Court File No. Ottawa 18-RD19579

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

CAITLAN COLEMAN

Applicant

- and -

JOSHUA BOYLE

Respondent

FACTUM OF THE INTERVENOR, WOMEN'S LEGAL EDUCATION AND ACTION FUND

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830
Toronto, ON M5J 2N7

Gillian Hnatiw (LSO: 48530C)
ghnatiw@agbllp.com

Julia Wilkes (LSO: 62070W)
jwilkes@agbllp.com

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Zohar Levy (LSO: 59861O)
zlevy@fasken.com

Lawyers for the Intervenor,
Women's Legal Education and Action Fund

TO: **BAYNE SELLAR ERTEL CARTER**
Barristers & Solicitors
500 – 200 Elgin Street
Ottawa, ON K2P 1L5

Ian Carter (LSO: 54792Q)
Tel: 613 236 0535
Fax: 613 236 6958
icarter@bsbcriminallaw.com

Lawyers for Caitlan Coleman

AND TO: **GREENSPON GRANGER HILL**
331 Somerset Street West
Ottawa, ON K2P 0J8

Lawrence Greenspon
Eric Granger
Ninetta Caparelli
Tel: 613 288 2890
Fax: 613 288 2896

Lawyers for Joshua Boyle

AND TO: **CROWN ATTORNEY'S OFFICE**
161 Elgin Street
Ottawa, ON K2P 2K1

Meaghan Cunningham
Jason Neubauer
Tel: 613 239 1200
Fax: 613 239 1214

Lawyers for Her Majesty the Queen

AND TO: **ABERGEL GOLDSTEIN & PARTNERS**
116 Lisgar Street
Ottawa, ON K2P 0C2

Howard Krongold
Tel: 613 235 9779
Fax: 613 235 8317

DAVIES BARRISTERS
352 Elgin Street
Ottawa, Ontario K2P 1M8

Meaghan McMahon
Tel: 613-230-0222
Fax: 613-691-1373

Lawyers for Proposed Intervenor, Criminal Lawyers' Association

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FACTUM OF THE PROPOSED INTERVENOR, WOMEN'S LEGAL EDUCATION AND ACTION FUND

PART I - FACTUAL OVERVIEW

1. LEAF has been at the forefront of protecting and promoting women's substantive equality in the context of sexual assault law and practice for almost 35 years. During this time, LEAF has intervened in over 150 cases in an effort to enhance equality for women and girls, including ground-breaking cases concerning the use of a complainant's sexual history in sexual assault trials.[1] LEAF's expertise includes the manner in which sexual assault proceedings engage the equality rights of women under s. 7, 8, 15, and 28 of the Charter, and is built on its unique consultative process that draws on the knowledge and experience of feminist legal academics, lawyers, and activists across Canada.[2]

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[1] *R. v. Seaboyer*, [1991] 2 SCR 577, 4 OR (3d) 383, LEAF Book of Authorities, Tab 10; *R. v. Darrach*, [2000] 2 SCR 443, 2000 SCC 46, Applicant's Book of Authorities, Tab 3.
[2] Affidavit of Elizabeth Shilton affirmed May 6, 2019, LEAF Motion Record, Tab 2 at paras. 4, 7, and 9, p. 9-13.

2. LEAF has long advocated for sexual assault laws that respect and promote women's substantive equality. LEAF was instrumental, along with other feminist activists, in securing the rape shield protections currently afforded by s. 276 of the *Criminal Code*.[3] Through this work, LEAF has developed particular expertise in equality rights within the criminal justice system.[4]

3. LEAF seeks leave to intervene in the within application to make submissions on the availability of *certiorari* to complainants in sexual assault proceedings, and to provide assistance to this Honourable Court in understanding the history and framework of s. 276, within which the errors on the face of the record occur. Specifically, LEAF proposes to make submissions regarding the need to consider the *Charter* rights of sexual assault complainants, as well as the ongoing and problematic use of rape myths in sexual assault proceedings.

4. With regard to the within case, LEAF relies on the facts as set out by the parties.

PART II - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. LEAF SHOULD BE GRANTED LEAVE TO INTERVENE

5. LEAF seeks leave to intervene in the *certiorari* application pursuant to the court's inherent jurisdiction over the trial process. The court is at liberty to grant leave where, as here, it is just and equitable to do so.

