IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF QUEEN'S BENCH OF ALBERTA
(JUDICIAL DISTRICT OF EDMONTON)

BETWEEN:

L.C. (THE COMPLAINANT)

Appellant
(Intervener at trial)

- and -

THE ATTORNEY GENERAL OF ALBERTA

Appellant
(Respondent at trial)

- and -

BRIAN JOSEPH MILLS

Respondent
(Applicant at trial)

- and -

THE ATTORNEY GENERAL OF CANADA

Intervener
(Intervener at trial)

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# FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

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## PART I: INTRODUCTION

1. The Women's Legal Education and Action Fund (LEAF) is intervening in this Appeal, as it has in many others before this Court, to ensure that *Charter* equality guarantees are fully recognized and enforced. LEAF will be arguing that this Honourable Court must address the issues raised by this Appeal with full regard for the equality guarantees of the *Charter* and their centrality to the integrity of the criminal justice process.

2. LEAF's position as a member of the equality-seeking Coalitions intervening in R. v. O'Connor and A.(L.L.) v. B.(A.) was that the production of the private records of complainants in sexual offence cases is a gendered inequality, like sexual assault itself, which distorts the criminal justice process. It was, and still is, LEAF's position that full equality for women and children can best be secured by a complete prohibition on records production in sexual assault proceedings.

3. Notwithstanding that Bill C-46 does not offer such a complete prohibition, LEAF submits that it is constitutional, both ensuring the fair trial rights of accused persons and furthering the equality rights of women and children. The legislation can only achieve both purposes where it is implemented in accordance with the *Charter's* equality requirements as well as the fair trial rights of accused persons.

## PART II: POINTS IN ISSUE

4. The points in issue are set out in the Factum of the Appellant. This Appeal concerns the constitutionality of Bill C-46, legislation promulgated to address all, not just some, of the *Charter* guarantees that bear on production of records in sexual offence cases. LEAF submits that Bill C-46 should be upheld by this Honourable Court and argues that:

1) Bill C-46 represents a constitutionally valid mechanism for dealing with applications for production of complainants' records;

2) Parliament had a constitutional obligation to take the equality guarantees of the *Charter* into account when creating Bill C-46;

3) A fair trial as guaranteed by the *Charter* is a right enjoyed not only by accused persons but also by complainants and the public who have a right to the proper administration of justice;

4) The provisions of Bill C-46 do not render sexual offence trials unfair. The legislation makes these trials more fair than they would be otherwise, because it takes into account not only accused persons' right to full answer and defence but also the rights of complainants and the public to the fair and proper administration of justice;

5) In the alternative, if this Honourable Court finds that Bill C-46 *prima facie* impinges upon certain *Charter*-protected rights, it is LEAF's position that the legislation is justifiable because of the role it plays in providing women and children with greater access to the equal protection and benefit of the law, and in particular, by enhancing their equal security of the person rights as mandated by sections 7, 15 and 28 of the *Charter*.

## PART III: ARGUMENT

### THE EQUALITY FOCUS OF BILL C-46

5. It is a constitutional imperative that the equality guarantees of the *Charter* fundamentally inform an examination of the constitutionality of Bill C-46. This Honourable Court has acknowledged the importance of promoting the equality of groups subject to discrimination, 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 , [1995] 2 S.C.R. 513, per L'Heureux-Dubé J. at 554
>
> Eldridge v. B.C. (A.G.), [1997] 3 S. C. R. 624 per LaForest, J. at 667

6. Section 15 is designed to protect those groups who are subject to social, political and legal discrimination and prejudice 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 583
Eldridge, supra

7. 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 543

8. Notwithstanding this Honourable Court's consistent endorsements of the elemental role of equality, the equality guarantees under the *Charter* were not a consideration in the majority decisions in R. v. O'Connor, [1995] 4 S.C.R. 411, A. (L.L.) v. B. (A.) , [1995] 4 S.C.R. 536 or R. v. Carosella, [1997] 1 S.C.R. 80. It is to be noted that equality is not even mentioned in the majority reasons in these cases.

9. Parliament was obligated in crafting its legislation to ensure that equality principles were accorded the recognition and influence demanded by such a fundamental right. Despite the very clear language of the Preamble, it has been asserted that Bill C-46 was "scrupulously drafted to defeat access to third party records" and that "so prevalent are [its] obstacles [to production] that this Bill will come perilously close to qualifying as one of those rare enactments whose very purpose and not just its effect, contravenes the *Charter*."

