Court File No: C19455

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

AND

ANDREW SCOTT DARRACH

Appellant

AND

THE ATTORNEY GENERAL OF CANADA

Intervenor

AND

WOMEN'S LEGAL EDUCATION AND ACTION FUND; CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES; DISABLED WOMEN'S NETWORK CANADA; NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN

Intervenors

FACTUM OF THE INTERVENORS,

WOMEN'S LEGAL EDUCATION AND ACTION FUND et al.

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PART I - INTERVENOR'S STATEMENT AS TO FACTS

1. The Intervenor Coalition ("the Coalition"), constituted by the Women's Legal Education and Action Fund, the DisAbled Women's Network of Canada, the National Action Committee on the Status of Women and the Canadian Association of Sexual Assault Centres, brings to this appeal extensive expertise in sexual violence against women and children, reform of the law relating to it, and the application of constitutional equality principles.

2. The only testimony before the learned trial judge relating to the sexual history of the complainant and the Appellant was that of the complainant. This was to the effect that they had a romantic relationship which ended before the sexual assault for which the Appellant was convicted, and that the Appellant had always respected her "no" in the past.

Testimony of complainant, December 20, 1993, T.,3 (5),17 (5).

3. By way of affidavit, the Appellant unsuccessfully attempted to add to the evidence in order to influence findings of fact on the s.276.2 application. The trial judge stated:

> Without the evidence in the affidavit being properly tested by cross-examination, the court can not attribute much, if any, weight to such evidence....How can a court possibly determine whether such evidence, for example, has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice?....As a trier of fact I am unable to make any finding of fact based on the evidence in sub paragraphs 7(a) to (l) of his affidavit without cross-examination or some form of corroborative evidence.
>
> Ruling, August 18, 1994, T., 6 (15) - 7 (15).

4. The Appellant draws extensively on that affidavit but has not challenged the factual determinations by the trial judge.

Appellant's Factum, paragraphs 2-5, 7-14.

5. The trial judge accepted the following evidence by the complainant as clear, uncontradicted and as making out all the elements of sexual assault. On the night of November 6, 1992, she spent some time with the Appellant. He was trying to be affectionate, but other than one kiss, she said "no" to his advances. At his residence, she accepted a hug but after that she pushed him away and said "no" repeatedly. He then laid her down on the couch, ripped her shirt open and continued trying to kiss her. Later he tried to take her pants off, and touch her breasts and vagina. She continued to say "no", but he would not let her up. He took off his shirt, undid his pants and went on top of her, pinning her arms down with his legs. He then tried to make her suck on his penis. She repeatedly said "no" and moved her head back and forth. He then attempted to pry open her teeth and lips with his fingers.

Proceedings at Trial, August 18, 1994, Reasons for Judgment.

6. On the evidence, there was no basis for any finding or implication that the Appellant took any steps to "ascertain that the complainant was consenting". Nor was there any testimony which could have formed the basis for a finding that the Appellant did not hear the complainant saying "no", or was not aware of her pushing him away or moving her head back and forth.

PART II - RESPONSE TO APPELLANT'S ISSUES

7. The Appellant challenges the constitutionality of a number of inter-connected substantive, procedural, and evidentiary provisions which Parliament introduced to reform the

offence of sexual assault and to structure the fact determination process so as to promote both equality and fair trials.

> Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3d Sess., 34th Parl., 1991-1992 ("Bill C-49").

8. The Coalition's position with respect to the Appellant's issues can be stated in the following way:

(a) The right to a fair trial in s.7, and the right not to be compelled to be a witness in s.11(c), of the *Charter*, do not include the right to force another person to answer questions about her sexual history, without a prior judicial hearing on whether a fair and factual foundation has been laid to justify such examination (the s.276.2(2) non-compellability issue).

(b) The right not to be compelled to be a witness in s.11(c) of the *Charter* does not include the right to insist on compelled examination of another person about facts known to the accused, so that the accused may avoid testifying, without providing sufficiently detailed particulars to justify such examination (the s.276.1(2)(a) right to silence issue).

(c) The right not to be compelled to be a witness in s.11(c) of the *Charter* does not place constraints on the legislative framing of an offence on the ground alone that such framing may affect the decision of the accused about whether to testify (the s.273.2(b) right to silence issue).

(d) The principles of fundamental justice in s.7 of the *Charter* and, in particular, the right to some precision in the framing of offences, do not preclude Parliament from defining consent in such a way as to respect self-determination and to prevent persons who wish to have sexual contact with others from substituting their own judgment, however

discriminatory, for that of Parliament on what constitutes consent (the s 273.1(2)(d) consent issues).