6. There is no express rule governing this type of proposed intervention in the Superior Court. Accordingly, courts have expressed various tests that parallel the considerations in appellate courts.[5] In *R v. N.S.*, the application judge considered whether the proposed intervenor (i) had a

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[3] Shilton Affidavit at para. 16, LEAF Motion Record at p. 15.
[4] Shilton Affidavit at paras. 19-20, LEAF Motion Record at p. 16-17.
[5] When determining whether to grant intervenor status in criminal cases, appellate courts consider a variety of factors, including: (a) the nature of the case; (b) the likelihood of the applicant making a useful contribution without causing injustice to the immediate parties; (c) the applicant's particular expertise on the subject matter of the appeal; (d)

real, substantial, and identifiable interest in the matter and (ii) had expertise to help the court appreciate fully the implications of the decision.[6] In *R v. Eurocenter Canada Ltd.*, the court stated that two-step test for intervention requires the court to (i) characterize the subject matter or nature of the proceeding and (ii) determine whether "the proposed intervenor has a direct interest (not merely a jurisprudential one) or their presence will be necessary for a decision (because their expertise will be of assistance)".[7] LEAF's proposed intervention herein satisfies either test.

7. The public interest nature of this application, and of the issues which have arisen, warrants intervention. The court's approach to this application, and in particular to determining whether the trial judge's decision disclosed an error of law on the face of the record, will have a significant impact on complainants in other sexual assault proceedings and on women more broadly as they decide whether to come forward and report sexual assault. Furthermore, the application and interpretation of s. 276 in this context gives rise to issues of public importance, including women's rights to equality, dignity, privacy and bodily and sexual integrity. Both the nature of the case and the issues that arise support LEAF's involvement as a proposed intervenor.

8. Finally, and critically, LEAF will make a useful contribution to the resolution of these issues. LEAF has decades of experience with the development of sexual assault jurisprudence and the impact of this jurisprudence on women's equality. This expertise includes an understanding of the pernicious myths and stereotypes that have made sexual assault particularly difficult to prosecute in the context of intimate and spousal relationships. The s. 276 decision in this case

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whether the arguments advanced by the intervener are repetitive of those of the appellant or the respondent; and (e) the extent that the proposed intervener is a well-recognized group with a special expertise and a broadly identifiable membership base (*R. v. Barton*, 2016 ABCA 68 at para. 4, LEAF Book of Authorities, Tab 4).

[6] *R. v. N.S.*, (2009), 95 O.R. (3d) 735 (S.C.J.), rev'd in part 2010 ONCA 670, aff'd 2012 SCC 72, LEAF Book of Authorities, Tab 7.

[7] *R. v. Eurocenter Canada Ltd.*, [2004] O.J. No. 2195, 71 O.R. (3d) 27 at paras. 29-30, LEAF Book of Authorities, Tab 5, citing *R v. De Trang*, 2002 ABQB 185.

amplifies myths and misconceptions about sexual assault in the spousal context. LEAF will offer important submissions on the disproportionate impact this flawed reasoning will have on female complainants, particularly in cases involving intimate partner violence.

9. LEAF has intervened in over a dozen Supreme Court of Canada appeals involving sexual assault and has developed a contextual analysis that addresses the section 7, 8, 15, and 28 *Charter* rights of sexual assault complainants. LEAF brings a nuanced understanding of a fair criminal trial process, which considers the rights and circumstances of complainants, the accused and society at large.[8] LEAF's significant experience and expertise will make a valuable contribution to assist the court in resolving the important questions of this application.

B. *CERTIORARI* IS AVAILABLE TO COMPLAINANTS IN RELATION TO DECISIONS UNDER S 276

10. In criminal proceedings, a third party – that is, a party other than the Crown or the accused – may challenge an order that finally decides that third party's rights. The procedure to be followed depends on the level of court that made the order at issue. Where the order was made by a provincial court, the challenge proceeds by way of application to a superior court judge for the extraordinary remedy of *certiorari*. Where the impugned order was made by a superior court, against which *certiorari* does not lie, the challenge proceeds by way of application for leave to appeal directly to the Supreme Court pursuant to s. 40(1) of the *Supreme Court Act*.[9] While the procedure varies, there is always an avenue by which a third party may seek redress.