Preamble to Bill C-46

D. Paciocco, "Bill C-46 Should Not Survive Constitutional Challenge" (1996), 3 S.O.L.R. 185

10. The animating principles of Bill C-46 are fairness to the accused and equality. This is readily discernible from the Preamble. (see Appendix I) In the Preamble to Bill C-46 Parliament explicitly sets out that both equality and fundamental justice, including the fair trial rights of accused persons, are relevant concerns. The purpose of the legislation is to ensure that *all* rights implicated by production are protected and to create a regime for records production in sexual offence cases that reflects a commitment to the equality rights of complainants as well as the rights of defendants.

11. Bill C-46 is part of Parliament's ongoing recognition of and commitment to the equality rights of women and children before the courts as complainants. Parliament's concerns for the fair trial rights of complainants in sexual offence cases are anchored in a well-established history of reformulating sexual assault laws to ensure greater fairness and access to justice for women.

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

Los, M. "The Struggle to Redefine Rape in the Early 1980's" in J. Roberts and R. Mohr, eds. Confronting Sexual Assault: A Decade of Legal and Social Change (University of Toronto Press: 1994) 20

McIntyre, S. "Redefining Reformism: The Consultations That Shaped Bill C-49 in J. Roberts and R. Mohr, eds. Confronting Sexual Assault: A Decade of Legal and Social Change, (University of Toronto Press: 1994) 293

12. The purpose of Bill C-46 can be determined not only from its Preamble but also from the Parliamentary record which identifies the legislation's recognition of the rights of both complainants and accused persons and the need for these rights to be "accommodated and reconciled to the greatest extent possible." It is well established that the Parliamentary record can assist in determining the background and purpose of the legislation.

Case on Appeal, Vol. V, 936 - 941, Government Orders, February 4, 1997
R. v. Morgentaler, [1993] 3 S.C.R. 463 per Sopinka, J. at 484

13. This Appeal is about whether Bill C-46 represents a constitutionally valid records production regime in the context of sexual offence proceedings. The legislation's conformity with section 15 of the *Charter* is fundamental to this question. It is not a matter of this Honourable Court imposing its view of ideal legislation: the issue to be determined is whether Parliament's enactment of Bill C-46 is constitutional or not.

Vriend v. Alberta, [1998] 1 S.C.R. 493 per Cory, J. and Iacobucci, J. at 531

14. This Appeal provides this Honourable Court with the opportunity to confirm the constitutional validity of a legislative regime governing records production that is animated by equality considerations and to re-articulate the principles to be employed in the interpretation and application of the legislation, giving "real effect to equality."

> The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and harmony with all. *The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain...* (emphasis added)

Vriend, supra, per Cory J. and Iacobucci, J. at 536

## SEXUAL ASSAULT AND SEXUAL ASSAULT LAW AS PRACTICES OF INEQUALITY

15. Bill C-46 properly recognizes sexual assault as a gendered crime, a reality identified by this Honourable Court.

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

16. Sexual violence occurs in the context of the social, economic and political inequality of women and children. Inequality leads to the degradation of women's and children's credibility and personhood making them more vulnerable to sexual violence by men.

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

Jane Doe v. Toronto (Metropolitan) Commissioners of Police (1998), 126 C.C.C. (3d) 12 (Ont. Gen. Div.)

17. LEAF submits that sexual violence and systemic inequalities intersect: women and children experiencing compounded inequalities are most at risk of sexual assault which may be directly motivated by such factors as the woman's race, disability, age and socio-economic status .

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

K. Busby, "Discriminatory Uses of Records In Sexual Violence Cases" (1997) 9 Canadian Journal of Women and the Law 148 at 163

18. Adolescents and children are particularly vulnerable to sexual assault. It is girls who are most at risk of sexual abuse which is perpetrated against them almost without exception by adult males in positions of trust or authority. The social inequality of children is reflected by these realities. The availability of children as victims in relationships demarcated by power and trust make them easy targets for sexual violation.

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

A. McGillivray, " *R v. Bauder*: Seductive Children, Safe Rapists and Other Justice Tales " (1998) 25 Man L.J. 360

19. Historically, laws governing sexual assault have perpetuated the inequalities experienced by women and children by denying them the equal protection and benefit of the law. The substantive laws relating to sexual offences against women, and the evidentiary laws that governed the prosecution of these crimes were informed by discriminatory stereotypes about women, and were promulgated without regard for sex equality values.

