File No. 20666/88; 20835/88

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO

B E T W E E N:

STEVEN SEABOYER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF SASKATCHEWAN
CANADIAN CIVIL LIBERTIES ASSOCIATION
WOMEN'S LEGAL EDUCATION AND ACTION FUND et al.

Interveners

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO

B E T W E E N:

NIGEL GAYME

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF SASKATCHEWAN, THE ATTORNEY GENERAL OF MANITOBA, THE CANADIAN CIVIL LIBERTIES ASSOCIATION and WOMEN'S LEGAL EDUCATION AND ACTION FUND et al.

Interveners

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PART 1: INTRODUCTION

1. The Interveners are rape crisis and treatment centres, and policy, research, litigation, organizing and action groups working on behalf of survivors of sexual abuse and assault. As a group, they are equality advocates for women and children with particular experience in the areas of sexual violence. This coalition is dedicated to protecting and advancing the equality and security rights of women and children, under Canadian law.

2. The Interveners bring to these cases extensive expertise on the equality and security needs of women and children who are victims of sexual offences, on the basis of direct contact with victims, relevant legal and social research and scholarship, policy development in the public and private sectors, counselling and law.

PART II: POINTS IN ISSUE

3. The points in issue are set out in the Factums of the Appellants.

4. The Interveners take no position on the issues raised in paragraphs 4 and 5 of the Appellant Seaboyer's factum, and paragraphs 49-52 of the Appellant Gayme's factum.

5. The Interveners submit that s.246.6 (now s.276) and s.246.7 (now s.277) of the Criminal Code should be upheld. The Interveners argue that:

(1) evidence of the type excluded by these sections has no impact on s.7 or s.11(d) Charter rights; such evidence is either irrelevant, or of very limited probative value and highly prejudicial to victims and to the administration of justice;

(2) in the alternative, if this Court finds that these sections have some impact on Charter-protected rights, the sections are nevertheless justifiable because of the role they play in protecting and enhancing the rights of women and children to equal protection and benefit of the law, and in particular to equal security of the person, as mandated by ss.7, 15, and 28 of the Charter.

PART III: ARGUMENT

(i) Legislative Purpose and Intent

6. The law of sexual assault has played a unique role in the history of women's inequality. Historically as a matter of common law, women, the victims of rape, were not legal persons. Rape was treated by the law more like a property offence than like an offence against the person: a property offence committed by one man against another man's property. Women were also disenfranchised. Therefore laws relating to sexual assault were developed, promulgated and administered by men, the perpetrator group, without regard to the experience and perspective of women, the victim group, and without regard to sex equality values or law.

> Backhouse, Constance B., "Nineteenth Century Canadian Rape Law, 1800-92" in Essays in the History of Canadian Law, Vol. II, ed. D.H. Flaherty (Osgoode Society: 1983) at 200-247
>
> Clark, L. and D. Lewis, Rape: The Price of Coercive Sexuality (Toronto, Women's Press: 1977) at 110-124

7. If rape law had taken sex equality into account, it would have taken into account the following:

(a) The victims of sexual assault in Canada, as elsewhere,

are overwhelmingly female; the perpetrators of sexual assault are overwhelmingly adult males.

(b) Sexual assaults which are not committed against adult women are overwhelmingly committed against children, mostly by older males.

(c) Only a fraction of sexual assaults are reported. Only a fraction of reported sexual assaults are prosecuted. Only a fraction of prosecuted sexual assaults result in convictions.

(d) On a conservative estimate, at least one in four Canadian women will be sexually assaulted at least once in her life. One half of these women will be sexually assaulted before the age of seventeen.

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

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

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

Felony Arrests: Their Prosecution and Disposition in New York City's Courts, Vera Institute of Justice Monograph at 6-9

Renner, K.E. and C. Wackett "Sexual Assault: Social and Stranger Rape" (1987), 6 Can. J. of Com. Mental Health 49 at 53-55

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

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

8. The law of sexual assault has historically evidenced a suspicion that women's accusations of sexual abuse were uniquely likely to be fabricated. Thus the law required that rape complaints be recent, and that sexual crimes alone among violent crimes against the person be corroborated. It was not possible to prosecute rape in marriage. Juries were cautioned that victim testimony in rape cases be viewed with special scepticism.

