S.C.C. No. 24568

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court (General Division))

BETWEEN:

L.L.A., THE SEXUAL ASSAULT CARE CENTRE OF THE PLUMMER MEMORIAL PUBLIC HOSPITAL and WOMEN IN CRISIS (ALGOMA) INC. OPERATING AS 'WOMEN'S OUTREACH'

Appellants
(Respondents)

- and -

ARDEN BEHARRIELL

Respondent
(Applicant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

ATTORNEY GENERAL OF CANADA

Intervenor

ABORIGINAL WOMEN'S COUNCIL, CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES DISABLED WOMEN'S NETWORK ONTARIO AND LEGAL EDUCATION AND ACTION FUND

Intervenors

- and -

CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW

Intervenor

- and -

CRIMINAL LAWYERS' ASSOCIATION

Intervenor

- and -

ATTORNEY GENERAL OF MANITOBA

Intervenor

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I N D E X

PART I: INTRODUCTION

1. The Intervenor Coalition (the "Coalition"), constituted by the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the DisAbled Women's Network Ontario and the Women's Legal Education and Action Fund, brings to this appeal extensive expertise in the areas of sexual violence against women and children, the intersection of inequalities based on sex, race and disability and vulnerability to sexual violence, the lived experiences of Aboriginal women and women with disabilities including the reality of their limited access to justice, and the application of constitutional law and equality jurisprudence to these contexts.

2. Members of the Coalition in this appeal brought this expertise to bear in written and oral argument in The Queen v. O'Connor. The issues addressed by the Coalition members in that appeal concerned production of the confidential records of complainants in sexual assault cases, in the context of different facts. In O'Connor, the complainants are Aboriginal women and the accused is a white man who was their priest, employer and principal, the incidents giving rise to the charges occurred 25 to 30 years ago when the four complainants were adults and the personal records being sought by the accused included inherently unreliable documents, both historic and contemporary in origin. In the present appeal, the complainant and the accused, who was a close family friend and neighbour, are white, the alleged assault occurred when the complainant was a child and the personal records are counselling records produced relatively recently.

3. The O'Connor case illustrates that Defence Applications for production implicate a broad range of personal records, including coercive institutional records made by, and in the control of, alleged perpetrators. The extensive range of records sought in O'Conner and other cases (see Appendix I) is not raised by this appeal however: what is being sought by the Respondent here are the counselling records of the Appellant generated by counsellors at a hospital-based sexual assault counselling centre and a community-based women's counselling centre. It is therefore counselling records that are the context in this appeal.

4. The Coalition is intervening in this appeal, as it did in O'Connor, to ensure that the equality guarantees in the *Charter* animated by applications for production of counselling records in criminal cases involving sexual violence are fully recognized and

addressed by this Court in its treatment of the issues arising in this case. This case is distinctly different on its facts from O'Connor and as a consequence, a different range of equality considerations are implicated. It is the submission of the Coalition that the issues raised by the O'Connor appeal cannot be subsumed in this appeal and require independent determination by this Court.

5. The equality guarantees which are fundamental to the issue of production of complainants' counselling records in sexual assault cases were not addressed by the trial Court whose decision to order production of the Appellant's records has been appealed to this Court. Indeed, in no reported Canadian case to date dealing with this issue have these constitutional imperatives been addressed.

6. In the Coalition's submission the production of the counselling records of complainants in sexual assault cases is a practice of gendered inequality, like sexual assault itself. As will be argued below, production of such records denies women's equality and equal right to security of the person, and distorts and undermines the criminal justice process: it therefore cannot be permitted in any sexual assault prosecution.

PART II: POINTS IN ISSUE

7. In keeping with its position in O'Connor, the Coalition submits that the constitutional rights of the female victims of sexual violence to security of the person without discrimination based on sex, race, disability or sexual orientation and to equal protection and benefit of the law cannot be fully recognized or vindicated in this appeal, or in criminal law and procedure more generally, unless courts acknowledge the social, historical, political and legal conditions of inequality in which sexual violence occurs and out of which legal principles and legal practices emerge, including those which govern Defence applications for production of personal records.

8. The Coalition does not take a position on other issues raised in this appeal.

PART III: ARGUMENT

Sexual Assault As A Practice of Sex-Inequality

9. This Court has recognized that there is a relationship between sexual violence against women and inequality between the sexes. In particular, it has recognized that: sexual assault is a gender-based crime insofar as 99 percent of the offenders are men and 90 percent of the victims are women; sexual assault is an attack on human dignity which constitutes a denial of any concept of equality for women; and that in a sexually unequal society, institutional-based sexual coercion, such as that in the workplace, family, and medical profession is an abuse of both sexual and social power used to underscore women's ascribed inferiority to men.

Conway v. The Queen, [1993] 2 S.C.R. 872, per La Forest J. at 877
Osolin v. The Queen [1993] 4 S.C.R. 595, per Cory J. at 669
Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1254, per Dickson C.J. at 1284
Norberg v. Wynrib, [1992] 2 S.C.R. 226, per LaForest J. at 261-62, 264, per McLachlin J. at 275, 278-79
M.(K.) v. M.(H.), [1992] 3 S.C.R. 6, per LaForest J. at 27, 32, 56

10. This Court has recognized sexual assault as a gendered crime that is overwhelmingly perpetrated by men against women.

R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577, per L'Heureux-Dubé J. at 648
Osolin v. The Queen, [1993] 4 S.C.R. 595, per Cory J. at 669

11. While sexual assault has been de-gendered in law it has not been de-gendered in fact. Women are targeted for sexual violence because they are women and all women are subordinated to the fear of sexual assault, irrespective of who they are.

S. Martin,"Some Constitutional Considerations on Sexual Violence Against Women" (1994) 32 Alta. L. Rev. No. 3, 535 at 544

Preamble to Bill C-49, An Act to amend the Criminal Code (sexual assault), 3d Sess., 34th Parl., 1991

12. The Coalition submits that there is a correlation between vulnerability to sexual violence and disadvantage: women and girls experiencing compounded inequalities are most at risk of sexual assault which may be directly motivated by these inequalities.

> E. J. Shilton & A. S. Derrick, "Sex Equality and Sexual Assault: In the Aftermath of *Seaboyer*" (1991) 11 Windsor Y.B. Access Just. 107 at 123

13. The particular vulnerability to sexual assault that is experienced by women who are Aboriginal, disabled, or Black was discussed by the Coalition in its factum in O'Connor (paragraphs 17 to 24). Other cases will expose the particular operation and intersection of more inequalities which continue not to be acknowledged or challenged by a legal system that fails to invoke the gurantees of section 15. It is material to acknowledge that neither the O'Connor case nor the present appeal represent all the dynamics of power and institutionalized oppression to which women are subject.

