

IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

IVON SHEARING

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND ("LEAF")

Intervener

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

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SHEILAH MARTIN  
Faculty of Law  
Murray Fraser Hall  
2500 University Drive N.W.  
Calgary, AB T2N 1N4

Tel: (403) 220-7112  
Fax: (403) 282-8325  
Email: [martins@ucalgary.ca](mailto:martins@ucalgary.ca)

Counsel for the Intervener

CAROLE BROWN  
Borden Ladner Gervais LLP  
1000 – 60 Queen Street  
Ottawa, Ontario  
K1P 5Y7

Tel: (613) 237-5160 ext. 468  
Fax: (613) 230-8842

Ottawa Agent for Counsel for the Intervener

RITU KHULLAR  
Chivers Greckol & Kanee  
#101, 10426 – 81 Avenue  
Edmonton, AB T6E 1X5

Tel: (780) 439-3611  
Fax: (780) 439-8543  
Email: [rkhullar@cgklaw.net](mailto:rkhullar@cgklaw.net)

Counsel for the Intervener

## TABLE OF CONTENTS

PART I	INTRODUCTION	1
PART II	POINTS IN ISSUES	2
PART III	ARGUMENT	
A.	THE DIARY	3
i)	Applicability of ss. 278.1 – 278.91 of the <i>Criminal Code</i>	3
ii)	Use of Diary at Trial	6
iii)	Application to this Case	7
iv)	Section 278.5(2) Factors	7
a)	The extent to which the record is necessary for the accused to make a full answer and defence, the probative value of the record, and effect on integrity of trial process (s. 278.5(2)(a), (b) and (h))	7
b)	The nature and extent of the reasonable expectation of privacy with respect to the record and the potential prejudice to the personal dignity and privacy of the complainant (s. 278.5(2)(c) and (e))	8
c)	Whether production of the record is based on a discriminatory belief or bias (s. 278.5(2)(d))	9
d)	Society's interest in encouraging the reporting of sexual offences (s. 278.5(f) and (h))	11
e)	Salutary And Deleterious Effects	11
B.	SIMILAR FACT EVIDENCE	11
i)	The standard for receiving similar fact evidence in sexual assault cases	13
ii)	The Role of Collusion	13
PART IV	RELIEF REQUESTED	20

**PART V**  
**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE REFERENCE</b>
<i>Irwin Toy v. A.G. Quebec</i> , [1989] 1 S.C.R. 927	9
<i>LAC Minerals v. Int'l Corona Resources</i> (1989), 2 S.C.R. 574	5
<i>P. v Arp</i> , [1998] 3 S.C.R. 339	12, 13, 14, 17
<i>R. v B. (C.R.)</i> , [1990] 1 S.C.R. 717	11, 14
<i>R. v. B. (L.); R.v. G. (M.A.)</i> (1997), 35 O.R. (3d) 35 (C.A.)	12, 15
<i>R. v. Batte</i> (2000) 49 O.R. (3d) (C.A.) 321	7, 12, 13, 14
<i>R. v. D.M.</i> , [2000] O.J. No. 3114 (Sup. Ct. J.)	7, 9, 11
<i>R. v. Darrach</i> , [2000] 2 S.C.R. 443	1, 6, 9, 13
<i>R. v. Esau</i> , [1997] 2 S.C.R. 777	1, 2
<i>R. v. Ewanchuk</i> , [1999] 1 S.C.R. 330	1, 13
<i>R. v H.</i> ((Dec. 6, 1999) B.C.S.C. Vanc. Reg. CC. 990301)	5
<i>R. v. J.W.</i> , [1994] O.J. No. 1282 (G.D.)	8
<i>R. v. L.G.</i> , [2000] O.J. No. 5090 (Sup. Ct. J.)	11
<i>R. v. Leipert</i> , [1997] 1 S.C.R. 281	7
<i>R. v. Mills</i> , [1999] 3 S.C.R. 668	1, 3, 4, 6, 8, 9, 11
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<i>R. v. Osolin</i> , [1993] 4 S.C.R. 595	1, 2, 6, 9
<i>R. v. P.</i> , [1991] 3 All E.R. 337 (H.L.)	14, 15
<i>R.. v. Park</i> , [1995] 2 S.C.R. 836	1
<i>R. v. Plant</i> , [1993] 3 S.C.R. 281	8
<i>R. v. Seaboyer</i> , [1991] 2 S.C.R. 577	1, 18
<i>R. v. Sharpe</i> 2001 S.C.C. 2	8

<i>R. v. W.P.N.</i> , [2000] N.W.T.J. No. 15 (S.C.)	8, 9, 11
<i>R v. White</i> , ((Feb. 10, 1997) Ontario Court of Justice G.D., J-97-0246)	5
<i>Re Rizzo &amp; Rizzo Shoes Ltd.</i> , [1981], 1 S.C.R. 27	3
<i>Re Timm</i> , [1981] 2 S.C.R. 315	9
<i>Slavutych v. Baker</i> , [1976] 1 S.C.R. 254	5
<i>V.(K.L.)v. R. (D.G.)</i> (1994) 118 D.L.R. (4 <sup>th</sup> ) 699 (B.C.C.A.), leave to appeal to S.C.C. filed and discontinued [1994] S.C.C.A. No. 436	8
<b>TEXTS AND ARTICLES</b>	
L.B. Bienen, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise of Evidence" (1983) 19 <i>Cal. Western L.Rev.</i> 235	18
C. Boyle, "The Case of the Missing Records: <i>R. v. Carosella</i> " (1997) 8 <i>Constitutional Forum</i> 59	7
C. Boyle, <i>Sexual Assault</i> (Carswell, Toronto: 1984)	10
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K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) <i>C.J.W.L.</i> 148	5
L.M.G. Clark, <i>Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law: Still Searching for Epistemic Equality</i> (Ottawa: Canadian Advisory Council on the Status of Women, 1993)	10
J. B. LaVacca, Protecting the Contents of a Personal Diary from Unwanted Eyes 19 <i>Rutgers L.J.</i> 389	8
Marilyn MacCrimmon, "Trial by Ordeal" (1996), 1 <i>Can. Crim. L. Rev.</i> 31	1
Elizabeth Sheehy, "Legal Responses to Violence Against Women in Canada" (1999) 19 <i>Canadian Women Studies</i> 62	1
J. Sopinka et al., <i>The Law of Evidence</i> (2d) (Toronto: Butterworths, 1999)	10
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## PART I - INTRODUCTION