(e) The principles of fundamental justice in s.7 of the *Charter* do not preclude Parliament from defining sexual assault in such a way as to deny any individual the right to persist in self-interested misconceptions about the willingness of others to engage in sexual activity and to avoid any responsibility for taking care to correct misconceptions (the s.273.2(b) reasonable steps issues).

(f) The right to make full answer and defence does not include a right to use a woman's alleged consent to have sex with the accused in the past as a means to suggest that she is lying or somehow mistaken about whether she consented on the occasion subject to prosecution (the s.276(1) sexual history issue).

(g) The right to make full answer and defence does not include a right to rely on the discriminatory assumption that women are not autonomous persons entitled to determine freely and for themselves whether, when, under what conditions and with whom to engage in sexual activities on each occasion such questions arise (the s.276(1) and s.276(2)(c) sexual history issues).

9. The Coalition submits that these issues can logically and conveniently be considered in two clusters.

(A) Procedural issues relating to possible constitutional constraints on legislative regulation of the trial process. These issues are referred to above as non-compellability and the right to silence.

(B) Substantive and evidentiary issues relating to possible constitutional constraints on the legislative definition of sexual assault and to the corollary effects of such definition on the materiality and relevance of evidence in sexual assault trials. These issues are referred to above as consent, reasonable steps, and sexual history.

10. It is logically convenient to address the issues in the order suggested above for the following reasons. If the trial judge was correct in her ruling regarding the procedural issues, then there are no challengeable factual findings which necessitate an examination of the mistaken belief in consent defence and whether the complainant's repeated utterances of non-consent must be examined in the context of her past sexual history with the Appellant. More fundamentally, while Bill C-49 is an integrated whole so that issues cannot be examined in isolation, the procedural safeguards in it are a crucial foundation for the substantive and evidentiary aspects of Bill C-49. If the complainant can be compelled to give evidence, and if the accused does not have to give detailed particulars, then courts will not have the necessary legal tools to restrict sexual assault trials, consistent with constitutional equality principles, to material and relevant evidence.

Relationship Between Inequality, Sexual Violence and The Law

11. Women occupy a systemically unequal social, economic and political status in Canadian society. Such inequality is manifest in systemically diminished economic and physical security and social credibility, and lack of respect for their full personhood. Such

diminished status is reflected in and reinforced by women's pervasive vulnerability to male sexual violence.

12. An equality analysis [of sexual violence] is necessary because of the essentially gendered nature of crimes of sexual violence. A focus on individual rights may fail to make the connection between the socially disadvantaged position of certain groups and how individual groups' members are treated. For example, an equality analysis helps make the point that sexual violence is essentially a sex-specific, group-based phenomenon which occurs within a larger context of social inequality: it is not merely the personal problem of individual women.

Martin, "Some Constitutional Considerations on Sexual Violence Against Women" (1994) 32 Alberta Law Review 535 at 547.

13. Historically, common and statute law have failed to offer women the equal benefit and protection of criminal law. Formally embedded in the law were inegalitarian norms which legitimized and reinforced the social discreditation and devaluation of women and diminished the likelihood that male sexual violence would be reported and punished. Sexual double standards were the foundation of legal double standards reflected in rules about corroboration, recent complaint, sexual history and the marital rape exemption.

R.v.Letendre (1991), 5 C.R. (4th) 159 (B.C.S.C.);
Boyle, *Sexual Assault* (1984) at 47-48 and 133-158;
R.v. Seaboyer, [1991] 2 S.C.R. 577, *per* L'Heureux-Dubé, J. at 665-678.

14. In the last twenty years, the exposure of violence in residential schools, reformatories, amateur athletics and professional contexts has revealed that the vulnerability of women and minors of both sexes to sexual violence is exacerbated or compounded by other systemic inequalities such as those based on race, class, disability, age and sexual identity, as well as in

inequalities of social and institutional power between perpetrator and victim. In such systemically or situationally unequal power relations, sexual violence remains an expression and assertion of dominance over those whose socially diminished credibility, autonomy and devalued personhood renders them easy prey as well as unlikely and easily discreditable complainants.

15. Since the *Charter* came into force, persons accused of sexual violence have used arguments framed as fair trial provisions to attack legislative reforms directed at extending to women and children the equal protection and benefit of the law, and to press for changes in the common law. Some judgments have been receptive to such arguments while ignoring the effects of the equality guarantees in s.15 and s.28 of the *Charter*.