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

20. Equality itself, and even its expression as a constitutional value, remains very much an aspiration only and has not been afforded its proper role by the Courts in the context of sexual assault proceedings.

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

J. McInnes and C. Boyle, " Judging Sexual Assault Law Against a Standard of Equality (1995) 29 U.B.C.L.J. Vol. 2: 341

The Honourable Judge D. Hackett, "Finding and Following ' The Road Less Travelled': Judicial Neutrality and the Protection and Enforcement of Equality Rights in Criminal Trial Courts" (1998) 10 Can. Journal of Women and the Law 129 at 131

21. It was acknowledged by this Honourable Court 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

22. The spectre of the lying female complainant is fashioned from intractable misogynist assumptions that do not withstand scrutiny. There is no reliable empirical basis for the belief that sexual assault reports to the police are more often false than reports

of other crimes. The suspicion that men are the innocent victims of women's fraudulent police reports about sexual assault draws its strength from powerful myths and prejudices about women and girls.

> K. Busby, (1995) "Rape Crisis Backlash and the Spectre of False Rape Allegations" (unpublished)
>
> M. Burt, "Rape Myths and Acquaintance Rape" in A. Parrot & L. Bechhofer, eds., Acquaintance Rape: The Hidden Crime (Toronto: 1991) 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 - 8
>
> 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.*

23. And yet Defence claims for the need to get access to women's private records are fueled by precisely this pernicious mythology: that women are lying or deluded about being sexually assaulted and only ready access to their records will ensure that innocent men are not wrongly convicted.

## RECORDS PRODUCTION AS A PRACTICE OF INEQUALITY

24. Applications for the production of the private records of complainants in criminal trials is a recent phenomenon primarily occurring in sexual offence cases. The principal purpose behind production of records applications is to bolster Defence attacks on the complainant's credibility, motives and character. Records applications are characterized by requests for multiple records and arise almost invariably in cases where the accused and complainant know each other. (In fact, in 70 percent of the cases, complainants and accused were related to each other.) Records applications have been brought for a breath-taking range of records, including many kinds of records that document the life-histories of women and children.

> K. Kelly, "You Must Be Crazy If You Think You Were Raped: Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997) 9 Canadian Journal of Women and the Law 178
>
> K. Busby, "Third Party Records Cases Since R. v. O'Connor: A Preliminary Analysis" (forthcoming) (1999) Man. L.J. at 2, 18
>
> Case on Appeal, Vol. VI, at 1174 - 5, The Submissions of the National Association of Women and the Law to the Standing Committee on Justice and Legal Affairs

25. Women and children whose lives have been heavily documented are generally those women and children experiencing compounded inequalities because of their poverty, race, class and mental health histories. Their lives provide extensive sources of records usually created without their knowledge, consent or participation. There is a substantial risk that the records created about such complainants will reflect the discriminatory assumptions of the record-makers and the power dynamics that characterize lives shaped by inequality. Records applications in cases involving heavily documented women and children subject these complainants to excessive and unprecedented scrutiny as witnesses.

K. Busby, "Discriminatory Uses of Records In Sexual Violence Cases" supra at 160 - 162, 173

M. McCrimmon, "Trial By Ordeal" (1996) 1 Can. Crim. L. R. 31 at 49

26. Applications for production rely upon and reinforce biased attitudes about women that are rooted in faulty stereotypes and deeply embedded myths about women and sexual assault. They also seek to exploit defamatory characterizations of counsellors as corrupt obstructers of justice. As a consequence they have a negative impact on these relationships and undercut the work of counselling organizations.

K. Busby, "Discriminatory Uses of Records In Sexual Violence Cases" (1997) supra at 171 - 172

Preamble, Bill C-46

R. v. Carosella, [1997] 1 S.C.R. 80 per L'Heureux-Dube, J. at 155

27. Production of records applications in sexual assault cases represent discriminatory treatment of women and children complainants setting them apart from other witnesses participating in the criminal justice process. Like past evidentiary rules now recognized as discriminatory, applications for records production draw from the groundless suspicion that women's reports of sexual violence are uniquely likely to be fabricated, and therefore complainants must be subjected to exhaustive and oppressive credibility testing to prove them worthy of the law's protection. This is especially problematic because the interaction by women and children with the criminal justice system is principally as complainants of sexual violence and, in this context, they are not accorded their full entitlement to equality. Other witnesses are not required to displace discriminatory presumptions in order to qualify for equal justice.