1. In the past two decades there has been significant legislative reform and litigation in the area of sexual assault law. Parliament and the courts have engaged in a "dialogue" which has been informed, and enriched, by the voices of LEAF, other equality seeking groups, and groups representing the rights of the accused. This multilateral conversation has contributed to the development of improved sexual assault law designed to recognize and promote the rights of accused persons, people who have been sexually assaulted, and society (*R. v. Mills*, [1999] 3 S.C.R. 668 at par. 57).

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2. Cultural and legal analyses of sexual violence have revealed that sexual assault is a practice of inequality. Women, particularly those from disadvantaged groups, are the primary victims of sexual assault. Women who engage with the criminal justice system have historically been subjected to rules of law and procedure that often exacerbate the violations caused by the perpetrators of sexual assault. Judicial and legislative reforms in the areas of substantive and procedural criminal law have begun the process of responding to these systemic inequalities. (*R. v. Osolin*, [1993] 4 S.C.R. 595 at 669; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 348 per Major J., and 361 – 368 per L'Heureux-Dubé; *R. v. Mills*, [1999] 3 S.C.R. 668 at par. 58; Marilyn MacCrimmon, "Trial by Ordeal" (1996) 1 *Can. Crim. L. Rev.* 31; Elizabeth Sheehy, "Legal Responses to Violence Against Women in Canada" (1999) 19 *Canadian Women Studies* 62).

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3. This Court is familiar with the numerous revisions to the *Criminal Code* enacted to protect the rights of complainants and the fair trial interests of the community as guaranteed by *Canadian Charter of Rights and Freedoms*. Specifically in relation to this case, the law of sexual assault was amended in 1983 to remove mandatory instructions about corroboration, and to abrogate rules relating to recent complaint (*The Criminal Law Amendment Act*, S.C. 1980-81-82, c. 125, s. 19; *An Act to amend the Criminal Code (Sexual Assault)*, S.C. 1992, c. 38, s. 2; *R. v. Darrach*, [2000] 2 S.C.R. 443).

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4. In this, and other contexts, this Court has recognized the prevalence of myths and stereotypes in the law of sexual assault. Despite efforts to cleanse the criminal law of these discriminatory notions about women and sexual assault, the myths continue to find purchase in new forms, and in relation to new legal strategies. The myths of fabrication and the unreliability of female witnesses are particularly relevant in the present case (*R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 604 per McLachlin, J., at 651 - 3 per L'Heureux-Dubé, J. (dissent); *R. v. Park*, [1995] 2 S.C.R. 836 at 863 - 864 per L'Heureux-Dubé, J.; *R. v. Esau*, [1997] 2

S.C.R. 777 at 814 – 815 per McLachlin, J.; *R. v. Osolin*, [1993] 4 S.C.R. 595 at 624-5 per L'Heureux-Dubé, J. (dissent)).

5. Many discriminatory assumptions and myths were crystallized and entrenched in the evidentiary doctrine of recent complaint under which it was assumed that a survivor of sexual assault would disclose the events at the earliest "reasonable" opportunity. If there was no such recent complaint, an adverse inference would be drawn as to the survivor's truthfulness in alleging that a sexual assault had taken place. According to H. de Bracton,

10 When therefore a virgin has been so deflowered and overpowered against the peace of the lord the king, forthwith and whilst the act is fresh, she ought to repair with hue and cry to the neighbouring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the serjeant of the lord the king, and to the coroners and to the viscount, and make her appeal at the first county court... (H. de Bracton, *De Legibus Angliae*, vol. II, 483 (1268), edited by Sir Travers Twiss).

6. One of the more contemporary reproductions of these myths is found in Glanville Williams' classic work on corroboration:

20 There is a sound reason for [the common law rule on corroboration], because sexual cases are particularly subject to the danger of deliberately false charges resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed (G. Williams, *Corroboration – Sexual Cases* [1962] Crim. L.R. 662 at 662).

7. Unfortunately, the formal abrogation of discredited sexist rules relating to recent complaint and corroboration have not prevented their underlying myths from continuing to play a prominent role in the defence of sexual assault cases. LEAF's argument in this case will examine the persistent presence of these myths implicit in attempts to cross-examine complainants on their diaries, and in the law of similar fact evidence and collusion. LEAF submits that the law of sexual assault must be assiduously developed by the courts and Parliament to repudiate the myths that undermine women's equality, privacy and security of  
30 the person, impede trial fairness and impugn the integrity of the truth seeking process.

## PART II: POINTS IN ISSUES

8. The intervener LEAF supports the facts and points in issue in the Respondent's factum.

### PART III: ARGUMENT

#### A. THE DIARY

9. LEAF supports the conclusion of the courts below to prohibit cross-examination of KW-G on the non-recording of the sexual assaults in her diary. However, LEAF goes further and submits that ss. 278.1 - 278.91 of the *Criminal Code* (the "Personal Records Section") ought to have applied in this case directly or by influencing the common law. The diary should not have been produced to the Appellant and no use of the diary should have been permitted. This conclusion is consistent with the constitutional analysis in *R. v. Mills*; respects the freedom of conscience and expression, and privacy, and equality rights of the complainant; and prevents the re-introduction of discriminatory myths concerning recent complaint and fabrication into the trial process.