> Backhouse, op. cit. at 220-226; 233-235
>
> Brooks, N., "Rape and the Laws of Evidence" (1975), 23 Chitty's L.J. 1
>
> Berger, V., "Man's Trial, Women's Tribulation: Rape Cases in the Courtroom" (1977), 77 Col.L.R. 1 at 21-22

9. In the context of the above substantive criminal law rules, evidentiary rules were developed permitting wide-ranging cross-examination of the complainant on her previous sexual history and sexual reputation. These matters were regarded as relevant to the complainant's credibility, and to whether or not she had consented to the act.

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

11. The law of evidence reflected deeply entrenched fallacies about women and their sexuality. For example, a widely-used treatise on evidence, as late as 1970, stated that:

> (1) Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their physical

> complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.
>
> (2) No judge should ever let a sex offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.
>
> Wigmore, J.H., Evidence in Trials at Common Law, Vol. 3A, rev. J.H. Chadbourne (Boston, Little, Brown & Co: 1970) at 924a (pp.736-7)

12. Legal doctrines developed against this historical background continued to shape the criminal law in Canada until the mid-1970s, when Parliamentary law reform began to acknowledge some of the realities of sexual assault and its place in the status of women.

13. Sections 276 and 277 were part of a process of change designed to make the criminal justice system more accessible to women and child survivors of sexual assault, to protect their dignity and self-respect within the trial process, and to protect their bodily integrity and personal autonomy by improving the odds that their abusers would be brought to justice.

> S.C. 1980-81-82, c.125
>
> House of Commons, Debates:
> 18 November 1975: 9204, 9224-25
> 19 November 1975: 9247-48, 9251-52, 9259, 9261
> 8 July 1981: 11300-01, 11342-44
> 17 December 1981: 14165-66
> 20 July 1982: 19499-19500
> 4 August 1982: 20041-42
>
> Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence:
> 22 April, 1982, 77:27-46

14. These legislative reforms involved a recognition that traditional practices and procedures of the criminal courts "stacked the deck" against the victims of sexual assault in ways that were unique to these offences and ungrounded in reality. As women were gaining a public voice, the received myths became less acceptable as a foundation for legal doctrine and criminal procedure.

15. The process described above commenced in 1976 with Parliament's first package of reforms of sexual assault law. Part of this package was section 142 of the Criminal Code.

S.C. 1974-75-76, c.93

16. Although section 142 was designed to protect victims from intrusive and irrelevant cross-examination, it was interpreted by the courts as broadening the scope for cross-examination of complainants about prior sexual history and reputation, in that it made a complainant compellable on these issues, and allowed the defence to impeach her credibility by calling witnesses to testify with respect to her reputation, previously regarded as a collateral issue.

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

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

17. In 1982, partly in response to this jurisprudence, Parliament passed a second package of legislative reforms, including what are currently ss. 276 and 277 of the Code.

S.C. 1980-81-82, c.125

18. These reforms were enacted after careful study and review by Parliament, involving extensive committee hearings in which representatives of groups of women who had been sexually assaulted were heard. A variety of detailed, comprehensive and authoritative studies and Royal Commission reports, including a report from the Law Reform Commission of Canada, were reviewed.

Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence
27 April 1982, 78: 4-7, 25-28
6 May 1982, 82: 30-49
1 June 1982, 91: 3-56; 91A:1-10
9 June 1982, 95: 3-25

See also citations, para. 13 supra

19. Parliament enacted these provisions knowing that only one in ten rape cases is ever reported, and that the conviction rate is lower for rape than for other indictable offences. The reforms were explicitly designed to ensure that laws against sexual assault would be more equitably and effectively enforced. They clearly promote sex equality.

See citations, para. 13 supra

20. These provisions were enacted with the purpose of protecting and enhancing the equality of victims of sexual assault, and providing them with equal benefit of the criminal law and equal protection within the criminal justice system.

See citations, para. 13 supra

(ii) **Equality Rights Under The Charter**

21. This Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation

must be measured. This Court has also said that the section 15 guarantee "is the broadest of all guarantees [in the Charter]. It applies to and supports all other rights guaranteed by the Charter."

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

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

22. In this Court's developing jurisprudence, while s.15 does not itself guarantee social equality, equal law is seen as a means to an equal society, as well as an end in itself. Thus, the purpose of s.15 "is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".

Andrews, supra at p.171

23. This Court has acknowledged the importance of promoting the equality of disadvantaged groups. In the words of Wilson J., "s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society."

