Canadian courts in numerous cases. LEAF's legal arguments and analysis have been found credible by the Supreme Court of Canada and other courts. Many cases in which LEAF has intervened or which LEAF has sponsored have involved issues about violence against women: Janzen and Govereau v. Platy Enterprises[1], Attorney-General of Canada v. Canadian Newspapers Company Limited[2], Re Seabover and the Queen[3], Re Gayme and the Queen[4], Butler v. the Queen[5], Jane Doe v. the Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al.[6] Norberg v. Wynrib[7] and KM v. HM[8].

LEAF, in coalition with the Barbra Schlifer Commemorative Clinic, the Metro Action Committee on Public Violence Against Women and Children (METRAC), the Metropolitan Toronto Special Committee on Child Abuse, the Canadian Association of Sexual Assault Centres and the Women's College Hospital Sexual Assault Care Centre Team, intervened in the cases of Re Seabover and the Queen and Re Gayme and the Queen ("Seabover") to argue that the legislation in question reflected a necessary, albeit minimal, recognition of women's constitutional rights to equality and security of the person. In formulating its arguments, LEAF and other members of the coalition consulted with a broad cross section of women's groups, including rape crisis centres, shelters for battered women, and national women's organizations.

When s. 276 of the Criminal Code was struck down, LEAF participated with representatives of women's groups from across Canada in a consultation process which examined the realities of sexual assault, the criminal justice system, the myths and stereotypes surrounding sexual assault and finally, Bill C-49.

This brief written in response to Bill C-49 builds upon the extensive legal research undertaken in preparation for all of the above-mentioned cases as well as the broad consultations with front-line workers in rape crisis centres and battered women's shelters, with representatives of organizations involved in seeking to reduce and redress violence against women and children, and with representatives of a broad spectrum of national women's organizations involved in advancing women's equality.

The consultations have confirmed these realities in women's lives:

(a) sexual violence adversely affects the lives of all women;
(b) sexual violence reflects and reinforces women's social, economic and political inequality;
(c) inequalities based on race, class and disability compound women's vulnerability to violence;
(d) women receive unequal treatment in the legal system based on sex;
(e) inequalities based on race, class and disability compound the unequal treatment women receive by and within the legal system once they have experienced sexual assault;
(f) discriminatory myths about sexual violence and about women's sexuality continue to shape the social attitudes and values which produce violence against women and which deprive women of their constitutional rights to life, liberty and security of person, to equal protection and benefit of criminal law and, therefore to full equality.

Like all of the women we consulted, LEAF views the tabling of Bill C-49 as an

historic opportunity and as a watershed test of this society's commitment to enact laws which effectively combat violence against women. For the first time in Canadian history, the drafting of sexual assault legislation must be governed by a Constitution which, through ss. 15 and 28, explicitly guarantees to women equality before and under the law and equal benefit and protection of the law, and by a jurisprudence which dictates that equality must be defined purposively to protect those groups who suffer social, political and legal disadvantage in society. Moreover, for the first time in Canadian history, the proposals before this Committee have not only been significantly and directly shaped by those the law is designed to serve, but have taken as their starting point in framing constitutionally driven law reforms, diversely situated women's knowledge of the realities of sexual violence and of the very significant shortcomings of sexual assault law and law enforcement. Bill C-49, therefore, tests the weight Parliament will accord to women's constitutional rights and to women's right to participate in proposing a law which women believe will work for women.

In proposing amendments to Bill C-49, LEAF and those people consulted by LEAF were always mindful of the constitutional rights of accused persons in criminal proceedings. However, we also recognize that sexual assault law will never be consistent with women's constitutional rights unless many of our evidentiary, procedural and substantive criminal laws are understood to have discriminatory origins and consequences. These laws must not be beyond challenge and reconsideration merely because they have or are falsely claimed to have ancient origins. Indeed, we urge Parliament to be very wary of arguments which are rooted in past misogyny or which describe as "long-accepted", or "fundamental" or "settled", doctrine and jurisprudence which is of recent origin and is often either unsettled or inconclusive.

The guarantees contained in s. 15 of the Charter constitute principles of fundamental justice no less than do fair trial rights. Sexual violence deprives many women of life, and all women of liberty and security of person no less than imprisonment abridges convicted offenders' liberty and security. In the face of the

sheer scale and pervasiveness of violence against women and children, and the criminal law's historic ineffectiveness in either deterring such violence or fully redressing it, Parliament must not allow the conventions of traditional legal thinking to foreclose new ways of thinking shaped by a new constitutional reality. This is particularly so where many of the conventions invoked by opponents of reform were framed when law formally excluded women from all incidents of legal personhood such as the right to vote, practice or adjudicate law, hold political office or sit on juries, and where the legacy of that history remains so pronounced in the under-representation of women in Parliament and on the bench, in those doctrines which necessitated the 1983 sexual assault amendments (such as spousal immunity from rape prosecution), and in some of the starkly misogynist legal responses to Bill C-49 itself by lawyers.

II. SEXUAL ASSAULT AND SEXUAL INEQUALITY

A. The Facts Concerning Sexual Assault

Legislation amending the Criminal Code should address the social reality that sexual assault is predominantly a crime of aggression against women and children, a crime that sexualizes their unequal power. Again and again, research has underscored that social reality. Statistics clearly demonstrate the following:

a) the victims of sexual assault in Canada, as elsewhere, are overwhelmingly female. At least ninety percent of sexual assaults involve female victims. The perpetrators of sexual assault are overwhelmingly adult males[9];

b) sexual assaults which are not committed against adult women are overwhelmingly committed against children, mostly by older males[10]; and

c) according to conservative estimates, at least one in four Canadian

women will be sexually assaulted at least once in her lifetime. One-half of these women will be sexually assaulted before the age of seventeen.[11]

B. Vulnerability and Victimization

Women's sexual victimization is inextricably related to their unequal status within society. Women are victimized because of their unequal status. In turn, their unequal status is further entrenched by their victimization. Moreover, some women are especially vulnerable. The following are a few examples:

a) Women with disabilities have been found to be anywhere from two times to ten times more vulnerable to sexual abuse than women who are not disabled. Recent research shows that 27 per cent of the offenders are special service providers and that the more severely disabled the victims are, the more likely they are to be abused by a service provider[12];

b) American studies have shown that Black women are statistically substantially over-represented as rape victims[13];

c) Young women are particularly vulnerable to sexual assault, especially by those known to them[14];

d) The vulnerability of a woman to sexual assault can be heightened by her membership in a particular social or occupational group. Working class and immigrant women are more vulnerable to rape.[15] Women additionally disadvantaged by low household income or low education are at greater risk of becoming victims of violent crime.

e) Sex trade workers are additionally vulnerable to sexual assault. Many sex trade workers are women who were victims of childhood sexual abuse.[15]

f) Lesbian women at our consultations report experiencing heightened vulnerability to sexual assault motivated explicitly by hatred of lesbians. The lack of research on this issue is itself a sex equality issue.

Any legislation which is enacted by Parliament must afford protection to these women.

C. Sexual Assault as an Equality Issue

The Supreme Court of Canada has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. It has also said that s. 15 is the broadest of all guarantees in the Charter, a guarantee which "applies to and supports all other rights guaranteed by the Charter"[17]. Furthermore, the Court has recognized that s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society"[18]. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. LEAF submits that sexual assault constitutes discrimination on the basis of sex and age: women are sexually assaulted based on their sex; children are sexually assaulted based on their age and sex.

In sex-unequal societies, 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 the aggressor, female sexuality embodies the role of the 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. In fact, a third of all college men say they would rape women if they could be assured they would not get caught[19].

Sexual assault is categorical and group-based. Under most circumstances, men are not subjected to sexual assault by women, nor are adult men treated in the way children of both sexes are treated by those who sexually assault them. Women occupy a disadvantaged status as victims and targets of sexual aggression. Rape, and the fear of rape, function as a mechanism of social control over women, enabling men to assert dominance over women and maintain the existing system of gender stratification. Rape operates as both a symbol and reality of women's subordinate social status to men.

Sexual assault is a social practice that harms women as women, because they are women. As one example, women are recognized as sexually harassed based on their sex. The Supreme Court of Canada has recognized that sexual harassment is used to "underscore women's difference from, and by implication, inferiority with respect to the male dominant group" and to remind women of their inferior ascribed status[20]. The same is true of other forms of sexual assault.

D. Some Historical and Social Comment on the Common Law of Sexual Assault

A review of the history of rape law underlines the unequal status of women under law and in society. Historically as a matter of common law, women, the victims of rape, were not legal persons. Rape was treated by the law more like a property offence than like an offence against the person: a property offence committed by one man against another man's property. Women were also disenfranchised. Rape laws were therefore developed, promulgated and administered by men, the perpetrator group, without regard to the experience and perspective of women, the victim groups, and without regard to sex equality values or law[21].

In particular, the law of sexual assault has historically evidenced a suspicion that women's accusations of sexual assault were uniquely likely to be fabricated. Thus the law required that rape complaints be recent, and that sexual crimes alone among violent crimes against the person be corroborated. It was not possible to prosecute rape in marriage. Juries were cautioned that victim testimony in rape cases should be viewed with special scepticism. Evidentiary rules were developed permitting wide ranging cross-examination of the complainant on her previous sexual history and sexual reputation. These matters were regarded as relevant to the complainant's credibility, and to whether or not she had consented to the act[22].

Women have never been proven more likely than men to lie about sexual activity or anything else. False accusations of sexual assault have never been shown more difficult to disprove than false accusations of any other crime. There is no basis to suggest that sexual assault is more frequently falsely reported than other crimes.

The laws of evidence in rape cases reflected deeply entrenched fallacies about women and their sexuality. Madame Justice L'Heureux-Dubé in her dissenting opinion in Seaboyer recognized the myths and stereotypes affecting the law and its enforcement. She stated:

> The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e. who she should be in order to be recognized as having been, in the eyes of the law, raped;who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimization does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained[23].