##### i) Applicability of ss. 278.1 – 278.91 of the *Criminal Code*

10. At trial, Henderson J. concluded that the Personal Record Sections did not apply because the accused already had physical possession of the complainant's diary. LEAF submits that this conclusion was wrong. The accident of physical possession, particularly in circumstances of questionable propriety, should not determine the applicability of the statutory scheme enacted by Parliament to govern production of private records in sexual offences. The question of production logically precedes that of use as evidence, and as is clear from the Preamble, the Personal Records Sections constitute a complete code with respect to proper production. According to this Court in *R. v. Mills*:

The accused must have a procedure for obtaining evidence that respects all the relevant constitutional rights at stake, just as the prosecution does through the warrant process. As we will explain below, Bill C-46 is just such a procedure (par. 111).

11. This Court has adopted a purposive analysis to the interpretation of legislation. In applying the purposive approach, the Court looks to the intention of the enacting body. The scheme and object of the legislation, as well as its wording, purpose and effect are evaluated in relation to the overall context. Every law, including criminal law, is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects (*Interpretation Act* R.S.C. 1985 c. i-21 s. 12; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at par. 21, 22; see also R. Sullivan, *Dreidger On The Construction of Statutes* (3d) (Toronto: Butterworths, 1994) at 35 – 39).

12. The purpose of the Personal Records Sections is clearly articulated in the preamble of Bill C-46. That purpose includes, *inter alia*: promotion and protection of full *Charter* rights for victims of sexual violence as well as for accused persons; prosecution of sexual offenses within a framework of laws that are fair to complainants, accused persons and society at large; acknowledgement that sexual violence impacts negatively on the equal participation of women and children in society; and recognition that production of personal information raises complex issues as to equality, privacy, and the right to make full answer and defence (*R. v. Mills*, par. 32).

13. Sections 278.2(1) and (2) of the *Criminal Code* provide as follows:

278.2(1) No record relating to a complainant or a witness **shall be produced** to the accused...[emphasis added].

278.2(2) Section 278.1 this section and sections 278.3 to 278.91 apply where a record is in the possession or control of **any person**...[emphasis added].

14. The words "any person" are unambiguous and unlimited: they include the accused. LEAF submits that, on a purposive analysis, the word "produced" should be interpreted as having a specific legal meaning in the context of the Personal Record Sections: **to make records lawfully available for use in the proceedings**. A contrary interpretation would permit the accused to circumvent the statutory scheme designed to protect a complainant's privacy and equality rights and to potentially profit from his unsanctioned, even improper access to confidential information. The purpose of the legislation would be defeated and the fairness of the trial undermined. An interpretation of the Personal Record Sections that places complainants in a more vulnerable position and creates an incentive for an accused to obtain personal records extra-judicially would be an entirely unacceptable and retrogressive outcome.

15. The applicability of the Personal Record Sections cannot depend on the happenstance of bare physical possession, without regard to lawful possession or the terms of the *Criminal Code*. Constitutional rights may be waived and property rights can be alienated or extinguished according to law. A complainant's many rights in her diary are not, however, abandoned only because such rights have been previously violated. Whether by an unlawful taking, failure to return property to its owner, unauthorized copying or appropriated disclosure to a third party, an accused cannot escape the procedure established by

the Private Records Section because he was "lucky", had friends, enjoyed continued access, or gained physical possession through unlawful means.

16. A "bright line" approach to the applicability of the Private Records Section is required to avoid confusion, costly litigation and to remove the incentive of a rule that allows the accused to participate in, and at least profit from the denial of the complainant's property rights and *Charter* rights, including a right to privacy. (In a civil context see *LAC Minerals v. Int'l Corona Resources*, [1989] 2 S.C.R. 574; *Slavutych v. Baker*, [1976] 1 S.C.R. 254).

10 17. A "bright line" approach is especially important because it is not uncommon for an accused to come into physical possession of the complainant's diary or other personal records. This case is not factually unique. In *R. v. H.* ((Dec. 6, 1999) B.C.S.C. Vanc. Reg. CC. 990301), the trial judge characterized the unauthorized retention of the complainant's diary by the accused as conversion and directed its return. In *R. v. White* ((Feb. 10, 1997) Ontario Court of Justice G.D., J-97-0246 at 14), the accused was in possession of the complainant's psychiatric notes without sanction of the Court. Given the high number of sexual assault cases involving family members, acquaintances or others with close connections to the complainant, this Court cannot allow the accident of physical possession to undermine the purposes for which Bill C-46 was enacted (K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) *C.J.W.L.* 148 at 150, fn7,9).

20 18. The rules of production and use of personal records in sexual assault cases should also be developed recognizing that a trial judge has the inherent jurisdiction to control the process of the court. LEAF submits that the wrongful conversion of a complainant's private diary for use as evidence, and consequent circumvention of the Personal Record Sections, constitutes just such an abuse of process. In a criminal trial in these circumstances, the court's inherent jurisdiction includes the power to direct the accused to return the diary to its rightful owner, the complainant. Thereafter, the procedures established in the *Criminal Code*, or the values which inform them, must be followed to preserve the fairness of the trial.

30 19. LEAF endorses the Respondent's analysis in paragraphs 62-64 of its factum. If the Private Records Section had been applied to the case at bar, the Appellant would not have been entitled to production of any part of the diary. Indeed, he would not have progressed beyond the first branch of the test established therein.

20. Alternatively, if the Personal Records Sections do not apply directly, as a matter of statutory interpretation, LEAF submits they should be relied upon as a constitutionally appropriate model. The common law governing cross-examination of a complainant on her private records must be developed in a manner that incorporates *Charter* values; the values contained in the Private Records Section; and the approach taken by this Court in *R. v. Mills* and *R. v. Darrach*. In particular, the *R. v. Mills* approach of considering the salutary and deleterious effects on the *Charter* rights at issue in such a cross-examination is vastly preferable, constitutionally, to the Appellant's proposed approach of asking whether the probative value substantially outweighs the prejudicial effect.