11. There is no question that these avenues are available to complainants to challenge orders made in the course of sexual offences proceeding where those orders finally determine their

[8] Affidavit of Elizabeth Shilton sworn May 6, 2019 at paras. 16 and 17, LEAF Motion Record at p. 15.
[9] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at paras. 24-30, 40, LEAF Book of Authorities, Tab 2; *R. v. Primeau*, [1995] 2 SCR 60 at paras. 11-14, LEAF Book of Authorities, Tab 9; *A. (L.L.) v. B. (A.)*, [1995] 4 SCR 536 at paras. 22-26, LEAF Book of Authorities, Tab 1.

rights.[10] Equally, there is no question that an order permitting the accused to adduce evidence of the complainant's prior sexual history is of a "final and conclusive character" vis-à-vis the complainant.[11] Permitting the accused to adduce evidence of the complainant's sexual history – including, but not solely, through cross-examination – infringes her rights to privacy and equality, and potentially also her dignity and psychological well-being, in ways that cannot be undone.

12. Recent amendments to the *Criminal Code* granted complainants the right to appear and make submissions and to be represented by counsel in applications under s. 276. These amendments underscore the significance of a complainant in an application to permit the admission of sexual history evidence.[12] These amendments further "reflect the importance of balancing the varied interests at play in a criminal trial, namely, the rights of the accused; the truth-seeking functions of courts; and the privacy, security and equality interests of a complainant".[13]

C. *CERTIORARI* IS AVAILABLE TO COMPLAINANTS IN RESPECT OF AN ERROR OF LAW ON THE FACE OF THE RECORD

13. *Certiorari* is available to third parties in criminal matters "in a wider range of circumstances than for parties, given that third parties have no right of appeal". Whereas parties to criminal proceedings may only seek *certiorari* where the alleged error is jurisdictional in nature,

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[10] See *R. v. N.S.* (2009), 95 O.R. (3d) 735 (S.C.J.), rev'd in part 2010 ONCA 670, aff'd 2012 SCC 72, LEAF Book of Authorities, Tab 7 (*certiorari* found to be available to a complainant to challenge an order requiring that she remove her niqab to testify, initially on the basis of jurisdictional error, and on appeal on the basis of error of law as discussed in detail below); *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, LEAF Book of Authorities, Tab 1 (the Supreme Court has jurisdiction under s. 40(1) of the *Supreme Court Act* to entertain an appeal by the complainant and other third parties from an order requiring production of the complainant's therapeutic records); *R. v. Mills*, [1999] 3 S.C.R. 668, LEAF Book of Authorities, Tab 6 (complainant granted leave to appeal pursuant to s. 40(1) of the *Supreme Court Act* from the interlocutory order of a superior court judge that the *Criminal Code* provisions governing access to records relating to complainants were unconstitutional).

[11] *R. v. Awashish*, 2018 SCC 45 at para. 20, Applicant's Book of Authorities, Tab 1.

[12] *Criminal Code*, ss. 278.94(2) and 278.94(3).

[13] Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act. Second Reading, *Debates of the Senate*, 42-1 No. 182 (February 15, 2018) at 4845 (Hon. Murray Sinclair), LEAF Book of Authorities, Tab 11.

third parties may also seek *certiorari* in respect of an alleged error of law on the face of the record.[14]

14. An error of law "on the face of the record" need not be blatant or merely technical in nature. On the contrary, the case law establishes that an error of law on the face of the record is made out where the challenged order:

(a) unjustifiably infringes the third party's rights under the *Charter of Rights and Freedoms*;

(b) arises from a failure to consider a relevant factor or alternative measure, or another such omission; or

(c) is inconsistent with the governing law.[15]

(a) Unjustifiable Infringement of *Charter Rights*

15. In *Dagenais*, the Supreme Court concluded that a publication ban that disproportionately infringed a third party's right to freedom of expression constituted an error of law on the face of the record.[16]

16. In accordance with that binding precedent, the Ontario Court of Appeal held in *N.S.* that an order requiring a complainant to remove her niqab to testify would similarly, absent adequate justification, offend *Charter* principles and constitute an error of law.[17]

17. Doherty JA, writing on behalf of the court, went on to hold that where a third party brings a *certiorari* application on the basis that the order is contrary to *Charter* principles, "the Superior

[14] *R. v. Awashish*, 2018 SCC 45 at para. 12, Applicant's Book of Authorities, Tab 1.
[15] *R. v. Mullings*, 2012 ONSC 2910 at para. 28 ("*Mullings*"), Applicant's Book of Authorities, Tab 2. Cited with approval in *R. v. Raza*, 2017 ONSC 7090 and *R. v. Oleksiuk*, 2013 ONSC 5258; *R. v. Branson*, 2018 ONSC 6014*; R. v. Black*, 2018 ONSC 1430.
[16] *Dagenais*, *supra* at paras. 82-83 (per Lamer C.J.), LEAF Book of Authorities, Tab 2.
[17] *N.S.*, *supra* at para 24, LEAF Book of Authorities, Tab 7.