Myths and stereotypes about women and rape abound in the criminal justice system. These are only just a few. A woman cannot be raped against her will; if she really wants to prevent a rape she can. Rapes are committed by strangers and not by friends or family members. Women fabricate stories about sexual activity

both as part of a fantasy life, and out of spite. If a woman doesn't fall apart emotionally after an assault, an assault did not occur. Women are fickle and seek revenge on past lovers. Women on welfare, women who drink or women who use drugs consent to sex with anyone, or contract to have sex for money. Prostitutes fabricate rape charges to extort money. Women who contract for sex for money have "asked for it" and cannot be raped in the eyes of the law. Women consent to sex and change their minds. Women consent to sex and "cry rape" when they are found out to avoid the consequences of their actions.

These myths and stereotypes, with no basis in real social life, thrive in the criminal justice system in Canada. They shape both legal doctrine and substantive trial results. They are rooted in our consciousness at a level which makes them difficult to eradicate.

The literature and LEAF's consultations make it clear that myths and stereotypes which have affected structures and attitudes within the criminal justice system also affect the reporting of sexual assault. Only a fraction of sexual assaults are reported[24]. Only a fraction of reported sexual assaults are prosecuted. Only a fraction of prosecuted sexual assaults result in convictions[25].

There are a number of reasons why women may not report a sexual assault.

a) fear of people not believing their story;
b) fear of reprisals from the assailant;
c) fear of rejection by parents or partners;
d) community stigma;
e) wish to protect the reputation of assailant;
f) concern about the attitude of police and courts; and
g) fear of rejection by friends[26]

In addition, racist, classist, and ablist attitudes have affected the rates of reporting as women have learned that their own sexuality, race, class, physical and

mental condition, occupation and previous sexual history affect how people perceive the "well foundedness" of allegations that they were sexually assaulted. The following is a list of the factors which have been found to influence the police, prosecutors, judges and juries in assessing the credibility of the assault allegations of particular complainants:

a) Class biases on the part of police will affect whether a woman will be believed. A woman who is classified as "professional" is most likely to be believed while those classified as "unemployed", "idle" or "on welfare" are least likely to be believed[27]. Thus, working class and immigrant women are more vulnerable to rape because they have less power. They are less likely to be processed through the legal system and are, therefore less protected under the law[28].

b) Racist stereotypes and other manifestations of racism also affect the way women of colour are treated within the legal system.[29]

c) Extra-evidential factors have been found to influence the outcome of rape trials. It has been found that juries and judges will use myths and stereotypes to resolve the particular legal issues raised by the case in question[30]. For example, information on the "good" or "bad" character of the victim affects the decisions of jurors[31]. Juries are less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, consumed alcohol or used drugs, or had been acquainted with the defendant --- however briefly --- prior to the alleged assault[32]. Thus, women who fit within these categories are less likely to report.

d) Sex trade workers are extremely unlikely to be processed through the legal system when and if they report rapes[33].

e) The existence of a relationship between the parties has been used to blame the victim[34].

f) If a victim allegedly engaged in "misconduct", that is, had illegitimate children or was sleeping with her boyfriend, the victim is perceived to be less credible[35].

E. Trends in Canadian Law Reform

Canadian public policy has long recognized the need to reshape the law of sexual assault to recognize the rights of the victim. In 1972, the Law Reform Commission recommended an amendment to the Criminal Code to prohibit questioning of the complainant in a rape trial, regarding her sexual conduct with other men[36]. In 1976, the Criminal Code was amended to reflect those recommendation made by the Law Reform Commission.

The process described above commenced in 1976 with Parliament's first package of reforms of sexual assault law. Part of this package was section 142 of the Criminal Code[37]. Although s.142 was designed to protect victims from intrusive and irrelevant cross-examination, it was interpreted by the courts as broadening the scope for cross-examination of complainants about sexual history and reputation, in that it made a complainant compellable on these issues, and allowed the defence to impeach her credibility by calling witnesses to testify with respect to her reputation, previously regarded as a collateral issues[38].

In 1982, Parliament acted again to introduce equality values into sexual assault law with a second package of amendments, including s. 276 and 277 of the Code. These provisions limited the evidence which could be adduced regarding the complainant's sexual activity and reputation. These reforms were enacted after a careful study and review by Parliament, involving extensive committee hearings in which representatives of groups of women who had been sexually assaulted were

heard. A variety of detailed, comprehensive and authoritative studies and Royal Commission reports, including a report from the Law Reform Commission of Canada, were reviewed[39]. Parliament enacted these provisions knowing that only one in ten rape cases is ever reported, and that the conviction rate is lower for rape than for other indictable offenses. The reforms were explicitly designed to ensure that laws against sexual assault would be more equitably and effectively enforced.

Sections 276 and 277 were part of a process of change designed to make the criminal justice system more accessible to women and child survivors of sexual assault, to protect their dignity and self respect within the trial process and to protect their bodily integrity and personal autonomy by improving their odds that their abusers would be brought to justice[40]. These legislative reforms involved a recognition that traditional practices and procedures of the courts "stacked the deck" against the victims of sexual assault in ways that were unique to these offenses and ungrounded in reality. As women were gaining a public voice, the myths became less acceptable as a foundation for legal doctrine and criminal procedure.

Law has contributed to the disadvantage women suffer by offering distinctive and unusual protections to persons accused of sexual assault. The criminal law is now progressing towards recognizing the seriousness of the problem of sexual assault for women. Significant changes in the criminal law of sexual assault have eliminated husband's immunity and corroboration warnings, and have ensured that the names of complainants will not be published against their wishes. To be consistent with this trend any amendment of the Criminal Code should provide for the protection of women's rights to equality and security of person.

III. THE SEX EQUALITY IMPLICATIONS OF SEABOYER

The tabling of Bill C-49 was precipitated by the Supreme Court of Canada's decision in Seaboyer which struck down s. 276 of the Criminal Code as an infringement of an accused's s. 7 and 11(d) rights that could not be justified

pursuant to s. 1 of the Charter. (S. 277, which was also challenged, was held not to violate an accused's rights).

The consultations which followed the Seaboyer decision revealed striking consensus among women about its import. Although participants in the consultations unanimously agreed that a complainant's sexual history with the accused or with third parties is never relevant to whether she consented to the specific sexual contact in dispute at trial, they also believe that legislative amendments limited to the procedures and principles governing admissibility of sexual history evidence cannot begin to address the constitutional infirmities of present sexual assault law.

So-called "rape shield" laws only serve the small fraction of women who report sexual assault, whose complaints are given sufficient credit to proceed to prosecution and who are determined, optimistic or naive enough to believe that juries will find them worthy of the law's protection. Put another way, the Seaboyer decision did not materially alter the choices made by such potential complainants as aboriginal women, Black women and women of colour, elderly women, immigrant women, Jewish women, lesbians, poor women, refugee women, sex trade workers, women without full citizenship, or women with disabilities because these women rarely report sexual assault. For these women, the chilling impact of Seaboyer was its revelation that the Charter can be used to take away the little that s. 276 gave the most privileged Canadian women, and would be of little use in redressing the particular social and legal inequalities of most women. In LEAF's view, amendments which do not explicitly signal to those women least served by existing law and to men, police, defence and Crown lawyers, judges and juries that law is meant to protect all women, especially the most disadvantaged women, will result in even less reporting than did s. 276.

Moreover, s. 276 only restricted the admissibility of evidence of the complainant's sexual history with individuals other than the accused. Many women do not report rape because of their prior intimacy with the accused. They know that

police may not pursue their complaints. Crowns may not prosecute and judges and juries may not convict on the ground that rape is not possible or is somehow less culpable where a complainant once consented to sexual intimacy with the accused. They also know that even where the Crown proves that the sexual acts subject to charge were non-consensual, the "mistake of fact" defence may still result in acquittal. Seaboyer only reinforced such women's well-founded reluctance to report sexual assault.

Finally, women's reluctance to report rape turns on far more than evidence rules. It turns on their own experiences in civil and criminal litigation as well as increasingly available empirical studies of systemic gender bias in the judiciary. Even women who never expect to report sexual assault were outraged and alarmed by the easy assumption of the majority in Seaboyer - an assumption without any evidentiary foundation - that modern Canadian judges making discretionary evidentiary decisions about the relevance of victim sexual history evidence are somehow immune from the rape myths and other discriminatory biases about women which permeate our society, and will exercise their discretion from a perspective capable of protecting the sex equality rights of victims. The guidelines as proposed in that judgment by the majority are entirely dependent for their efficacy on judges bringing a "high degree of sensitivity"[41] to the assessment of whether the probative value of sexual history evidence outweights its prejudicial effect, and exercising their discretion in a way which is "sensitive and responsive" [42] to the equality concerns which activated Parliament in enacting the original rape-shield legislation. The women LEAF consulted have no reason to believe, and grave reason to doubt, that the Canadian judiciary, much less Canadian juries, have rid themselves of destructive gender bias; all believe that codifying the best of Seaboyer and filling its gaps cannot protect, much less advance, women's constitutional ss. 7 and 15 rights. Accordingly, LEAF, the other women's groups and the women we consulted support amendments to the substantive law of sexual assault which are designed to narrow, as a matter of law, an accused's ability to rely on rape myths and the justice system's ability to excuse such reliance even at the cost of women's lives, liberty and security of the person.

In Seaboyer, the Supreme Court accepted that s. 276 was designed to meet three fundamental objectives: (1) to ensure that cases would be decided on their merits, and not on the basis of myths, stereotypes and preconceived notions about how women do behave, how women should behave, and how the criminal law should treat victims who do not conform to sex unequal social rules; (2) to ensure victims are treated with justice and dignity in the course of the trial, and (3) to try to persuade women that they can trust the criminal justice system when they have been sexually assaulted, and thus encourage them to report rape and other forms of sexual assault. These remain important objectives consistent with ss. 7 and 15. The post-Seaboyer problem is how Parliament should revise sexual assault law to realize these objectives in a way that is consistent with the constitutional rights of women as well as those of accused persons.