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ii) **Use of Diary at Trial**

21. The right to cross-examine is an integral part of the right to full answer and defence. However, the accused in a sexual assault trial does not have an unlimited right to cross-examine the complainant. Cross-examination can be restricted when the subject is irrelevant, improper or the prejudice of the evidence exceeds its probative value. It is also clear that cross-examination based on sexist myths has no place in a truth seeking process, especially one that respects the complainant's *Charter* rights to equality ((ss. 15 and 28), privacy rights (s. 7), and freedom of conscience, thought, and expression (s. 2(a)(b))). This Court has stated:

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...an appreciation of the myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. As we have already discussed, the right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process. *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J., for the majority on the issue, stated, at pp. 669-70

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...The reasons in *Seaboyer* make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper.

The accused is not permitted to "whack the complainant" through the use of stereotypes regarding victims of sexual assault (*R. v. Mills* par. 90, see also par. 76, 94; *R. v. Osolin*, at 666, 669, 671; *R. v. Darrach* par. 28, 37).

iii) Application to this Case

22. The Appellant sought to cross-examine KW-G about the non-recording in her diary of the sexual assaults by the Appellant and beatings by her mother. LEAF submits that the factors in the Personal Record Sections should have been used to determine whether the diary should be produced to and used by the accused.

iv) Section 278.5(2) Factors

- 10 a) The extent to which the record is necessary for the accused to make a full answer and defence, the probative value of the record, and effect on integrity of trial process [s. 278.5(2)(a), (b) and (h)]

23. LEAF submits that cross-examination concerning the non-recording of sexual assault in a diary, lacks probative value, is not necessary for full answer and defense, and is based on discriminatory myths and assumptions. The Appellant invites the trier of fact to draw one or both of the following two inferences: (1) the sexual assaults did not occur if they were not recorded in the diary, and/or (2) the complainant is not credible because she did not record the sexual assaults or beatings.

- 20 24. Non-recording in a diary has no presumptive relevance because there is no expectation to record accurately or fully, as may exist with other types of documents. Parliament and the courts recognize that a diary is not relevant or producible merely because it mentions a sexual assault. *A fortiori*, non-recording is even less relevant and probative (s.278.3(4)(c) of the *Criminal Code*; *R v. D.M.*, [2000] O.J. No. 3114 (Sup. Ct. J.) at par. 41-43; *R. v. Batte* (2000) 49 O.R. (3d) 321 (C.A.)).

25. The innocence at stake exception does not help the Appellant. In *R. v. Leipert*, [1997] 1 S.C.R. 281, this Court was clear that "mere speculation that the information might assist the defence is insufficient" (par. 21). The non-recording could not establish innocence because non-recording does not in and of itself prove that no sexual assault occurred. (C. Boyle "The Case of the Missing Records: *R. v. Carosella*" (1997) 8 *Constitutional Forum* 59 at 61).
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- b) The nature and extent of the reasonable expectation of privacy with respect to the record and the potential prejudice to the personal dignity and privacy of the complainant [s. 278.5(2)(c) and (e)]

26. The Appellant submits that the nature of the privacy right in this case is such that it deserves little protection because: (1) a diary is less deserving of protection than counseling records; (2) the information is "mundane"; and (3) the context is a criminal trial.

27. LEAF submits that a diary is deserving of a high degree of protection, despite any differences from counseling records, because its expressive content and private nature engage numerous important *Charter* rights (freedom of conscience and thought and the right to privacy). Diaries and journals embody free thought and amount to thinking "out loud" or writing to oneself. They are a manifestation of opinion and belief and are closely tied to individual self-fulfillment: one of the core values protected by freedom of expression. Diaries are a form of "exceedingly private expression".

Just as our home is our castle, our mind is our citadel of privacy - and so should be our mind's most intimate expressions in a personal diary.

20 Reasons for Judgment of the Honourable Mr. Justice Donald, A.R. p. 2581, *infra*; (see also *V.(K.L.)v. R. (D.G.)* (1994) 118 D.L.R. (4<sup>th</sup>) 699 (B.C.C.A.), leave to appeal to S.C.C. filed and discontinued [1994] S.C.C.A. No. 436); *R. v. W.P.N.*, [2000] N.W.T.J. No. 15 (S.C.) at par. 22, 34; *R.v. J.W.*, [1994] O.J. No. 1282 (G.D.); *R. v. Sharpe* 2001 S.C.C. 2 at par. 75, 105, 108; J. B. LaVacca, "Protecting the Contents of a Personal Diary from Unwanted Eyes" 19 *Rutgers L.J.* 389 at 390, 417; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 165- 166 per Wilson J.

28. Diaries are a form of private self-expression and are protected because of human dignity, integrity, and autonomy. One key aspect of privacy is the ability to

30 ... protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

*R. v. Plant*, [1993] 3 S.C.R. 281 at 293; cited with approval in *R. v. Mills* par. 81, see also par. 80; *R. v. Sharpe* par. 26; *Charter* ss. 7, 8.

29. Liberty also lies at the heart of privacy rights. As this Court recognized in *R. v. Mills*, freedom not to be compelled to share confidences with others is "the very hallmark of a free society". When the state

requires or permits the invasion of privacy through compelled disclosure of private diaries it violates the individual's right be left alone.

30. A complainant's right to security of the person and mental integrity is also implicated by disclosure of a diary. Even upon disclosure to a court, "prejudice is occasioned to the personal dignity and right to privacy of the complainant" (*R v. D.M.*, par. 43; *R.v.W.P.N.*, [2000] N.W.T.J. No. 15 (S.C.) at par. 22, *R. v. Mills*, par. 85).

