

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

BETWEEN

HER MAJESTY THE QUEEN

Appellant
(Respondent)

AND:

CANADIAN NEWSPAPERS COMPANY LIMITED

Respondent
(Appellant)

AND:

WOMEN'S LEGAL EDUCATION AND ACTION FUND, ONTARIO COALITION OF RAPE CRISIS CENTRES, BARBRA SCHLIFER COMMEMORATIVE CLINIC, WOMEN'S COLLEGE HOSPITAL SEXUAL ASSAULT CARE CENTRE TEAM, METROPOLITAN TORONTO SPECIAL COMMITTEE ON CHILD ABUSE, METRO ACTION COMMITTEE ON PUBLIC VIOLENCE AGAINST WOMEN AND CHILDREN, BROADSIDE COMMUNICATIONS, LTD., AND WOMENHEALTHSHARING, INC.

Intervenors

AND:

ATTORNEY GENERAL OF ONTARIO

Intervenor

AND:

PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC

Intervenor

FACTUM OF THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND (LEAF), ET AL.

CAVALUZZO, HAYES & LENNON
43 Madison Avenue
Toronto, Ontario M5R 2S2

NELLIGAN/POWER
77 Metcalfe Str., Ste 1000
Ottawa, Ontario K1P 5L6

Elizabeth J. Shilton Lennon
Helena P. Orton

Ottawa Agents for the
solicitors for LEAF

SOLICITORS FOR WOMEN'S LEGAL EDUCATION
and ACTION FUND (LEAF), et al.

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TO : THE REGISTRAR OF THIS
HONOURABLE COURT

AND TO: Frank Iacobucci
Deputy Attorney General of Canada
The Department of Justice
1 Front Street West
Suite 500
Toronto, Ontario
M5J 1A5

Solicitor for the Appellant

AND TO: Sheila R. Block and James C. Tory
Tory, Tory, DesLauriers
& Binnington
Barristers and Solicitors
IBM Tower
Toronto-Dominion Centre
Toronto, Ontario
M5K 1N2

Solicitors for the Respondent

AND TO: Ministry of the Attorney General
18 King Street East
17th Floor
Toronto, Ontario
M5C 1C5

Attention: David Lepofsky, Esq.

AND TO: Noel, Decary, Aubry & Associates
Barristers and Solicitors
111 Champlain Street
Hull, Quebec
J8X 3R1

Solicitors for the Procureur General
de la Province de Quebec

PART 1: FACTS

1. Intervenors are rape crisis and treatment centers, policy, research, litigation, organizing and action groups on behalf of victims of sexual violence, and women's publishing concerns. They are equality advocates for women and children with particular experience in the areas of sexual violence against women and children, the preconditions for access to justice by sexually offended individuals, equal access to freedom of expression by women, and equality rights of disadvantaged groups.

Affidavit of Intervenors, Appendix "A"

2. Intervenors bring extensive expertise on the equality, liberty, security, and extensive needs of women and children survivors 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, work with agencies of government, and the practice of medicine, counselling, journalism and law.

Affidavit of Intervenors, supra.

3. Challenged here is section 442(3) of the Criminal Code ("section 442(3)) which provides for mandatory nonpublication of the names and identities of victims of sexual assault at the discretion of the victim or prosecutor.

Criminal Code. 1953-54, c.51, s. 442(3).

4. Victims of sexual assault often do not report the crimes against them because of fear of revenge, dread of the attitudes of police and courts, experience of not being believed, and feelings of humiliation and shame.

Reported and Unreported Crimes, Exhibit "A" to Affidavit of Carolyn Kobernick, Case on Appeal ("CA"), 97-99.

Rape: Guidelines for a Community Response, Exhibit "B" to Affidavit of Carolyn Kobernick, CA, 131,137.

5. Uncontroverted expert testimony at trial establishes that sexual assault victims are often unwilling to report crimes and to proceed with prosecutions if their names and identities may be publicized, and that reporting of sexual assault would drop if section 442(3) protections were eliminated.

Testimony of Doreen Carol Boucher, CA, 72-75

6. The factual support for section 443(2) provided by the record in this case is universally confirmed by the extensive experience of Intervenors.