14. Studies show that two factors operate in a rapist's selection of a victim: vulnerability and availability. The more disadvantaged, dependent or relatively powerless a woman, the more she is vulnerable to sexual exploitation and violation by men, particularly by men she knows. Contrary to rape mythology, only a minority of sexual assaults are committed by strangers.

> Ministry of the Solicitor General, Canadian Urban Victimization Survey, "Female Victims of Crime" (Ottawa: 1985) at 2
>
> Report of the Committee on Sexual Offences Against Children and Youth (The Badgley Report): Sexual Offences Against Children and Youth, Vol. 1 (Ottawa: 1984) at 196-98
>
> M. Burt, "Rape Myths and Acquaintance Rape" in A. Parrot & L. Bechhofer, eds., Acquaintance Rape: The Hidden Crime (Toronto: 1991)

15. According to Statistics Canada's national Violence Against Women survey, children are especially vulnerable to sexual assault: in 1993, 63% of the victims of sexual assault were children or teenagers.

> J. Roberts, "Criminal Justice Processing of Sexual Assault Cases" Juristat Vol. 14, No. 7, March, 1994 at 6-7
>
> Final Report of the Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence -- Achieving Equality (Ottawa: 1993) at 28-29

16. The inequality of children and the dominance and power which adults exercise over them has also been recognized by this Court. This inequality is reflected by the fact that children, predominantly girls, are most often sexually abused by an adult, almost always male, who occupies a relationship of power or trust.

R. v. L. (D.O.), [1993] 4 S.C.R. 419, per Lamer J. at 428-29, per L'Heureux-Dubé J. at 439-41

17. It is submitted that as fathers, brothers, grandfathers, uncles, neighbours and family friends, men have access to, and can sexually exploit the vulnerability of, girls. As adults they are imbued with power and social status denied children and are regarded as more credible than their young victims, because of the privilege accorded them by their age and their gender. These dynamics operate effectively to immunize adult men from prosecution and conviction for sexual offences against children.

R. v. L. (D.O.), [1993] 4 S.C.R. 419, per L'Heureux-Dubé J. at 439-41

18. In the Coaltion's submission, the more socially powerless or stigmatized women and girls are, the more easily discredited and discreditable. The correlation between social status and credibility enhances perpetrators' expectations that their socially unequal victims will never report them or be credited if they do. To the extent law permits and even facilitates the stereotype-based discrediting of women, law colludes in immunizing those who exploit and then trade on status-based credibility and discreditation. In the result, and contrary to the *Charter*, the legal system directly reinforces the inequality of women.

Sexual Assault Law As A Practice of Sex-Inequality

19. The principles grounding our system of criminal justice have been characterized by this Court as designed to avoid unprobative and misleading evidence, encourage the reporting of crimes and protect the security and privacy of the witnesses, all of which conform to fundamental conceptions of justice.

R. v. Seaboyer, supra, per McLachlin J. at 604-06, 626

20. Notwithstanding these principles, all of which operate to uphold the integrity of the criminal justice system, equality remains more an elusive and abstract concept than a part of the reality of women and girls who participate in the prosecution of crimes of sexual violence against them.

C. Boyle & M. McCrimmon, *"R. v. Seaboyer:* A Lost Cause?" (1992) 7 C.R. (4th) 225

21. The history of sexual assault law and the legal practices that govern the prosecution of sexual assault offences is a history that reflects the social, political and legal disadvantage suffered by women. The substantive laws relating to rape and other sexual offences against women, and the evidentiary laws that governed the prosecution of crimes of sexual violence were promulgated in accordance with discriminatory myths and stereotypes about women and without regard for sex equality values.

R. v. Seaboyer, supra, per L'Heureux-Dubé J. at 665-74

22. Discriminatory myths and stereotypes about women and children have been exploited in sexual assault cases to good effect by Defence counsel. It is submitted that efforts to reform the law of sexual assault have not achieved real equality for women and girls.

E. Sheehy, "Canadian Judges and The Law of Rape: Should the Charter Insulate Bias?" (1989) 21 Ottawa L. Rev. 741 at 774, 776

23. It remains a fact that of the most serious crimes, sexual assault is one of the most unreported, the reasons for this being fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity, embarrassment and retribution.

Canadian Newspapers Co. v. Canada (A.G.), [1988] 2 S.C.R. 122, per Lamer C.J. at 131-32

R. v. Seaboyer, supra, per L'Heureux-Dubé J. at 649

R. v. L. (D.O.), supra, per L'Heureux-Dubé J. at 441-42

Case on Appeal, Affidavit of L.L.A., pp. 85-6, para. 4

24. Of the incidents of sexual assault reported to Statistics Canada in 1993, only 6% were reported to police. Fear of the attitudes likely to be shown by the police and the courts toward complainants continues to deter significant numbers of women from reporting.

Roberts, supra, at 6-7

25. This general lack of public confidence in the fair administration of justice in sexual assault cases was expressed by the Appellant in this case who deposed to the fact

that had she been advised her counselling records could be subject to public scrutiny by way of disclosure she would not have laid criminal charges in relation to the sexual assault. The counsellor with the Women's Outreach Centre described that in the two and a half years of her employment with the Centre during which time she has counselled "well over 120 people" only two clients "have made a report to the police about the abuse they have suffered." The personal intrusiveness and the humiliation associated with the criminal process of reporting and prosecution were cited as significant reasons for not coming forward.

Case on Appeal, Affidavit of L.L.A., p. 86, para. 8
Case on Appeal, Affidavit of Sherrie Baic, pp. 72-3, para. 10

26. The Appellant's decision not to report the incident until she was an adult was driven by fears of humiliation and her anxiety about being accessible to the Respondent, whom she was afraid might harm her. Throughout the Appellant's childhood and adolescence, which the Appellant experienced as the child of a single parent after the tragic death of her father when she was six, the Respondent was a proximate presence in her life. He was not only a very close friend of the Appellant's brother "for a very long time", the friend with whom she played was the Respondent's daughter. The Appellant's sister lived in the Respondent's building and the older siblings would take the Appellant with them to visit the Respondent at his apartment.

Case on Appeal, Preliminary Inquiry Evidence of L.L.A., pp. 39, 40, 43, 46, 64
Case on Appeal, Affidavit of L.L.A., p. 86, para. 4

27. That minority of women, like the Appellant, who have reported the sexual assaults against them have had their experience with respect to the prosecuting of these crimes distorted by the embedded discriminatory attitudes held by all participants in the criminal justice system: police, prosecutors, defense lawyers, jurors and judges.