Court must review the correctness of the challenged decision in determining whether to grant extraordinary remedy relief. The scope of review on the *certiorari* application will be the same as the scope of review on an appeal where correctness is the applicable standard of review."[18]

18. The proper approach to the interpretation and application of s. 276 is discussed in detail below. It is essential to note at the outset, however, that s. 276 is centrally concerned with protecting *Charter* rights, and, where necessary, reconciling the right of the accused to make full answer and defence with the rights of complainants and others to privacy and equality.

19. Section 276 simultaneously protects the integrity of the trial process and the complainant's privacy and equality rights by excluding evidence that is irrelevant and misleading. Sexual history evidence that is sought to be adduced in explicit or implicit support of one of the twin myths – that a complainant is more likely to have consented or is less worthy of belief by reason of the sexual nature of an activity she previously engaged in – is never relevant. Excluding that evidence has no impact on the rights of the accused because "full answer and defence does not include the right to evidence that would distort the search for truth inherent in the trial process."[19]

20. Equally, an order permitting the accused to adduce sexual history evidence that is not probative of an issue at trial will constitute an unjustified infringement of the complainant's dignity, privacy, and equality. An accused never has a right to adduce irrelevant evidence.[20] There is accordingly nothing with which to balance or reconcile the rights of the complainant.

21. Admitting such evidence would, in contrast, have a profoundly deleterious impact on the complainant's right to privacy and equality. The prevalence of sexual violence, and the difficulties

[18] *N.S.*, *supra* at para 24, LEAF Book of Authorities, Tab 7. The Court of Appeal's reasons with respect to the scope of review were not addressed on the appellant's further appeal to the Supreme Court.
[19] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 76, LEAF Book of Authorities, Tab 6.
[20] *R. v. Darrach*, 2000 SCC 46 at para. 37, Applicant's Book of Authorities, Tab 3.

in prosecuting such violence, are fundamental components of sex inequality for women in this country. Pernicious and persistent myths and stereotypes concerning sexual assault and sexual assault complainants "reduce the entitlement of individuals to the equal recognition and protection of the law. This inequality falls most heavily on women since sexual assault has been, and continues to be, largely a gender-based crime. The vast majority of victims are female, and the vast majority of perpetrators are male."[21]

22. An order permitting the accused to adduce evidence of prior sexual history in support of one of the twin myths or where that evidence is otherwise irrelevant therefore constitutes an error of law on the face of the record. There is simply no justification for the gross violation of the complainant's privacy and equality rights that would result.

23. Finally, an accused does not have the right to adduce even relevant sexual history evidence if that evidence would be more prejudicial to the administration of justice than it is probative to an issue at trial, having regard to the factors set out in ss. 276(3).[22] An order permitting the accused to adduce sexual history evidence that is more prejudicial than probative would therefore also constitute an error of law on the basis that it offends *Charter* principles.

24. Thus, in the context of s. 276, where the error of law alleged on application for *certiorari* is the failure to follow binding precedent governing the assessment of relevance and/or to properly weigh the probative value of the evidence relative to its prejudicial effect, *Charter* considerations are necessarily also engaged. Such an error will also constitute an unjustified infringement of the complainant's *Charter* rights.

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[21] *R. v. Barton*, 2017 ABCA 216 at para. 8 (appeal to SCC heard but not decided), LEAF Book of Authorities, Tab 4.
[22] *R. v. Darrach,* 2000 SCC 46 at paras. 38-43, Applicant's Book of Authorities, Tab 3.

(b) Omission of a relevant factor

25. All sexual history evidence is presumptively inadmissible in sexual assault proceedings.[23] This presumptive inadmissibility ensures that an accused cannot adduce irrelevant, non-probative sexual history evidence based on discriminatory beliefs and rape mythologies.