PART II: POINTS IN ISSUE

7. Intervenors adopt the statement of points in issue as defined by this Court in its Order of June 6, 1985.

PART III: ARGUMENT

A. INTRODUCTION

8. Intervenor submit that section 442(3) should be upheld in its entirety under Sections 1, 2(b), 7, 15, and 28 of the Canadian Charter of Rights and Freedoms (“the Charter”).
Canadian Charter of Rights and Freedoms. Constitution Act, 1982,
as enacted by Canada Act 1981 (U.K.), 1982, c.11.
9. Intervenor submit that section 442(3) raises no issues under section 2(b) of the Charter because Canadian Newspapers have no legitimate interest in the “expression” of names and identifying information of victims of sexual assault.
10. If section 442(3) is found to raise expressive concerns, the provision is, alternatively, submitted to be constitutional as an equality, expression, liberty and security measure under sections 2(b), 7, 15 and 28 of the Charter. Publication of identities of victims of sexual assault against their will significantly threatens equal access to justice, equal security, and expressive equality of Canadian women and children, materially undermines their liberty, and threatens their physical security and sense of security. Section 442(3) promotes these interests.
11. Intervenor agree with Appellant and the Ontario Court of Appeal that Respondents have no standing to raise section II(d) fair trial issues in this action. All arguments concerning the gains to sexual assault defendants if section 442(3) were discretionary or eliminated are fair trial arguments which Canadian Newspapers have no standing to make.
Reasons for Judgment, (Howland, C.J.O.) CA at 197.
Re. Southam Inc. and The Queen (No. 1), (1983) 41 O.R.
(2d) 113 at 117.
12. Intervenor approach the Charter as a whole, considering each provision in light of the others, prior to balancing conflicts of rights under section 1. This preserves the integrity of the Charter’s design, the purpose of each Charter-protected right, and the distinctive role of section 1 as more than a second venue for substantive judgments better approached first as matters of substantive rights.
13. Should the case be resolved under section 1, Intervenor submit that Charter-based equality, liberty, security, and expressive interests of women and children justify section 442(3) as a reasonable limit on any expressive interests of newspapers and (if found properly raised) any section 11(d) fair trial rights of sexual assault defendants.
14. Intervenor submit that the Ontario Court of Appeal was correct in recognizing that section 442(3) serves an urgent social interest in encouraging reporting of sex offences. It was correct in holding that section 442(3) does not infringe section II(d) in that trials remain public. That Court was further correct when, on the basis of these

recognitions, it did not void section 442(3) entirely as a violation of speech and fair trial rights, as it was urged to do.

Reasons for Judgment,(Osborne, J.), CA, 151-152.

15. However, the Ontario Court of Appeal erred in giving courts discretion to deny victims' requests for protection under section 442(3) by not recognizing the significance for Charter-based equality of the mandatory feature of the provision .
 16. Charter-based equality, expression, liberty and security rights provide the increment of constitutional support needed to uphold the mandatory victim-driven aspect of section 442(3)
 17. At stake in this case are the practical conditions under which victims of sexual assault, overwhelmingly women and children, must rely on government equally to protect and vindicate their legal rights — hence the social conditions under which all women and children, the primary target groups for sexual assault, can live on a daily basis.
- B. RESPONDENTS HAVE NO VALID EXPRESSIVE INTEREST IN PUBLICIZING THE IDENTITIES OF VICTIMS OF SEXUAL ASSAULT.**
18. The name and identity of sexual assault victims is not “conscience, religion, thought, belief, or opinion,” or part of their “expression,” in the sense the Charter protects. The Charter does not expressly protect freedom of information or freedom to publicize, nor has it been interpreted to do so.
 19. The expressive status of the names and identities of victims of sexual assault is nil. Under section 442(3), everything can be broadcast or published about the issue of sexual assault, the trial, and the victim — except who she personally is. Indeed, the victim’s identity can be publicized by word of mouth, just not by the mass media; it can be fully publicized if she consents. A witness for respondents stated below that a section 442(3) order “would effectively preclude the reporting of the proceedings at trial.” As the trial judge recognized in the instant case, the press can inform the public concerning a marital rape trial without disclosing the victim’s identity.
Affidavit of Michael Grieve, CA, 63.
Reasons for Judgment (Osborne, J.) CA, 152-3.
 20. Since the accused is on trial, not the victim, the victim deserves at least as much protection as an accused, and the “[t]he public need not be aware of the identity of the accused in order to be informed about the legal issues being litigated.” Where necessary, as here, to protect the victim’s identity, and only for this reason, the defendant’s identity could be covered by section 442(3), with no loss to public information.

R. v. P. (1978), 41 C.C.C. (2d) 377 at 379.

21. Broadcasting or publishing a sexual assault victim's name and identity against her will does not further the values on which section 2(b) is based, such as the dignity and worth of the person or the rule of law. Section 442(3) promotes these values.

R. v. Keegstra, (1984) 19 C.C.C. (3d) 254 at 266-267.

22. Courts are less likely to protect one person's freedom of expression if it denies the freedom of expression of others. Some courts have upheld prohibitions on some forms of expression which, in effect, cancel their expressive value by silencing the speech of others.

R. v. Keegstra, *supra*. at 268.

R. v. Zundel, (1987) 58 O.R. (2d) 129 at 155.

C. SECTION 442(3) PROMOTES EQUALITY RIGHTS.

23. Section 15 of the Charter provides both a constitutional right to equality and equal access to other Charter-protected rights ("equal benefit of the law"), including those of liberty, security, and expression. Section 28 further provides equal access by women and men to the Charter's guarantees. Section 442(3) effectuates the Charter's guarantee of freedom from discrimination on the basis of two enumerated grounds — age and sex — by supporting equal access to the criminal justice system, equal liberty and security, and equal freedom of expression.