Although the Court majority accepted that these three objectives are legitimate and pressing, it failed to appreciate or give much weight to their sex equality dimensions or to the fact that they implicate significant Charter values. To some degree this may be because the legislative record available to the government and interveners in advancing equality arguments was not particularly strong, well-articulated or compelling. Moreover, although current equality jurisprudence could be invoked, defenders of s. 276 could not claim that substantive equality principles shaped Parliament's intent in drafting the law. S. 276 was enacted prior to the coming into force of s. 15 of the Charter, prior to the landmark decision of the Supreme Court in Andrews v. Law Society of British Columbia[43] which gave s. 15 a purposive and substantive interpretation, and prior to the Supreme Court's other path-breaking sex equality decisions such as Janzen and Govereau v. Platy Enterprises[44], Brook v. Canada Safeway[45], and Action Travail des Femmes v. C.N.R.[46] in which the Court recognized the concepts of indirect (i.e. unintentional) and systemic discrimination, held that systemic discrimination requires systemic remedies, and recognized sexual assault as gender-based discrimination. Until equality principles are familiar, understood and deeply respected by lawyers and judges, Parliament must take the lead in invoking s. 15 explicitly and elaborating its

application when enacting equality-promoting laws. Indeed the Charter mandates that it do so.

IV. BILL C-49

A. Some Comments on the Drafting Process

As a result of our consultations and legal research, LEAF is of the view that in order to conform to the Charter, new sexual assault legislation must contain the following:

1) a strong, gender-specific preamble explicitly explaining the objectives of the amendments and justifying them by reference to the Charter. The Preamble should serve as a vehicle for public education as well as an interpretive guide for police, lawyers and judges involved in enforcing the law. As we propose that the Preamble be framed, it would also seek to persuade those women historically deprived of legal protection from sexual violence that Parliament clearly intends the law to protect them;

2) clarification of the meaning of consent and non-consent to restrict as a matter of law the operation of rape myths and other discriminatory biases in all stages of the law enforcement process. Besides offering women and men greater certainty about their legal rights and obligations, such clarification will also minimize the exculpatory power of rape myths by converting what might otherwise be dangerous mistakes of fact into mistakes of law.

3) revisions to the mistake defence consistent with the definition of consent above;

4) comprehensive statutory guidelines to govern the exercise of judicial

discretion in determining the admissibility of sexual history evidence with the accused or third parties which both codify what Seaboyer declared to be impermissible use of such evidence and which emphasize the equality principles underlying the amendments;

5) procedural guidelines codifying what Seaboyer left unsettled and ensuring in camera proceedings, the non-compellability of complainants and the issuance of written, appealable reasons on admissibility of sexual history evidence.

Broadly speaking each of these components is incorporated into Bill C-49, primarily because the Minister of Justice initiated meaningful, direct consultations with a number of national and provincial legal, professional and community-based organizations on how to respond to Seaboyer. She had the wisdom and willingness to take seriously those whom the law purports to serve, and whose expertise on why and how current law fails animates the first Canadian sexual assault law designed in conformity with women's constitutional rights. What is innovative about Bill C-49 is greatly to the credit of the Minister. It is also greatly to the credit of those women who volunteered their considerable expertise to the consultation process notwithstanding their fear that Parliament might not be genuinely committed to the process of enacting a law that would really work for women, and their fear that Parliament might disregard their knowledge precisely because they are women.

Because of the extraordinary public pressure on the government to respond quickly to the harm done by Seaboyer, Bill C-49 was tabled before the consultation process was fully representative of women's diversity. The Minister underwrote a three day consultation in January of 1992 to bring an even more unprecedented assembly of historically excluded voices to the law reform process. These included aboriginal women, Black women and women of colour, elderly women, immigrant women, Jewish women, lesbians, poor women, refugee women, sex trade workers, women without full citizenship and women with disabilities. The refinements to Bill C-49 unanimously endorsed by this assembly are the foundations of LEAF's

submissions to this Committee.

LEAF's recommendations build upon the framework of Bill C-49 and seek to improve the clarity of the Preamble and consent provisions, enhance the Bill's likelihood of surviving constitutional challenge, and respond to the concerns of those disadvantaged women who are least likely to benefit from the law as framed. No substantive changes are recommended to ss. 276(1) - 276.5. LEAF supports the efforts made by the Department of Justice to codify comprehensive evidentiary and procedural guidelines for trial judges.

B. Some Comments on the Policy and Drafting of the Proposed Legislation

1) PREAMBLE

LEAF recommends three changes: a new sequence, more particularity about whom the law seeks to benefit and why, and revision of unclear phrasing. Along with other participants in the January consultations, we consider it essential that the Preamble form part of the existing and amended law such that it must be considered by police, Crown and defence lawyers, and judges when enforcing or applying the law. We suggest that the Preamble be numbered and printed immediately after s. 265(2). We also recommend an additional clause to read as follows:

> **The sexual assault provisions of the Criminal Code and, in particular, ss.265-278 inclusive, shall be interpreted and applied in accordance with this Preamble.**

i) Sequence

Because the amendments go well beyond "correcting" for Seaboyer, LEAF considers it important to shift the reference to s. 276 to a position far lower in the Preamble as an introduction to the evidentiary clause, rather than as the preface to

the whole legislative package. The tabled sequence may be used to suggest that all amendments should be construed narrowly as if they are all intended only to deal with sexual history evidence. By reordering the sequence, the evidentiary guidelines become only one component of a package of substantive reforms driven by the Charter, and subject to the equality principles governing the entire package. Reference to the Charter should appear first in the Preamble to underline that Parliament was mindful of Charter rights in all its drafting and factored women's constitutional equality rights into the framing of the legislation. This is important to state because it was not the case when enacting previous sexual assault laws.

ii) Particularity

The Preamble is phrased in very general, gender neutral terms. Given the fact that statistics demonstrate that overwhelmingly women are the victims of sexual assault and men are the perpetrators, gender neutral language misrepresents the reality behind public support for this law without defusing gender specific opposition to it. More importantly, gender neutral language may undercut sex equality arguments in defence of the amendments, and will undercut the symbolic power of this law to signal to women that Parliament acknowledges and is committed to ending a gender-specific crime. Underlining that women and children are particularly and pervasively at risk not only states reality, but bolsters s. 15 arguments with respect to sex and age in support of this legislation, and strengthens the s. 1 position should any provision be found a prima facie Charter breach. Below, we recommend revisions moving from gender neutral to gender specific phrasing. This allows Parliament to state that it is gravely concerned about all sexual violence, but particularly that against women and children.

We also recommend more particularity in underscoring the unique relationship among sexual violence, existing sexual assault law and sex equality with reference to how that relationship is compounded by other inequalities such as race, citizenship, poverty, occupational status and disability. We have therefore clarified the third clause of the existing Preamble and added a new fourth clause.

iii) Linguistic Clarity

LEAF recommends that the Preamble's sequence and content be redrafted according to the revised format below. Where we recommend fine-tuning of phrasing in the interests of clarity, revisions appear in bold lettering and are followed by explanatory notes.

Preamble [inserted as s. 265(2).2]

a) Whereas the Parliament of Canada intends to promote **and ensure** the full protection of the rights guaranteed under sections 7 and 15 of the Canadian Charter of Rights and Freedoms;

Explanatory Note: The phrase, "and ensure" was added to strengthen the constitutional imperative. Promoting full protection isn't enough; it conveys "we'll try, but there are no guarantees". Insofar as the Charter entrenches guarantees, Parliament should state that its object is to ensure they will be enforced.

b) Whereas the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society **and, in particular, the prevalence of sexual assault against women and children;**

Explanatory Note: This change, discussed above under "particularity", is a crucial important component of Parliament's articulation of its commitment to sex equality.

c. Whereas the Parliament of Canada recognizes the unique **historical role** of the **laws** of sexual assault, of **actual assault** and of fear of assault in **denying and restricting the constitutional rights of women;**

Explanatory Note: What is meant by the "unique" clause is currently unclear,

reducing its usefulness as an interpretive aid to the law. As used in LEAF et al's Seabover factum and the Seabover dissent, the historical uniqueness of sexual assault law lies in its entirely negative contribution to the legitimation of sexual violence and/or the under-reporting, under-prosecuting and low conviction rates for sexual assault. Making this statement serves as a powerful s. 7 and s. 15 justification, if one is needed, for these amendments. If the Preamble makes the connections between the previous negative role of law and the equality objectives of the new law, this becomes integral to the legislative history; there is no shortage of documentation to substantiate these claims about the previous role of law in any subsequent challenge.

d) Whereas the Parliament of Canada recognizes that vulnerability to sexual assault and diminished access to justice are directly related to social inequalities such as those experienced by aboriginal women, Black women and women of colour, elderly women, immigrant women, Jewish women, lesbians, poor women, refugee women, sex trade workers, women without full citizenship, women who have a disability, and children;

Explanatory Note: This is one of two new clauses LEAF recommends. It opens by stating a general concern and moves to the particular by identifying those women most vulnerable to sexual abuse, least likely to report and most likely either to have their claims held "unfounded" or to be discredited pre-trial or at trial for discriminatory reasons. This amendment would acknowledge as a matter of law the reality and significance of compound inequality: i.e. that sexism plus, for example, racism, is not simply a matter of 1 + 1 (i.e. more discrimination), but distinctive discrimination.

Those Crown attorneys sensitive to the distinctive nature of compound inequality could use the tabled evidentiary guidelines in s. 276 to restrict evidence shaped by on sexist stereotypes in combination with other stereotypes. If the

Preamble alerts them, and judges, to inequalities among women, they will be more likely to recognize the problem. Our proposal, however, might also influence police and prosecutors at an earlier stage than the voir dire. It might also serve the interests of public education. Insofar as the tabled guidelines implicitly acknowledge that bias can influence what evidence is admitted and how it is used, this addition is quite consistent in principle with what has already been tabled.