26. Where, as here, the accused denies that the sexual activity set out in the charges occurred, **the complainant's prior sexual history will rarely be relevant**.[24]

27. In determining whether the trial judge's application of s. 276 in this case constituted an error on the face of the record, the legislative history and purpose of the rape shield provisions must be considered.

(i) History of the Rape Shield Provisions

28. Rape shield provisions were first introduced by Parliament approximately 40 years ago in an effort to protect women from invasive cross-examinations rooted in discriminatory myths and stereotypes.[25] These myths and stereotypes have a highly prejudicial effect on the assessment of the complainant's credibility and distort the truth-seeking function of the criminal trial.[26]

29. Since that time, the various iterations of the rape shield provisions have played a central role in increasing trial fairness and improving access to justice for survivors of sexual assault.

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[23] *Criminal Code*, RSC, 1985, c C-49, s 276(1) and (2); *R v. T(M)* 2012 ONCA 511 at para. 42, Applicant's Book of Authorities, Tab 4 ("Section 276(1) excludes evidence that the complainant "engaged in sexual activity" with another person at another time and place if it is tendered for either purpose proscribed by the subsection. The exclusionary rule in s. 276(2) rejects all evidence of other sexual activity unless the evidence satisfies each of the requirements of the inclusionary exception.").

[24] *R v. Darrach,* [2000] 2000 SCC 46 at para. 58, Applicant's Book of Authorities, Tab 3.

[25] *R v. Seaboyer*, [1991] 2 SCR 577, 4 OR (3d) 383 at paras. 183-203, LEAF Book of Authorities, Tab 10; The first provisions were enacted in 1976 and excluded sexual history evidence with persons other than the accused (s. 142).

[26] *R v. Seaboyer*, [1991] 2 SCR 577, 4 OR (3d) 383 at para. 52, LEAF Book of Authorities, Tab 10; *R v. Darrach*, at paras. 24 and 37. Applicant's Book of Authorities, Tab 3; *R v. Mills*, [1999] 3 SCR 668 at para. 74, LEAF Book of Authorities, Tab 6; Preamble to Bill C-49 *An Act to Amend the Criminal Code (Sexual Assault)*, SC 1992, c. 38 as cited in Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at 48 and 56, LEAF Book of Authorities, Tab 12.

When Parliament reformulated s. 276 in 1992 in response to the Supreme Court's decision in *R. v. Seaboyer*, it chose to maintain the presumptive exclusion of all sexual history evidence and reaffirmed the bedrock notion that a complainant's sexual history is "rarely relevant" to her credibility or the charge.[27] Judges are required to be vigilant and to scrutinize the proposed evidence with a view to preventing discriminatory myths and stereotypes from tainting the trial process.

(ii) Parliament acts to prevent courts from misapplying s. 276

30. Critiques of the jurisprudence that developed under s. 276 suggested that the provision was being applied unevenly, with trial judges frequently misapplying or misinterpreting the test.[28]

31. First, many courts failed to appreciate that there are no exceptions to the exclusion of twin myths evidence. Pursuant to s. 276, judges have **no** discretion to permit evidence that links to one or both of the twin myths.[29]

32. Second, courts often failed to appreciate that s. 276 requires trial judges to consider all discriminatory stereotypes or belief (*i.e.* all rape myths) and that prohibition created by s. 276 is thus broader than the twin myths.[30]

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[27]Preamble to Bill C-49 *An Act to Amend the Criminal Code (Sexual Assault)*, 34th Parl, 3rd Sess. 1992, (as passed by the House of Commons 15 June 1992) "AND WHEREAS the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny." as cited in Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at 48 and 56, LEAF Book of Authorities, Tab 12.

[28] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at 53-54, LEAF Book of Authorities, Tab 12.

[29] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at 57-58, LEAF Book of Authorities, Tab 12.

[30] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at 57-58, LEAF Book of Authorities, Tab 12; *R v. Osolin*, [1993] 4 SCR 595 at paras. 35-38, LEAF Book of Authorities, Tab 8. See for example, *R. v. S(JS)*, 2014 BCSC 804, *R v. Carrie*, 2012 ONSC 1687 at para. 11; *R v. Beilhartz*, 2013 ONSC 5670 at para. 12; Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complaints, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 Alta L Rev743 at 755.