Osolin v. The Queen , supra, per L'Heureux-Dubé J. at 662, 624-25

M. McCrimmon, "Trial By Ordeal", supra at 39

28. The discrediting by this Court of the discriminatory myths that clog sexual assault proceedings does not cause them to simply cease 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 J. Roberts and R. Mohr, eds. Confronting Sexual Assault: A Decade of Legal and Social Change (University of Toronto Press: 1994) 268 at 281

Research and Statistics Section, Department of Justice, *Implementation Review of Bill C-49* (Technical Report) by Colin Meredith, Renate Mohr, and Rosemary Cairns Way (Ottawa: Department of Justice, 1997) at 54

29. This Honourable Court's majority decision in O'Connor did not address the sex discrimination underlying records production applications. As the majority of the Court did not undertake any equality analysis, the common law promulgated in O'Connor maintains the inequality experienced by women and children who are subjected to these applications. This Appeal provides the opportunity for the Court to move the law forward in a manner consistent with the requirements of the *Charter's* equality guarantees.

30. In the present case, the Respondent has invoked a series of stereotypes with respect to the Appellant to justify the pursuit of her records: that she made the accusations up, that she has a motive for bringing the allegations, and that she is highly suggestible which may have resulted in her concocting a false story in counselling about being assaulted. Defence counsel described these assertions as constituting the "theory of defence."

Case on Appeal, Vol. I, at 86, Defence Submissions

31. There is no basis in the evidence to support these allegations about the Appellant. The Respondent advanced no basis for its assertion that the Appellant has a motive for bringing her allegations and did not establish that the content of her second statement was created as a result of improper therapeutic influences. Notwithstanding, the Respondent kept on trying to trawl for private information, seeking not only the Appellant's counselling records but then her psychiatric records as well even while saying to the Court: "I am not putting to the Court that [the Appellant] has any emotional or psychiatric difficulties."

Case on Appeal, Vol. I, at 174, Submissions of Defence Counsel, March 13, 1997

32. After portions of certain records were produced by the Trial Judge to Defence counsel, he then developed his application for production of additional records submitting an affidavit from his legal secretary as a purported basis for obtaining them. In her affidavit, the secretary stated that the Appellant had described to police in the second statement " a much different version of the alleged complaint than initially complained of." This was asserted notwithstanding an absence of any clear evidence that the secretary had seen the original statement in its entirety. Furthermore, she deposed that it was her belief that "the emotional history disclosed in the file may very well describe an individual suffering from an acute psychosis." This was purely the deponent's opinion, one she was not qualified to give.

Case on Appeal, Vol. I, p. 38, Affidavit of Tracey Goodhand dated May 1, 1997

Case on Appeal, Cross-Examination of Tracey Goodhand dated May 15, 1997

**BILL C-46's EQUALITY FRAMEWORK AND THE RIGHTS UNDER ss. 7 and 11**

33. 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

*RELEVANCE*

34. The Respondent's attack on the constitutionality of Bill C-46 is primarily constructed around the argument that the legislation operates to deny an accused access to relevant information about the complainant which is essential to advancing a full answer and defence. This argument casts the search for information by Defence in a sexual offence trial as a neutral endeavor devoid of gendered assumptions and biases. However the purported relevance in the information being pursued by Defence has to be understood in terms of the engrained rape mythology and stereotypes which have historically characterized sexual assault trials.

35. Relevance assessments must be made through an equality prism. Equality, as a *Charter* value, must inform how relevance, a common law principle, is determined.

RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 per McIntyre J. at 592 -3, 603

Hill v. Church of Scientology, [1995] 2 S.C.R. 1130 per Cory J. at 1165, 1169

R. v. Salituro, [1991] 3 S.C.R. 654 per Iacobucci, J. at 670, 675

36. It is submitted that once equality is employed to define relevance it becomes apparent that legislation that limits access to the production of irrelevant personal information about a complainant in a sexual offence trial is consistent both with the right to a fair trial and the right to equality. Much of what the criminal justice system has seen as relevant - the fact that a woman may have lied about an unrelated matter, the fact that a woman has a mental health history, the fact that a woman has talked to a counsellor, the fact that a woman did not make an immediate complaint or that she was sexually abused by others - draws on reasoning that is rooted in deeply embedded discriminatory assumptions about women.