1. Section 442(3) advances sexual equality by promoting equal access to justice by women.

(a) Equality rights must be approached purposively.

24. This Court has interpreted Charter guarantees in light of the interests they are meant to protect, adopting an expansive and broad rather than narrow and technical approach. The interpretation of sections 15 and 28, and their relationship to other Charter provisions and to section 1, has taken this approach.

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 at 366.

Hunter v. Southam, Inc., [1984] 2 S.C.R. 145 at 156-157.

Re Singh and Minister of Employment and Immigration [1985] 1 S.C.R. 177 at 209, 218-219.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 337-338.

R. v. Oakes [1986] 1 S.C.R. 103 at 119.

25. This Court has identified equality as one of the fundamental values of society, against which the objects of all legislation must be measured.

R. v. Oakes, *supra*. at 136.

26. This Court has acknowledged the importance of promoting the equality of particular groups.

R. v. Big M. Drug Mart, *supra*, at 337-338.

Society des Acadiens v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549 at 579.

Caldwell v. Stuart, [1984] 2 S.C.R. 603 at 626.

27. It is submitted that sections 15 and 28, taken together, disclose an intent to promote the equality of women.
28. The legislative history of section 15, including changes in its drafting, reveals a clear intent that its equality guarantees be strong and reach the substance as well as process of law.

Peter Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights", in Canadian Charter of Rights and Freedoms: Commentary, eds. W. Tarnopolsky and G. Beaudoin (Toronto: Carswell, 1982) 1 at 19-20.

Mary Eberts, "Women and Constitutional Renewal", in Women and the Constitution, eds. A. Doerr and M. Carrier (Ottawa: Minister Supply and Services Canada, 1981) 3-27

29. Section 28 was added to the Charter to confirm and strengthen its commitment to the equality of women.

"Summary of Conference Resolutions", in Equality Rights and The Canadian Charter of Rights and Freedoms, eds. A. Bayefsky and M. Eberts (Toronto: Carswell, 1985) at 634-644.

30. Legislatures may confine legislative reforms to urgent concerns of needy constituencies.

Edwards Books and Art Ltd v. The Queen, [1985] 2 S.C.R. 713 at 772.

31. Women's status calls for legislative attention and Charter recognition as an equality problem. Acknowledged indices of all-pervasive second class citizenship, from unequal pay to physical victimization, have led to the recognition that women are socially unequal to men. Despite some "formal equality" under law, women are properly termed a disadvantaged or disempowered group.

House of Commons, Committee on Secretary of State, Fairness in Funding: Report on the Women's Program (May 26, 1987).

(b) Sexual assault is a sex equality issue.

32. Victims of sexual assault are, overwhelmingly, women; perpetrators of sexual assault are, overwhelmingly, men. Sexual violation of women by men is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men.

33. Only a fraction of rapes are reported. Only a fraction of reported rapes are prosecuted. Only a fraction of prosecuted rapes result in convictions. Rape sentences are often short. Most rapists, therefore, continue to live in society either undetected or unpunished and unrehabilitated.

House of Commons Debates, Official Report, (1st Sess. 32nd Parl., Vol XIII, July 8, 1981) at 11349.

House of Commons Debates, Official Report, supra, (Dec. 17, 1981) at 14187.

34. In sum, victims of sex crimes, largely women, are comparatively disadvantaged relative to the perpetrators of sex crimes, largely men. A systemic situation of inequality between the sexes thus exists in the social practice of sexual violence, the victims of which are women, and in the operation of the criminal justice system, which de jure outlaws sexual violence but de facto permits men to engage in it on a wide scale.

(c) Forced Publicity of the identities of sexual assault victims is a sex equality issue.

35. Because of the place of sexual assault in the denigrated status of women under existing conditions of sex inequality, for a woman to be known as a victim of sexual violence is always stigmatic, frequently humiliating and sometimes dangerous. A direct relationship thus exists between the ability of a sexual assault victim to control the conditions under which her victimization will become public knowledge and her willingness to report the crime against her..

Testimony of Doreen Carol Boucher, CA, supra.

36. Because sexual assault is still widely regarded as a statement of the victim's character, morals and desires, media publicity harms reputations and deters reporting.

37. As the Courts below recognized, when identifying information about a female who has been a victim of sexual violence is involuntarily disclosed, the impact on her employment opportunities, family and personal life, emotional well-being, dignity, reputation, physical security, and future can be devastating. The long-term effects of involuntary disclosure can include rejection by family members, ostracism from the community, deteriorated work relationships, termination of employment, further terrorization, harassment and assault, and silencing.

38. When assailants are unlikely to be reported, due to complainants' fear of publicity or whatever reason, the victim population is subjected to heightened risk of crime.

39. While intervenors see no value in the publication of victim identities, intervenors see positive value in news coverage of rape cases otherwise. Such accounts can diminish the aura of shame and secrecy surrounding sexual assault, reduce the isolation of victims

from one another and from information about sexual assault, reduce public ignorance about the nature and extent of the problem, and counter public apathy. Intervenor also, in general, oppose publication bans on defendant names and identities, since other victims of the same abuser (of whom there are often many) are less likely to be found.