We have listed vulnerable groups in alphabetical order so that there is no suggestion that any is worse off than another. We recommend the French version also be alphabetized even though the order changes.

With the exception of the enumeration of children and sex trade workers in this clause, LEAF has adopted a gender specific format. Aboriginals, Black, elderly, gay, immigrant, Jewish and poor men, as well as men who have disabilities, who are refugees or who lack full citizenship are also members of disadvantaged groups who experience unequal access to the justice system and/or unequal treatment by the police or by judges and juries during the trial process by comparisaon with affluent and/or white male citizens. Because their group disadvantage does not manifest itself as vulnerability to sexual abuse, we have not included them specifically in this clause, although they are included by implication in its general initial language. Gay men and male prison inmates do experience both unequal access to justice and heightened vulnerability to sexual assault. LEAF would have no objection if they are specifically included. We believe, however, that it is for their communities to request inclusion. We avoid using the typical enumerated ground approach (i.e. "...inequalities based on race, class, source of income, sexual orientation, citizenship status etc.") because, in addition to being inaccurate in their gender neutrality as to vulnerability to sexual assault, these categories stated as such are also objectifying in their abstraction and insufficiently particular. Racism operates as a factor in when, where, why and with what legal result aboriginal women are raped and Black women and women of colour are raped; the way racism manifests itself, however is often different.

e) Whereas Parliament recognizes that the continued operation of sexist

myths about sexual assault and women's sexuality is inconsistent with the promotion of the rights and freedoms enshrined in the Charter;

Explanatory Note: The Preamble and the amendments suggest that Parliament's primary concern in amending the law is the way that rape myths influence the trial process. But rape myths also, of course, influence the police, victim witness personnel, lawyers engaged in plea bargaining, the way law schools teach criminal law, and so on. Perhaps more importantly, they play a systemic role in the gender socialization which contributes to violence against women. If the law aspires to curb the incidence of sexual violence as well as to improve the trial process after violence is reported and prosecuted, we believe Parliament should send a strong signal that confronting rape myths and their harm is everybody's business. We all internalize these destructive myths; as phrased above, no one is "singled out" as the problem , no one is likely to argue against this proposition, and the link between the myths and such Charter rights as security of the person and equality is again underlined.

f) Whereas the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of **sexual assault offenses within a framework of laws that are consistent with the principles of fundamental justice and, more particularly, that secure justice for complainants as well as for accused persons;**

Explanatory Note: We substituted the phrase"...prosecution of sexual assault offenses "for"...prosecution of offenders "in case the tabled language could be read as an erosion of the presumption of innocence. We substituted"...that secure justice "for"...that are fair", because, in legal discourse, "fair" is a "softer" term than "justice", and "justice" picks up on the stronger imperative of "fundamental justice". The Department of Justice phrasing may be used to argue that accused offenders must be afforded full, traditional s. 7 legal rights while complainants will get something less -- some "softer" standard called fair treatment .

g) Whereas the Supreme Court of Canada has declared the existing section 276 of the Criminal Code to be of no force and effect;

And whereas the Parliament of Canada believes that at trials of sexual offenses, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial effect of such evidence;

Explanatory Note: Focusing on the prejudicial "character" of the evidence suggests that having a prior sexual history is discreditable in itself or that the evidence itself is damning. The more accurate point (capable of being substantiated through social science scholarship)[47] is that the effect of such evidence is inherently prejudicial to the fact-finding process as well as to social attitudes about rape victims.

2. SUBSTANTIVE LAW: SECTIONS 273.1 - 273.2

This section generally adopts an approach to consent that respects and promotes sex equality rights. In our view, however, it is should be strengthened and clarified. LEAF's analysis in support of the constitutionality of this approach appears below in Section IV. B. In this section we indicate why LEAF supports statutory language defining consent in sexual assault law.

In a society where sex equality had been achieved, it would be sufficient to define sexual assault concisely as "sexual activity without consent". There would be no reference to force, and the term "consent" would not be tainted by a gendered culture's sexual double standards or by gender socialization linking masculinity to sexual aggression and force. It would not be tainted by laws which decree that forced or unwanted sex is not unlawful if the accused believed the victim was consenting, no matter how egregious the force or how unreasonable the belief, or

if the accused can raise a reasonable about whether he believed the complainant was consenting. Our society is permeated by misogynist myths which normalize sexual aggression and foster the self-serving belief that "no means yes", silence means "yes" and "maybe" means "certainly". Present law gives accused persons who argue that ambiguity implies consent no legal responsibility for engaging in forced sex, even where it is proved by the Crown to be de facto non-consensual on the part of the woman involved.

In this context, LEAF endorses a modest, yet radical reform: a definition of consent in law which requires the unequivocal, voluntary agreement of individual sexual partners, and the codification of common rape myths now dignified as "honest mistakes" as errors of law. Parliament should place the same responsibility on citizens initiating sexual activity that criminal law places on them in all other circumstances: that they operate in ignorance of the law at their own risk, instead of at women's risk. Moreover, because consent at one time or to one act or in particular circumstances cannot reasonably be construed as a grant of perpetual consent, the law should be codified on the common-sense principle that consent can be revoked. The law should refuse to exculpate the belief, however honest, that if a woman agrees to kiss, she agrees to intercourse or if she agrees to intercourse while at dinner, she has forfeited her legal right to change her mind during the drive home, or if she agrees to sex for money, she cannot refuse sex for free. The law should stop presuming the aggressor's legal right to define and control the complainant's sexual choices and stop presuming men cannot control their own.

LEAF wishes to emphasize that notwithstanding the scare-mongering of many opponents of Bill C-49, innocent men will be at no risk under a regime of law which promotes women's sexual autonomy and freedom of choice. Where a woman actually (as opposed to in rape myth fantasy) gives mixed messages about her desire for sexual intimacy, a man need only ask for clarity. The only person who can decide if consent is really present is, after all, right there. If the communication remains unclear, three choices are available: further communication, discontinuing sexual initiatives or risking pursuit of non-consensual sex which may culminate in

prosecution. In a sex equal society the obvious choice is not to proceed. That there are opponents of a law which requires no more than communication between sexual actors and that there are defence lawyers who argue that it is unconstitutional for Parliament to require that a man who seeks to be exonerated for his mistaken belief about consent to sexual contact must have taken reasonable steps in the circumstances to form that belief, signals how much this law is needed.

a) LEAF, therefore, proposes that s. 273.1 be amended to read:

> Subject to subsection (2) and subsection 265(3), "consent" means for the purposes of sections 271, 272 and 273, the **unequivocal**, voluntary agreement of the complainant to engage in the sexual activity **subject to charges.**

Explanatory Note: LEAF believes the substitution of "subject to charges" for "in question" clarifies s. 273.1 and underlines that agreement to a particular sexual activity on one occasion does not constitute consent to that same activity (the activity "in question") on another.

b) Section 273.1(2)

The language of d) and e) must be expanded to make clear that any form of communication of lack of consent or revocation will have the same legal effect. This is of particular concern to women whose disabilities may preclude or impair verbal communication or restrict the types of "conduct" easily understood as rejection of sexual overtures (e.g. walking out, shouting for help, fending off an assailant, etc.), and women whose language and/or cultural norms are different from their assailant's. We propose that the phrase "by words or conduct" in all three clauses be replaced by the phrase "**by words, gestures, conduct or any other means...**" .

c) Similar changes should be made to section 273.1(2)(a). It does not matter by what means an accused interprets a third party's words, conduct or silence as

proxy consent for the complainant; the law should simply codify that no accused can rely on third party consent. General phrasing will be important where the accused commits sexual assault on the basis that the complainant's spouse, father, brother, lover or pimp simply did not object, rather than that he overtly expressed "agreement".

d) With respect to s.273.1(2)(c), LEAF recommends that this section be expanded to read: "the complainant engages in the activity by reason of the accused's abuse of a position of trust, **power** or authority". The terms "trust" and "authority" already have legal meanings which may be used to narrow the import of this clause. Many employees are not in positions of trust or authority over other co-workers, but do have power through formal or behind-the-scenes evaluation processes to injure a co-worker's promotion or other employment opportunities; examples might include fellow faculty members assessing a colleague for tenure, or "lead hands" in an industrial workplace. An off-duty police officer is not in a position of authority when assaulting a sex trade worker, but has the power to coerce submission. Other examples would include a spouse who sponsors the immigration of a family member, a social worker with power to recommend a client for subsidized benefits, or a spouse who threatens to contest custody.

In elaborating the meaning of "undue exploitation of sex" in Butler[48], the Supreme Court of Canada has made it clear that there is no constitutional impediment to this type of clause in advancing women's equality.

e) With respect to s.273.1(2)(e), LEAF completely supports the revocation clause.

f) LEAF proposes two additional clauses that would also counter the operation of rape myths or other discriminatory biases in sexual assault law enforcement and trials. Both were unanimously endorsed by participants at the January consultations. We propose they be numbered ss. 273.1(3)(a) and (b) and that tabled s. 273.1(3) be renumbered s.273(4).

273.1(3)(a): Consent shall not be presumed on the basis that the complainant consumed alcohol or drugs prior to the sexual activity subject to charges.

Explanatory Note: Prior consumption of alcohol or drugs (with the accused or otherwise) remains one of the most common rationales for concluding the complainant "asked for it" or has herself to blame for being assaulted. Research indicates that it is not that the complainant drank too much, but that she drank at all, which inculpates her in the perceptions of some police, prosecutors, judges and juries[49]. This clause may also serve a public education function.

273.1(3)(b): Consent shall not be presumed on the basis of the complainant's membership in any historically disadvantaged group enumerated or recognized on analogous grounds in s. 15 of the Canadian Charter of Rights and Freedoms, or on the basis of employment or immigration status, or on the basis that the complainant is a sex trade worker or a lesbian.