37. This Honourable Court discussed relevance in O'Connor relating it to "...evidence that may be probative to the material issues in the case (i.e. the unfolding of events) [and] evidence relating to the credibility of witnesses and the reliability of other evidence in the case."

O'Connor, supra, per Lamer, C.J.C. and Sopinka, J. at 436

38. What is important in a sexual offence case is how the material issues, the credibility of the complainant and the reliability of the other evidence, are understood and what values, assumptions and ideas inform this understanding. Courts must be precluded from drawing inferences about what is relevant on the basis of discriminatory or stereotypical lines of reasoning.

O'Connor, supra , per L'Heureux-Dubé, at 500

39. Credibility is always a relevant issue in sexual offence proceedings as it is in almost all other criminal cases. Under the guise of testing credibility, private records can be exploited to make any complainant appear unreliable and dishonest, distorting the trial process.

M. McCrimmon, "Trial By Ordeal", supra at 45

R. v. Pritchard [1996] B.C.J. No. 1768 (B.C.S.C.)

40. It is submitted that s. 15 must be relied upon as an interpretative tool in giving meaning to, and informing the construction of, relevance in this context. The application of equality norms will impart a very different content to what is relevant in a sexual offence trial. The logical connections between certain information (sought in applications to produce private records) and the material issues of the trial (did the offence occur) must be established through non-discriminatory, egalitarian reasoning and analysis.

J. McInnis and C. Boyle, supra

R. v. Osolin, supra, per L'Heureux-Dube at 624

41. Relevance must also be constructed in terms of what is real not what is imagined. There is no evidence that sexual assault is falsely reported to police more than other crimes. Public mischief and perjury charges against women who allege sexual assault are rare as are recantations. Purported evidence of an elevated, offence-specific rate of recantation in sexual assault cases is unreliable. It also cannot be assumed that recantations, when they occur, are true: women and girls can be subject to a variety of pressures not to make or to withdraw their allegations of sexual assault.

Case on Appeal, Vol. V, 843 J. Roberts, "Sexual Assault in Canada: Recent Statistical Trends" (1996) Queen's Law Journal, 395 - 421

K. Busby, (1995) "Rape Crisis Backlash and the Spectre of False Rape Allegations" (unpublished) at 14 - 15

42. Records production applications are grounded in faulty premises about how records are created and what they contain. None of the records being sought in such applications are records which were created for the purpose of obtaining an accurate report of the details of the incident. References to the incident, where they exist, will be haphazard and incomplete. They may have been authored by a record-keeper whose subjectivity and possible biases have influenced the content of what has been created thereby causing the records to be inherently unreliable sources of information.

K. Busby, "Discriminatory Uses of Records In Sexual Violence Cases", supra at 158 - 160

43. Counselling records are not the sworn account of a witness describing certain events nor do they constitute prior statements. They are dialogue consisting of "an entire spectrum of factors such as personal history, thoughts, and emotions...." and the acts constituting the criminal offence are rarely discussed. They may be readily susceptible to being taken out of context. The purpose of the counselling process is not to ascertain the historical truth of what happened.

K. Busby, "Discriminatory Uses of Records In Sexual Violence Cases", supra at 158

Osolin, supra, L'Heureuex-Dubé, at 623

A. (L.L.), supra, per L'Heureux-Dubé at 62

J. M. Gilmour, "Counselling Records: Disclosure in Sexual Assault Cases" in J. Cameron ed. The Charter's Impact on the Criminal Justice System (Toronto: Carswell, 1996) 239 at 249

Case on Appeal, Vol. III, Evidence of Dr. Marj Holmgren, at 467 - 8, 470; Vol. IV, Evidence of Dr. Norman Aldous, at 697

44. Other types of records are similarly created for specific purposes unrelated to the issues engaged by a sexual offence trial. Child welfare records contain detailed accounts of the daily lives of children and adolescents under protection orders. Military records note any deviance from military standards of conduct, such as same sex relationships. Prison records note acts which may have been characterized as impacting on institutional security.