40. Uncertainty as to whether one's identity will be published or broadcast upon reporting a sexual offence is a significant barrier to reporting. Only a mandatory nonpublication rule — leaving the choice of publicity primarily with the victim — provides the certainty that permits all victims to know, at the time they are making the decision to report, that reporting their offence will not further injure them through its publication. All women and children, as target classes for sexual assault, thus have a material interest in section 442(3) as helping to provide them equal access to the judicial process.

(d) Section 442(3) is protected by sections 15 and 28 of the Charter.

41. Section 15 must be given prospective effect to give it a purposive interpretation. Regardless of the timing of the commencement of an application, each section of the Charter must be interpreted in light of all its provisions, including the equality rights provisions. In any event, legislation which invokes equality defences should not be judicially modified prior to an opportunity for full constitutional defence.
42. In cases arising under human rights legislation, this Court has recognized the need to secure the rights of historically disadvantaged persons such as women through protecting positive relief measures which improve their condition. Such measures have been characterized as “quasi-constitutional.” It is submitted that women's rights should be at least as expansive under the Charter as under human rights codes. Acts specifically mandated by statute which promote sex equality should receive at least as much protection under the Charter as acts authorized but not specifically mandated by statutes which promote sex equality has received under human rights codes.

I.C.B.C. v. Heerspink, [1982] 2 S.C.R. 145 at 157-158.

Canadian National Railway Co. v. Attorney General of Canada, [1987] 1 S.C.R. 1114.

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84.

43. Just as statutes which are neutral on their face as to sex or age can be based on discriminatory attitudes and can have unintended or nonconsciously discriminatory effects, such statutes can be based on egalitarian purposes or have the result of advancing equality in their applications.

Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Re. O.H.R.C. and Simpson-Sears Ltd., [1985] 2 S.C.R. 536 at 546-547.

44. The clear result of section 442(3) is to advance the equality of women by providing equal access to criminal redress for sexual violation through reducing the consequences of reporting such crimes, of which women are disproportionately the victims and which are signals and integral to the maintenance of women's second class social status.
45. This Court has recognized that dominant groups in society should not be permitted to use the Charter to put back legislative measures designed for the advancement of the less advantaged.
Edwards Books and Art Ltd. and The Queen, *supra* at 779.
46. While a proper legislative purpose cannot save a law that violates the Charter any more than a proper private motive can save a practice that discriminates under human rights legislation, both the legislature's purpose and the impact of its legislation are relevant in assessing the constitutionality of a statute.
Canadian National Railway Co. v. Attorney General, *supra*.
The A.G. of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66.
R. v. Big M Drug Mart Ltd., *supra*.
47. The legislature tailored section 442(3) to sex offences, victims of which are mostly women and children. It noted scholarship documenting underreporting of rape, cited women's fear of public stigma and humiliation as special factors in their nonreporting, and connected these factors to women's social status.
House of Commons Debates, Official Report, (1st Sess. 30th Parl., Vol. IX) No. 18, 1975, 9204, 9225.
48. Parliament has twice reconsidered a version of section 442(3) giving courts discretion over nonpublication orders. Both times it expressly readopted the mandatory provision, consciously choosing to leave the publicity decision with the victim(s) and their representatives.
Bill C-15, An Act to Amend the Criminal Code and the Canada Evidence Act, (2d Sess., 33d Parl., Assented to June 30, 1987), House of Commons, section 13(3) (First Reading).
Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-15, House of Commons, March 17, 1987.
Bill C-15, *supra*, Section 14(3), (as passed).
Bill C-89, An Act to Amend the Criminal Code [Victims of Crimes], (2nd Sess., 33d Parl., First Reading November 5, 1987).
49. Counsel for Defendant argued at trial that in some rape cases, the real victim is the person accused by the alleged victim, apparently on the assumption that women fabricate rape charges. On this theory, publication of victim identities would presumably produce a wide-ranging inquiry into their sexual associations. Rejection

of such assumptions underlies current public policy, exemplified by provisions that exclude sexual history and character evidence in sexual assault cases. The right to publicize a victim's name would thus punish and deter grounded as well as ungrounded charges, a distinction usually left to the trial process.

Cross-Examination by Mr. Petrone, CA, 75.

Criminal Code, *supra*, s. 246.6.

50. Allowing judicial and media discretion over publicity is based on the view that the likely veracity of some sexual assault victims can be distinguished from that of others prior to trial. This reveals a false assumption that certain women are knowably likely to be fabricating rape charges under certain factual conditions. Only a trial can make this determination.

51. The protections of the Charter are not designed only for individuals, but also for groups, so that group members can be aware of the equality of treatment or respect afforded their group and share the sense that they can expect equality of treatment and respect as well.

Kask v. Shimizu, [1986] 28 D.L.R. (4th), 64 at 69.