10 31. No human activity is excluded from the scope of the constitutional guarantee of freedom of expression on the basis of its content or meaning (*Inwin Toy v. A.G. Quebec*, [1989] 1 S.C.R. 927 at 967 - 971). Accordingly, the specific content of a diary is irrelevant to an analysis of the rights at stake when the question of its compelled disclosure arises. Mundane or profound, it is a uniquely private form of self-expression that attracts *Charter* protection. In the apt words of KW-G: "Whether it's mundane or exciting or boring, it's still mine." (A.R. 1289/16).

32. To assert simpliciter, as a justification for disclosure, that the diary is being used in a criminal trial begs the question of how that trial can fairly respect all relevant rights and interests.

20 c) **Whether production of the record is based on a discriminatory belief or bias [s. 278.5(2)(d)]**

33. The Appellant's assertion of relevance depends upon the Court assuming that true victims complain and that women who do not complain are fabricating their abuse: the very myths behind the abrogated doctrine of recent complaint and the stereotypic reasoning discredited in *R. v. Osolin*, *R. v. Mills* and *R. v. Darrach*.

30 34. The original rule requiring recent complaint was imposed only for female victims of sexual assault and it presumed that women complainants were presumptively not credible. In the absence of evidence of recent complaint the trial judge was required to warn a jury to draw an adverse inference against the veracity of the complainant. This Court has recognized that it was exceptional to grant special probative value to the silence of an alleged victim of a sexual offence (*Re Timm*, [1981] 2 S.C.R. 315 at 320; J.

Sopinka *et al.*, *The Law of Evidence* (2d) (Toronto: Butterworths, 1999) at 321-323; C. Boyle, *Sexual Assault* (Toronto: Carswell, 1984) at 152 – 153).

35. The assumption was that a victim of sexual assault would raise a hue and cry at the first available opportunity. The rationales underlying this myth include:

- women who complain of rape are not credible;
- women who complain of rape often lie;
- women lie either to get revenge or to cover up their own sexual wrongdoing; and
- women who do not raise a hue and cry probably consented to the intercourse or made up the entire story for some other purpose.

L.M.G. Clark, *Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law: Still Searching for Epistemic Equality* (Ottawa: Canadian Advisory Council on the Status of Women, 1993) at 14, 16, 17, 25, 26.

36. In 1983 Parliament removed this testimonial disability. The Appellant now asks this Court to give renewed force to its discriminatory assumptions because cross-examination on the non-recording of sexual assault is predicated on the same biased rationale:

- KW-G is not a credible witness because she is a female complainant of sexual assault;
- KW-G has fabricated the allegations of sexual assault;
- KW-G wants revenge on the Appellant for her unhappy childhood (see A.R. 1199/31 - 1201/30); and
- if the sexual assaults had happened as KW-G alleges, she would have recorded them in her diary.

37. The Appellant's proposed repackaging of recent complaint can be accomplished simply by asking questions about the non-recording before the trier of fact. In some cases it is understood that the mere asking of certain questions may impair the overall fairness of the trial. The actual answer given is secondary because the prejudice and power derives from the innuendo imbedded in the interrogatory: "Have you stopped beating your wife?" is a familiar example. In cases of sexual assault some lines of cross-examination evoke and play upon socially ingrained notions about the untrustworthiness of female complainants. Parliament and this Court have limited the right to cross-examine based on the twin myths that unchaste women are more likely to lie or consent to sex. Questions that grant special probative value to a non-recording should be subject to similar suspicions and restrictions.

d) **Society's interest in encouraging the reporting of sexual offences [s. 278.5(f) and (h)]**

38. Society's interest in encouraging the reporting of sexual offences is threatened when a judge rules in favour of production or use of a complainant's diary in the absence of material demonstrating that the diary has a realistic potential to provide added information to the accused or a reasonable prospect of impeaching the complainant's credibility (*R. v. D.M.*, [2000] O.J. No. 3114 (Sup. Ct. J.) par. 43; see also preamble to Bill C-46, *R. v. Mills* par. 32).

10 e) **Salutary And Deleterious Effects**

39. In cases where the *R. v. Mills* criteria have been applied in the context of applications for personal records under the *Criminal Code*, the lower courts have not produced personal diaries to the accused. Rather, courts have concluded that the probative value, if any, of diaries, is outweighed by the prejudicial intrusion of the constitutional rights of the witness (*R. v. D.M.*, [2000] O.J. No. 3114 (Sup. Ct. J.) ; *R. v. L.G.*, [2000] O.J. No. 5090 (Sup. Ct. J.) at par. 95-97; *R v. W.P.N.*, [2000] N.W.T.J. No. 15 (S.C.)). LEAF submits that in this case the salutary effects on the Appellant's right to full answer and defense is minimal at best, and the deleterious effect on the privacy right of the complainant and the integrity of the trial system is high, in relation to the non-recording in the diary and the permitted uses of the diary by the trial judge.

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B. **SIMILAR FACT EVIDENCE**

40. There have been significant developments concerning the admissibility of similar fact evidence over the past decade. This Court has rejected categories in favor of a general principle approach and has eschewed the need for catchwords like "striking similarity".

In *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717 McLachlin J. writing for the seven person majority stated:

The common law has traditionally taken a strict view of similar fact evidence, regarding it with suspicion. In recent years, the courts have moved to loosen the formalistic strictures which had come to encumber the rule. The old category approach determining what types of similar fact evidence is admissible has given way to a more general test which balances the probative value of the evidence against its prejudice (p. 723).