K. Busby, "Discriminatory Uses of Records In Sexual Violence Cases", supra at 158

*WHAT CONSTITUTES THE RIGHT TO A FAIR TRIAL ?*

45. An evaluation of the conformity of Bill C-46 to the constitutional guarantee of a fair trial necessitates an exploration not only of the legal and social context in which the legislation is situated but also the issue of who is entitled to claim the right to a fair trial. It is not only the accused but also the complainant and the public at large who are entitled to the equal benefit of a fair and just trial process. Equality of fairness to complainants as well as accused persons is a fundamental tenet of our criminal justice system.

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

46. An accused's right to a fair trial is not a right to perfect justice according to his determination of what this would involve, but fundamentally fair justice taking into account the rights of others involved in the process. Section 7 of the *Charter* entitles an accused person to a fair hearing; not the most favourable procedures that could possibly be imagined.

O'Connor, supra, per McLachlin, J., at 517

R. v. Lyons, [1987] 2 S.C.R. 309 per LaForest, J. at 362

47. The right to a fair trial does not mean that an accused person is entitled to everything that might possibly be helpful to his defence. The assertion that unfettered production of complainant's private records in sexual offence trials is essential to secure fair trials invites the question - were there no fair trials of sexual offences before this recent proliferation of production applications? It is pertinent to this issue that Defence counsel do not equate accuseds' constitutional fair trial rights with invasive access to private records in all criminal proceedings or all cases involving crimes of violence or even all cases which may turn on an eye witness's credibility or reliability.

Case on Appeal, Vol. VII, at 1243, LEAF's Submissions to Standing Committee on Justice and Legal Affairs

M. McCrimmon, "Trial By Ordeal", supra at 39 - 40

Case on Appeal, Vol. VI, at 1167, The Submissions of the National Association of Women and the Law to the Standing Committee on Justice and Legal Affairs

48. Public interest considerations arising in our criminal justice system operate to limit Defence access to information in certain contexts. In determining whether an accused is entitled to know the identity of a confidential informant, this Honourable Court has required a demonstration that innocence is at stake to warrant judicial review of the information for relevance. Innocence at stake requires a basis in the evidence for concluding that disclosure is necessary to demonstrate the innocence of the accused. Mere speculation that the information being sought might assist is insufficient.

R. v. Liepert , [1997] 1 S.C.R. 281 per McLachlin, J. at 295

49. For an accused person to obtain production of the identity of a crime tipster, s/he must be able to articulate a real basis in the evidence; reliance on a hypothetical will not be adequate. The justification for production is required to be made in the absence of the accused seeing the tip received by police. This Honourable Court has not regarded such requirements to represent unconstitutional impediments to full answer and defence.

Liepert, supra

50. It is submitted that the public interest in encouraging victims to report sexual offences and to testify in sexual offence trials is as much in the public interest as encouraging crime informants. Unbridled access to private records will mean that some women and children will simply choose not to report the sexual violence committed against them, or will not obtain counselling. It is submitted that equality entitles women who have been sexually assaulted the right to seek counselling and pursue a prosecution of the offence against them. It is not consonant with equality that women be forced into making choices unrelated to their best interests or the public interest in order to avoid re-victimization in the court process.

J.M. Gilmour, "Counselling Records: Disclosure in Sexual Assault Cases", supra at 252

Case on Appeal, Vol. VI at 1170 - 71, Submissions of the National Association of Women and the Law to the Standing Committee on Justice and Legal Affairs

R. v. Brown (1993), 126 N.S.R. (2d) 281 (N.S.S.C.) at 284

51. A sexual offence trial does not involve a private dispute between two private individuals: it is a process that centrally engages the public interest and must reflect society's pursuit of justice on behalf of all its members. Fair trials are essential to the proper administration of criminal justice. They must be conducted in accordance with norms and principles that give full expression to all the guarantees of the *Charter*, including women's equal right to a fair trial as complainants in sexual offence proceedings.

52. As victims of sexual violence, women are already marginalized relative to victims of other crimes in the context of reporting and charging rates.

Case on Appeal, Vol. V, 843 J. Roberts, "Sexual Assault in Canada: Recent Statistical Trends" (1996) Queen's Law Journal, at 870

53. In the context of the testimonial competence of spouses, this Honourable Court has endorsed the importance of ensuring all witnesses have equal access to participation in the justice system.

R. v. Salituro, supra per Iacobucci, J. at 677

54. The gendered nature of the treatment meted out to women and children in sexual offence proceedings denies their right to equality in the criminal justice process. They are subject to deliberate and oppressive Defence strategies, which are utilized as a means of "whacking the complainant." It is in this context that complainants are "very much on trial."