33. Third, courts have encountered particular difficulty understanding and identifying the pernicious manner in which discriminatory myths and stereotypes operate in the context of intimate partner and spousal relationships.[31]

34. In response to these problems, Parliament recently amended s. 276 to provide judges with additional guidance on the proper application of the test for adducing sexual history evidence.[32] Significantly, it also chose to empower complainants by vesting them with a right to standing and to counsel in rape shield proceedings.

(iii) Section 276 mandates a two stage, multi-factor test

35. Section 276(1) creates a complete prohibition on the admission of sexual history evidence to support either or both of the "twin myths", *i.e.* the inference that a sexual assault complainant is more likely to have consented to the sexual activity at issue because she previously consented to other sexual activity and/or that she is less worthy of belief because of her sexual history.[33] A complainant's sexual history will **never** be relevant if it is sought to be introduced for one of these purposes, as "[the twin myths] are not probative of consent or credibility and can severely distort the trial process."[34] If the accused seeks to lead the evidence to support one of the twin myths, the trial judge **must** dismiss the application – as it will fail at the first element of the ss. 276(2) test for admissibility.[35]

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[31] Melanie Randall, "Sexual Assault in Spousal Relationships, Continuous Consent, the Law: Honest but Mistaken Judicial Beliefs", 2008 32-2 Manitoba Law Journal 144, LEAF Book of Authorities, Tab 13.

[32] Specifically, Parliament added s. 276(2)(a) which should eliminate the misconception that the former s. 276(2) provided an exception to s. 276(1). The new provision expressly states that if the accused seeks to adduce evidence which goes to one or both of the twin myths, it is inadmissible.

[33] *Criminal Code*, RSC, 1985, c C-46, s 276(1) (a) and (b); Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at 53, LEAF Book of Authorities, Tab 12.

[34] *R. v. Darrach,* 2000 SCC 46 at para. 33, Applicant's Book of Authorities, Tab 3.

[35] 276(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the

36. If, instead, the accused seeks to adduce sexual history evidence for a purpose other than to support the twin myths, the remaining elements in the test for admissibility in ss. 276(2) are engaged. Thus, before admitting the evidence, the judge must also be satisfied that the evidence:

(b) is relevant to an issue at trial;

(c) is of specific instances of sexual activity; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[36]

37. All elements of this test **must** be satisfied for the evidence to be admitted. Further, when conducting the analysis, judges **must** consider the eight factors set out in ss. 276(3), including the "need to remove from the fact-finding process any discriminatory belief or bias." In referencing 'discriminatory beliefs and biases' **after** evidence linked to the twin myths has been screened out, Parliament was clearly directing judges to consider **other** discriminatory, equality impairing beliefs and biases, including:

a) "ongoing sexual partners do not sexually assault one another"[37]

b) "women are not reliable reporters of events"

c) "women are prone to exaggerate"[38]

d) "women falsely report having been raped to get attention"[39]; and

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subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence (a) is not being adduced for the purpose of supporting an inference described in subsection (1)…

[36] *Criminal Code* s. 276(2).

[37] *Seaboyer* at para. 163, LEAF Book of Authorities, Tab 10.

[38] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police,* 1998 CarswellOnt 3144, [1998] O.J. No. 2681, 126 C.C.C. (3d) 12, 160 D.L.R. (4th) 697, 39 O.R. (3d) 487, 43 C.C.L.T. (2d) 123, 60 O.T.C. 321, 80 A.C.W.S. (3d) 894 at para 13, LEAF Book of Authorities, Tab 3.

e) the existence of a spousal or intimate relationship itself creates "a presumption of ongoing or continuous consent to sexual engagement".[40]

38. The Supreme Court has repeatedly recognized the disadvantage that women suffer as a result of stereotypes in society and the justice system.[41] Thus, it is significant that ss. 276(3) also directs judges to consider "society's interest in encouraging the reporting of sexual assault offences" and the "potential prejudice to the complainant's personal dignity and right of privacy."[42] In so doing, Parliament explicitly directed judges to weigh the impact that adducing sexual history will have on the complainant, as well as on women more broadly as they decide whether to come forward and report sexual assault.[43]

39. The correct application of s. 276 requires the judge to start by rigorously scrutinizing the purpose for which the accused proposes to adduce sexual history evidence and ensure that it is logically connected to his defence.[44] In so doing, the judge must be alert to the pernicious nature of the twin myths, as well as the other prejudicial myths and stereotypes that can distort the truth-seeking function of the criminal trial.