> *Seaboyer, supra*;
> *R.v.O'Connor*, [1995] 4 S.C.R. 411;
> *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536;
> *R.v.Carosella*, [1997] 1 S.C.R .80;
> *R.v.Mills*, [1997] A.J. No.891 (Q.B.) (Q.L.);
> *R.v.Lee*, [1997] O.J. No.3796 (Ct. of Just. Gen.Div.) (Q.L.).

16. In this factum, the term "constitutional equality principles" embraces a cluster of inter-connected constitutional rights respecting the full and equal personhood under law of those disproportionately targeted for sexual assault by reason of their social or situational inequality, those who report their sexual violation and those who testify in public to such violation. Such principles respect and promote the fundamental rights of women and children to liberty and security of the person, to self-determination and self-expression, and to the equal benefit and protection of criminal law and procedure consistent with principles of fundamental justice.

17. The Coalition submits that respect for constitutional equality principles does not demand *less* respect for those constitutional principles traditionally seen as being in the interest of accused persons, such as the right to a fair trial, fundamental justice, and the right to make full answer and defence. The price for equality is not the conviction of innocent men. Nor do constitutional guarantees of accused persons' rights eclipse constitutional equality principles. In *Dagenais*, the Supreme Court of Canada held that "a hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law."

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

18. Courts have yet to apply *Dagenais* in the context of male sexual violence. The *Charter* does not guarantee a trial which promotes the accused's interest in securing an acquittal to the exclusion of all other societal interests and constitutional principles such as equality, liberty and security of the person. The application of *Dagenais* would be consistent with recent cases which hold that the *Charter* guarantees a fair hearing without entitling the accused to "the most favourable procedures that could possibly be imagined". Such cases open the door to an integrated approach to both fair process and just substantive offences, which is required to ensure that implementation of the contemporary commitment to equality is not defeated by an approach that conflicts with egalitarian values.

R.v.Lyons, [1987] 2 S.C.R. 309 at 362;
R.v.Crosby, [1995] 2 S.C.R. 912 at 921.

Bill C-49

19. Bill C-49 is the first sexual assault law responsive to s.15 of the *Charter*. In particular, both the Preamble and the text of the amendments codify Parliament's response to *Seaboyer, supra*. Analysis of such concepts as the right to a fair trial must now take place in a legal culture which for the first time is required, both legislatively and constitutionally, to take equality into account. The Preamble to Bill C-49 states:

> Whereas the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children:
>
> Whereas the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the ...*Charter*...
>
> Bill C-49, *supra*, Preamble.

20. Parliament has framed legislation bearing in mind that sexual assault is the practice of inequality and that law's response to that practice must be consistent with the vision of an egalitarian society "in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."

> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, *per* McIntyre J., at 171.

21. The provisions of Bill C-49 articulate what follows from according adult women respect for their full personhood in the sense of physical integrity, autonomy and sexual self-determination. Complainants cannot be subjected to fishing expeditions into their sexual history. The consent and non-consent provisions comprehend that sexual consent is an act

reflecting personal agency, not the imposed desires of another person; that consent must be voluntary, not coerced or presumed; that autonomous consent is not waivable by third parties or transferable from one specific time, place, context or person to another; and that free, self-determining adults have a right to change their minds and, on expressly revoking consent to sexual intimacy, have the right to be credited with knowing their own desires and to be respected in those desires.

22. The remaining provisions are an integral part of such incidents of equal personhood in law. Ignorance of the meaning of consent amounts to a mistake of law which may not exculpate a sexual aggressor who disregards the non-consent of another. Sexual history evidence offered to substantiate such a mistake of law is immaterial. Honest factual mistakes about consent may still exculpate, but not if the mistake was the result of mispresumption rather than reasonable efforts at communication which nevertheless failed. Little past history evidence will be material or relevant once consent is understood to mean voluntary agreement on a particular occasion, and is not considered waivable, transferable, irrevocable or based on generalizations about women's behaviour.

23. While Bill C-49 is a significant change in the law, it has constitutional support in the evolving jurisprudence on the need to show respect for all relevant constitutional principles. There are signs of preliminary recognition of the need for analysis of all constitutional rights, including equality, which are affected by criminal trials. The Supreme Court of Canada, in *R. v. Salituro*, has recognised that evidence rules must be tested against equality standards. As well, there is an evolving linkage between the status of certain groups in society and the

legitimacy of criminalizing behaviour which threatens their security. An example can be found in *R.* v. *Osolin*:

> It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.
>
> *R.v.Osolin*, [1993] 4 S.C.R., 595 *per* Cory J., at 669;
> *Salituro. v. R.*, [1991] 3 S.C.R. 654 at 671.