R. v. Seaboyer, supra, per L'Heureux-Dubé J. at 654-57, 660-65

C. Schmitz, "'Whack' sexual assault complainant at preliminary hearing" The Lawyers Weekly, May 27, 1988 at 22

28. Myths about women's proclivities to invent or fabricate allegations of sexual assault operate to distort the criminal justice process, directly contributing to lower conviction rates for sexual assault than for other offences.

Osolin v. The Queen, supra, per L'Heureux-Dubé J. at 625

R. v. Seaboyer, supra, per L'Heureux-Dubé J. at 654

R. v. L. (D.O.), supra, per L'Heureux-Dubé J. at 443

29. The special and problematic nature of the treatment of complainants in sexual assault trials has been recognized by this Court. It is acknowledged in Seaboyer and Osolin that "groundless myths and fantasized stereotypes" about rape victims have improperly informed the determination of evidentiary issues in sexual assault trials, undermining the administration of justice and the role of the trier of fact. A recurring stereotype about women involves the assertion that women fantasize sexual assault: "Females are assumed to make up stories that sex occurred when in fact nothing happened . . . "

R. v. Seaboyer, supra , per McLachlin J. at 604, per L'Heureux-Dubé J. at 653

Osolin v. The Queen , supra, per Cory J. at 670-71

30. The "false concepts" and unjust assumptions that have been discredited by this Court include: women cannot be raped against their will; lack of resistance indicates consent; sexually active women are more likely to consent and more likely to lie about sex, and children are inherently less reliable than adults.

Osolin v. The Queen, supra, per Cory J. at 670

R. v. Seaboyer, supra, per McLachlin J. at 604, 630

R. v. M.L.M., [1994] 2 S.C.R. 3

R. v. W.(R), [1992] 2 S.C.R. 122 per McLachlin J. at 132-34, 136

31. The stereotypes described in Seaboyer and Osolin, and characterized by this Court in L.(D.O.) as equally applicable to sexually assaulted girls, do not represent an exhaustive inventory of the operative biases that stigmatize and de-humanize women and girls.

R. v. L. (D.O.), supra, per L'Heureux-Dubé J. at 441-42

R. v. Seaboyer, supra, per L'Heureux-Dubé J. at 654

32. As described by the Coalition in O'Connor, the foundational myth about women and sexual assault is the fabrication myth which advances the proposition that women are uniquely likely to fabricate sexual assault allegations, placing innocent men at risk of prosecution and wrongful conviction.

Burt, supra at 28

M. Torrey, "When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions" (1991) 24 U. Calif Davis L. Rev. 1013 at 1027

H. Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 Minn. L. Rev. 763 at 792-93

S. Bond, " Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) 16 Dalhousie L. J. 416 at 420 *et seq.*

33. The foundational myth that women have a propensity to fabricate rape charges, in turn has spawned a host of subsidiary myths: that women can prevent rape if they really want to; that "good" women do not get raped, only "bad" ones do and they "deserve" it; that women are inherently malicious and fickle, and that for reasons of maliciousness and pathology, they fabricate sexual assault allegations .

Burt, supra at 28-32

R. v. Seaboyer, supra, per L'Heureux-Dubé J. at 651-55

34. The mendacious, maliciously motivated or pathologically mistaken woman-as-complainant is a discriminatory characterization not supported by the social-science literature which reports sexual assault complaints as no more likely to be false than reports of other crimes.

Torrey, supra at 1028

35. Children are similarly objectified by myths and stereotypes and are presumed to have fantasized about and fabricated sexual abuse, notwithstanding the repudiation of these assumptions by social-scientific research.

A. Young, "Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues" (1992) 2 Can. J. Fam. L. 11 at 19

36. As observed by this Court, "[Y]oung children... are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken. "

R. v. Khan, [1990] 2 S.C.R. 531, per McLachlin J. at 542

37. Certain stereotypes are constructed around women who report sex crimes committed against them as children. The power differential between children and adults that makes children vulnerable to sexual abuse by adults also serves to silence child victims, often for years. The inability of children until adulthood to recognize the harm occasioned to them by the sexual abuse of an adult is a testament to the vulnerability of children and the effectiveness of adult exploitation of their inequality.

M.(K.) v. M.(H.), supra , per LaForest J. at 31, 47, 56

38. As acknowledged by this Court, children may not be able to report their sexual abuse until, through the marshalling of courage and emotional strength, they are "psychologically prepared for the consequences of that reporting."

R. v. L. (W.K.), [1991] 1 S.C.R. 1091, per Stevenson J. at 1101

39. The discrediting by this Court of the discriminatory myths described above does not mean that they have simply ceased to exist. Their presence and influence continues to distort the experience of women and girls who bring charges of sexual assault.

Osolin v. The Queen , supra, per L'Heureux-Dubé J. at 621

D. Majury, "Seaboyer and Gayme: A Study in InEquality" in Confronting Sexual Assault A Decade of Legal and Social Change (Toronto: 1994) 268 at 281

40. In the present appeal, the Respondent invoked a series of stereotypes with respect to the Appellant to justify the Applications for production of her counselling records: that she may have imagined the assault or "made it up", that she may have a pattern of making sexual assault allegations (a stereotype that operates in conjunction with the flawed presumption that such allegations, if made, would have been made in relation to innocent

men), that she is highly suggestible which may have resulted in her concocting a false story, that her "late" complaint indicates itself that the accusation is unreliable, that she lied about being assaulted.

Case on Appeal, Defence Submissions on Motion at pp. 118, 141, 143, 145

41. These myths, which deny the Appellant's agency and autonomy, are undercut by an equality analysis and the facts. The Appellant, as early as the third grade, disclosed the assault to friends. The Appellant as an adult, at her own initiative and not at the suggestion of her counsellors, reported the assault against her because she had heard that the Respondent had assaulted someone else. In describing her decision, the Appellant noted that she had a six-year old niece, and referred to her concerns that the Respondent not be able to do to someone else what he did to her.

Case on Appeal, Preliminary Inquiry Evidence of L.L.A., pp. 43, 44-45, 51, 56

42. The Appellant's inability to connect, for some time, the effects of the assault to other difficulties she was experiencing in her life is a feature of childhood sexual abuse recognized by this Court.