52. Because of the risks of forced publicity, the right of victims of sexual assault to nonpublication of their name and identity promotes reporting and prosecution of sex crimes. Removal of that right practically precludes equal access to the criminal process for many women and children on the basis of their sex (women), age (boys), and age and sex (girls).

2. Section 442(33 advances equality for boys and girls by promoting equal access to justice by children.

53. Children are often victims of sexual abuse, overwhelmingly by adult men. The powerlessness of children enhances their vulnerability to sexual abuse and places them at a disadvantage in the legal system.

Ministry of Justice and Attorney General of Canada, Sexual Offenses Against Children, (Badgley Report) (1984) 30-32, 196-198, 927-928

54. The legislature expanded section 442(3) with children specifically in mind, now covering more sex crimes of which children are the victims, and witnesses under 18 years of age.

Bill C-15, *supra*.

55. The publicity associated with trials is often so traumatic for child victims or witnesses of sex crimes that it is decided that justice is not worth the cost. When, for whatever reason, child victims do not benefit from existing publication ban on victim identification, the added burden of exposure makes testifying in court more traumatic and sometimes impossible.

56. Courts have previously recognized that children are damaged by publicizing their involvement in crimes, whether as perpetrators or victims. Press is excluded and identifying information protected in Young Offender proceedings because protecting youth from the damaging effects of publicity is more important than any speech interests involved. Such provisions are constitutional.

Re. N. v Queen, (1979) 48 C.C.C. (2d), 97 at 103.

Re. Southam Inc. and The Queen (No. 1), (1984) 16 C.C.C. (3d), 263 at 271, 282.

Re. Canadian Newspapers and the Queen, (1984) 16 C.C.C. (3d) 495 at 508-509.

57. A Charter defeat of section 442(3), which applies to children as well as adults, could be used to undermine existing nonpublication protections for child victims and

witnesses in other statutes.

Child and Family Services Act, S.O. 1984, c.55, s.41 (8).

Young Offenders Act 1980-81-82-83, c. 110, s. 38(1).

58. Juxtaposing the Ontario Court of Appeal's decision in this case with the Young Offenders Act yields the perverse possibility that publication of a victim's name depends upon the perpetrator's age, protection being more certain if one is violated by a child than by an adult.

59. Boys are protected from disadvantage under section 15 on the basis of their age. Section 15 protects girls doubly: on the basis of both age and sex. Section 443(2) vindicates both Charter concerns.

3. Section 442(3) ameliorates the disadvantaged status of women and children.

60. Section 15(2) is an integral part of section 15 as a whole and a guide to its interpretation. Section 15(2), by sheltering equality initiatives from specious equality-based attacks, reveals that one purpose of section 15 is to ensure that the law benefits those disadvantaged by inequality.

61. Women and children are each socially disadvantaged and disempowered in specific ways. Children are disadvantaged relative to adults in physical strength and size, psychic vulnerability to adult authority, economic dependence, social power, relative lack of credibility and deprivation of social voice. Women are disadvantaged relative to men economically, socially, politically, as targets for physical and sexual violence, and in access to credibility and expression.

62. Section 15(2) directs particular constitutional sensitivity toward those who are disadvantaged on the basis of sex (women), age (boys), and sex and age (girls), in this case women and children victims of sexual assault.

63. One apparent purpose of the legislature in passing section 442(3) was to protect women and children victims of sexual assault, as its recent expansions make clear. Bill C-15, An Act to Amend the Criminal Code and the Canada Evidence Act, supra, Section 14.

64. Section 442(3), a provision designed to ameliorate the condition of two enumerated disadvantaged groups, therefore furthers the purpose section 15(2) underlines for section 15 as a whole.

D. SECTION 442(3) ENHANCES THE LIBERTY AND PERSONAL SECURITY OF WOMEN AND CHILDREN, THEIR SENSE OF SECURITY, AND THEIR EQUAL ACCESS TO THESE RIGHTS.

65. Section 7 of the Charter provides everyone with the legal right to liberty and security of the person without deprivation except for reasons of fundamental justice. Section 442(3) effectuates section 7 by opening the criminal process to victims of sex offences and making it more predictable that sex offenders will be brought to justice, increasing the freedom of movement, security, and sense of security of women and children by reducing the threat of sexual assault upon them.

1. Section 442(3) enhances women's and children's liberty, security, and sense of security.

66. Protected security centres on physical security. In addition, "serious state-imposed psychological stress, at least in the criminal law context, has been recognized to breach security of the person. While not granting an absolute right of protection from emotional distress or upset, section 7 security includes psychic freedom, such as from the threat of physical punishment or suffering, along with freedom from such punishment itself. It also includes personal dignity.

Morgentaler v. The Queen, unreported decision of S.C.C. File #19550 (Opinion of Dickson, C.J., at 15) (Opinion of Wilson, J. at 16).
Re. Singh and Minister of Employment and Immigration, supra.
R.L. Crain Inc. v. Couture (1984) 6 D.L.R. (4th) 478 at 502.

67. Protected liberty centres on liberty of the person in the physical sense, especially freedom of movement, but includes "more than freedom from captivity." It encompasses more than actual physical restraint but less than the full range of freedom of conduct.