24. The following submissions are therefore grounded in two basic themes: that all relevant co-existing, and co-equal, constitutional rights, including the equality, security of the person and liberty rights of women and children, must be respected in addressing the constitutionality of Bill C-49; and that failure to do so is, in itself, contrary to s.15, unfair and fundamentally unjust.

Constitutionality of Procedural Safeguards

25. The Appellant argues that the right not to be compelled to be a witness means that he should be able to examine the complainant about her sexual history with him contrary to s.276.2(2), and that he should be able to do so without justifying and pinpointing the scope of such examination by giving "detailed particulars of the evidence the accused seeks to adduce", contrary to s.276.1(2)(a). He further argues that the "reasonable steps" provision in s.273.2(b) infringes his right not to be compelled to testify.

26. The question of whether these sections are unconstitutional should not be answered without attention to constitutional equality principles. A starting point is to place these provisions in the context of the criminal justice process in general, so that sexual assault complainants are not forced to make distinctive contributions to fair trials constructed in an isolated and discriminatory fashion.

27. Thus, in the interests of fairness to the Crown and the efficiency of the trial process, it is not seen as unfair to an accused person to have to give notice and particulars, for instance, with respect to *Charter*-based applications to exclude evidence. Such a process enables a judge to decide an issue, if possible, without holding a hearing. The absence of an unnecessary hearing means that complainants do not have to bear the costs of an invasive examination bearing no relationship to the material issues at trial.

> *R.v. Durette* (1992), 72 CCC (3d) 421 at 436 (Ont.C.A.);
> *R.v. Feldman* (1994), 91 CCC (3d) 256 (B.C.C.A.), aff'd on other grounds [1994] SCR 832.

28. *Seaboyer* explicitly denounces fishing expeditions. Further, it implicitly contemplates both that some threshold must be met and that the complainant is not compellable.

> The fishing expeditions which unfortunately did occur in the past should not be permitted....Before evidence of consensual sexual conduct on the part of a victim is received, it must be established on a voir dire...by affidavit or the testimony of the accused or third parties, that the proposed use of the evidence of other sexual conduct is legitimate.
>
> *Seaboyer*, *supra*, at 634 and 636.

29. A duty on the complainant to submit to questioning about sexual activity without any threshold or particulars confirming that the information sought is relevant to material issues,

might well prove useful to the defence. However, usefulness is not determinative in deciding what a fair trial requires. Many far more legitimate and material aids to full answer and defence have not been held to fall within the boundaries of the various rules which, in combination, provide the accused with a fair trial. Examples are extensive investigation services paid for by the state, state-funded social science or empirical research bolstering constitutional challenges, and pre-selection of judges. In particular, choice of the most competent counsel irrespective of cost would be very useful to all accused persons and yet such choice is outside the boundaries of the right to a fair trial.

> *R.v.Prosper*, [1994] 3 S.C.R. 236 (there is no constitutional obligation to provide a state-funded duty counsel system);
> *R.v.Welsh*, [1996] 15 O.T.C. 195 (Gen.Div.) (the right to counsel of choice does not include the right to dictate dates of trial);
> *R.v.Robinson; R.v.Dolejs* (1990), 51 C.C.C. (3d) 452 (Alta. C.A.) (the right to counsel of choice is not guaranteed under the rubric of a fair trial);
> *R.v.Rockwood* (1989), 49 C.C.C. (3d) 129 (N.S.C.A.) (indigent accused do not have a right to choice of counsel at a rate higher than legal aid).

30. The spectacle of a constitution indifferent to the injustices of poverty and yet scrupulous to permit routine invasive questioning of sexual assault complainants in the name of fair trials is one likely to foster disrespect for both the constitution and the criminal justice system.

31. A law compelling complainants to testify without prior judicial screening would signal the low status of the group most likely to find itself subjected to such questioning, women and children, by permitting routine state-sponsored intrusion into very private and sensitive information about their intimate lives, and by demonstrating that they lack control

over such information. Compelling the complainant to testify, and in particular to testify without any prior assessment of the relevance to material issues or the legitimacy of the logical purposes her evidence is said to serve, which the requirement of detailed particulars facilitates, would denude the sexual history provisions of any shield-like quality.

32. With respect to the reasonable steps provision, should evidence of such steps not emerge from the testimony of complainants or others at trial, an accused would simply find himself in the commonplace situation of having to testify as a matter of tactical choice, as for instance, with respect to self-defence or provocation. The legislative framing of offences and defences routinely influences defence decisions without infringing the right to silence.