Case on Appeal, Preliminary Inquiry Evidence of L.L.A., pp. 43-44

M.(K.) v. M.(H.), supra, per LaForest J. at 28-29

R. v. L. (W.K.), supra

Production of Records As A Practice of Sex-Inequality

43. Women are the predominant victims of sexual violence, perpetrated principally by men. It is women therefore who participate in counselling and it is women's counselling records that are the subject of production applications brought by the men they prosecute for sex crimes. Production of counselling records, like sexual assault itself, is gendered, and as a consequence, an equality issue, implicating women's rights to equality and equal security of the person as guaranteed by the *Charter*.

44. In order for the law to give full recognition to equality it must be grounded in a theory of inequality. This formulation of equality theory and practice requires that practices, such as applications to produce personal records in sexual assault cases, be assessed in terms of whether they contribute to women's real inequality and whether the elimination of such practices will advance equality for women.

K., Lahey, "Feminist Theories of (In) Equality" in Equality and Judicial Neutrality (Toronto: Carswell 1987) at 83

45. When the counselling records of complainants are pursued or produced, complainants do not receive equal access to justice. The production of such records, or the potential for such production, deny their right to the equal benefit and protection of the law. Applications for production rely upon and reinforce biased attitudes about women that are rooted in faulty stereotypes. By so doing, such applications constitute a discriminatory practice that violates the equality guarantees of the *Charter*.

Egan v. Canada, [1995] S.C.J. No. 43 per Cory J. at para. 180

46. It is submitted that the production of complainants' counselling records operates to aggravate and perpetuate the disadvantage to which female sexual assault victims have historically been subject and as such constitute a violation of the *Charter's* equality guarantees. Equality requires the elimination of distinctions that "...treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."

Egan v. Canada, supra, per L'Heureux-Dubé J. at para. 36

47. In applications for production of complainants' counselling records, it is not merely the sensibilities of complainants that are at stake, it is their equal human status in court and in society. The issue is not merely, or even principally, one of privacy, but one of equality. Where does production, or even just the threat of it, leave women who have disclosed intimate details of their histories to counsellors? Like the now discredited use of a woman's past sexual history, will such records be used to improperly imply that such women are less believable or more likely to have consented? Will such records be de-contextualized and used to pathologize and stigmatize women who have counselling "histories"? In the Coalition's submission, the Courts, short of absolutely prohibiting production of such records, cannot prevent complainants' records being exploited for these and other real inequality-producing purposes.

48. Like past evidentiary rules now recognized as discriminatory, contemporary applications for production promote the groundless suspicion that women's reports of sexual violence are uniquely likely to be fabricated, and therefore complainants are subjected to exhaustive and oppressive credibility testing to prove them worthy of the law's protection. In the result, complainants' access to law's protection is conditioned on

legally sanctioned access to their private lives and disregard for their autonomy and dignity to a degree unparalleled in other criminal proceedings where credibility is at issue.

Osolin v. The Queen , supra, per L'Heureux-Dubé J. at 624-25
R. v. K.A.D., [1994] O.J. No. 1837 (Ont. Ct. P.D.)
R. v. Darby, unreported, February 24, 1994 (B.C. Prov. Ct.)
M. McCrimmon, "Developments in the Law of Evidence: The 1991-92 Term Truth, Fairness and Equality" 4 Sup. Ct. Law Rev. 225 at 272

49. The constitutional guarantees of equality and equal security of the person require that the victims of sexual violence be protected from the discriminatory treatment that accrues from the production to Defence of counselling records. This Court has acknowledged the importance of promoting the equality of disadvantaged groups, describing s.15 as the broadest of all *Charter* guarantees, one that applies to and supports all other rights guaranteed by the *Charter*. Its purpose is "to ensure equality in the formulation and application of the law" and "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society".

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, per McIntrye J. at 171
R. v. Swain, [1991] 1 S.C.R. 933, per Lamer C.J. at 992
Egan v. Canada , supra, per L'Heureux-Dubé J. at para. 38

50. Section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society. It, more than any other section of the *Charter*, "...recognizes and cherishes the innate human dignity of every individual."

Andrews v. Law Society of British Columbia, supra, per Wilson J. at 154
R. v. Turpin, [1989] 1 S.C.R. 1296, per Wilson J. at 1332-33
Egan v. Canada , supra, per Cory J. at para. 128

51. It is submitted that female sexual assault victims constitute a group who suffer social, political and legal disadvantage in our society and for whom the protection of equality rights under s. 15 were designed. As asserted by the Coalition in O'Connor, a legal practice which, in the name of fair trial rights, is premised on individual members

of disadvantaged groups most targeted for sexual violence not being worthy of credit on the basis of discriminatory assumptions, does not reflect, far less promote, "a society in which all are secure in the knowledge they are recognized at law as human beings equally deserving of concern, respect and consideration". Such a practice, it is submitted, overtly violates s.15.

Andrews v. Law Society of British Columbia, supra, per McIntyre J. at 171

52. It is the submission of the Coalition that judicial treatment of applications to produce complainants' personal records in sexual assault cases have reflected, exploited and reinforced the same discriminatory stereotypes about women, children and their sexuality that Parliament and this Court have endeavored to displace.

Criminal Law Amendment Act, S.C. 1980-81-82-83, c.125.
R. v. Seaboyer, supra
An Act to Amend the Criminal Code (sexual assault) S.C. 1992, c. 38 s. 276(3)

53. In the Coalition's submission, the escalating pursuit and production of complainants' personal records is but the latest manifestation of the operation of gender bias in sexual offence proceedings and is coincident with these equality-driven reforms. The burgeoning case law on production applications in sexual offence proceedings confirms that these applications rely upon and evoke discriminatory myths and stereotypes about women and sexual assault.

54. It is submitted that the increasing frequency and scope of applications and orders for production of personal records of complainants in sexual assault prosecutions, as well as the rationales offered for seeking records such as those being sought in this appeal, have no counterpart elsewhere in criminal law.

55. As noted by the Coalition in O'Connor, and updated for the purpose of this appeal, in the last 18 months virtually every request for disclosure of a Crown witness' personal records in a criminal proceeding arose in a case involving sexual violence. In terms of the violation of complainants' privacy, many of the disclosures sought and obtained significantly exceed that previously achieved through sexual history evidence alone.

Appendix I

56. The issue of production of complainant's counselling records in sexual assault cases is reflexively framed in Defence arguments as a fair trial right: The premise is: no records, no fair trial.

B. Spencer, "Medical health records of complainants are valuable tool in sexual assault cases" The Lawyers Weekly, December 2, 1994 at 10

Case on Appeal, Submissions of Defence on Motion at p. 114

57. The purpose of the criminal trial process is the attainment of truth. The principles of fundamental justice enshrined in s. 7 of the *Charter* require the truth-seeking process to be a fair one. The process must enable the trier of fact to "get at the truth and properly and fairly dispose of the case" while at the same time providing the accused with the opportunity to make a full defence.