Andrews, supra at p.154

R. v. Turpin, [1989] 1 S.C.R 1296 at 1332-3

(iii) **Sexual Assault as an Equality Issue**

24. It is submitted that the social practice of sexual assault constitutes discrimination on the basis of sex and age. Its treatment by the legal system therefore implicates the equality

rights of women and children.

25. Just as women are sexually harassed based on their sex, women are sexually assaulted based on their sex. The Supreme Court has quoted with approval a scholar's argument that sexual harassment is used in a sexist society to "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to "remind women of their inferior ascribed status". The same is true of sexual assault.

> Janzen and Govereau v. Platy Enterprises, [1989] 1 S.C.R. 1252 at 1285

26. Children are sexually assaulted because of their age and sex.

27. For purposes of the laws against sexual assault, women and children are groups disadvantaged by social inequality within the meaning of s.15.

28. Sexual assault is categorical and group-based. Just as "no man would have been subjected to [sexual harassment]", men are not under most circumstances subjected to sexual assault by women, nor are adult men treated in the way children of both sexes are treated by those who sexually assault them. Just as "[a]ny female considering employment at the ... [r]estaurant was a potential victim ... and as such was disadvantaged because of her sex", any woman and child in an unequal society is a potential victim of sexual assault and as such is disadvantaged because of age and sex.

> Janzen, supra at 1288-91

29. In sex-unequal societies, both sexes are taught to accept sexual aggression by men against women as normal to some degree. Male sexual exploitation of women is fostered by traditional gender

roles in which male sexuality embodies the role of the aggressor, female sexuality embodies the role of the victim, and some force is romanticized as acceptable. Sexual assaults frequently occur in the context of normal social events, often by an assailant who is known to the victim. A third of all college men say they would rape women if they could be assured they would not get caught.

Renner and Wackett, op.cit. at 49-56

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

Check, J.V.P., and N.M. Malamuth, "Sex Role Stereotyping and Reactions To Depictions of Stranger Versus Acquaintance Rape" (1983), 45 J. of Pers. and Soc. Psych. 344.

Gunn, R. and C. Minch, Sexual Assault: The Dilemma of Disclosure, The Question of Conviction, (Winnipeg, U. of Man.: 1988) at 3-12; 44-46

30. Women occupy a disadvantaged status as victims and targets of sexual aggression. Rape, and the fear of rape, function cross-culturally as a mechanism of social control over women, enabling men to assert dominance over women and maintaining the existing system of gender stratification. Rape operates as both a symbol and reality of women's subordinate social status to men.

Gordon, M.T. and S. Riger, The Female Fear (New York, The Free Press: 1989) at 8-22

Brownmiller S., Against Our Will: Men, Women and Rape, (New York, Bantam: 1975) at 1-188

31. Thus, sexual assault cannot be legally treated by the law as just another "gender neutral" crime, in other words a crime in which gender does not matter. Rather, the criminal law of sexual assault must be measured by constitutional equality standards.

(iv) Role of Sections 276 and 277 in Promoting and Enhancing Section 15 and Section 7 Rights of Women and Children

32. It is submitted that permitting a sexual assault victim to be questioned at large about her past sexual conduct and sexual reputation elicits evidence which is irrelevant and prejudicial. Such evidence:

(a) reduces the likelihood that sexual assaults will be reported;

(b) subjects her to demeaning and dehumanizing experiences in the trial process that undermine her credibility, expose her to public contempt, and trivialize her violation;

(c) reduces the likelihood that her violation will be recognized as such and that anyone will be brought to account for it; and

(d) reduces the likelihood that further violations, both of herself and other women, will be deterred.

See Articles cited paras. 33-34 infra

33. Contemporary empirical research supports the conclusion that the admission of sexual history in sexual assault trials independently reduces the possibility of conviction and lowers sentences. Once a woman is "sexualized" by the introduction of this evidence, it becomes the "pivot of the case". When their female victims are shown not to conform to traditional sex roles, men who rape are less likely to be convicted, and if convicted are less likely to receive a severe sanction. Evidence of past sexual activities in effect transforms the courtroom into a sexual spectacle.