Parkdale Hotel Ltd. v. A.G. of Canada (1986), 27 D.L.R. (4th) 19 at 34.
R. v Robson (1985), 19 D.L.R. (4th) 112 at 115, 119.

R. v. Neale (1986), 28 C.C.C. (3d) 345, leave to appeal to S.C.C. refused Jan. 15, 1987.

68. Fundamental justice is broader than, and includes, natural justice.
Reference Re. Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486.
69. “Rights” under section 7 have wide generic meaning.
Re. Cadieux and Dir. of Mountain Institution, (1984), 13 C.C.C. (3d) 330 at 338.
70. Principles of fundamental justice permit review of the substance of a deprivation, including the history of the right, its legislative tradition, and community standards.
R.L. Crain v. Couture, *supra*, at 507, S10.
71. Canadian women’s interest in personal security from assault is threatened by the involuntary publicizing of their identities as sexual assault victims. Victims who avoid publicity by non-reporting are, in effect, violated with official impunity. Their offenders, in turn, remain at large to terrorize and assault others, whose security is reduced and whose liberty — in the sense of freedom of movement — is often curtailed in an effort to avoid them. Victims who do not report because of fear of publicity are vulnerable to further assault by their offenders who remain at large. Victims who do report may be further harassed, threatened, and individually targeted for assault as a result of publication.
72. The history of section 442(3) reveals concern for women’s personal security from sexual assault. Community intolerance for legal disincentives to reporting sexual assault was expressed and influenced the passage of the provision.
House of Commons Debates, *supra*, at 9204, 9225.
73. Section 442(3) therefore delivers principles of fundamental justice by enhancing the liberty, security, and sense of security of actual and prospective victims of sexual assault.
2. Equal personal security and liberty are at once principles of fundamental justice and guaranteed by sections 15 and 28 of the Charter.
74. Breach of section 7 principles of fundamental justice may give rise to a Charter claim. Access to justice for violations of the person and equitable treatment by law are both principles of fundamental justice.
The Queen v. Operation Dismantle, (1983), 3 D.L.R. (4th) 193 (per LeDain, Marceau and Hugessen, JJ.).
75. Sections 15 and 28 guarantee equal access to all Charter-protected rights, including section 7 liberty and security.

76. Women often isolate themselves, avoiding events or places, as a precaution against sexual assault. Threat of sexual assault is threat of punishment for being female. Men, who are not subjected to the constant threat of rape and other forms of sexual assault as women are, have correspondingly greater security of the person, sense of security, and liberty of movement in society.
77. Both the criminal law against sex offences and section 442(3) attempt to equalize these social inequalities by prohibiting violations of the physical person and encouraging their reporting.
78. Barriers to reporting and prosecuting sexual assault differentially impact women and children, in effect denying victims the equal benefit and protection of the laws against sexual assault on the basis of sex and age.
79. Section 442(3) promotes equal liberty and security of women and children by increasing the likelihood that their violators will be brought to justice without further injury to their person through publication and by moving toward a society in which sexual offences could be reported and more effectively prosecuted. In such a society, women and children would have freedom of movement and personal security that they can not have so long as sexual offences are, as a practical matter, permitted. They would also have the sense of security that such changes would make practical, rather than living in well-founded and constant fear of being sexually violated with impunity.
80. The constitutionality of section 442(3) is therefore supported by section 7 and by sections 15 and 28 grants of equal access to section 7 rights.

E. WOMEN'S RIGHT TO EQUALITY OF EXPRESSION IS PROMOTED BY SECTION 442(3) AND UNDERMINED BY MAKING IT DISCRETIONARY.

81. One purpose of section 2(b) is to guarantee freedom of expression in furtherance of other Charter-protected rights. Section 442(3), by assuring that publicity of a sexual assault victim's identity is voluntary, supports victim speech hence equal entry into the legal process. Substituting judicial and media discretion for victim and prosecutorial discretion silences victim speech, restricting protected access to expression and to justice.
82. Sexual assault silences women. It restricts the probability and potency of their public and private speech, including survivors' ability to express themselves, their legitimacy to many hearers, and their credibility to officials.
83. Forced publicity makes women feel blamed, targeted, endangered and judged for the sexual assault against them. Added to the pain of the assault itself, this has a devastating silencing effect. Faced with choosing between the danger and indignity of

publicity they cannot control or suffering in silence, many have chosen the latter. If women cannot choose how they will be publicized as sexual assault victims, they will speak less.

84. Section 442(3) gives the victim choice over the conditions under which her name and identity can be publicized. The choice to report is a choice to go on the public record. The choice to prosecute is a choice to enter the public arena. Section 442(3) makes the choice to have one's name broadcast and published a further choice. The issue is thus not whether or not publication occurs, or state interference with publication, but whether the decision to publicize the victim's identity will be made by the victim and her representatives or by a judge and the media.