R. v. Seaboyer, supra

58. Production of records in a sex unequal criminal justice system and culture will not assist "getting at the truth." The constitutional guarantee of a fair trial and the entitlement to make full answer and defence does not provide any right to promote and reinforce discriminatory assumptions about women and children. Nor do the fair trial rights of accused persons operate to "trump" the security of the person and equality rights of complainants. This Court has rejected a hierarchical approach to rights and has established that: "When the protected rights of two individuals come into conflict...*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, per Lamer C. J. at 877

59. The principles governing our criminal justice system and the rules that apply, including the rules of evidence, recognize the interests not only of accused persons but also those of complainants. Equality of fairness to complainants as well as accused persons is a fundamental tenet of the criminal justice process.

R. v. Corbett, [1988] 1 S.C.R. 670, per La Forest J. at 745-46

R. v. Seaboyer, supra

R. v. E. (A. W.), [1993] 3 S.C.R. 155, per Cory J. at 198

R. v. Levogiannis, [1993] 4 S.C.R. 475, per L'Heureux-Dubé J. at 485

An Act to Amend the Criminal Code (sexual assault), S.C. 1992, c. 38, s. 276(3)

Preamble to Bill C-49, An Act to amend the Criminal Code (sexual assault), 3d Sess., 34th Parl., 1991

60. Parliament's concerns for the fair trial rights of complainants in sexual assault cases are anchored in a long-established history of reformulating sexual assault laws to ensure greater fairness and access to justice for women. Parliament's grave concerns about the incidence of sexual violence and its interest in ensuring that such crimes are reported must be satisfied by denying production to Defence of women's personal histories as production denies women's equality rights and distorts the trial process.

61. Production and the threat of production will lead into the thicket of discriminatory myths and stereotypes that falsely define women and girls and the acts of sexual violence against them. Production applications will turn sexual assault trials into the "second rape."

Bond, supra at 420 *et seq.*

62. In the Coalition's submission, production of records operates to deny women's real equality. It is a practice that like hate speech against identifiable groups, sends a message that the lives and experiences of some individuals - women - are not worth as much as the lives and experiences of others - men. Such a message is antithetical to the essential democratic values which venerate the equality, humanity and dignity of all persons.

R. v. Keegstra, [1990] 3 S.C.R. 697, per Dickson C.J. at 756

63. Law exerts a powerful influence on societal attitudes: the exploitation in the criminal process of discriminatory stereotypes to oppress women by effect or by design, communicates the law's acceptance of such stereotypes and acts to maintain their *de facto* and *de jure* inequality.

S. Murthy, "Rejecting Unreasonable Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent" (1991), 79 California Law Rev. 541 at 568

64. It is submitted that the practice of production of counselling records in sexual offence proceedings has the effect of requiring certain complainants, those with a counselling history, to overcome the discriminatory presumptions that construct a relationship between the existence of such records and the complainants' credibility as witnesses. Other witnesses are not required to displace such presumptions in order to qualify for equal justice.

Osolin v. The Queen, supra, per L'Heureux-Dubé J. at 622

65. Production of personal records will disadvantage most the women who, because of their disadvantaged status, have been most documented - women such as immigrant women, institutionalized women, poor women. The O'Connor case is a powerful illustration of this point: the breadth of records concerning the complainants in that case is a direct consequence of their being poor Aboriginal women subjugated to the residential school system. The more a woman has been subject to the power and authority of the state, often because of her disadvantaged status, the greater the number of records that will be available for the Defence to pursue.

66. In the Coalition's submission, some women will simply choose not to report the sexual violence committed against them, or will not obtain counselling. The present appeal represents this inequality at work: the Appellant has asserted that had she known her records could be ordered produced, she would not have sought counselling and she would not have reported. It is submitted that production applications will operate to deny women who have been sexually assaulted the right to both seek counselling and pursue a prosecution of the offence against them. Women will therefore be forced into making choices unrelated to their best interests in order to avoid re-victimization in the court process.

Case on Appeal, Affidavit of L.L.A., at p. 86, para. 8

67. All women whose counselling records are implicated by Defence applications to produce are denied a fair trial, the full protection and benefit of the law and equal security of the person. The effect of production applications - on reporting, on women's decisions to seek counselling, on the prosecution process itself - denies women the equality rights promised to them under the *Charter*.

The Order for Production Underlying This Appeal

68. On February 15, 1994, Mr. Justice Loukidelis issued a production order requiring the Sexual Assault Care Centre of the Plummer Memorial Public Hospital and Women in Crisis (Agoma) Inc. ("the Record Holders") to produce to the Defence all records in their possession relating to the Appellant, L.L.A. for cross-examination purposes, limiting cross-examination to questions concerning possible contradictory statements found in the records with preliminary inquiry or trial testimony.

Case on Appeal: Reasons of Loukidelis, J. at pp. 191, 197-207

69. In the Coalition's submissions such limitations, even if enforced, do nothing to remedy the egregious injustice done to complainants in sexual assault cases whose personal histories become a focus of the judicial fact-finding process. Production of counselling records, irrespective of any restrictions placed on the extent or the use of the records, operates without exception to perpetuate the systemic and pernicious disadvantaging of women in the criminal justice process.

70. The rationale advanced by Defence in support of production of the records was related to the credibility of the Appellant and the unsubstantiated possibility that the allegations had been manufactured in the course of counselling . Defence counsel submitted that the records would have to reviewed in order to determine:

> ...what if any statement [the complainant] has made in the past with respect to the incident; whether there have been allegations of sexual abuse to other people, about other people; and what was the method of extracting the information from her during the 14 months she underwent sessions prior to going to see the police.

Case on Appeal: Defence Submissions on Motion, p. 141

71. The production order was made in this case notwithstanding there being no evidence that information concerning the assault was "extracted" by counsellors from the Appellant. To the contrary, the Appellant's evidence is that she brought up the issue of reporting the assault to the police, a decision she came to once she developed the strength to do so and the insight to realize that the assault was not her fault. The purpose for which the records were made and the circumstances in which their making occurred were also never analyzed by the Court below. At Women's Outreach the records were prepared

as "a tool [for the counsellor] to help the client" and were not intended to be scrutinized as part of adversarial legal proceedings.