Explanatory Note: This clause, consistent with Bill C-49's section 276(1)(a), seeks to reduce the operation of discriminatory stereotypes in determining consent. The non-Charter categories incorporate all stereotypes that have been documented as operating to render a reported rape "unfounded", not worth prosecuting, or not worth the conviction of an accused. This supplements the new "mistake" provision. LEAF believes that it is imperative that Bill C-49 explicitly displace the prevalent view that rape of sex trade workers is not rape in law.

g) LEAF believes current s. 273.1(3) [proposed 273.1(4)] is necessary to foreclose expressio unius, exclusio alterius arguments, and to override R. v. Guerrero[50] in which the Ontario Court of Appeal held that s. 265(3) of the current Criminal Code is exhaustive of circumstances negating consent. The proposed open-ended language is also consistent with R. v. Jobidon[51] in which the Supreme Court,

speaking of physical assault, held that s. 265 "defined consent only in part by negatively indicating a few ways consent could be vitiated". It is not difficult to imagine many circumstances in which a complainant might submit to unwanted sex for reasons other than those enumerated in s. 265(3) (for instance, blackmail) or where the law should not find consent for reasons other than those enumerated in s. 273.1(2) (for example, Jobidon-like facts, or impersonation by the accused of a doctor).

3. PROCEDURE: Section 276.1(3) and s. 276.2(1)

LEAF supports exclusion of the public but urges revision of these provisions to allow the judge to admit at the complainant's request at least one layperson to sit with her should she choose to attend the voir dire application or the voir dire. Normally this would be a rape crisis centre worker who has advised her since the assault.

LEAF submits that the law should make it clear that the current "publication ban" on the identification of victims of sexual assault is for the benefit of the complainant, and can be lifted at any time at the complainant's request.

LEAF suggests that careful thought should be given to the question of whether a judge's reasons on a voir dire to determine the admissibility of sexual history evidence should be available to the public. While there are clearly sex equality issues to be considered around the identification of complainants, if such reasons are not publicly available on the same basis as final judgments in sexual assault cases, it may not be possible to monitor the performance of judges and the judicial system as a whole to determine if these procedural reforms are adequately protecting the sex equality rights of complainants.

C: Some Comments in Support of the Proposed Legislation

It is LEAF's position that the proposed legislation meets constitutional standards, and can withstand constitutional challenge. We therefore have no constitutional criticisms to offer. Because the Bill has been attacked on grounds which have been characterized by its detractors as constitutional, however, we have felt it appropriate to offer some comment on these criticisms from the perspective of our expertise and experience in constitutional litigation.

(1) SECTION 273.1 (2)

"No consent is obtained.... where

(b) the complainant is incapable of consenting to the activity by reason of intoxication or other condition;"

Professor Bryant, in his article "The Issue of Consent in the Crime of Sexual Assault"[52] states:

> (H)istorically, courts have recognised that sleep, intoxication, immaturity, and the lack of intellectual capacity, were capable of vitiating consent. The underlying justifications for recognising these circumstances as being capable of vitiating consent were two-fold: (1) to protect persons who were particularly vulnerable; and (2) to protect persons who were not sufficiently conscious (sleep or intoxication), intelligent (mental capacity) or mature (age) to make a meaningful choice.

Bryant argues that it cannot reasonably be argued that s. 265(3) of the Criminal Code is exhaustive of the circumstances in which there is no consent: "For example, if V. is unconscious by reason of illness or medical sedation and D. sexually molests V., would anyone suggest that V. consented?" [53]

In particular, intoxication vitiates consent at common law. It would appear, therefore, that this provision in Bill C-49 merely codifies the common law of consent. Examples of intoxication vitiating consent at common law can be found in the following cases:

(a) Camplin (1845), 169 E.R. 163

> "Prisoner gave a girl of thirteen years of age liquor for the purpose of exciting her; she became quite drunk; and when she was in a state of insensibility he violated her. Held: a rape."

(b) Fletcher (1859), 8 Cox C.C. 131.

> "It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it liable to be indicted. If so, every drunken woman returning from the market, and happening to fall down by the road side, may be ravished by the will of passers by."

(c) Lang (1975), 62 Cr. App. Rep. 50.

> "The evidence... of her mind being so influenced by drink that she lacked the understanding of her situation necessary to enable her to make a choice."

In Jobidon, the majority indicated that the Criminal Code only partially expresses the law of consent and that the common law continues to play a role. "For instance, [the common law] provided that, as a general rule, consent would only be valid or legally effective if it was given freely by a rational and sober person."[54] This aspect of the law has never been subject to constitutional challenge.

Unless Parliament is of the view that individuals should be able to sexually exploit others who are under the influence of alcohol or drugs to the extent that they are incapable of making a choice about whether to engage in sexual activity, it seems sensible to include a provision such as this in the Code in order to make this

aspcet of the law more accessible to the public.

(2) SECTION 273.2

(i) The "reverse onus" issue.

Some commentators on Bill C-49 have criticized it on the basis that the following clause in section 1 contains a reverse onus, that is, imposes a burden of proof on persons accused of sexual assault.

> 273.2 It is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> . . .
>
> (b) the accused did not take all reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

If this provision did indeed contain a reverse onus then it could be challenged constitutionally on the basis that it infringed section 11(d) of the Charter, the right of an accused to be presumed innocent until proven guilty according to law. The question of whether a reverse onus in such circumstances would be unconstitutional would then depend on whether the courts thought it satisfied the test in section 1 of the Charter, that is whether it is a reasonable limit in a free and democratic society: see R.v. Wholesale Travel Group Inc.[55]

What is a reverse onus? The normal "burden of proof" rule is that the Crown must prove the guilt of the accused beyond a reasonable doubt. Thus the Crown must establish all the elements of the relevant offence, and the accused is given the benefit of any reasonable doubt with respect to any element. Underlying this allocation of burden of proof is the social value that it is better to risk acquitting a guilty person than to risk convicting an innocent one. If a burden of proof is placed on the accused, that, in law, is a reverse onus. A reverse onus would be created

in a sexual assault trial, for example, if the Crown had to prove only sexual contact, and then the onus shifted to accused persons to prove consent. Where the law creates a reverse onus, the usual quantum of proof required is proof on a balance of probabilities.

This evidentiary structure, with its strong emphasis on erring on the side of acquittal, exists independently of the substantive elements of any particular offence. In other words, the structure requires the Crown to prove that the offence, as defined by Parliament, was committed. (There are constitutional constraints on Parliament's freedom to define offenses as it sees fit, but these will be dealt with separately below.) Thus a change in the substantive definition of an offence does not, by itself, entail any change in the normal rules about who has the burden of proof.

It is therefore crucial to any analysis of the proposed legislation to note that while the proposed s.273.2 would change the substantive definition of sexual assault, there is nothing in it to suggest a shift in the burden of proof. The accused would still get the benefit of any reasonable doubt with respect to the factor of mistaken belief in consent, as newly defined by Parliament in Bill C-49.

(ii) The present law with respect to mistaken belief in consent.

The present law can be contrasted, on both substantive and evidentiary levels, with the law as proposed in Bill C-49. As the law now stands, the Crown must prove, beyond a reasonable doubt, an absence of consent. The accused gets the benefit of any reasonable doubt on this issue. As well, the defence may raise the argument that even if the complainant did not consent, the accused mistakenly believed that she was consenting.

Under existing law, an honest belief is sufficient to acquit, although the reasonableness of the belief is evidence which will influence the finding of honesty. In other words, a judge or jury can decide that if the claimed belief is unreasonable

then it could not have been honestly held. The present law arises from the infamous decision of the Supreme Court of Canada in R. v. Pappajohn[56]. The Pappajohn rule applied, to what was then rape, the principle, relevant to many but not all criminal offenses, that an accused should not be convicted unless he knowingly or recklessly did what Parliament has defined as criminal. With respect to rape this meant that an accused must be acquitted unless he knowingly or recklessly had intercourse with an unconsenting person. This is often referred to as requiring a subjective test for belief in consent, since the inquiry is into the accused's actual state of mind, as distinct from an objective test where an accused's belief would be measured against a standard, usually that of the reasonable or ordinary person. Pappajohn is largely codified in section 265(4) of the Criminal Code.

In terms of the rules of evidence relating to the burden of proof, the argument that the accused made an honest mistake will only be considered if there is an "air of reality" to the claim. In other words, there is an evidentiary threshold that has to be crossed before the defence is considered by the judge or jury. While the honest mistake argument is technically a denial that the Crown has proved the mens rea of the offence, the approach taken is similar to that taken with respect to defences, for instance self-defence. (Indeed, this concept is often referred to for convenience as "the defense of mistake of fact".) Self-defence will not be considered unless some evidentiary basis for it arises from the evidence led by either the Crown or the defence. The courts do not apply every defence to every case irrespective of the evidence. The judge or jury must consider all defences which have a chance of raising a reasonable doubt on the evidence in the case, but not others. Once the argument of a mistaken belief in consent is seen to have an "air of reality" then the accused must get the benefit of any reasonable doubt on that issue, as with all other issues.

(iii) The effects of Bill C-49.

Bill C-49 would change the substantive configuration of the mistaken belief in

consent defence. Thus an honest belief in itself would not be enough to justify an acquittal, in the absence of reasonable steps taken to ascertain whether or not there was consent. An accused would not be able to defend himself, without more, on the basis that he honestly believes that "no means maybe", and presumably that "maybe means yes"[57] ; or that sexually active women consent to have sex with anyone who wants to have sex with them[58]; or that a woman who has had consensual sex with him on a previous occasion must be willing to have sex again[59]; or that a woman who hitch-hikes, walks alone at night, drinks, dresses "provocatively" or invites him into her home must be consenting to sexual contact[60]; or that force and terror are not inconsistent with consent[61]; or that the passivity of a sick woman signifies consent[62]. Women and children would no longer be completely at the mercy of those who genuinely think that passivity is an indicator of consent, and those who think that resistance is the consent of a "virtuous" woman. The Bill would require that people who wish to touch others sexually take some responsibility for avoiding the serious harm of unconsensual sex.