40. Frequently, the twin myths lurk behind more innocuous lines of arguments. Here, the accused seeks to adduce evidence of his prior sexual relationship with the complainant to support an argument that she has, consciously or unconsciously, "inserted" elements of the consensual

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[39] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police,* 1998 CarswellOnt 3144, 39 O.R. (3d) ("*Jane Doe"*) at para. 13, LEAF Book of Authorities, Tab 3.
[40] Melanie Randall, "Sexual Assault in Spousal Relationships, Continuous Consent, the Law: Honest but Mistaken Judicial Beliefs", 2008 32-2 *Manitoba Law Journal* 144, LEAF Book of Authorities, Tab 13.
[41] *R. v. Seaboyer*, [1991] 2 S.C.R. 577(S.C.C.), LEAF Book of Authorities, Tab 10; see also *R v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.); *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.); *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46 (S.C.C.).)
[42] *Criminal Code* s. 276(3)(b) and (f).
[43] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at p. 80, LEAF Book of Authorities, Tab 12.
[44] *R v. Darrach* at para. 57-59, Applicant's Book of Authorities, Tab 3.

sexual activities into her evidence and then "added" features to make those activities non-consensual.

41. At first blush, this argument does not appear to invoke either of the twin myths. However, upon conducting the rigorous scrutiny mandated by Parliament in s. 276, the prejudicial reasoning at its heart is revealed. Essentially, the accused here argues that his prior consensual relationship with the complainant is relevant to the reliability and/or credibility of her evidence, that her memory is less reliable or her lie is more persuasive, because they have had sex before. Boiled down, both lines argument suggest that the complainant is inherently less believable as a result of their prior sexual activity. In other words, by reason of the sexual nature of that activity, she is less worthy of belief. This directly engages the second of the twin myths; if allowed to stand, the decision would render sexual history evidence admissible in almost every spousal assault case. Pursuant to ss. 276(1), the trial judge's decision to include this evidence is a blatant error on the face of the record.

42. Alternatively, if the accused's proposed purpose does not engage twin myths, the court must be satisfied that the complainant's sexual history: i) is **relevant** to an issue at trial; ii) involves **specific** instances of sexual activity; and iii) has **significant probative value** that is not substantially outweighed by the danger of prejudice to the proper administration of justice. These requirements must be weighted with regard to the factors set out in ss. 276(3), including the "need to remove from the fact-finding process any discriminatory belief or bias".

43. In this case, the suggestion is that the complainant's prior intimate relationship with the accused is relevant to the reliability/credibility of her memory. Using their sexual history to suggest that it is more likely that she is misremembering or fabricating her allegations goes to the

heart of the rape myths identified in *Jane Doe, supra, i.e.* that "women are not reliable reporters of events", that "women are prone to exaggerate" and/or that "women lie about being raped".[45]

44. This line of reasoning, if allowed, would have serious implications for any woman reporting domestic violence or sexual abuse in the context of ongoing consensual relationships. To accept that a couple's past sexual history is wholesale relevant to a complainant's reliability/credibility simply because the complainant acknowledges some frailty in her memory would effectively nullify the entire purpose of s. 276, particularly in the context of abusive spousal relationships.

(c) Failing to follow binding precedent

45. Finally, the trial judge errored on the face of the record by disregarding binding authority from the Court of Appeal for Ontario.

46. In *R. v. L.S.* the Court of Appeal conducted the s. 276 analysis set out above and concluded as follows:

> I also see no relevance, based on the material filed in support of the application, to any fact in issue of evidence of specific instances of other sexual activity involving E.K. and the appellant, or the details of their sex life. **<u>The appellant's submission that evidence including details of other consensual sexual activity could somehow make the appellant's assertion that the incident alleged by E.K. never happened more credible, makes no sense to me.</u>** This was not a case in which the appellant testified that whatever sexual incident E.K. was talking about, must have been consensual, but that because of the many consensual sexual encounters they had, he could not recall the details. The appellant insisted that the encounter described by E.K. did not and could not have happened as it was entirely inconsistent with the nature of their sexual relationship.[46] [emphasis added]

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[45] *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police,* 1998 CarswellOnt 3144, [1998] O.J. No. 2681, 126 C.C.C. (3d) 12, 160 D.L.R. (4th) 697, 39 O.R. (3d) 487, 43 C.C.L.T. (2d) 123, 60 O.T.C. 321, 80 A.C.W.S. (3d) 894 at para. 13, LEAF Book of Authorities, Tab 3.
[46] *R v. L.S.*, 2017 ONCA 685 at para. 73, Applicant's Book of Authorities, Tab 8.