La Free, "Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape

Processing" (1980), 58 Social Forces 833

La Free, G.D. B. Reskin and C.A. Visher, "Juror's Responses to Victim's Behaviour and Legal Issues in Sexual Assault Trials" (1985), 32 Soc. Prob. 389-407

Borgida, E. and P. White, "Social Perception of Rape Victims" (1978), 2 Law and Human Behaviour 339

Holmstrom, L.L. and A.W. Burgess, The Victim of Rape: Institutional Reactions (New Jersey, Transaction Books: 1983) at 157-220

McCahill, T.W., L.C. Meyer and A.M. Fischman, The Aftermath of Rape (Toronto, Lexington Books: 1979) at 190-91

34. Any evidence of sexual activity outside marriage leads jurors to doubt the defendant's guilt in cases in which consent or a lack of sexual activity is pleaded. It has been shown that juries use victims' past sexual conduct to mitigate defendants' culpability. Even unfounded and unrebutted questions concerning past sexual behaviour plant suspicions and do serious damage to the victim's credibility. This is often adopted as a deliberate defence strategy. Simulated jury studies indicate that once a victim is asked about her sexual past, if she refuses to answer she is perceived as sexually active, and as more responsible for having precipitated the rape, than victims who were not asked.

Catton, K., "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim - Its' Effect on the Perceived Guilt of the Accused" (1975), 33 U.of T. Fac. L.R. 165

Cann, A., L.J. Calhoun and J.W. Selby, "Attributing Responsibility to the Victim of Rape: Influence of Information Regarding Past Sexual Experience" (1979), 32 Human Relations 57

35. Research such as this has led many states in the United States to restrict the admissibility of evidence about rape complainants' sexual history in court.

Galvin, Harriet R., "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade", (1986) 70 Minnesota L.R. 763 at 768-77

36. In sex-unequal societies, sexual activity is thought to be degrading to women, although not to men. Public knowledge of details of a woman's sexual past, voluntary or involuntary, destroys her standing as a credible member of the community. As a result, public disclosure of sexual activity is experienced as humiliating, and is avoided by victims even at the cost of protected rights.

37. The prospect of participating in such a process, with the results outlined above, acts as a powerful disincentive for women to make legitimate rape complaints, and to pursue vindication of their violations through the legal system.

Canadian Urban Victimization Survey, "Reported and Unreported Crimes" at 3 supra

Gunn and Minch, op.cit. at 35-82

Holmstrom and Burgess, op.cit. at 58

38. When a victim's sexual history or reputation with others may be introduced at a sexual assault trial, she does not receive equal access to justice. It is not merely the victims' sensibilities that are at stake, but their equal human status in court and in society. The issue is not privacy, but equality.

39. Just as Charter rights can be used to challenge legislation, they can be used to uphold existing legislation that furthers and promotes Charter rights. S.15 "has a large remedial component". Victims of sex crimes need remedial legislation like ss. 276 and 277 to promote their right to equal access to justice in a sex

unequal society.

> R. v. Keegstra, unreported decision of the Supreme Court of Canada, per Dickson C.J.C. at 55
>
> Andrews, supra at p. 171
>
> McKinney v. University of Guelph, unreported decision of the Supreme Court of Canada, per Wilson J., dissenting, at 115-6

40. While changes in statistical reporting procedures since the new reform package was introduced make direct comparisons difficult, and relevant provisions of the law have been under constitutional attack virtually since they were passed, the data available suggests that the new law has had some positive impact on reporting rates for sexual asault.

> Renner, K.E. and S. Sahjpaul, "The New Sexual Assault Law: What Has Been Its Effect" (1986), 28 Can. J. of Crim. 407

(v) Impact of Excluded Evidence on Appellants' Constitutional Rights

41. It is submitted that evidence of victim sexual history and reputation excluded by ss. 276 and 277 is virtually always totally irrelevant to a determination of the facts. Where it may have some marginal relevance to an issue in the case, its probative value is easily outweighed by its prejudicial effect: i.e. its unreliability, its unwarranted and disproportionate impact on trial outcomes, and its negative impact on other process goals, such as reporting and deterrence, which promote equality.

> Priest v. Rotary, 98 F.R.D. 755 (1983, U.S.D.C)

42. Constitutional guarantees of fair trial rights do not include

the right to present irrelevant evidence.

> R. v. Corbett, [1988] 1 S.C.R. 670 at 687-8, 744 per LaForest, J. dissenting on other grounds.
>
> People v. Thompson, 257 N.W. 2d 268, (1977, Mich. C.A.)