If the present approach is applied to the new law, this could mean that, once the judge has determined that there is an "air of reality" to the claim of mistaken belief in consent, the Crown would have the responsibility of proving beyond a reasonable doubt that the accused did not take reasonable steps. If this approach is adopted, at the end of the trial, if there was any reasonable doubt about whether the accused took reasonable steps, then the accused would be entitled to the benefit of that doubt.

We do not mean to suggest that the addition of a substantive requirement of "reasonable steps", unaccompanied by any change in the burden of proof, is the ideal approach to the problems which arise where sexual contact takes place in a context of sex inequality, and where there is a significant danger that more powerful persons may persist in self-interested misconceptions about the willingness of more vulnerable persons to have sex with them. A sexual assault law which fully reflects a commitment to sex equality and which fully recognises the harms of forced sex might constitutionally include a much more dramatic requirement that

those who wish to have sexual contact with others should bear the risk of non-consent. Bill C-49 simply imposes a duty to take reasonable steps while leaving the evolution of rules relating to burden of proof, in a manner consistent with constitutional values, in the hands of the judiciary.

(iv) The constitutionality of the "reasonable steps" requirement.

As suggested above, Parliament's freedom to shape the substantive elements of offenses is limited by the Charter. A line of Supreme Court of Canada cases beginning with Reference Re Section 94(2) of the Motor Vehicle Act[63] and including, most recently, R. v. Wholesale Travel Group Inc.[64] , has addressed the question of the extent to which Parliament has the power to create offenses which do not require proof of a subjective mens rea. An analysis of these cases is necessary in order to determine when Parliament can determine that a reasonableness test should be used in the course of a determination of culpability.

Some commentators on the Bill have suggested that a "reasonable steps" requirement would be inconsistent with the commitment to "fundamental justice" in section 7 or the Charter. Bill C-49 therefore raises the question of the meaning of the concept of fundamental justice, as well as how that meaning should interact with the commitment to sex equality in ss. 15 and 28 of the Charter.

While various arguments have been suggested as the basis for a constitutional challenge to the "reasonable steps" requirement, the most popular form of the argument is that Parliament cannot constitutionally create a sexual assault offence which does not embody the concept of subjective mens rea. In other words, the argument is that fundamental justice requires that an accused be able to argue that he made an honest mistake, without being measured against any kind of objective standard such as that of a reasonable person. This argument raises the question of whether Parliament ever has the power to require individuals to take reasonable care at risk of criminal sanctions, especially with respect to activities with a high potential for causing harm to others, such as driving, handling explosives or

firearms, or engaging in sexual contact. As can be seen from these examples, this argument raises a very fundamental issue about Parliamentary power to structure criminal offenses to meet the needs of society which goes far beyond Bill C-49 itself.[65]

It is LEAF's position that there is no fundamental injustice involved in punishing a person for failure to take reasonable steps to ensure consent before having sexual contact with another. Furthermore, it is LEAF's position that existing caselaw does not support any such proposition.

It is clear that for some offenses in Canadian law, mens rea, a "guilty mind", is a constitutional requirement. The nature and content of that mens rea in particular cases, however, is not at all clear. In R. v. Nguyen; R. v. Hess[66] a case considering tha absolute liability aspect of the offence of "statutory rape", Madame Justice Wilson, speaking for the majority, says:

> Prior to the Charter, Parliament had to use express statutory language in order to displace the requirement that the prosecutor prove mens rea. With the advent of the Charter, Parliament must now be prepared to show that a provision that purports to make it unnecessary for the Crown to prove mens rea and that does not provide an accused, at a minimum, with a due diligence defence is a reasonable limit that can be demonstrably justified in a free and democratic society.[67]

While she found that elimination of a "guilty mind" requirement altogether violated constitutional guarantees, with respect to the offence of "statutory rape" itself she is prepared to go no farther than to say that "[a]t a minimum the provision must provide for a defence of due diligence".[68]

In Wholesale Travel, Lamer C.J.C., speaking for a majority of the judges who addressed this issue, stated that the "rationale for elevating mens rea ... to a constitutionally required element, was that it was a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the

particular nature of the crime. In Vaillancourt, this court held that for certain crimes, the special nature of the stigma attaching to a conviction and/or the severity of the available punishment necessitate subjective mens rea."[69]

What are these "special stigma" crimes? They are thought to be those crimes which society as a whole regards as involving moral turpitude rather than simply unacceptable behaviour, crimes "abhorrent to the basic values of human society" . In R. v. Logan[70] the Supreme Court of Canada said that they are very few in number. Murder has been held to be one, in Vaillancourt[71] and Martineau[72], on the basis of the extreme stigma attached and the severe penalty of life imprisonment. In Logan the Supreme Court extended its rulings in Vaillancourt and Martineau to attempted murder. Lamer C.J.C., speaking for the majority, held that attempted murder has the same stigma as murder; in his view, someone convicted of attempted murder is a "lucky murderer" who may have the same "killer instinct" as a murderer but who, for some reason, was unable to kill the victim.[73] Because, unlike murder, attempted murder has no minimum sentence, Lamer C.J.C., focused on moral blameworthiness as the most important factor, thus removing one of the few clearly ascertainable indicia of stigma.

The case law on manslaughter is far less clear. In R. v. Tutton[74], the Court was asked to decide whether the crime of manslaughter by criminal negligence required mens rea to be determined according to a subjective or objective test. The Court split 3:3; Lamer J. (as he then was) referred to the constitutional implications of this choice. He supported the objective test for criminal negligence so long as adequate consideration was given to the circumstances of the accused (a view which probably underlies the wording "in the circumstances known to the accused" in Bill C-49) but went on to say that this did not preclude him in future from considering whether the objective test for mens rea in such a case is contrary to fundamental justice.[75] The Ontario Court of Appeal has since held that criminal negligence in the operation of a motor vehicle[76] or criminal negligence causing death[77] are not crimes in this special category, and thus that a subjective mental state is not a constitutional requirement.

Cory, J., in his judgment in Wholesale Travel, develops a constitutional distinction between conduct which is prohibited because of society's moral repugnance for such behaviour, and conduct which is prohibited in furtherence of our collective need, in the interests of the effective functioning of society, to protect the vulnerable from its harmful consquences[78]. The former types of offenses require full, subjective mens rea; with respect to the latter, the mental element can properly be determined on a objective basis. In discussing the importance of legislation designed to protect the society, and in particular vulnerable groups within society, he states that it "would be unfortunate indeed if the Charter were used as a weapon to attack measures intended to protect the disadvantaged and comparatively powerless members of society"[79]. This harms-based approach to mens rea requirements provides a foundation for a constitutional doctrine of mens rea consistent with sex equality values and the requirements of s.15 of the Charter.[80]

Lamer C.J.C. has urged a policy of deference to legislative determinations of what public policy requires, which points to a narrow category of "special stigma" offenses. After pointing out that negligence is the minimum constitutional requirement for offenses for which imprisonment is a penalty, he stated in Wholesale Travel: "Whether a fault requirement higher than this constitutional minimum (negligence) ought to be adopted where an accused faces possible imprisonment or conviction of any offence under the Criminal Code is a question of public policy which must be determined by Parliament, and for the courts to pronounce upon this would be contrary to what this court has said in Reference re: s.94(2) of Motor Vehicle Act...: that we refrain from 'adjudicating upon the merits or wisdom of enactments.' It is not the role of this court to 'second guess' the policy decisions made by elected officials."[81]

It is evident that the courts have not yet devised a reliable list of criteria for determining when a crime fits into the "special stigma" category. It is clearly recognized that there is a significant element of circularity which attaches to any consideration of the constitutional requirements for the mental element of particular

offences when analysed according to concepts of stigma. For example, in dealing with the specific problem posed by Wholesale Travel, that of misleading advertsing, both Cory J. and Lamer C.J.C. note in their judgments that less stigma will attach to a conviction for an offence which can be proved through a showing of carelessness (objective mens rea) than would attach to such a conviction if dishonesty had to be proved.[82] It would follow from this reasoning that if Parliament decides to introduce an objective element into the offence of sexual assault, this will per se lower the stigma associated with the offence.

It is important to stress that an intuitive assessment of the social stigma attached to sexual assault is not an adequate basis for making this important determination. Rather, the decision should involve an examination of the nature of the offence, the social problem being addressed by the offence, the degree to which a subjective test would hinder adequate responses to that social problem, the penalties and the social attitude to the behaviour criminalized by the offence.

It is equally important to stress that making constitutional decisions about the required elements of criminal acts on the basis of an inherently subjective concept like " special stigma" is full of equality traps. Madame Justice Wilson, in her concurring reasons in Reference Re s. 94(2) of the Motor Vehicles Act points out the contingent and contextual basis on which people make judgments about what is morally repugnant:

> The introduction of concepts of morality into criminal responsibility inevitably led to a sharp distinction between crimes which were mala in se and crimes which were merely mala prohibita. Blackstone describes crimes which were mala in se as offenses against "those rights which God and nature have established" . . . and crimes which were mala prohibita as breaches of 'those laws which enjoin only positive duties, and forbid any such things as are not mala in se . . without any admixture of moral guilt" . . . . This distinction is now pretty well discredited . . . While it is undoubtedly the case that certain crimes evoke feelings of revulsion and condemnation in the minds of most people, those feelings are now generally perceived as dependent upon a number of variable factors such as environment, education and religious prejudice and are no longer seen as providing a secure basis

for the segregation of crimes into two different categories.[83]

An attempt to find a social consensus on whether or not sexual assault should fit into the category of crimes to which there is a special stigma attached would clearly, based on the social science data available, founder on a number of paradoxes about how this behaviour is regarded in our society. For example, women and men differ substantially in what kind of sexual behaviour is regarded as crossing the line between the permissible and the unlawful. Furthermore, the wide social and cultural acceptance of violent and coerced sex suggests that stigma, if any, attaches to criminal conviction, rather than to significant parts of the range of behaviour that falls within current definitions of the offence of sexual assault.