R.v.Boss (1988), 46 C.C.C. (3d) 523 (Ont.C.A.).

33. Furthermore, the legislative framing of offences and defences, and its effect on the materiality of evidence, will influence whether an accused will be permitted to present certain testimony by any means. Where the sexual history evidence sought to be secured by compelled complainant testimony is immaterial to consent as presently defined (as is the case on the facts as found in the case at bar), such evidence, whether presented through the testimony of the complainant or the accused, is inadmissible. The Appellant cannot complain of being forced to testify where his evidence is, in any event, constitutionally inadmissible.

34. If this Honourable Court takes the view that the non-compellability of the complainant or the requirement to give detailed particulars or indeed the effect of the

reasonable steps provision infringes s.11(c) of the *Charter* then the Coalition submits that s.276.2(2), s.276.1(2)(a) and s.273.2(b) are saved by s.1.

35. The Coalition agrees with the Appellant that the impugned provisions have a pressing and substantial objective. The values and principles essential to a free and democratic society include respect for the inherent dignity of the human person and commitment to social justice and equality. The pressing and substantial objective addressed by the challenged provisions is the honouring of all constitutional guarantees, including equality, liberty and security of the person, in the context of sexual assault laws. In particular, the legislation attempts to eradicate signals of the low status of women and children reflected in procedures which permit intrusive questioning of complainants without foundation, and to reform a defence which permitted self-interested misconceptions about women's sexual accessibility.

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

36. In considering whether s. 319 of the *Criminal Code* (hate propaganda) was saved by s. 1, the Supreme Court of Canada stated:

> A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded to the groups to which he or she belongs....
>
> In light of the *Charter* commitment to section 1, the objective of the impugned legislation is enhanced in so far as it seeks to ensure the equality of all individuals in Canadian society.
>
> *R.v.Keegstra*, [1990] 3 S.C.R. 697 at 746 and 756.

37. There is a rational connection between these objectives and the impugned provisions. Section 276.1(2)(a) protects complainants from the illegitimate examination of their sexual

history by requiring that a foundation for such questioning first be established. Section 276.2(2) recognizes a logical and ethical imperative: in order for complainants' dignity and equality to be respected, this foundation must be established without compelling them to testify. Section 273.2(b) attempts to counter-balance the social reality that women and children are targeted for sexual assault, by requiring a person who wishes to have sexual contact to take some steps to verify a perception of consent.

38. In particular, and by analogy to the prohibition of hate propaganda, the reasonable steps provision bears a "rational connection to the legitimate Parliamentary objective of protecting target groups members and fostering harmonious social relations in a community dedicated to equality and multiculturalism."

Keegstra, supra, at 767.

39. The impugned provisions minimally impair the right to silence given that the accused initiates the process of inquiring into a complainant's sexual history. As well, pointing to evidence capable of raising a reasonable doubt about whether the accused, having taken reasonable steps to ascertain consent, nevertheless made an honest mistake, is no more onerous than the existing requirement that there be an air of reality to a claim of mistaken belief in consent. Indeed, the Coalition submits that the provisions do not go far enough to promote equality. Bill C-49 envisages the use of sexual history evidence in many situations, and the reasonable steps provision is explicitly limited to circumstances known to the accused.

40. In balancing the effects of the impugned provisions against their objectives, the promotion of equality is a relevant factor. Thus, with respect to such balancing in the context of finding s.163 (obscenity) saved by s. 1, the Supreme Court of Canada has stated:

> It is aimed at avoiding harm, which Parliament has reasonably concluded will be caused...to individuals, groups such as women and children, and consequently to society as a whole, by the distribution of [obscene] materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.
>
> *Butler* v. *R.*, [1990] 3 S.C.R. 452 at 509.

Constitutionality of Substantive Provisions and Their Evidentiary Effects

41. The substantive reforms to the law on consent, mistaken belief in consent, and sexual history evidence are inter-connected since the legal meaning of consent will inevitably limit what it is that an accused can be mistaken about, and the substantive issues in a trial will inevitably determine the scope of material and relevant evidence.

A. Consent

42. Section 273.1(2)(d) states that no consent is obtained where the complainant "expresses by words or conduct, a lack of agreement to engage in the activity". It can be colloquially referred to as the "no means no" provision. Far from falling short of constitutional standards of precision, this provision is distinctive for its clarity, and more than satisfies the test for fair notice, which is that legislation must give sufficient guidance for legal debate.