43. Relevance is a basic principle governing the admissibility of evidence. No evidence is admissible which is not relevant. As a matter of public policy, more important interests have at time outweighed relevance, and produced exclusionary rules such as solicitor-client privilege, hearsay rules, spousal immunity, and the general principle that no evidence should be admitted if its probative value is outweighed by its prejudicial effect.

> Cross, R., Evidence, 5th ed. (London, Butterworths: 1979) at 17-31
>
> Delisle, R.J., Evidence: Principles and Problems, 2d. ed. (Toronto, Carswell: 1989) at 9-18

44. It is submitted that the impugned provisions of the Criminal Code function simply to bring the rules of evidence in sexual assault cases into line with the rules of evidence in other criminal cases by providing an appropriate and necessary counter-balance to the systemic bias against women and child victims in the criminal justice system.

> Boyle, C. and S.W. Rowley, "Sexual Assault and Family Violence: Reflections on Bias" in Equality and Judicial Neutrality, ed. K. Mahoney and S. Martin (Toronto, Carswell: 1987) 312 at 323-5
>
> Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987), 2 C.J.W.L. 233
>
> Dawson, T.B., "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1988), 2 C.J.W.L. 310

Sheehy, E.A., "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989), 21 Ott. L.R. 741

R. v. Bird and Peebles (1984), 40 C.R. (3d) 41 (Man. Q.B.).

Priest v. Rotary, supra

45. While relevance is a legal concept, it is essentially a matter grounded in empirical experience. Facts which are regarded, as a matter of experience, as likely to be associated with other facts, are seen as "tending to prove or disprove" those other facts, and therefore as relevant evidence to establish those other facts.

46. Beliefs about relevance are derived from the experience of the person who is making the determination about relevance. The consequence is that those with power can define their experience as objective fact. Because social power in our society has historically been distributed along gender lines, and men have been able to impose their experience on the social definition of reality, male experience of sexual relationships and relations, and male perceptions of women's experience of sex and sexual relationships in the sexual assault area have dominated and informed concepts of legal relevance.

47. Due to sex inequality in society, women's perceptions and experience of sex and sexual relationships are not the same as men's.

MacKinnon, C., Toward a Feminist Theory of the State (Cambridge, Harvard: 1989) at 126-154

48. Historically, women who have ever had sex outside marriage were regarded as untruthful; sexual activity outside traditional

marriage was therefore regarded as relevant to the credibility of female witnesses. This rule was not applied to men, because "unchaste" men were not regarded as untruthful. There is no basis in fact for predicating a judgment of truthfulness on a person's sexual experience.

49. Historically, women who consented to sex with one man or some men outside marriage were regarded as more likely to consent to sex with <u>any</u> man. "Unchastity" was therefore regarded as relevant to consent. In fact, women clearly understand that men are distinct and different from each other, and that the fact that a woman consented to enter into sexual relations with one man tells us nothing useful about whether she would consent to enter into similar relations with a different man. It certainly tells us nothing useful about the factual issue of whether or not she <u>did</u> consent on a particular occasion.

50. Section 276 recognizes that in some situations the accused may put evidence of the complainant's sexual history before the court. These exceptions, while arguably overbroad, amply provide for fair trials in all situations in which potentially relevant evidence of any significant probative value might be adduced.

Dawson, <u>op.cit.</u> at 317-21

51. It is submitted that in all of the hypothetical situations outlined in the Appellants' factums, evidence of sexual history and/or sexual reputation is either totally irrelevant, admissible pursuant to the exceptions provided for in s.276, or, in the alternative, of very low probative value and highly prejudicial to the interests of the administration of justice, and the complainant. These examples present scenarios arguing the relevance of similar fact patterns and propensity, character,

motive for false accusation, unchastity going to lack of credibility, and fantasy. They seek to shape the law according to misogynist stereotypes holding that women who are or have been sexually active are available for, and interested in, further sexual activity, and that they fabricate allegations of sexual assault. The examples involving prostituted women obscure the irrelevance of past sexual exchanges for money to a present allegation of rape, and fail to acknowledge that whether or not the sexual exchange on the occasion in issue was to be for a fee is clearly admissible. All these examples seek to show "what kind of woman" the complainant "is" to divert attention from the issue at trial: what the defendant did or did not do to her. The "demeanour" examples are particularly obnoxious.