There would be several appalling ironies which would flow from a Parliamentary (or judicial) consensus that sexual assault constitutionally carries a "special stigma". If the law would not require reasonable steps to be taken on the basis of the stigma associated with sexual assault, this would mean that so much stigma is associated with this crime that Parliament would be paralysed in addressing the social harms caused by sexual assault. This would surely convey a message of societal tolerance rather than abhorrence. A further irony would arise from a comparison with the outcome of Wholesale Travel itself. The law would then be that Parliament can demand that reasonable care be taken to avoid misleading advertising, an offence punishable by five years in prison, but cannot demand that reasonable care be taken to avoid unconsensual sex. A reasonable person could conclude that misleading advertising is taken more seriously as a social evil than sexual assault.

Equality seekers aspire to a state of society in which the sexual autonomy of women is part of public consciousness, violence against women is repugnant to society as a whole, and male behaviour is modified to accord with these social norms. But the statistical picture discussed above makes it crystal clear that we have not yet reached that state. In our view, the proposed new law is part of an attempt to transform public consciousness, and to attack a pervasive social problem

arising in part from the failure of men in our society to accept and conform to legal limitations on their sexual access to women. Parliament should not be deprived of legislative weapons against such social problems by the attachment of a highly subjective, and in this case highly hypocritical, label like "special stigma" to the crime of sexual assault.

In view of the fact that the current state of constitutional law binds Parliament with no specific direction on the mens rea component of sexual assault, LEAF submits that the preferable approach is to canvass the pros and cons of a "reasonable steps" requirement from a policy standpoint. Is it a good idea? The significant question here is not about authorities but about values. Should it be seen as just to require reasonable steps to be taken and would such a requirement promote sex equality? If the answer to both questions is yes, as we submit it is, then Parliament should pass this aspect of the Bill, and government lawyers should defend it vigorously against any challenge in the courts.

The strongest argument against a "reasonable steps" requirement is that insistence on a subjective test (so that a mistake does not have to be reasonable) avoids the danger of punishing someone who is incapable of taking reasonable steps and thus does not deserve to be punished. A less compelling version of the argument is that a subjective test avoids the danger of punishing someone who is capable of taking reasonable steps and does not do so, but thus has not intended to commit sexual assault. Behind these arguments is the concept that such behaviour is not deserving of punishment, and that therefore punishment would be unjust.

In our view, such behaviour is clearly worthy of punishment; the constitutional arguments in support of imposing criminal sanctions on it far more compelling than those against. Some of them are outlined below.

(1) The argument that it is unjust to punish behaviour which is not accompanied by full-blown, subjective mens rea is a relatively new one in the evolution of criminal

justice principles. The idea that, in the context or rape, a mistake was not required to be reasonable, was only recognised by the Supreme Court of Canada in 1980, in the Pappajohn case discussed above. Indeed in that case Martland J. expressed the view that the issue of whether a mistake was required to be reasonable had not been settled in the case law prior to Pappajohn.[94] There are conflicting traditions in the history of the criminal law, which should make one hesitate before giving one line of authority a broad constitutional or policy significance.

(2) To illustrate the above, one can point to examples in our present criminal law, where Parliament requires that individuals conform to a standard of reasonable behaviour.

(i) There are explicit negligence offenses in the Criminal Code: see, for example, s.86(2) (careless use of storage of a firearm), and s.80 (breach of duty to take reasonable care with respect to explosives). One can also find offenses where negligence is relevant to one aspect of the offence, which provide a model for the approach to sexual assault taken in the Bill. The following are two examples:

(1) s. 150

"It is not a defence to [such charges as sexual exploitation with a young person or corrupting children] that the accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant."

(2) s.290(2)

"No person commits bigamy by going through a form of marriage if...(a) that person in good faith and on reasonable grounds believes his spouse is dead,...."

(ii) There are criminal negligence offenses in the Code: see, for

example, ss. 220 and 221. When considered by the Supreme Court of Canada in R. v. Tutton[85], referred to above, the Supreme Court was evenly split on whether these offenses used an objective or subjective test.

(iii) Defences routinely contain a test of reasonableness. For instance, it is not enough in self-defence that the accused honestly believes that he cannot, without the use of force, preserve himself from death or grievous bodily harm. Such belief must be based on reasonable grounds. Similarly, with respect to provocation, it is not enough that the accused lost his self-control. That loss of self-control is measured against the standard of the ordinary person. There may be conceptual differences between a defence proper, such as self-defence, and a denial of an element of the offence, such as mistaken belief in consent (although such conceptual differences are blurred in the existing rule that an evidentiary basis must exist for both types of argument), but there is no relevant functional or constitutional difference.

(iv) If one broadened the inquiry to include provincial offenses one could find many more examples of where Canadians are required to bring their behaviour into conformity with an objective standard under threat of punishment: for example, the various careless driving offenses.

(3) Other common law jurisdictions can be found which require that a mistaken belief in consent must be reasonable.[86]

(4) The courts have frequently shown a reluctance to apply the Pappajohn rule literally. The clearest example of an attempt to find a way around the logical implications of the idea that an honest mistake can be a defence can be found in Sansregret v. The Queen[87]. In that case, the accused, who used to live with the victim, broke into her house and terrorized her into submission to intercourse. In fear for her life, she pretended a willingness to renew the relationship and to have

sex. The trial judge found that the accused was totally deceived and that, while no rational person would have believed she was consenting, Sansregret did. Following Pappajohn, as she was bound to do, the trial judge acquitted. The case went to the Supreme Court of Canada, where a new form of the old doctrine of wilful blindness was developed in order to convict.[88] Thus even thought the trial judge found an honest belief in consent, Sansregret was convicted. What this means in effect, although this was not acknowledged by the Court, was that the accused was being punished for a belief no reasonable person would have had in the circumstances. A functional willingness to punish for negligent sexual assault was disguised by the term "wilful blindness". When the courts themselves reveal ambivalence about the application of the Pappajohn rule, it should not be raised to the status of a constitutional principle, or used to limit legitimate policy initiatives of Parliament.

(5) In addition to arguments which focus on history, statutory precedents, and judicial ambivalence, there are very profound social policy arguments in support of a requirement that an individual should be required to take reasonable steps in the circumstances known to the accused at the time, as the proposed legislation requires[89]. The attention of the accused is focused on the relevant transaction, as sexual conduct rarely happens accidentally. Reasonable steps are easy to take. There is little or no social cost to the avoidance of sexual contact should the responsibility be onerous in any set of circumstances. The harm of unconsensual sex is significant to its victims, primarily women and children, and those who care about them. Failure to take reasonable steps can therefore be seen as criminally culpable in itself.

The requirement that reasonable steps be taken to ascertain consent clearly promotes sex equality by giving enhanced legal protection to a vulnerable group, women and children. Those men who are most dangerous to women are constructed as "innocent" using the Pappajohn rule. These are the men who genuinely believe that women are in a state of perpetual consent which can only be

withdrawn through vigorous resistance. Such a belief may take specific forms with respect to, for example, First Nations women, or women with disabilities, or prostitutes, or sexually active women. However, if willingness to entertain such a belief, in any of its forms, is privileged by the law as a defence, then the law is signalling that women belong to a group the members of which can be harmed with impunity. Such a law would clearly violate the sex equality rights of women under the Charter.

There is no reason for the law to assume that our state of mind is determined any more than our behaviour is, and yet if an accused said "I couldn't help committing sexual assault" we convict him, while if he says "I couldn't help assuming that when a woman says no she doesn't mean it", we currently acquit him. Criminal offenses by their very nature involve state mandates to bring our behaviour into conformity with objective standards, irrespective of the social forces which shape our impulses. The argument against the wisdom or constitutionality of this requirement is a denial of Parliament's power to require us to bring the way we approach sexual contact with others into conformity with standards of public policy, developed in the context of sex equality values, rather than individual standards developed in a social context of sex inequality.[90]

SUMMARY AND CONCLUSION

LEAF is very pleased that the Minister of Justice has tabled a Bill which clearly recognizes sexual assault as a sex equality issue, and furthers the government's constitutional obligation to promote the equality of women in an area as significant as sexual assault. LEAF applauds the process of consultation with diverse groups of women, and is gratified to see that process reflected in very substantial ways in the Bill.

LEAF has provided substantive proposals for strengthening and clarifying the

intent and the language of the proposed legislation. LEAF's legal analysis supports the constitutionality of the approach taken by the government to promoting the Charter rights of victims of sexual assault, while respecting the rights of accused persons.

LEAF and the women of Canada with whom it has consulted in preparing its position look forward to an early passage of this Bill, and ultimately to a society in which women who are violated are truly vindicated by the criminal law, and violence against women is truly deterred by that law.

NOTES

1. (1989), 59 D.L.R. (4th) 352 (S.C.C.)
2. [1988] 2 S.C.R. 122
3. (1991), 83 D.L.R. (4th) 193 (S.C.C.)
4. Ibid.
5. Unreported decision of the Supreme Court of Canada, February 27, 1992
6. (1990), 72 D.L.R. (4th) 580 (Ont.Div.Ct.)
7. Heard on June 19, 1991 in the Supreme Court of Canada, Court File No. 21924, no decision rendered.
8. Heard on November 8, 1991 in the Supreme Court of Canada, Court File No. 21763, no decision rendered.
9. Crime Statistics 1986, quoted in T.Brettel Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1988), 2 C.J.W.L. 310 at note 72, p. 326

   Brickman, J. and J. Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1985), 7 Int. J. of Women's Studies 195

Solicitor General of Canada, Canadian Urban Victimization Survey "Female Victims of Crime," (1985) , (Ottawa: Supply and Services, 1985) at 2

Katz, S. and Mazur, M.A. Understanding the Rape Victim. A Synthesis of Research Findings (New York: John Wiley & Sons, 1979) at p. 153.