R.v.Pharmaceutical Society (Nova Scotia), [1992] 2 S.C.R. 606 at 639.

43. To find s.273.1(2)(d) unconstitutionally vague would be to require the legislative definition of consent to meet a higher standard of precision than its common law predecessor and a higher standard than other legal concepts, such as gross indecency, which have survived challenge.

R.v.LeBeau (1988), 41 C.C.C. (3d) 163 (Ont.C.A.).

44. More significantly, for the Appellant to argue that Parliament cannot constitutionally legislate that a person who says "no" is not consenting or that he required clearer notice that a former sexual partner may not, as a matter of law, be deemed perpetually sexually accessible, amounts to inviting this Honourable Court, as a constitutional matter, to indulge disregard for a woman's sexual autonomy and security of the person. Being treated by others and by the law as if one's expressed decisions about sexual activity are not determinative is surely a signal of very low status in any society. Parliament recognized in s.273.1(2)(d) that "no", or conduct indicating "no", is not foreplay but non-consent as a matter of law.

45. The Supreme Court of Canada has held that silence is not consent. So there can surely be no constitutional obstacle to Parliament making it an offence to touch a person sexually after they have indicated they do not wish to be so touched. Furthermore, such a provision promotes equal respect for all: it does not leave open the possibility that the law will go behind the "no" of certain groups of women, such as women who have had a previous relationship with the accused and thus are at risk of experiencing a low level of respect for their sexual autonomy. In particular, the focus on communication at the time, expressed in the

phrase "the sexual activity in question" in s.273.1(1) as well as in s.273.1(2)(d), is consistent with respect for sexual autonomy. The legal focus is thus on the expressed wishes of the individual concerned rather than on consent as constructed by the accused or by the court on the basis of past behaviour.

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

B. Mistaken Belief in Consent (Reasonable Steps)

46. The requirement in s.273.2(b) of reasonable steps to ascertain consent, as a precondition for invoking the mistaken belief in consent defence, challenges any social or legal assumption of the sexual availability of women. The precise categorization of s.273(2)(b) in terms of the conceptual structure of the offence is as yet unresolved by the Supreme Court of Canada. The provision may be characterized in different ways: as a fault requirement, as a element in a defence proper, or as an adaptation of the *actus reus* of sexual assault. It is submitted that, however the provision is characterized, it is both consistent with fundamental justice and well-supported by equality, liberty, and security of the person rights.

R. v. Esau, [1997] S.C.J. No. 71 at para 29 (Q.L.)

47. A finding that the reasonable steps provision infringes the *Charter* would mislabel as morally innocent those men who are most dangerous to women and children. These include men who are indifferent to the sexual autonomy of others, or believe that women are in a perpetual state of consent which can only be withdrawn, if at all, by vigorous resistance, or chose to believe that resistance is consent disguised as virtue, or are not prepared to take "no" at its face value. Prior to Bill C-49, such men's discriminatory perceptions and the violence

which followed from them were labelled as moral innocence by a subjective standard for mistaken belief in consent. If willingness to entertain such beliefs is constitutionally privileged as exculpatory then women and children will be violated with impunity so long as self-interested disregard for their autonomy, personhood and physical and sexual integrity remain socially systemic norms.

48. The Appellant argues that s.273.2(b) creates a reverse onus. There is nothing in s.273.2(b) which removes the benefit of any reasonable doubt from the accused. What is being called a reverse onus here is responsibility to take reasonable steps before mistakenly engaging in non-consensual sex, not who gets the benefit of the doubt on the facts at the end of the trial.

49. The Appellant argues that s.273.2(b) is unconstitutionally vague. Parliament is free to use such a commonplace standard as reasonableness in sexual offences no less than in other criminal matters. This well-known standard is used with respect to careless use of a firearm, reasonable apprehension of harm in self-defence, and the marked departure from the standard of the reasonable person in crimes of negligence generally. In applying the provision, judicial interpretation of this standard will be assisted by two things: the definition of consent, since the accused will have to take reasonable steps to ascertain consent as currently defined; and the fact that these provisions are underpinned by a recognition of *Charter* principles, including equality. Thus the test for reasonableness in this context may be stated as those steps which a reasonable person, committed to equality and cognizant of consent as defined in the *Criminal Code*, would take to avoid sexually assaulting another person by mistake. Such a test would at

once promote equality and limit the scope of legal debate about meaning. For example, the fact that a person is not able to speak should not be used as a basis for an assumption of consent.

50. The courts have expertise in giving meaning to a standard of reasonableness, consistent with constitutional equality principles. "The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality."