Case on Appeal, Preliminary Inquiry Evidence of L.L.A. at pp. 44, 56
Case on Appeal, Affidavit of Sherrie Baic, p.73, para. 11

72. The purpose of counselling as empowerment for women who have experienced sexual violence is apparent from the Appellant's testimony. Counselling relationships that assure and maintain the woman's safety and trust operate to enable women to develop confidence and self-esteem and regain their autonomy and control.

Case on Appeal, Affidavit of Sherrie Baic, p. 72, paras. 6, 7, 9
Case on Appeal, Affidavit of L.L.A., p. 87, para. 10
Case of Appeal, Preliminary Inquiry Evidence of L.L.A., p.44

73. The fear that the records will be produced causes them to be kept in ways that do not always serve the clients' best interests or her recovery from the effects of the sexual assault. Production will operate to isolate women and deny them the right to empowerment and equality.

Case on Appeal, Affidavit of Bryna Coppel-Park, p. 83, para. 4
Case on Appeal, Affidavit of Sherrie Baic, p. 73, para. 14

74. As submitted by the Coalition in O'Connor, in a legal and social culture not constructed in accordance with principles of systemic inequality and discriminatory stereotypes, the order for production of the Appellant's counselling records would not have been made. Sex equality would have repudiated the illegitimate grounds for the application and affirmed the essential character and role of the Appellant's ss. 7, 15 and 28 rights.

75. The significance of this appeal is revealed as much by what the appeal does not concern as by what it does concern. This appeal does not engage the controversy of "false memory syndrome" as the evidence discloses that the Appellant never lost the memory of the incident. It is an appeal that does not concern the range of records or compounded inequalities raised by O'Connor. It is an appeal about confidential counselling for adult women survivors of childhood sexual abuse and their equality-

driven right to have records of that counselling secure from production to Defence in sexual assault prosecutions.

76. The Coalition submits that this Court should hold that, in the context of a sex-unequal legal and social culture, production of complainants' counselling records will aggravate women's inequality by perpetuating the discriminatory stereotyping and discrediting of women and will undermine the integrity of the justice system by deterring reporting and distorting the fact finding process. As a consequence, vindication of complainants' constitutional rights and the interests of justice can only be achieved by an absolute prohibition against the production of complainants' counselling records in sexual offence proceedings.

PART IV: ORDER REQUESTED

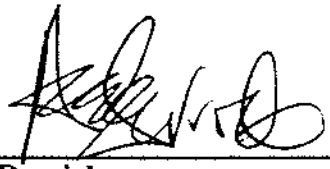
77. The Coalition respectfully requests:

i) That the Appeal be allowed;

ii) That the Order for Production of the records be quashed; and

iii) That Orders for Production of complainants' counselling records in sexual offence cases be declared a violation of the sex-equality guarantees in the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by



Anne S. Derrick

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PART V

TABLE OF AUTHORITIES

JUDGMENTS **PAGE**

ARTICLES **PAGE**

STATUTES **PAGE**

APPENDIX I

Recent cases where the defence sought access to Crown witnesses' records.

This appendix reviews recent[1] criminal cases in which defence counsel sought access to Crown witnesses' records such as diaries, or school, employment, therapy, medical or Child and Family Services files[2]. Extensive searches on QL databases revealed very few cases[3] *other than sexual violence cases* where such records were sought.

I. List of Cases Reviewed

1. *R. v. Allen* (27 January 1995) (Ont. Ct. J. (Prov. Div))
2. *Aube v. Beharriell* (1995), 21 O.R. (3d) 621 (CA)
3. *R. v. Barbosa* (24 August 1994) No. CRIM NJ(P) 4314/94 (Ont. Ct. J. (Gen. Div.))
4. *R. v. Bhaye* (22 September 1994) No. 21198585 P10101 (Alta. P. C. (Crim. Div.))
5. *R. v. Carosella* (24 November 1994) No.92-CR-03295 (On. Ct. J. (Gen. Div.))
6. *R. v. Comilang* (9 March 1994) Nos. 923198, 926658, 203/94 (Ont. Ct. J. (Gen. Div.))
7. *R. v. Cook* (28 February 1995) CR. AM. No.2127 (N.S.S.C)
8. *Re D.* (1994) 49 R.F.L. (3) 414 (B.C.P.C.)
9. *R. v. Darby* (24 February 1994) New Westminster Res. No. 35588 (B.C.P.C.)
10. *R. v. Darroch* (11 January 1994)(Ont.Ct.J.(Prov. Div.)) (See also: *R. v. Darroch* (May, 1994) (On.Ct.J.(Prov. Div.)) and *R. v. Darroch* (1994) 17 O.R. (3) 481 (Ont.Ct.J.(Prov. Div.)
11. *R. v. G.(L.J.)* (26 April 1995) File No. 9358/92 (On. Ct. J. (Gen. Div.))
12. *R. v. Guy* (10 March 1995) File No. 76/94 (Ont. Ct. J. (Gen. Div.))
13. *R. v. Fletcher* (20 December 1993) Kamloops Reg. No. 42528 (B.C.S.C.)
14. *R. v. Johansson* (9 December 1993) Vanc. Reg. No. CC931499 (B.C.S.C.)
15. *R. v. K.(A.D.)* (29 July 1994) Brockville (Ont. Ct. J. (Prov. Div.))
16. *R. v. K.(D.A.)* (9 January 1995) Campbell River Reg. No. 19932 (B.C.P.C.)
17. *R. v. Kennedy* (26 May 1994) Action # 93/00885 (Ont Ct. J. (Gen. Div.))
18. *R. v. Keukens* (11 April 1995) File No. 4885/94 (Ont. Ct. J. (Gen. Div.))
19. *R. v. Kliman* (29 November 1993) Vanc. Reg. No. CC930630 (B.C.S.C.) (On appeal.)
20. *R. v. L.E. and E.E.* (17 November 1993) Nos. 612624, C12625, C14451, C16448 (Ont. C.A.)
21. *R. v. Lefebvre* (28 March 1994) Quesnel Reg. No. 16072KC (B.C. Prov. Ct.)
22. *R. v. M.A.S.* (12 April 1994) Action No. 7831/93 (Ont. Ct. J. (Gen. Div.))
23. *R. v. M.K.* (1994), 30 C.R. (4) 94 (Ont. Ct. J. (Gen. Div.)
24. *R. v. M.(R.)* (10 March 1994) File No. 10199 (B.C.Yt.Ct.)
25. *R. v. Martinez* (23 December 1994) St. J. No.1905 (Nfld. S.C.T.D.)
26. *R. v. Olscamp* (3 June 1994) Action No. 92-12158 (Ont. Ct. J. (Gen. Div.))
27. *R. v. O'Connor* (1995) on appeal to the S.C.C.
28. *R. v. Ross (#1)* (2 June 1994) C.R. No. 12391 (N.S.S.C.)
29. *R. v. Ross (#2)* (13 February 1995) No. C.R. 12391 (N.S.S.C.)
30. *R. v. S. (J.)* (3 February 1995) No. CR. 02677 (N.W.T.S.C.)
31. *R. v. S. (T.J.)* (28 February 1995) No. AD-0501 (P.E.I.S.C. (Appeal Div.))
32. *R. v. Spurgeon* (1994) 148 A.R. 73 (Q.B.)
33. *R. v. Thurlow* (September 1994) No. 3504 (Ont. Ct. J. (Gen. Div.))
34. *R. v. Triffo* (6 April 1995) Q.B.C. No. 36 of 1994 J.C.R. (SK. Q.B.))
35. *R. v. VanTassell* (20 July 1994) Action S.Y. No. 3498 (N.S.S.C.)
36. *R. v. W.(D.D.)* (21 November 1994) Victoria Reg. No. 74632 (B.C.S.C.)