Dawson, op.cit. at 317-25

52. It is further submitted that the hypotheticals presented by the Appellants in their factums illustrate the very problem the law was designed to correct. They are substantially reflective of what scholars term "rape myths". Studies indicate that men who believe in the assumptions behind such scenarios would be more likely to rape, and less likely to recognize that what they were doing was rape.

Burt, M.R. and R.S. Albin, "Rape Myths, Rape Definitions and Probability of Conviction" (1981), 11 J. of App. Soc. Psych. 212

Burt, M.R., "Justifying Personal Violence: A Comparison of Rapists and the General Public" (1983), 8 Victimology 131

53. Arguments that evidence not provided for in the exceptions is relevant reflect gender-biased assumptions about female sexuality. The construction of rules of evidence on gender-biased assumptions

that disadvantage women violates ss. 7, 15 and 28 of the Charter.

See citations, para. 44 supra

54. The Appellant Seaboyer argues that the problems which precipitated the laws under examination will not recur if they are declared inoperative because we will now have a "modern common law approach" based on "present day views of sexual relationships" (para. 93). Presumably this means that judges and juries will no longer accept the myths about women's sexuality that were at the root of previous unacceptable treatment of complainants. It is submitted that no support for this has been provided by the Appellants.

55. Generally consistent patterns in sentencing in sexual assault cases in the lower courts, together with the comments provided by trial judges in imposing sentence, make it clear that in many cases the judges who would be exercising the discretion do not understand the enormity of the crime of sexual assault, the impact on the victim, the violence inherent in coerced sex, the power exercised by men over women in our society as a result of sex-unequal institutions and other power structures, and the systemic role of sexual assault and threats of sexual assault in maintaining sex-unequal power relations in our society. No decision should be made in these cases on the assumption that trial judges and triers of fact understand and accept sex equality principles, and that their decisions on relevance will be informed by them.

R. v. Lavallee, [1990] 1 S.C.R. 852 at 872-75

Marshall, P. "Sexual Assault, The Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216

Informa Inc., Sexual Assault: Measuring the Impact of the Launch Campaign, Report Prepared for the Ontario Women's Directorate, August 1988

56. The legislative history demonstrates that the impugned legislation was passed because Parliament found that exercises of judicial discretion failed to reflect concerns for sex equality, and concerns for the dignity, bodily integrity and equal security of the person of women victims. No evidence has been produced to suggest that these Parliamentary findings do not continue to be valid.

See paras. 12-20, supra

57. Where law reform has left the admissibility of sexual conduct evidence to the discretion of the trial judge, "such evidence is often admitted on highly questionable grounds and decision-making in this area is more a reflection of prejudice against the complainant than of relevance to the accused's case in any real and acceptable sense".

> Adler, Z., "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation", [1985] Crim. L.R. 768 at 770

58. Section 7 and 11(d) values invoked by the accused include justice and fairness with respect to the interests of the state as representative of the public, and the protection of the integrity of the administration of justice as well as the accused's interests. It is submitted that "fairness" must recognize the legitimate interests of the complainant.

> R. v. Corbett, supra at 745 per LaForest, J., dissenting on other grounds

59. American State Courts have, almost without exception, upheld rape shield laws, rejecting contentions that the particular statute constituted a denial of due process or of a fair trial.

Backhouse, C. and L. Schoenroth, "A Comparative Survey of Canadian and American Rape Law" (1983) 6 Can. - U.S. Law Journal 48 at 70-1

(vi) Equality Issues Raised by the Defence of Mistaken Belief in Consent

60. In R. v. Pappajohn this Court found that mistaken belief in consent was a defence available in sexual assault cases even where there was no reasonable basis for the mistake.

R. v. Pappajohn, [1980] 2 S.C.R. 120

61. As reflected in Pappajohn, the legal concept of mistaken belief in consent defines the boundaries of criminal behaviour without regard to the bodily integrity and sense of self-worth of the victim, or to the liberty and security interests of the victim. It transforms consent from something the women does into something the man thinks.

62. It provides no incentive for men to inform themselves about women's sexuality in general, or on the particular occasion. It promotes a state of law in which stereotypical, even pornographic, myths about women's sexuality are sanctioned by law, and thus become validated in the eyes of jurors. It makes it possible for a man to be acquitted of rape regardless of the amount of force used.