> *R.v.R.D.S.*, [1997] S.C.J. No.84 at para. 48 (Q.L.), *per* L'Heureux-Dubé, McLachlin, Gonthier and La Forest JJ.

C. Sexual History

51. The Coalition agrees with the Appellant that s.276(1) creates an absolute bar to certain sexual activity evidence. Section 276(1) bars evidence relying for its relevance on inferences depending solely on the sexual nature of the activity to show a disposition to consent or to lie. The Coalition, however, submits that such an absolute bar is constitutional, as barring only discriminatory inferences.

> *R. v. Harris*, [1997] O.J. No. 3560 (Ont.C.A.) at paras 43 and 50 (Q.L.);
> *R. v. J.M.*, [1997] Whitehorse Registry No. 96-03641A (Y.T.C.) at para. 25 (Q.L.);
> Boyle and MacCrimmon, *"R. v. Seaboyer*: A Lost Cause?" (1991), 7 C.R. (4th) 225 at 228-232.

52. The probative value/prejudice balancing process in s. 276(2) is only applicable to situations where some other route to relevance can be found, such as mistaken belief in

consent, identity, where the Crown has put the relationship between the complainant and the accused in issue, or where the evidence of the sexual activity is inextricably linked to other relevant evidence.

Harris, supra;
Crosby, supra.

53. The Appellant argues that the sexual history evidence is relevant via two chains of reasoning. One is that the details of his sexual history with the complainant showed a disposition to consent to sex with the Appellant in particular (the mind set argument). The second is that a distinctive pattern of sexual activity showed that the complainant consented on the particular occasion subject to prosecution (the pattern argument). The Coalition submits that both chains of reasoning are prohibited by the absolute bar in section 276(1).

54. The constitutionality of the sexual history provisions in general cannot be divorced from the substantive issues of consent and mistaken belief in consent. Constitutionally speaking, relevance reasoning involves a non-discriminatory linkage between certain information and material issues. The substantive law establishes the material issues. Thus, given that "no" means non-consent as a matter of law, any evidence of previous sexual activity grounding an argument that "no" meant something else is simply immaterial. Neither an accused nor a finder of fact is permitted to go behind the complainant's "no" and decide that it meant "yes" on the basis of sexual history evidence.

55. Further, even if an accused grounds his materiality argument in mistaken belief in consent rather than consent, s.273.1(2)(d) renders immaterial any attempt by such accused to go behind the complainant's "no" and argue on the basis of sexual history that her "no" meant something else. Since the law now clearly says that "no means no" an accused who thinks that "no" means "yes" is making a mistake of law and evidence that "no" meant "yes" in the past (even assuming that is demonstrable) is immaterial.

> Vandervort, "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-1988) 2 Canadian Journal of Women and the Law 233.

56. The undisputed evidence is that the complainant repeatedly said "no". Therefore, if, as the Coalition argues, the "no means no" provision is constitutional, it renders immaterial the sexual history evidence at issue in this case. Should the Court consider hypothetical scenarios not involving undisputed "nos", the Coalition submits that s.276(1) properly bars the very type of reasoning at issue here, involving mind set and pattern inferences.

57. The mind-set argument, that the sexual history of a complainant may show a disposition to consent to sex with a particular person, calls upon an inegalitarian inference prohibited by s. 276(1). Individual decisions, fundamental to human worth, dignity and autonomy, should not be trivialized as manifestations of unconsidered reflexive habit but should be credited as products of rational human reflection in terms of time, circumstances and current preferences. Examples are decisions to adopt a religious belief, join a political party, vote, form or dissolve a close relationship and engage in sexual relations

58. Acceptance of reasoning based on a disposition to consent to sex with a particular person reinforces patterns of discriminatory fact finding which legitimate presumptive sexual access or draw on cultural images such as the kept woman, the concubine, the hand-maiden, the unchaste woman, and the married woman as the property of her husband.

59. The pattern argument, that a distinctive pattern of sexual activity showed that a complainant consented, also calls upon an inegalitarian inference prohibited by s. 276(1). There are dangers of setting up a dichotomy of distinctive and non-distinctive sex. Aside from the obvious dangers of prolonging and confusing the trial with collateral issues, there is the risk that people seen as engaging in distinctive sexual practices will be marginalized and shown less respect for their sexual autonomy. Beyond the world of pornography, there is no such thing as a propensity to consent to sexual relations. Whatever the form that sexual activity takes, women are autonomous persons, not bundles of disposition.