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41. Many appeals concerning similar fact evidence involve the sexual abuse of children by an accused person known to the victims. The general, traditional exclusionary rule is strained in these cases because it

was designed primarily to protect the right of the accused not to be convicted on the basis of prohibited propensity reasoning. In the distinctive context of sexual assault courts are now required to fashion rules of evidence that respect the *Charter* rights of complainants, ensure a fair trial for the accused, complainant and community, and eradicate the discriminatory myths, stereotypes, and assumptions which have no place in a truth seeking process.

10 42. Recent developments include the restatement of similar fact evidence into evidence of discreditable conduct, with a more careful differentiation between types of bad character evidence. What is inadmissible is restricted to "disposition evidence which is adduced solely to invite the jury to find the accused guilty because of his or her past immoral conduct" (*R. v Arp*, [1998] 3 S.C.R. 339 at par. 41) or reasoning which suggests that the accused is a bad person, but not evidence that has a connection to the case (*R. v. B. (L.)*; *R.v. G. (M.A.)* (1997), 35 O.R. (3d) 35 (C.A.) per Charron J.A. at 57 - 58).

43. Prohibited reasoning is narrowed further because a distinction is drawn between character and disposition evidence on the one hand and habit or pattern on the other (*R. v. Batte* (2000) 49 O.R. (3d) 321 (C.A.) at 350, fn9, per Doherty J.).

20 44. Propensity itself is not prohibited (*R. v. B. (L.)*, per Charron J.A. at 57-58). In *R. v. Batte* Doherty J. A. explained that many admissible forms of similar fact rely, at least in part, on a limited form of propensity reasoning :

The criminal law's resistance to propensity evidence is not, however, absolute. There will be situations in which the probative force of propensity reasoning is so strong that it overcomes the potential prejudice and cannot be ignored if the truth of the allegation is to be determined. The probative force of propensity reasoning reaches that level where the evidence, if accepted, suggests a strong disposition to do the very act alleged in the indictment (par. 102).

In *R. v. B. (L.)* Charron J. A. stated:

30 The Appellant is correct that this reasoning involves consideration of propensity in the sense that the Appellant's prior misconduct, in so far as it showed a tendency to act in a particular way, was relied upon by the trial judge to support his finding that the Appellant acted again in this fashion in committing the offence. However, as discussed earlier, this does not constitute an impermissible inference. It is simply consistent with the underlying proposition that gave the evidence its probative value in the first place. Nowhere in the trial judge's reasons is there any suggestion that he drew any inference of guilt from the general bad character of the accused reflected by his prior

misconduct (at 64).

45. LEAF submits that the presence of some form of propensity reasoning should not make the evidence inadmissible or raise the standard against which it is measured. As in *R. v. Batte* at par. 113 the trier of fact could rely upon the evidence of other complainants to "infer that the Appellant had consistently, over a prolonged period, extracted sexual services from the complainants while they were under his control as his entitlement in return for the benefits he bestowed upon them."

10 46. LEAF submits that recognition of a limited form of propensity reasoning in relation to the accused's conduct is not inconsistent with the inadmissibility under s. 276(1) of the *Criminal Code* of evidence of sexual activity to support an inference that, "the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge." No double standard is thereby created. A limited form of propensity reasoning should be permitted in relation to the accused's conduct because it may sometimes have probative value. In this way it is not pure propensity reasoning, but rather conduct or pattern evidence related to and relevant to the specific conduct of the accused in the case. By contrast, as this Court has held on more than one occasion, the inadmissibility of evidence of the complainant's sexual history, under the common law or s. 276(1), is rational, fair, proper, and constitutional, precisely because what is excluded lacks probative value on the issues of credibility and consent and leads to improper lines of reasoning that can only distort the truth seeking function ( *R. v. Darrach*, [2000] 2 S.C.R. 443 at par 32-48).

20 47. Section 273.1(1) of the *Criminal Code* defines "consent" as "voluntary agreement of the complainant to engage in the sexual activity in question". This Court has recognized that what is required is an unambiguous communication of voluntary agreement to participate in a specific activity with a specific person, and the agreement must be given at the time of the activity. Prior sexual activity, whether consensual or non-consensual, therefore has no legal bearing on the presence or absence of consent on the occasion that forms the basis for the charge (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330).

i) **The standard for receiving similar fact evidence in sexual assault cases**

30 48. The Appellant argues that a high degree of similarity should be required in this case and claims that the test it claims was established in *R. v. Arp* for identity should apply to credibility based evidence. LEAF submits that the test for admissibility should not focus solely on similarity and that even if the

standard requires a high degree of similarity for issues of identity, such a standard should not apply in this different context. LEAF adopts the position advanced by the Respondent in par. 23-31 and in *R. v. Arp* that different considerations arise in different contexts. It is important that a case involves allegations of sexual assault, especially historic and intimate abuse over a period of time. The purpose for which the evidence is tendered is also important because it can be admitted on the central issue of the credibility of the complainant; as corroboration where identity or *mens rea* is not in issue (both in *R. v. B (C.R.)* per McLachlin, J.) and to prove that the assault occurred; (*R. v. Batte* at par. 102). The context will also be shaped by the defense raised: whether lack of identity, that the acts complained of did not take place (the Appellant's defense to charges relating to the G sisters); the complainant consented; or the accused had a mistaken belief that the complainants consented (the Appellant's defense to the other charges).

49. LEAF submits that the focus of discreditable conduct evidence should not be simply on similarities and differences but on whether there is a sufficient connection to establish the improbability of coincidence. Similar facts draw their probative force from their connection to a material issue. Similarity has sometimes been used as a proxy to measure connection, relationship or nexus. However, the search for a similarity is only one means of establishing the connection required for probative value. It is one factor and should not be elevated into an end in itself or be allowed to degenerate into an acontextual listing of similarities and dissimilarities. This error is at the base of the Appellant's argument that the trial judge committed a reviewable error when he failed to list the dissimilarities between the alleged sexual acts.