63. Parliament, in response to such equality concerns and in the interests of maintaining criminal sanctions against forcing women to engage in sexual relations to which they do not consent, has now codified in section 265(4) the defence in order to limit its scope. Concurrently, it also codified the nature of the sexual history

evidence relevant to this defence in s.276(1)(c). It is submitted that these provisions are constitutional exercises of Parliament's authority to define the scope of criminal conduct, maintaining mens rea requirements while focusing trials on case-specific facts rather than stereotypes.

Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence
22 April, 1982, 77:32
28 July, 1982, 107:125-130

64. It is submitted that even as codified by Parliament there is serious reason to doubt whether the defence of mistaken belief in consent can withstand s.15 scrutiny in view of its impact on women's equality rights.

Sheehy, op.cit. at 761-8

65. It is further submitted that in light of its implications for sex equality it should be narrowly interpreted. So interpreted, no relevant evidence whatsoever would be excluded by ss.276 and 277.

(vii) Section 1 Issues

66. Section 1 has recently been described by this Court as the locus in which "the fundamental values and aspirations of Canadian society" are brought together.

R. v. Keegstra, supra, per Dickson C.J.C. at 29-32

67. The Chief Justice, as he then was, comments that "promoting equality is an undertaking essential to any free and democratic society . . . The principles underlying s. 15 of the Charter are

thus integral to the s. 1 analysis". Where the objective of the legislation is to promote equality, that objective is enhanced "in light of the Charter commitment to equality, and the reflection of this commitment in the framework of s.1".

Keegstra, supra, per Dickson C.J.C. at 55

68. This Court has recognized that where Charter challenges involve legislation mediating the claims of different groups, the analysis under s.1 involves different considerations than where the conflict is strictly between an individual and the state as "singular antagonist".

A.G. of Quebec v. Irwin Toy, [1989] 1 S.C.R. 927 at 994

Edwards Books and Art Limited v. The Queen, [1986] 2 S.C.R. 713

United States of America v. Cotroni [1989] 1 S.C.R. 1469, 1489-90

69. It is submitted that in a free and democratic society in which equality is a paramount value, the impugned sections accord more than due weight to the rights of the accused in balancing those rights against the equality rights of women and children.

70. It is submitted that where it is clear that the issue involved is a complex and sensitive social issue, and where Parliament engaged in a thoughtful process of deliberation, involving due consideration of the competing rights and interests involved, of the social conditions, and of evolving sensitivity to issues of sex equality, this Court should defer to the Parliamentary compromise between the interests of the respective groups involved in the absence of clear and convincing evidence that some other balance would be more appropriate under the Charter. "[A]s courts review

the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative functions".

Irwin Toy, supra at 993

71. Where the rights in conflict are those of women and men, this Court must have regard to section 28 of the Charter, and avoid any interpretation of the Charter which allows the rights of men to override the rights of women.

(viii) **Constitutional Exemption Approach Does Not Give Adequate Protection to the Equality and Security Rights of Women and Child Victims**

72. The Ontario Court of Appeal attempted to resolve the issues before it by upholding the legislative provisions, but recognizing the right of any defendant who could demonstrate a constraint on his particular rights to claim a "constitutional exemption" from the statutory restrictions on cross-examination of complainants.

73. The constitutional exemption approach is simply a species of judicial discretion, and suffers from all the constitutional flaws inherent in that concept in this type of case, as outlined in paragraphs 53-57 above.

74. Judicial discretion also fails to provide certainty to victims that their rights and interests will be respected and vindicated by the criminal justice system.

75. Victims need to be sure they will receive this protection at the time they make a decision to report. This Court has recognized that there is a compelling social interest in the reporting of the

crime of sexual assault, and that assured protections of the privacy and dignity of the victims are essential to persuade victims to report.

> Canadian Newspapers Co. v. A.G. Canada, [1988] 2 S.C.R. 122 at 130

76. The "compromise" reached by the Ontario Court of Appeal fails to confront the group nature of the equality right to be protected here. The legislation, by contrast, promotes the equality rights of women and children as groups because it promotes reporting, increases the likelihood that guilty persons will be convicted, and therefore deters the crime of sexual assault. The constitutional exemption solution goes only so far as to protect those individual victims whose cases get as far as the trial of their victimizers, and whose dignity, privacy, and equality are deemed worthy of protection on a case by case basis.

PART IV: ORDER REQUESTED

77. The Intervener Women's Legal Education and Action Fund et al. submits that the constitutional questions should be answered as follows

1. No.
2. If yes, yes.

All of which is respectfully submitted.

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