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10. Sexual Offenses Against Children, Report of the Committee on Sexual Offenses Against Children and Youths (Badgley Report), (Ottawa, Ministry of Supplies and Services: 1984) at 175-233; 351-365

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Russell, Diana E.H., Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment (Beverley Hills, Sage: 1984) at 41-53

12. Doucette, J., Violent Acts Against Disabled Women, The Disabled Women's Network, (1986), Toronto at p. xviii

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13. Feild, H.S. and L.B. Bienen. Jurors and Rape. Lexington, Mass.: Lexington Books, 1980 at p. 139.

Katz and Mazur, supra at 39-44

14. Canadian Urban Victimization Survey, "Female Victims of Crimes", supra at 2-3

15. Guberman C. No Safe Place: Violence Against Women and Children (Toronto: Women's Press) 1985.

16. Giobbe, Evalina, "Confronting Liberal Lies About Prostitution" in Dorchen Leidholdt and Janice Raymond, eds. The Sexual Liberal and the Attack on Feminism (New York: Pergamon, 1990) at 73, 78

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Children: Psychological Social Service, and Criminal Justice Concerns" (1989-90), 3 C.J.W.L. 420 at 423

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

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

18. Andrews, supra at 154

19. Malamuth, N.M., "Rape Proclivity Among Males" (1981), 37 J. of Social Issues 139

20. See Janzen et al. v. Platy Enterprises, supra note 1 at 376

21. Backhouse, Constance, "Nineteenth Century Canadian Rape Law, 1800-92" in Essays in the History of Candian Law, Vol. II, ed. D.H. Flaherty (Osgoode Society, 1983) at 200-247

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Clark, L. and D. Lewis, Rape: The Price of Coercive Sexuality (Toronto, 1977) at pp. 11'0-124.

22. Backhouse, supra at 220-226; 233-235

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Berger, V. "Man's Trial, Women's Tribulation: Rape Cases in the Courtroom" (1977), 77 Col. L.R. 1 at 21-22

23. See Seabover, supra at 207

24. Department of Justice Canada. Sentencing Patterns in Canada: An Overview of the Correctional Sentences Project. 1987.

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Solicitor General of Canada, Canadian Urban Victimization Survey, "Female Victims of Crime" (1985); "Reported and Unreported Crimes" (1984)

25. Clark L. and D. Lewis, A Study of Rape in Canada: Phases 'C' and 'D':Report to the Donner Foundation of Canada, 1976 (unpublished), quoted in M. Stanley, The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127 (1985), at p. 20

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Williams, K.M., The Prosecution of Sexual Assaults (Institute for Law and Social Research, Washington: 1978) at 19-40

26. Holmstrom, L. and A. Burgess, The Victim of Rape: Institutional Reactions (1983) at 58

Marshall, P., "Sexual Assault, the Charter and Sentencing Reform", (1988), 63 C.R. 216 at 217

Solicitor General of Canada, Canadian Urban Victimiation Survey, "Reported and Unreported Crimes" (1984) at 10

Canadian Newspapers Co. Ltd. v. Canada (Attorney General), supra, at 131. The court has taken judicial notice that compared to other crimes, sexual assault is one of the most unreported, due mainly to the victim's fear of treatment by police, the fear of trial procedures and fear of publicity.

27. Clark and Lewis, supra at 91-94

28. Guberman, C. supra at 74

29. Tong, Rosemarie, Women, Sex and the Law (Totowa, N.J.: Rowman & Allanheld, 1984) at 155, 158-9, 164

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30. Feild and Bienan, supra at 139

31. Doob, Kirshenbaum and Brooks, "Evidence of the Character of a Victim in a Rape Case" (1973), unpublished, quoted in Neil Brooks, "Rape and the Laws of Evidence", 23 Chitty's L.J.1

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32. Catton K., "Evidence Regarding the prior Sexual History of an Alleged Rape Victim -- Its Effect on the Perceived Guilt of the Accused" (1975) U. Of T. Fac.L.Rev. 165.

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La Free, Reskin and Visher, supra at 397

33. Guberman, C. supra at 74

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34. Check J. and N. Malamuth, "Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape" (1983), 45 J. of Personality and Soc. Psychology 344 at 344-45

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35. Catton K., "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim -- Its Effect

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36. Stanley, M. The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127, Sexual Assault Legislation in Canada: An Evaluation, Report No. 1, Department of Justice Canada, Ottawa: July 1985, pp. 77-86

37. This section provided generally that a witness could not be asked questions with respect to her sexual conduct unless (1) reasonable notice and sufficient particulars were given, and (2) the judge decided, after a hearing in camera, that exclusion of the evidence would prevent a "just determination of an issue of fact in the proceedings, including the credibility" of the witness: see Christine Boyle, "Section 142 of the Criminal Code: A Trojan Horse?" 23 C.L.Q. 253

38. R. v. Forsythe, [1980] 2 S.C.R. 268

R. v. Konkin, [1983] 1 S.C.R. 388 at 398 per Wilson J., dissenting

39. Standing Committee on Justice and Legal Affairs:
22 April 1982: 77:46
27 April 1982: 78: 4-7, 25-28
6 May 1982: 82: 30-43
1 June 1982: 91:10-16; 91A:1-10

40. S.C. 1980-81-82, c.125
House of Commons, Debates:
18 November 1975: 9204, 9224-25
19 November 1975: 9247-48, 9251-52, 9259, 9261
7 July 1981: 11300-01, 11342-43
17 December 1981: 14165
22 April, 1982, 77:29
20 July 1982: 19499-19500
4 August 1982: 20041-42

41. Seabover, supra at 280

42. Seabover, supra at 281

43. (1989), 56 D.L.R. (4th) 1

44. See Note 1

45. Brooks v. Canada Safeway Ltd. (1989), 59 D.L.R. (4th) 321 (S.C.C.)

46. Action Travail des Femmes v. Canadian National Railway Co. (1987), 40 D.L.R. (4th) 193 (S.C.C.)

47. See Note 29

48. See Note 5

49.

50. (1988), 64 C.R. (3d) 65

51. (1991), 7 C.R. (4th) 233 at 250

52. (1989), 68 Can. B. Rev. 94 at 131

53. Ibid.

54. Jodidon, supra at 254

55. (1991), 84 D.L.R. (4th) 161 (S.C.C.)

56. (1980), 2 S.C.R. 120

57. See R. v. Letendre (1991), 5 C.R. (4th) 159 (B.C.S.C.)

58. See the link made by the majority in Seabover between past sexual history and mistaken belief in consent at 265.

59. See Edgar, 27th November, 1991 B.C. Provincial Court, BCO165

60. See R. v. Letendre, Note 57

61. See R. v. Sansregret (1983), 31 C.R.N.S. 220

62. See R. v. Weaver (1990), 80 C.R. (3d) 396

63. (1985), 23 C.C.C. (3d) 289

64. Supra

65. The offence that has attracted the most attention to this constitutional question to date is that of the careless use or storage of firearms: see R. v. Finlay (1991), 6 C.R. (4th) 157, leave to appeal to the Supreme Court of Canada granted, November 14, 1991

66. (1990), 59 C.C.C. (3d) 161

67. Ibid. at 171, emphasis added.

68. Ibid. at 177. One of the issues in the case was the fact that Parliament had amended the "statutory rape" provisions after the charges had been laid in these cases to eliminate the absolute liability requirement and provide for a "due diligence" defence similar to the one provided for in this Bill for sexual

assault. There is no suggestion in any of the judgments that there is any constitutional infirmity in the amended "statutory rape" provision.

69. Supra at 179

70. 73 D.L.R. (4th) 40

71. (1987), 2 S.C.R. 636

72. (1990), 2 S.C.R. 633

73. Supra

74. [1989] 1 S.C.R. 1392

75. Ibid. at 1434-35

76. R. v. Nelson (1990), 75 C.R. (3d) 70; 38 O.A.C. 17

77. R. v. Gingrich (1991), 44 O.A.C. 290

78. Supra at 205

79. Ibid. at 216

80. It must be acknowledged that in dicta Cory J. listed sexual assault, along with fraud, murder, robbery and theft, as offences "so abhorrent to the basic values of society that they are universally recognized as crimes" (p.13). There is no authority for this statement as it applies to sexual assault in Canadian law.

81. Ibid. at 281-82

82. Lamer, p. 22; Cory, p. 20

83. (1985), 24 D.L.R. (4th) 536 (S.C.C.) at 568-69

84. Supra at 180

85. Supra at 251

86. Susan Estrich, Real Rape (Harvard University Press; 1987) at 93-98

87. 17 D.L.R. (4th) 577 (S.C.C.)

88. Ibid. at 598-91

89. See generally Toni Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980), 30 U.of T. L.J. 75

90. There is a more moderate argument against the proposed legislation which does not attack Parliament's power to punish "negligent" behaviour, but which suggests that such behaviour can only be constitutionally prohibited if it is treated by the law as separate and lesser than a sexual assault offence which reflects subjective mens rea in all its component elements. LEAF does not see this argument as having any constitutional basis whatsoever. A Parliamentary choice to create a lesser offence is strictly a policy choice, and not one that LEAF would encourage. Such a differentiated approach would simply shift some of the discretionary decision-making about gradations of culpability from judges at the sentencing stage to police and prosecutors at the stage of laying and proceeding with charges. Most crimes contain within them different degrees of culpability; it is the recognition of this that largely justifies the vastly different penalties available for an accused persons convicted of the same offence. As with most offences, a range of more or less culpable behaviours is presently included under the rubric of sexual assault - from the infamous "stolen kiss" discussed in the Court of Appeal judgment in R. v. Chase (1987), 37 C.C.C. (3d) 97 (S.C.C.) to forced sexual intercourse. It is absurd to conclude that an intentional kiss is more culpable than forcing sexual intercourse without taking reasonable care to ensure that there is consent. How, then, is it possible to argue that a concept of sexual assault which includes a "reasonable steps" component must be a separate offence to be "fundamentally just" as a matter of constitutional law?