B. Feldthusen, "Access to Private Therapeutic Records of Sexual Assault Complainants" 75 Can. Bar. Rev. 537 at 546

K. Kelly, "You Must Be Crazy If You Think You Were Raped: Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" supra at 187

Case on Appeal, Vol. II, at 239, Defence Submissions

55. Putting the complainant on trial is achieved through securing production of her private records. As demonstrated by this case, Defence counsel rarely have a cogent theory of how such records will relate to material issues in the trial. For example, Defence counsel frequently assert that the issue in the case is one of "recovered memory" even where such assertions have no air of reality and notwithstanding that the prosecution of true recovered memory cases are very rare. The assertion of a right to private records is an assertion of the right to engage in a fishing expedition. Fishing expeditions have not been accepted by this Honourable Court as a fair trial right.

K. Busby, "Third Party Records Cases Since R. v. O'Connor: A Preliminary Analysis", supra, at 21, 23 -24

R. v. Seaboyer, supra, per L'Heureux-Dubé, J. at 634 and 636

56. The constitutional guarantee of a fair trial and the entitlement to make full answer and defence do not provide any right to exploit and benefit from 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 Honourable 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

*FUNDAMENTAL JUSTICE AND THE RIGHT TO BE PRESUMED INNOCENT*

57. The right to be presumed innocent pervades the criminal process although its particular requirements will vary according to the context in which it is being applied. It is a presumption which operates as a procedural and evidentiary rule at trial requiring that the accused's guilt be proven beyond a reasonable doubt.

R. v. Pearson , [1992] 3 S.C.R. 665 per Lamer, C.J. at 683 - 5

58. The presumption of innocence does not strip away the right of complainants to fair proceedings; it does not include a concomitant presumption that women and children appearing as witnesses in the Crown's proceedings against the accused are lying, deluded or mistaken. The criminal justice system must give effect to the rights of complainants in sexual offence proceedings and be "ever vigilant in protecting victims of sexual assault from further victimization."

C.B.C. v. N.B. (A.G.), [1996] 3 S.C.R. 480 per Cory J. at 521

59. Reforms that vindicate equality rights operate to at least limit the number of wrongful acquittals arising in sexual offence cases. It is to be remembered that when an accused in a sexual offence case is wrongly acquitted, (due, for example, to a jury's reliance on discriminatory beliefs about her reinforced by disclosure of her history), the security and equality rights of women and children at large as the potential victims of a repeat offender are denied.

**SECTION 1**

60. LEAF does not concede in any respect that Bill C-46 violates an accused's right at trial to make a full answer and defence. However, if this Honourable Court finds that Bill C-46 imposes a limit on an accused's fair trial rights contrary to s. 7 or 11 (d) of the *Charter*, LEAF undertakes the following section 1 analysis as an alternative argument.

This Court has found that, under s. 1 of the *Charter* there can be demonstrably justified limits on fair trial rights - including the presumption of innocence. See for example R. v. Downey, [1992] 2 S.C.R. 10; R. v. Chalk, [1990] 3 S.C.R. 1303; R. v. Swain, [1991] 1 S.C.R. 933; and R. v. Whyte, [1988] 2. S.C.R. 3.

61. Such s. 1 analysis draws from the inter-relationship and balancing of *Charter* rights, the principles and values of Canadian society, and the particular facts and circumstances at issue. LEAF submits that equality and respect for inherent dignity of the person are values that always underlie any s. 1 analysis. These factors are assessed within the framework of whether the objective of the legislation in question is pressing and substantial and whether the means chosen to achieve that objective are "rationally connected" to the objective, impair the right as little as possible, with effects that are proportional to the objective.

R. v. Oakes, [1986] 1 S.C.R. 103; see in particular Dickson C. J. at 136.

62. The legislation does not represent a reflexive reaction on the part of Parliament to the O'Connor and A.(L.L.) cases. The Federal Department of Justice had undertaken work on legislative amendments with respect to the issue of records production in sexual offence cases before these decisions were made. In the course of developing the legislation, the Justice Department held wide-ranging consultations with respect to the draft legislation and sought the input of the criminal defence bar as well as women's advocates, prosecutors and front-line sexual assault workers.