50. The English case of *R. v. P.*, [1991] 3 All E.R. 337 (H.L.), quoted with approval in *R. v. Arp*, involved criminal charges for historic and intimate sexual abuse. It provides an instructive model for a principled approach to evidence of discreditable conduct that emphasizes connection and relationship. The House of Lords admitted evidence that disclosed a prolonged course of conduct involving the use of force and domination:

evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to admit it, notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include "striking similarity" in the manner in which the crime is committed...the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important

relationships in this connection. Where the identity of the perpetrator is in issue, and the evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle (p. 348).

51. Measuring connections by similarities is even less helpful in cases of sexual assault. Charron J.A. of the Ontario Court of Appeal recognized that similarities and dissimilarities between sexual acts are "often  
10 not as compelling as the circumstances surrounding the incidents, particularly where there is nothing unusual about the sexual acts in question" (*R. v. B(L)* at 52 – 53).

52. In cases of sexual assault the analysis must be based on this Court's recognition that sexual assault is a practice of inequality that involves a profound invasion of the complainant's security of the person, physical inviolability and psychological well being. The distinctive social and legal features of this serious under-reported crime have played a part in this Court's reasoning on a wide spectrum of constitutional, evidentiary and procedural issues. When applied to similar fact evidence it means that the process of articulating connections or similarities should be contextual, free from rape myths and other discriminatory assumptions and requires an understanding of power, vulnerability, and historic and intimate  
20 sexual abuse.

53. Without a clear appreciation for context and the distinctive equality context of sexual assault, the inquiry may become a simple search for "similarities" and "dissimilarities". This approach is dangerous because:

- (1) the process of selecting what is similar and dissimilar is highly subjective, variable and often indeterminate;
- (2) whether a fact is classified as a common characteristic or is distinguished as a material difference is often based on unworkable or imaginary principles;
- (3) the level of particularity or generality employed has a significant bearing on whether the  
30 same fact is seen as similar or dissimilar;
- (4) a standard that emphasizes similarities and dissimilarities may reinforce a dichotomy of sameness versus difference and unduly emphasize constructed "differences";

- (5) the absence of guidance on what features are relevant invites arguments based on absurd assumptions: differences emerge when victims are divided into body parts and the accused is divided into roles;
- (6) an arbitrary difference can still be listed without an explanation of its effects on probative value; and
- (7) the listing of similarities and differences suggests that both are equally probative and that the number of each has some separate significance.

54. Without making specific submissions on the facts of this case, these dangers can be illustrated in the Appellant's arguments at par. 123-130 of the factum. For example, the Appellant asserts that there is a material dissimilarity in the facts because the accused was in a role of parent to the Gs, as the only male in the house, but the others viewed him as the spiritual leader of the philosophy. However, the evidence discloses that Mrs. G and her children were members of the Kalabrian faith and that she earned her living and supported her children as the live-in housekeeper of the accused. The accused's additional relationship with the Gs is both a similarity and a difference but it is presented as a dissimilarity. While the particular label attached to each relationship (parental role and spiritual leader) can be made to look separate, at a more general level both positions involve authority, power, trust, and vulnerability. From this level of analysis they are more similar than dissimilar. If it is possible to divide the accused into various roles, a platform is created from which it is then argued that a difference exists because the Appellant was acting in one capacity with the Gs and in another distinct capacity for the others. This process promises endless regression. Rather than attempting to juxtapose his parental role with that of a spiritual adviser, it would be equally correct to say that he was the father of the congregation.

55. The apparently objective "difference" in the ages of the complainants provides another example. How should the court deal with the fact that the sexual abuse of one victim commenced at 12 and then continued until she was twenty and the abuse of another victim began when she was 15. (See par. 123 of the Appellant's factum). When does 12 become sufficiently different from 13, 14, 15, 16, or 17 to qualify? Should the age grouping somehow be tied to the legal standards of 14 or 18? Does this fact qualify as a similarity because both girls were young or because both were being abused by the age of 15? Or is this a dissimilarity because the abuse started at a different time? Before one can assert that there is a disparity should other factors be considered? For example, perhaps victims were 12 and 15 respectively when the

accused first met them or first had access to an opportunity to abuse them. On a more general level is the key issue on age that both victims were small children and he was a much older adult?

10 56. In sexual assault cases, especially where the abuse spans many years and involves violence among people who know each other, patterns of predation and the context of power imbalance must be taken into account. Abusers with the power to force sex and extract silence usually also have the power to choose the victim and the place, time, duration, type, form, frequency, and severity of the assault. A contextual standard acknowledges that an accused may simply have used his position to create varied circumstances to seek gratification whether in the den or at camp. The accused may have modified his assessment about what place or time gave him a greater chance of remaining undetected. The accused may also have had many years to select, vary and change what he wanted or thought he could extract from his victims. Different victims may have been caught at different times and points a variation in his boldness, comfort, desire, access, or opportunity.

57. The Appellant argues that the approach to identity should be adopted whenever similar fact evidence is used to prove a central issue. However, whether the accused committed the offense is always a central issue in the Crown's case.

20 58. The Appellant also argues at par. 102 that the probative value of the similar fact evidence in this case must "significantly" outweigh its prejudicial effect, relying on *R v. Arp*. LEAF submits that this case is not authority for that proposition for two reasons. First, Cory J. does not expressly set the standard of proof required as "significantly outweighs". At par. 44 he states that the "probative value must, of course, significantly outweigh the prejudice to the accused for the evidence to be admissible". However at par. 42 and 50 he speaks of whether the probative value of the evidence outweighs its prejudicial effect. The judgment therefore contains various standards, without an express endorsement or selection between them. Second, even if this remark is interpreted as establishing a preference for a "substantially outweighs" legal standard, it may simply have applied to that case, or more broadly to cases involving identity. However, such a standard would not automatically apply in this different context.

ii) **The Role of Collusion**

59. Whatever approach to similar fact is adopted, the link between collusion and rape myths must be acknowledged and neutralized. Women and children complainants in cases of sexual assault have historically been subject to a variety of special rules designed to impose credibility checks on their testimony:

10 The common law has viewed victims of sexual assault with suspicion and distrust. As a result, unique evidentiary rules were developed. The Complainant in a sexual assault trial was treated unlike any other. In the case of sexual offences, the common law "enshrined" prevailing mythology and stereotype by formulating rules that made it extremely difficult for the complainant to establish her credibility ( *R. v. Seaboyer*, [1991] 2 S.C.R. 577 per L'Hereux-Dubé J. (dissent) at 665).