85. The prohibition authorized by section 442(3) is clear, concrete, narrow, limited and tailored to its objectives. The public is not excluded from trials. Any information about the trial other than the name and identity of the victim can be published. The victim can choose to disclose her identity. Broader rights to ban publication of information have been granted to criminal defendants on no stronger Charter justification.

Re. Global Communications and A.G. for Canada, (1984) 44 O.R. (2d), 609 at 625.

86. A victim-driven disclosure system enhances freedom of expression by giving women opportunities for freedom of speech. Much information on sexual assault has been first revealed in the feminist press because it provides a situation for publicity that victims control. Victim control in this area thus promotes values upon which freedom of expression is based: the search for truth, self-fulfillment, and participation in government and public dialogue.

87. Voyeurism can be masked as freedom of expression. Courts have noted, in giving effect to section 28, that "if true equality between male and female persons is to be achieved it would be quite wrong ... to ignore the threat to equality" posed by some expressive materials, in that case pornography.

R. v. Red Hot Video Ltd., (1985), 18 C.C.C. (3d) 3 at 23.

Sask. H.R.C. v. Waldo (1984) 5 C.H.R.R. D/2074 at 2080-2081 .

88. Courts have found that Charter rights, including the right to freedom of expression, are not absolute.

R. v. Zundel, *supra*, at 147.

Retail. Wholesale Department Store Union. Local 580 v.

Dolphin Delivery Ltd., (1986) 2 S.C.R. 573 at 588.

89. Sex equality interests have, at times, taken precedence over speech interests prior to reaching section 1. Similar results have been reached by U.S. courts in the absence of

an equivalent to section 1.

R. v. Red Hot Video Ltd., *supra*.

Sask. H.R.C. v. Waldo, *supra*.

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,
413 U.S. 376 (1973)

R. v. Keegstra, *supra*.

90. Statutory and judicial nonpublication bans on particular information in judicial proceedings have been upheld as constitutionally permissible limits upon freedom of the press, often based on fair trial safeguards, usually to protect accused perpetrators of crimes, typically men.

Re. Global Communications Ltd. and A.G. for Canada, *supra*.

R. v. Banville, (1983), 145 D.L.R. 595.

Re. Southam Inc., and the Queen (No. 2), (1982) 70 C.C.C.
(2d) 264.

91. Measuring the interest on each side of this case, section 442(3) is seen substantially to further women's and children's sections 15, 28, 2(b), and 7 interests, while restricting the newspapers' interest in section 2(b) very little to not at all. Making section 442(3) protections discretionary by judges and the media would further the values of section 2(b) little if at all, while substantially undermining the values sections 15, 28, 2(b), and 7 exist to promote.

F. IN THE ALTERNATIVE, SECTION 442(3) RESTRICTS EXPRESSIVE (AND TRIAL) RIGHTS WITHIN REASONABLE LIMITS THAT A FREE AND DEMOCRATIC SOCIETY DEDICATED TO EQUALITY CAN DEMONSTRABLY JUSTIFY.

92. Under section 1, the usual procedure is to place the burden of justification on those seeking to limit the Charter-protected right.

R. v. Oakes, *supra*.

93. In the instant case, both sides claim a basis in the Charter for their interests: Respondents for newspapers and those accused of sexual assault, Applicants and Intervenors for sexually victimized women and children. It is submitted that a proper methodology for resolving such conflicts of rights under section 1 would place equal onus on each side and resolve the conflict on the merits of persuasion, giving priority to Canadian values over the value choices of other free and democratic societies, where necessary.

94. The rights and freedoms guaranteed by the Charter are not absolute. "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."

R. v. Oakes, *supra* at 136.

95. When considered with other rights under section 1, Canadian courts have found the right to freedom of expression is not absolute.

R. v. Red Hot Video, supra.

Re Luscher and Deputy Minister Revenue Canada, (1985),
17 D.L.R. (4th) 503 at 510.

Re. Ontario Film & Video Appreciation Society and Ontario
Board of Censors, [1983] 147 D.L.R. (3d) 58 at 64.

96. As Dickson, C.J.C., has noted concerning free speech prior to the Charter, while free speech is a fundamental value,

“it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assault.”

Re. Fraser and Public Service Staff Relations Board [1985]
2 S.C.R. 455 at 467.

97. The expressive and fairness losses to newspapers and defendants in not being able to publicize the names and identities of victims of sex offences are negligible. The equality, security, liberty, and expressive losses to women and children of such involuntary publicity is proportionally substantial. In “attempt[ing] to balance the limitation of the right with the evil or harm done to others,” section 442(3) limits protected rights to a de minimus degree, while its invalidation would visit substantial trauma and risk on those whom Intervenors represent, effectively excluding many from justice for their sexual violations.

Black v. Law Society of Alberta, (1986) 27 D.L.R. (4th) 527 at 567.

R. v. Keegstra, supra at 274-275.

98. The Ontario Supreme Court has ruled that the mandatory nonpublication of identities of young offenders is a reasonable limitation upon freedom of the press. As amended, the Young Offenders Act extends this protection to victims and witnesses.