37. *R. v. W.(G.L.) [Weagle]* (1994), 128 N.S.R. (2) 254 (N.S.S.C.)
38. *R. v. W.(J.) [Wismayer]* (25 March 1994) No. 2235/93 (Ont. Gen. Div.)
39. *R.v. Wong* (8 November 1994) Victoria Reg. No. 72075 (B.C.S.C.)

II. Reasons[4] given by defence counsel for access to the complainant's[5] records

1. Reasons not stated in decision

a. *R. v. S. (T.J.)*: psychiatric records.
b. *R. v. Keukans*: school records.
c. *R. v. Guy*: psychiatric records.
d. *R. v. Olscamp*: order to compel complainant and mother to submit to an examination by a psychologist.
e. *R. v. W.(D.D.)*: medical, health and school records sought.
f. *R. v. Lefebvre*: Child and Family Service files.
g. *R. v. Johansson*: Young Offenders record, psychiatric, psychological and mental health files.
h. *R. v. Spurgeon*: pre-sentencing report, information collected by the military police on the complainant's friends, therapy and medical records.
i. *R. v. Comilang*: hospital and therapy records.
j. *R. v. Ross(#1)*: medical and therapy records, tape recordings of conversations between the complainant and reporters.
k. *R. v. O'Connor* (therapy records, school and employment records, some medical records).

2. Reliability (defence allegation that the complainant is suffering from a disease or disorder of the mind)

a. *R. v. Martinez*: school and counselling records on history of blackouts and multiple personality disorder.
b. *R. v. S.(J.)*: school and education records, departmental progress reports, medical and psychological assessments, departmental financial records relating to care for the complainant, legal documents, care supervision admissions reports, child welfare protection reports, general correspondence. (Some records dated back to the 16 year old complainant's birth).
c. *R. v. Martinez:* counselling, psychiatic, child welfare, and school records.
d. *Re D.*: Child and Family Services records; reliability questioned without any foundation.
e. *R. v. Barbosa*: school and Child and Family Service records; reliability questioned on the basis that a C.F.S. file existed.
f. *R. v. W.(G.L.):* medical and psychiatric records: reliability questioned without any foundation.
g. *R. v. M.(R.):* sexual abuse treatment records; reliability questioned because the complainants were quite young and they were in therapy already.
h. *R. v. Ross(#1)*: additional medical and therapy records sought.
i. *R. v. Ross(#2)*: access to medical files sought in order to determine name of psychiatrist.

3. **To challenge credibility**

   a. **general or unspecified challenge**

      i) *R. v. Martinez*: child welfare files on history of lying and on drug use.

      ii) *R. v. Ross(#2)*: access to medical files sought in order to determine name of psychiatrist.

      iii) *R. v. Cook*: counselling records.

      iv) *R. v. Darroch*: psychiatric and hospital records.

      v) *R. v. K.(A.D.)*: therapy records.

      vi) *R. v. M.K.*: birth control clinic records, school records, Child and Family Service records, hospital and therapy records.

      vii) *R. v. L.E. and E.E.*: Children's Aid Society records.

      viii) *R. v. M.A.S.*: Children's Aid Society records.

      ix) *R. v. Barbosa*: school and Child and Family Services records.

      x) *R. v. W.(G.L.)*: medical and psychiatric records.

      xi) *R. v. VanTassell*: Crown file on charges against the complainant in an unrelated criminal matter.

      xii) *R. v. Ross(#1)*: taped conversations of complainant with reporters.

   b. **prior inconsistent statement**

      i) *R. v. Carosella*: sexual assault crisis centre records.

      ii) *R. v. Triffo*: all medical, psychological, psychiatric, counselling and therapy records.

      iii) *R. v. K.(D.A.)*: "nonprofessional sexual abuse counsellor".

      iv) *R. v. G.(L.J.)*: rape crisis centre records.

      v) *A.(L.L.)* v. *Behariell*: counselling records.

      vi) *Re D.*: Child and Family Service records.

      vii) *R. v. Fletcher*: sexual assault centre records.

      viii) *R. v. Thurlow*: sexual assault centre records.

      ix) *R. v. M.K.*: birth control clinic records, school records, Child and Family Service records, hospital and therapy records.

      x) *R. v. W.(G.L.)*: medical and psychiatric records.

      xi) *R. v. M.(R.)*: sexual abuse treatment records.

   c. **recovered memories**

      Note: cases are marked with an asterisk (*) if the reasons indicate that there was evidence that the charges were laid after memories were recovered. In the unmarked cases, there is nothing in the reasons to indicate that recovered memories are involved.)

      i) **R. v. Allen*: medical records, Family Services records, psychiatric and other counselling records including group therapy records.

      ii) *R. v. Cook*: counselling records.

      iii) *A.(L.L.)* v. *Behariell*: counselling records.

      iv) **R. v. Kliman*: diaries and medical records.

      v) *R. v. Kennedy*: group therapy records.

      vi) *R. v. Wong*: therapy records.

d. past sexual history

i) *R. v. Martinez*: child welfare files on involvement in prostitution.

ii) *R. v. W.(D.D.)*: brother-sister incest alleged; adoption records in order to disprove accused's paternity.

iii) *R. v. Darby*: medical records and Child and Family Services records.

iv) *R. v. Bhaye*: medical and psychotherapy records for "medical history involving psychiatric care for hysterical reactions in connection with sexual activity".

v) *R. v. M.K.*: birth control clinic records.