60. A prevalent and surprisingly durable rape myth is that women and girls concoct false tales of sexual assault for their own vengeful reasons. The opinion of Lord Hale that rape was an easy charge to make but difficult to disprove has been incorporated into legislation, judicial decisions, social biases and rape myths. The Appellant quotes the 1979 edition of Wigmore as an authority. As recently as 1970 the Wigmore text contained the following "principle" of evidence:

20 No judge should ever let a sexual offense charge go to a jury unless the female complainant's social history and mental make-up has been examined and testified to by a qualified physician (J. H. Wigmore, *Evidence in Trials at Common Law* (Boston: Little, Brown and Company, 1970) at s. 924a).

61. The Wigmore doctrine, originally introduced in 1934, and cited ever since has had a profound effect on how allegations of sexual assault by women and girls were received in the court system. This special rule, which simultaneously burdened complainants and privileged the accused, was based on scant, misleading and misogynist evidence. His "doctrine" has been thoroughly criticized as casting the opinions of one man as confirmed science and accepted law. There is irony in allowing such an obviously unsupported proposition to shape the law of evidence so much and for so long. However the social prejudice against women must have been so strong that it was accepted as beyond dispute, even within an adversarial process (L.B. Bienen, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise of Evidence" (1983) 19 *Cal. Western L.Rev.* 235).

62. There is always the risk of fabrication and its collective manifestation, collusion. These risks are present for all types of complainants and in all types of criminal cases, but historically they have been

overstated in the context of sexual assault. In this case the Appellant does not provide any evidence that the risks of fabrication or collusion are greater or different in sexual assault cases and such a matter cannot be the subject of judicial notice. Any attempt to reintroduce special standards for women and children in sexual assault cases under the rubric of collusion would be to repeat the errors of the Wigmore doctrine, but in a post-*Charter* Canada.

63. To protect the rights of complainants, the interests of the community and the integrity of the trial process, collusion must be treated as a distinct legal concept that can only be established by cogent proof, without the benefit of myths and stereotypes. Collusion should not be confused with the sharing of information, the victim's free speech or need to seek therapy. Where the evidentiary threshold for collusion is set too low or is discharged too easily, discrimination may result. An equality lens is required because a "common sense" understanding of when people may be making up their testimony may incorporate rape myths concerning fabrication. At par. 119 the Appellant argues that because the complainants may have shared information then the presence of exceptional similarity or a series of similarities loses much, if not all of its probative value. The proposed threshold is unacceptably low. Using the test advocated, the defense need only show that the complainants "may" have shared information. The impugned act is sharing, without any mention of influencing or altering and no limits are imposed on the type of information that may ground a claim of collusion.

64. A hallmark feature of myths and stereotypes is that they are so culturally ingrained that it takes very little in the way of narrative or reference to conjure the touchstone tale: especially when the myths and stereotypes are powerful or find expression and reinforcement in law. For example, the myth that women and children falsely accuse is often stronger when they accuse those with power over them. The accusation is believed to be a form of retribution, one of the few ways the otherwise powerless seek payback. There is also the reinforcing rape myth that men in positions of power are not the type of people who commit sexual assaults. In cases of historic or intimate sexual abuse it is not uncommon for the defense to supply a subtext of discontent suggesting, often through implication, other reasons why the complainants may have made such an allegation. Mere suggestions or slurs cannot be allowed to replace evidence, whether in the setting of doctrine or its application in a given case.

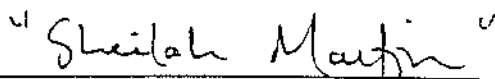
65. This Honorable Court has not yet decided where the possibility of collusion or conspiracy should be raised. LEAF submits that a specific rule of law limiting admissibility and requiring the Crown to negative collusion is not necessary and would operate in a manner which would replicate, reintroduce and reinforce otherwise rejected stereotypes. The trier of fact is generally charged with the responsibility of determining credibility, reliability and weight and the standard should be no different in sexual assault cases. Warnings may be given to the jury where called for by the evidence but no separate category is needed, nor should one be permitted.

#### PART IV: RELIEF REQUESTED

66. LEAF submits that the appeal should be dismissed for the reasons articulated in this factum.

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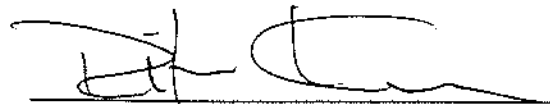
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SHEILAH MARTIN  
Faculty of Law  
Murray Fraser Hall  
2500 University Drive N.W.  
Calgary, AB T2N 1N4

Tel: (403) 220-7112  
Fax: (403) 282-8325  
Email: [martins@ucalgary.ca](mailto:martins@ucalgary.ca)

Counsel for the Intervener



RITU KHULLAR  
Chivers Greckol & Kanee  
#101, 10426 - 81 Avenue  
Edmonton, AB  
T6E 1X5

Tel: (780) 439-3611  
Fax: (780) 439-8543  
Email: [rkhullar@cgklaw.net](mailto:rkhullar@cgklaw.net)

Counsel for the Intervener

June 11, 2001  
Calgary and Edmonton, Alberta