Re Southam Inc. and The Queen, (1985) 16 C.C.C. (3d) 262.

Young Offenders Act, supra.

99. Sex and age equality are collective goals of fundamental — indeed superordinate — importance.

100. The United States Constitution contains no equivalent to section 1.

101. The United States Constitution, while on its face perhaps more readily lending itself to an interpretation which would elevate speech above other rights, especially when pursued by legislation, does not hold freedom of speech to be absolute. No “right to publicity” exists of the sort Respondents attempt to enshrine here. Freedom of speech

is balanced by interests in child protection, personal reputation, harmony and peace among groups, the moral fabric and quality of community life for all groups, and other public goods.

New York v. Ferber, 458 U.S. 747 (1982) (harm to children)

Gertz v. Robert Welch, 418 U.S. 323 (1974) (libel)

Miller v. California, 413 U.S. 15 (1973) (obscenity)

Beauharnais v. Illinois, 343 U.S. 250 (1952)(group libel)

102. While few nonpublication orders and no mandatory closure or nonpublication provisions have been upheld by the U.S. Supreme Court under First Amendment attack, no nonpublication provision, even one involving sex offenses, has ever been defended against a First Amendment attack on sex or age equality grounds.

Cox v. Cohn, 420 U.S. 469 (1975)

Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)

Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596 (1982)

Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976)

KNPX Broadcasting v. Arizona Sup. Ct., 459 U.S. 1302 (1982)

103. The public's right to know, to the limited extent recognized under the First Amendment, has never encompassed the right to know the name of a victim of sexual assault. Even the question whether state law may punish publication or broadcast of a rape victim's name remains unsettled under United States law.

Pell v. Procunier, 417 U.S. 817 (1974)

Houchins v. KQED, 438 U.S. 1 (1978)

Florida Star v. B.J.F., 499 So. 2d 883 (Fla. App. 1986),
56 U.S.L.W. 3414 (Dec. 16, 1987)

104. The American interpretation of expressive rights urged by Respondents to prohibit publication protections has not, on any evidence available or offered, solved the problem of rape nonreporting in the United States.

105. The U.S. Constitution contains no express guarantee of equality on the basis of sex or age. Sex equality has constitutional dimension in the United States only by interpretation.

106. In the United States, the legal system justifies closed trials for juvenile offenders, usually boys, based on the rationale that minors deserve special protection, but prohibits states from extending the same solicitude to minor rape victims, usually girls, under the First Amendment. This is gender inequality by law.

Globe Newspaper v. Superior Court, 102 S.Ct. 2613, 2623
(Burger, C.J., dissenting).

Gordon Gidlund, Case Comment, Globe Newspaper Co. v. Superior Court, 1
J. Law & Inequality 389, 401 (1983).

107. The United States Constitution permits legislatures to go further in pursuing equality rights than would be required by the equality guarantee itself.

Katzenbach v. Morgan, 384 U.S. 641 (1966).

City of Rome v. United States, 446 U.S. 156 (1980).

108. The fact that United States courts do not limit a right guaranteed under both constitutions does not make a Canadian limit on that right unreasonable.

Global Communications, *supra*, at 265.

109. Canadian values deserve priority in section I cases. “[T]he court must come back, ultimately...to the facts of our own free and democratic society to answer the question whether the limit imposed on the particular guaranteed freedom has been demonstrably justified as a reasonable one.”

Re. Southam Inc. No. 1, *supra* at 130.

110. As stated by the judge at trial in this case, upholding section 442(3) under section 1,

“This is a Canadian solution to a problem that I am sure exists in all jurisdictions.”

Reasons For Judgment (Osborne, J.) CA, 154.

111. Section I allows limits on rights demonstrably justified in “a free and democratic society.” Intervenors submit that equality is essential to democracy and requisite to freedom. Tolerating inequality is therefore inconsistent with freedom and democracy.

112. Sex and age equality, entrenched as constitutional rights, are distinctively Canadian value priorities.

113. Section 442(3) promotes sex and age equality.

114. Section 442(3) is therefore justified as a reasonable limit on speech and trial rights (if any) in a free and democratic society such as Canada.

PART IV: NATURE OF ORDER SOUGHT

115. Intervenors therefore submit that section 442(3) does not infringe freedom of expression under section 2(b).

116. Intervenors further submit that, taking the Charter as a whole, section 442(3) is protected as a provision to ensure the equality, liberty, security and speech of women and children under sections 2(b), 7, 15, and 28.

117. Intervenors alternatively submit that if section 442(3) is found to limit the Charter-protected rights of some, and is not constitutional as furthering more important Charter-protected rights of others, it is nonetheless a justified limit on those rights in a free and democratic society under section 1.

118. Intervenors respectfully request that the appeal be allowed setting aside the judgment of the Ontario Court of Appeal and that section 442(3) be upheld in its entirety.

ALL of which is respectfully submitted,

Elizabeth J. Shilton Lennon

Helena P. Orton
Of counsel for the Women's Legal
Education and Action Fund (LEAF),
et al.

February 17, 1988.

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