e. past sexual abuse/ history of complaints against others /propensity to fabricate

i) *R. v. Martinez*: child welfare files on history of involvement in prostitution.

ii) *R. v. S.(J.)*: school and education records, departmental progress reports, medical and psychological assessments, departmental financial records relating to care for the complainant, legal documents, care supervision admissions reports, child welfare protection reports, general correspondence. (seem records dated back to the 16 year old complainant's birth).

iii) *A.(L.L.)* v. *Behariell*: counselling records.

iv) *R. v. Kliman*: diaries and therapy records.

v) *R. v. M.(R.)*: sexual abuse treatment records.

vi) *R. v. Darby*: medical records and Child and Family Services records.

vii) *R. v. Bhaye*: medical and psychotherapy records for "medical history involving psychiatric care for hysterical reactions in connection with sexual activity".

viii) *R. v. Barbosa*: school and Child and Family Services records.

f. motive to fabricate

i) *R. v. Triffo*: all medical, psychological, psychiatric, counselling and therapy records from one year before the date of the sexual assault to the date of the application.

ii) *R. v. M.K.*: school records, birth control clinic records, hospital and therapy records, Child and Family Service records.

iii) *R. v. W.(J.)*: Children's Aid Society records, personal diaries.

iv) *R. v. Thurlow*: sexual assault centre records--on any *animus* the centre's workers may have shown towards the accused.

v) *R. v. VanTassell*: psychological records.

g. Other

i) **Names of witnesses.** *R. v. K.(D.A.)*: "nonprofessional sexual abuse counsellor".

ii) **Corroboration of an alibi.** *R. v. S.(J.)*: school and education records, departmental progress reports, medical and psychological assessments, departmental financial records relating to care for the complainant, legal documents, care supervision admissions reports, child welfare protection reports, general correspondence. (Some records dated back to the 16 year old complainant's birth).

iii) **Bad character.** *R. v. Darby*: medical and Child and Family Services records.

III. Nature of Orders made

1. Access denied

a. Relevancy not established

i) *R. v. Martinez* (Relevancy of school records and child welfare records of one complainant not established; other records ordered released.)
ii) *R. v. Triffo*
iii) *R. v. Cook*
iv) *R. v. Darroch*
v) *R. v. Ross(#1)* (Some records had been previously released.)
vi) *R. v. Ross(#2)* (Issue had already been thoroughly canvassed.)
vii) *R. v. S. (J.)* The fact that another charge was dismissed does not lay a foundation for relevance.

b. Not in Crown's possession or control/ Lack of notice to record holder/ Access prohibited by statute

i) *R. v. Lefebvre*
ii) *R. v. W.(J.)*
iii) *Re D.*
iv) *R. v. Johanson*: Young Offenders record.

c. Against public policy

i) *R. v. W.(D.D.)*
ii) *R. v. Olscamp*

d. Privilege

i) *R. v. Guy*
ii) *R. v. Martinez* (psychiatric records only)

2. Access allowed

a. Ordered produced without restrictions on use by defence counsel

i) *A.(L.L.)* v. *Behariell*
ii) *R. v. Spurgeon*
iii) *R. v. Kennedy*
iv) *R. v. Thurlow*
v) *R. v. O'Connor*

b. Ordered disclosed to a judge who would determine if any materials should be released:

i) *R. v. Martinez*: counselling records and child welfare records should be reviewed. (Parts of the file relating to drug use and invovlement in prostitution had already been ordered turned over to defence counsel.)
ii) *R. v. S. (J.)*: after review, the judge ordered that some records be released and that they be used solely on the issue of competency to testify. Use restricted to these proceedings only.

iii) *R. v. K.(D.A.)*: after review, the judge ordered that the records be disclosed. He also found that the counselling records were not privileged.

iv) *R. v. Allen*: after review, the judge ordered that documents be dislcosed to defence counsel and that the names of third parties in group therapy be deleted.

v) *R. v. Kliman*: diaries reviewed and not ordered to be produced, some therapy records ordered produced.

vi) *R. v. Barbosa*: some documents ordered released.

vii) *R. v. K.(A.D.)*: after review, some therapy records ordered produced.

viii) *R. v. M.K.*

ix) *R. v. M.(R.)*: after review, complete therapy file ordered to be disclosed.

x) *R. v. VanTassell*: judicial review found nothing relevant.

xi) *R. v. W.(J.)*: diaries reviewed, not ordered disclosed.

c. **Committal quashed or charges stayed for non-disclosure**

i) *R. v. Comilang*

ii) *R. v. Carosella* (crisis centre had destroyed files befroe disclosure was ordered.)

d. **Issue should be determined by trial judge**

i) *R. v. Fletcher*: motions judge found that he lacked jurisdiction to order production of files not in the Crown's possession but he rejected that they were privileged or irrelevant.

ii) *R. v. M.A.S.*

iii) *R. v. W.(G.L.)*: motions judge expressed scepticism about relevance but found that he lacked jurisdiction to order production.

iv) *R. v. Darby*: defence already had some medical and Child and Family Service files, ordered that it was for the trial judge to determine if any more should be produced.

3. **Other Situations**

a. **Disclosure made before motion dealt with**

i) *R. v. Keukans*: as the complainant consented and as defence had already seen the records anyway, the court granted access.

ii) *R. v. Johansson*: psychiatrist's name had been disclosed prior to the motion, files not ordered to be produced at this time.

iii) *R. v. Bhaye*

iv) *R. v. Allen*: the complainant consented to release of some documents (psychiatric records).

b. *R. v. G.(L.J.)*: after a rape crisis centre had been ordered to turn records over, it was discovered that they had been destroyed before criminal proceedings were commenced. Application for a stay denied.

c. *R. v. S. (T.J.)*: after the accused had been convicted, the complainant's psychiatrist (who was also treating the accused) wrote to defence counsel stating that the evidence he had given at the trial might have been in error. Court of Appeal court ordered that the psychiatrist should be examined to see if a foundation could be laid for an application to admit fresh evidence.

1. All of the cases are from the last 18 months (November, 1993-May, 1995). Only cases in which reasons for decision are available on QL are reviewed and only the information in the reasons are analyzed.

2. Not included in this analysis are cases where defence sought access to statements from law enforcement officials, taped interviews with children made for use as evidence, or medical records from attendances immediately after a sexual assault for forensic purposes.

3. The non-sexual violence cases during the time period under review included defence counsel obtaining access to a witness' criminal record or to school and Child and Family Services files in child assault cases.

4. More than one reason for access to the records may have been given by the defence.

5. Unless otherwise noted.