47. It is unnecessary to resolve the source of complainant's allegedly inserted memories in order to assess the reliability or credibility of her evidence. Where, as here, counsel for the accused has tested the complainant's evidence through cross-examination, there is no need to go further to try to determine the "source" of any frailties in her memory.

PART III – ORDER AND COSTS

48. LEAF takes no position on the ultimate disposition of this application. LEAF seeks no costs, and requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of May, 2019.

Gillian Hnatiw / Julia Wilkes / Zohar Levy

For:

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830
Toronto, ON M5J 2N7

Gillian Hnatiw (LSO: 48530C)
ghnatiw@agbllp.com

Julia Wilkes (LSO: 62070W)
jwilkes@agbllp.com

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Zohar Levy (LSO: 59861O)
zlevy@fasken.com

Lawyers for the Intervenor,
Women's Legal Education and Action Fund

SCHEDULE "A"

LIST OF AUTHORITIES

Cases

1. *A. (L.L.) v. B. (A.)*, [1995] 4 SCR 536

2. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835

3. *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CarswellOnt 3144, [1998] O.J. No. 2681, 126 C.C.C. (3d) 12, 160 D.L.R. (4th) 697, 39 O.R. (3d) 487, 43 C.C.L.T. (2d) 123, 60 O.T.C. 321, 80 A.C.W.S. (3d) 894

4. *R. v. Barton*, 2016 ABCA 68

5. *R. v. Eurocenter Canada Ltd.*, [2004] O.J. No. 2195, 71 O.R. (3d) 27

6. *R. v. Mills*, [1999] 3 S.C.R. 668

7. *R. v. N.S.*, (2009), 95 O.R. (3d) 735 (S.C.J.), rev'd in part 2010 ONCA 670

8. *R v. Osolin*, [1993] 4 SCR 595

9. *R. v. Primeau*, [1995] 2 SCR 60

10. *R. v. Seaboyer*, [1991] 2 SCR 577, 4 OR (3d) 383

Secondary Sources

11. *Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*. Second Reading, Debates of the Senate, 42-1 No. 182 (February 15, 2018)

12. Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1

13. Melanie Randall, "Sexual Assault in Spousal Relationships, Continuous Consent, the Law: Honest but Mistaken Judicial Beliefs", 2008 32-2 Manitoba Law Journal 144.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. ***Criminal Code*, R.S.C., 1985, c. C-46**

Evidence of complainant's sexual activity

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant:

a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
b) is less worthy of belief.

Conditions for admissibility

276 (2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence:

a) is not being adduced for the purpose of supporting an inference described in subsection (1);
b) is relevant to an issue at trial; and
c) is of specific instances of sexual activity; and
d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

276 (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court or justice shall take into account:

a) the interests of justice, including the right of the accused to make a full answer and defence;
b) society's interest in encouraging the reporting of sexual assault offences;
c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
d) the need to remove from the fact-finding process any discriminatory belief or bias;
e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
f) the potential prejudice to the complainant's personal dignity and right of privacy;

- **g)** the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- **h)** any other factor that the judge, provincial court judge or justice considers relevant.

Complainant not compellable

278. 94 (2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

Right to counsel

278.94 (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

HER MAJESTY THE QUEEN	-and-	CAITLAN COLEMAN	-and-	JOSHUA BOYLE
Respondent		Applicant		Respondent

Court File No. Ottawa 18-RD19579

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Ottawa

FACTUM OF THE INTERVENOR,
WOMEN'S LEGAL EDUCATION AND ACTION FUND

ADAIR GOLDBLATT BIEBER LLP
95 Wellington Street West
Suite 1830
Toronto, ON M5J 2N7

Gillian Hnatiw (LSO: 48530C)
Tel: 416 941 5895
Fax: 647 689 2059
ghnatiw@agbllp.com

Julia Wilkes (LSO: 62070W)
Tel: 416 351 2790
Fax: 647 689 2059
jwilkes@agbllp.com

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Zohar Levy (LSO: 59861O)
Tel: 416 868 7877
Fax: 416 364 7813
zlevy@fasken.com

Lawyers for the Intervenor
Women's Legal Education and Action Fund