60. The Appellant argues that his version of what happened closely resembles his version of sexual activity on previous occasions, and that therefore the sexual history evidence is relevant and admissible via similar fact reasoning. Where the very issue is whether the facts are indeed similar, that is whether there was consensual sex in both instances or indeed whether there was sexual assault in both instances, the similar fact rule cannot assist with a route to relevance. That rule, governing the admission of the bad acts of the accused, sometimes makes evidence admissible to show identity or a continuing animus toward the victim. There is no analogy to drawing inferences of consent or lack of credibility from sexual activity. Identity is not in issue so that sexual activity is not like a "calling card" or other

identifying characteristic. Consent is a context-specific decision, not a mind-set. There is no legitimate character trait which supports a disposition to consent to have sex generally or with a specific person.

61. Therefore an accused person is not denied the right to make full answer and defence simply because he is not permitted to reason from sexual history to consent or credibility via mind-set or pattern reasoning. An absolute bar on such evidence is consistent with respect for the autonomy of women in relationships and thus with their constitutional rights to equality, liberty, and security of the person.

62. Even if particular evidence is not caught by the absolute bar, a judge must still go on to weigh its probative value against its prejudicial effect on the trial, as in, for example, *R. v. Santocono*. Section 276(2)(c) states that the probative value must be significant and not substantially outweighed by the danger of prejudice. Thus evidence of insignificant value is inadmissible, and evidence of significant value may be excluded. It is submitted that this does not infringe any constitutional right to precision, to make full answer and defence, or not to be compelled to be a witness.

R. v. Santocono (1996), 28 OR (3d) 630 (Ont.C.A.).

63. In spite of the fact that *Seaboyer*, the authority on the constitutionality of sexual history legislation, neglected constitutional equality principles, Bill C-49 closely tracks that decision. It establishes that legislation permitting the exclusion of some probative evidence is constitutional.

> [T]he judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence.
>
> *Seaboyer*, *supra*, at 634.

64. The test adopted for assessing the former s.276 was whether it excluded "evidence the probative value of which is not substantially outweighed by its potential prejudice". While *Seaboyer* does not expressly state that evidence of "significant" probative value can be excluded if so outweighed, this is implicit in its preference for *R.v. Sweitzer*, [1982] 1 S.C.R. 949 over *R.v. Wray*, [1971] S.C.R. 272. In any event, the only evidence which raises any difficulty is evidence of significant probative value. *Seaboyer* sees sexual history evidence as always prejudicial in its reference to the "damages and disadvantages presented by the admission of such evidence." Thus evidence of insignificant probative value should always be outweighed by this prejudice. Material and relevant evidence that is necessary to make full answer and defence could never be substantially outweighed by the danger of prejudice.

Seaboyer, *supra*, at 634.

65. In any event, the real danger is not over-exclusion but over-admission because of inattention to the equality aspects of the balancing approach, such as the need to remove discriminatory reasoning from the fact determination process. Parliament has attempted to focus judicial attention on such aspects in s.276(3), which includes co-existing constitutional factors which must be taken into account in balancing probative value and prejudice.

66. The Appellant challenges, in isolation from s.276(3)(a), the factors in s.276(3)(d), "the need to remove from the fact-finding process any discriminatory belief or bias", and s.276(3)(f), the potential prejudice to the "personal dignity and right to privacy" of the complainant. Far from requiring a judge to conduct an unfair trial, these factors, consistent with *Dagenais*, *supra*, are supportive of a trial judge's duty to conduct a fair trial, since they promote the goal of an accurate, rational, fact-finding process.

67. The right to make full answer and defence does not include a right to call on discriminatory beliefs or biases. Similarly it does not include the right to achieve an acquittal by signalling the inferior status of the complainant as a constitutional rights holder by treating her without the respect for her dignity and privacy accorded citizens deemed equal before and under the law.

68. Section 276.2(3) also promotes the goal of a rational process. In the absence of a duty to give reasons, discriminatory reasoning could flourish unexamined. As well, it is an affront to the dignity and right to privacy of the complainant to be compelled to testify about her sexual history without being told why she is being so compelled.

PART III - ADDITIONAL ISSUES

69. The Coalition does not seek to raise any additional issues.

PART IV - ORDER REQUESTED

70. The Coalition respectfully requests that this Honourable Court dismiss the appeal.

ALL OF WHICH is respectfully submitted this 24th day of October, 1997.

Christine L.M. Boyle

Counsel for the Coalition

SCHEDULE A - AUTHORITIES TO BE CITED

	Paragraph no.
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