Case on Appeal, Vol. VII, at 1249, LEAF's Submissions to Standing Committee on Justice and Legal Affairs

63. The objectives of Bill C-46 are identified in the Bill's Preamble, and reflect Parliament's consideration of all the rights that intersect in sexual offence proceedings. Among Parliament's objectives here: ensuring an accused's access to "likely relevant" records, encouraging the reporting of sexually violent crimes, and protecting complainants from discriminatory invasions of their privacy. The legislation reflects Parliament's commitment to equality, and its recognition that sexual violence occurs in a context that is uniquely gendered, and thus requires a balancing of an accused's fair trial rights with complainants' equality rights. This commitment to equality should be accorded special constitutional consideration. These objectives are, therefore, pressing and substantial.

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

64. There is a rational connection between the legislation and Parliament's objectives. The legislation provides an accused with access to "likely relevant" records, but by defining what does not constitute "likely relevance", protects complainants from discriminatory fishing expeditions based on outdated prejudicial myths that women are more likely to lie, and that there is a significant risk of wrongful conviction.

65. The test for minimal impairment is different where legislation, and not a common law regime, is at issue. This Honourable Court has recognized that Parliament must consider competing societal goals, and therefore need not always chose "the absolutely least intrusive means" but must come within a range of means which impair *Charter* rights as little as reasonably possible. This Court's decision in O'Connor was within the context of a common law regime, and it is submitted that it does not reflect Parliament's only means to address access to records. Parliament's choice here reflects its legitimate consideration of competing interests of different groups in society.

Swain, supra, per Lamer, C.J.C. at 978
Downey, supra, per Cory, J. at 37
Chaulk, supra, per Lamer, C.J. at 1341
R. v. Edwards Books and Art, [1986] 2 S.C.R. 713 per Dickson, C.J. at 781

66. Moreover, as in Downey, supra, Parliament here chose a framework which avoids either of two absolutist positions - access to all records or no access to any records.

67. Further, the legislation strikes a proportional balance between its objective and the infringement of the accused's rights. Its use of an "equality filter" for relevance permits "likely relevant" documents to be reviewed by the Court, and produced to the accused if relevant. Limiting access to irrelevant records is a minimal limitation of an accused's rights.

## CONCLUSION

68. It is submitted a declaration that Bill C-46 is unconstitutional would be a seriously regressive step with respect to the equality guarantees of the *Charter* and the promotion of equality for women and children in the context of sexual offence proceedings. Indeed, it is LEAF's submission that the striking of Bill C-46 would be a breach of section 15 as it

would constitute a diminution of the equality protections afforded women and children in the context of sexual offence trials.

69. However, the effectiveness of the legislation's equality-promoting objectives will be dependent on how the legislation is applied in individual cases involving individual women and children whose private histories are at risk of exploitation for discriminatory and discreditable purposes. Equality informed and driven principles relating to the interpretation and application of Bill C-46 must be set out by this Honourable Court to ensure that production applications are conducted in a manner which furthers equality. LEAF urges this Court to articulate and condemn the discriminatory presumptions about women and children that are employed by participants in records production applications, including judges, to perpetuate the inequality of women and children who have been sexually violated.

## PART IV: ORDER REQUESTED

70. It is submitted that the constitutional questions should be answered as follows:

1. No.
2. If yes, yes.
3. No.
4. If yes, yes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Anne S. Derrick

"Peggy Kobly"

Peggy Kobly

Counsel for the Women's Legal Education and Action Fund

DATED: November 2, 1998.

## PART V

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## APPENDIX I

### Preamble to Bill C-46

WHEREAS the Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms* ;

WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all, including those who are accused of, and those who are or may be victims of, sexual violence or abuse;

WHEREAS the rights guaranteed by the *Canadian Charter of Rights and Freedoms* are guaranteed equally to all and, in the event of a conflict, those rights are to be accommodated and reconciled to the greatest extent possible;

WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence and abuse and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;

WHEREAS the Parliament of Canada recognizes that the compelled production of personal information may deter complainants of sexual offences from reporting the offence to the police and may deter complainants from seeking necessary treatment, counsellor or advice;

WHEREAS the Parliament of Canada recognizes that the work of those who provide services and assistance to complainants of sexual offences is detrimentally affected by the compelled production of records and by the process to compel that production;

WHEREAS the Parliament of Canada recognizes that, while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make a full answer and defence, that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny;