SEP 1993

No. CA 016527
Vancouver Registry

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE THACKRAY PRONOUNCED THE 7TH DAY OF DECEMBER, 1992

BETWEEN:

REGINA

Appellant

AND:

HUBERT PATRICK O'CONNOR

Respondent

AND:

ABORIGINAL WOMEN'S COUNCIL
CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES
DAWN CANADA: DisAbled Women's Network Canada
WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenors

AND:

CANADIAN MENTAL HEALTH ASSOCIATION

Intervenor

INTERVENORS' FACTUM
ABORIGINAL WOMEN'S COUNCIL; CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES; DAWN CANADA; WOMEN'S LEGAL EDUCATION AND ACTION FUND

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PART 1

STATEMENT OF FACTS

1. The Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, DAWN Canada: DisAbled Women's Network Canada, and the Women's Legal Education and Action Fund, hereinafter called the Coalition, accept the statement of facts as outlined by the Appellant with the following additions.

2. By Notice of Motion filed June 1, 1992, the Respondent obtained an Order, in part as follows:

> This Court Orders that Crown Counsel produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists whom have treated any of the complainants with respect to allegations of sexual assault or sexual abuse.
>
> This Court Further Orders that the complainants authorize all therapists, counsellors, psychologists and psychiatrists whom have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all of this material to counsel for the accused forthwith.

A.B., pp. 4-5.

3. Counsel for the Respondent expressed his foundation for the request for the Order in submissions before the Honourable Associate Chief Justice Campbell as follows:

> "...the importance of psychiatric and psychological counselling records with respect to accused person's ability to help defend themselves is evident -- self-evident. It is for the purposes of testing the credibility of the complainants, determining issues such as recent complaint, corroboration, contradictory statements, et cetera."

Transcript Volume 1, p. 10.

4. In the course of the proceedings, Crown counsel disclosed to the defence, among other things, complainants' therapists' records and extracts from a complainant's diary.

A.B., p. 57: Judgment of Mr. Justice Thackray, November 24, 1992.
A.B., p. 72: Judgment of Mr. Justice Thackray, December 6, 1992.

5. The Honourable Mr. Justice Thackray directed a stay of proceedings against the Respondent, Hubert Patrick O'Connor. He based his order, in part, on his lack of confidence that full disclosure had been made by the Crown.

A.B., p. 72: Judgment of Mr. Justice Thackray, December 6, 1992.

PART 2

ISSUES

This appeal concerns how the Supreme Court of Canada decision in R. v. Stinchcombe should be interpreted and applied in criminal trials for sexual assault. More specifically, the issues include:

(i) how the scope of and process for the pre-trial disclosure obligation can be defined in ways which are consistent with constitutional rights to equality and security of the person as well as with the right to a fair trial; and

(ii) how the concept of legal relevance can be given a meaning which is consistent with constitutional rights to equality and security of the person as well as with the right to a fair trial.

R. v. Stinchcombe, [1991] 3 S.C.R. 326.

PART 3

ARGUMENT

I Introduction

1. The determination of the above issues requires an analysis of the meaning and co-existence of a number of ideas fundamental to the Canadian legal system: the right to a fair trial; the test of relevance; and the right to equality and the equal right to security of the person of witnesses in sexual assault trials.

The Canadian Charter of Rights and Freedoms, Constitution Act, 1982. R.S.C. 1985, App. II, No. 44 (hereinafter Charter), ss. 7, 11(d), 15, 28.

2. More specifically, a stay of proceedings in the court below was ordered in part because of concerns that a fair trial would not be possible where "an aura" of prejudice had been created by the reluctance or tardiness of the Crown in making disclosure. Whatever the merits of this appeal, reluctant or tardy disclosure (or even non-disclosure) would only be unfair if the information in question were relevant. Relevance can be determined in a discriminatory fashion, thus triggering the need to consider constitutional rights of witnesses and of the societal groups to which they belong.

A.B., p. 72: Judgment of Mr. Justice Thackray, December 6, 1992.

3. Any analysis of disclosure which does not address the boundaries of fairness, the test of relevance, and the implications of equality rights will of necessity be a partial, rather than an impartial, one. Thus the meaning of the right to a fair trial must include respect for the equality rights of all participants. This is so, not because fairness and equality must somehow be balanced off against each other, with inevitable compromise for each, but because a trial incorporating unequal treatment of any participant will not be a fair trial as that concept has been articulated by the Supreme Court of Canada.

4. The Coalition's argument will first address the theoretical aspects of disclosure by discussing: disclosure as an equality issue, the right to a fair trial, and the test of relevance. We will then address, under the heading, "An Equality Analysis", the practical application of these concepts to disclosure of therapists' records.

II Disclosure is an Equality Issue

5. Sexual assault is by its nature a crime that directly affects, and directly harms, women. As Madame Justice L'Heureux-Dube said in R. v. Seaboyer (a case that considered the prohibition against leading evidence of a witness's past sexual history in a criminal trial of sexual assault):

> Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man (98.7 percent of those charged with sexual assault are men) ... Unlike other crimes of a violent nature, it is for the most part unreported. Yet, by all accounts, women are victimized at an alarming rate and there is some evidence that an already frighteningly high rate of sexual assault is on the increase. The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime.
>
> R. v. Seaboyer, [1991] 2 S.C.R. 577, L'Heureux-Dube J. in dissent, at pp. 648-9.

6. Women and children are the overwhelmingly predominant victims of sexual assault. Women with disabilities and aboriginal women are particularly vulnerable to sexual assault. Unique and heightened vulnerability is experienced when more than one basis of discrimination operate together.

> Affidavit of Lee Lakeman, Joan Meister, Theresa Netsena and Janet Kee, sworn June 1, 1993, paragraphs 39 - 51.

7. The way in which the law responds to sexual assault raises issues of the equal protection and benefit of the law and equality of security of the person for persons most vulnerable to sexual assault. For example, the Parliament of Canada has recognized this with respect to the admissibility of past sexual history evidence in sexual assault trials.

> Whereas the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.
>
> Preamble, An Act to amend the Criminal Code, (sexual assault), S.C., 1992, c.38.

8. The Supreme Court of Canada has recognized that evidence rules must be tested against equality standards. For example, in R. v. Salituro, a spouse who would have been incompetent to testify for the prosecution at common law was permitted to testify when the accused and his wife were separated without any reasonable possibility of reconciliation. The Court emphasized that the common law rule which excluded evidence against the accused was inconsistent with equality rights: "The rule reflects a view of the role of

women which is no longer compatible with the importance now given to sexual equality."

R. v. Salituro, [1991] 3 S.C.R. 654, at p. 671.

9. Acts of sexual assault deprive women and children of security of the person. Inappropriate disclosure of information concerning victims of sexual assault can further affect the right to security of the person and to equality. A legal system promotes personal security and equality when it prevents fishing expeditions into information seen as relevant on the basis of stereotypical and prejudiced assumptions; it vitiates personal security when it permits or even mandates such inquiries. The forced disclosure of irrelevant private and prejudicial information does not make a trial more fair or promote principles of fundamental justice under Charter sections 7 and 11(d), but rather the contrary. If extensive disclosure of personal records is required, this may create a significant barrier to access to justice. Women forced to chose between therapy and giving evidence may well not proceed with a complaint at all. The result will be that certain sexual assaults may be committed without any practical means of recourse to the criminal justice system.

III The Right to a Fair Trial

10. In the Canadian legal system, the general right to a fair trial takes the form of a range of more specific rights and procedural rules, including an accused's right to make full answer and defence. However, the formulation and application of these specific rights have reflected the principle that there are limits, whether based on principle or policy, to the right which may be claimed by an accused person. "It seems to me that s. 7 of the Charter entitles the appellant to a fair hearing: it does not entitle him to the most favourable procedures that could possibly be imagined."

R. v. Lyons, [1987] 2 S.C.R. 309. (S.C.C.), per La Forest J. speaking for the majority, at p. 362.

11. Boundaries are placed on the right to a fair trial in the Canadian legal system.

The Honourable David C. MacDonald, Legal Rights in the Canadian Charter of Rights and Freedoms, (Toronto: Carswell, 1989) at pp. 497-507.

12. For example: an accused has the right to retain counsel, but no guarantee of effective or competent counsel or even of qualification under provincial legal aid schemes; a right to a jury trial for serious offenses, but no guarantee of a jury that includes the genuine (for instance aboriginal) peers of the accused; the right to

cross-examine Crown witnesses, but no guaranteed right to cross-examine a child witness whose out-of-court statement has been ruled admissible as an exception to the hearsay rule.

13. The Coalition supports a strong (indeed a stronger) conception of a fair trial while submitting that particular assumptions of what fairness entails should be analyzed in terms of how much the accused should in general be able to demand from the State, other individuals, and corporate entities, to protect his interests. This is particularly important in this case as the issue is one of positive entitlement (to information produced by private individuals) rather than one of State avoidance of unfair procedures. A general analysis is also particularly necessary in this case to avoid the risk of creating an aspect of the fair trial rule which is well beyond the conventional boundaries of fairness. Witnesses in sexual assault trials (primarily women and children) could be required to make an extraordinarily onerous contribution through revelation of private and personal information to what may uncritically be assumed, in isolation, to be fairness.

> Christine Boyle, "Publication of Identifying Information About Sexual Assault Survivors: R. v. Canadian Newspapers Ltd." (1989-90), 3 C.J.W.L 602, at pp. 613-4.

14. The boundaries of the right to a fair trial are not static. The content of the concept has been evolving, in part because of the exploration of new constitutional standards. Thus under the rubric of the right to a fair trial, accused persons now enjoy some new aspects of the right while the willingness to question and reject some old assumptions has meant that other aspects have withered away. This process of challenge and change to an enduring concept means that assertions of unfairness cannot be made or accepted as self-evident truths. The rules of evidence must "remain useful and relevant in our changing legal and social environment."

> Masztalar v. Wiens, [1992] 2 W.W.R. 706 (BCCA) per McEachern C.J.B.C., at p. 715.

15. The Supreme Court of Canada recognized in R. v. Seaboyer that the admission of irrelevant evidence can prejudice the fact finding process. Fairness was seen in this case as relating broadly to the discovery of truth rather than narrowly to the interests of the accused alone.

> If we accept, as we must, that the purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent, then it follows that irrelevant evidence which may mislead the jury should be eliminated as far as possible.
>
> R. v. Seaboyer, [1991] 2 S.C.R. 577 per McLachlin J. for the majority, at p. 605.

16. Both Seaboyer and Stinchcombe are cases which exemplify the evolving concept of fairness.

Stinchcombe requires the pre-trial disclosure of relevant information. Support can be found in Seaboyer that relevance can be determined in a discriminatory fashion and that it is contradictory to conclude that truth has been found if only stereotype renders a determination of relevance understandable. Over-disclosure as well as under-disclosure put the fairness of pre-trial procedure and a fair trial at risk.

R. v. Seaboyer, [1991] 2 S.C.R. 577 per L'Heureux-Dube J. in dissent, at pp. 680-681.

R. v. Stinchcombe, [1991] 3 S.C.R. 326.

17. The decision in Seaboyer itself provides a practical example. It upheld as constitutional s. 277 of the Criminal Code which excludes evidence of sexual reputation.: "The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is not logical or practical link between a woman's sexual reputation and whether she is a truthful witness."

R. v. Seaboyer, [1991] 2 S.C.R. 577 per McLachlin J. for the majority, at p. 612.

Criminal Code, R.S.C. 1985, c. C-46, s. 277.

18. While Seaboyer related to the trial itself, the concept of fairness developed by the Supreme Court of Canada can be understood as relating broadly to the whole criminal justice process. The search for "truth" is not simply one that begins at trial (if indeed there is a trial). Both the pre-trial disclosure of irrelevant information and the non-disclosure of relevant information can affect the fairness of the trial. Thus the fairness of the trial is affected by the pre-trial investigatory process. The "facts" are ultimately determined at the culmination of a process in which many human beings participate: potential witnesses, police, Crown counsel and defence counsel. This process can be distorted unfairly by irrelevant information. Distorted fact finding is inconsistent with the goal of disclosure as stated in Stinchcombe: that is, "the ascertainment of the true facts of the case." It is also inconsistent with the Seaboyer concept of fairness because it prevents the determination of the truth and the proper and fair disposal of the case.

R. v. Stinchcombe [1991] 3 S.C.R. 326, per Sopinka J. for the majority, at p. 346.

19. No matter how scrupulous a judge is in the conduct of a trial, the effects of the pre-trial treatment of witnesses can distort the outcome. For example, a requirement that a witness make pre-trial disclosure of irrelevant, private and prejudicial information can discourage persons who have been sexually assaulted from reporting to the police or from testifying at trial; influence the perception of the witnesses' credibility;

promote unfair plea bargains; influence the witnesses' demeanour at trial; and affect how they are perceived and treated at trial.

IV The Test of Relevance

20. The concept of relevance is a familiar one in the law of evidence. It sets the boundaries of the Crown's pre-trial disclosure obligation. However, in practice determinations of relevance have been more a matter of intuition and hunch than of conscious analysis. It is generally understood that such determinations involve "common sense" and the decision maker's experience of life rather than logic. "The answer [to questions of relevance] must filter through the judge's experience, his judgment, and his knowledge of human conduct and motivation." Critical to a finding of relevance is an acceptable foundation that does not depend on bias or stereotype.

> McCormack's Handbook of the Law of Evidence, 2nd ed., p. 438 quoted in Stanley Schiff, Evidence in the Litigation Process, 3rd ed. (Toronto: Carswell, 1988) at p. 19.

21. Stinchcombe leaves important questions unanswered. What does "relevance" mean, for instance? There is no analysis of whether the Supreme Court of Canada contemplated the trial test of relevance (whether the information in question makes a matter to be proved more or less probable) or some broader pre-trial test of relevance. It is possible that the latter was intended since pre-trial disclosure has a strong investigatory function not so clearly present at trial. Information disclosed pre-trial may lead to the discovery of relevant information, even if it could not meet the trial test of relevance in itself. The emphasis in Stinchcombe and Seaboyer on the value of not risking conviction of the innocent, an emphasis supported by the Coalition, suggests a broader pre-trial test of relevance.

22. While the Court could hold that Stinchcombe applies to evidence which meets the trial test of relevance, it could instead take the view that relevance in the pre-trial sense may be understood as encompassing information which could contain or lead to something relevant in the trial sense. This does not mean, however, that defence counsel can seek disclosure of information that would not be admissible at trial and the disclosure of which would simply have the effect of harassing a witness.

23. In many cases, a broader pre-trial conception of relevance will not present problems and indeed has positive advantages in protecting vulnerable accused persons. The Crown can err on the side of disclosing

irrelevant information without significant costs. For instance, a statement of a prospective witness to the police or Crown may turn out to have no relevance at all in the trial or even the pre-trial sense and yet could be properly disclosed.

24. In other cases, the right to a fair trial must co-exist constitutionally with other rights, such as the right to equality or security of the person for witnesses. Disclosure in such cases does have significant costs. Here, the Crown and the court must be scrupulous in avoiding the unconstitutional disclosure of information the relevance of which (in either sense) could only be assumed on the basis of discriminatory generalizations.

25. Sensitivity to this point is most clearly demonstrated in the understanding that the defence cannot go on fishing expeditions and must lay a foundation for the finding of relevance. Such cases are consistent with a commonplace requirement of foundational facts. For instance, there must be a finding that the conditions of the exceptions to the hearsay rule have been established before a hearsay statement is admissible.

R. v. Coon (1991), 74 C.C.C. (3d) 146 (Ont. G.D.).

R. v. Gringas (1992), 74 C.C.C. (3d) 53 (Alta. C.C.).

R. v. Learn, (April 1, 1992), Cranbrook Registry No. SC 2310 (B.C.S.C.)

R. v. S.T.L., (November 9, 1992), Brampton Registry No. 200146 (Ont. Prov. Div.).

26. The idea of laying a foundation itself requires analysis. A foundation for a determination of relevance requires conscious or unconscious generalizations based on experience and common sense. In order to ensure that such generalizations do not incorporate discriminatory assumptions, they must be carefully examined. Indeed, an unwillingness to question underlying generalizations and place the costs of over-disclosure on a particular segment of society (in this case the witnesses in sexual assault trials, primarily women and children) can be seen as inconsistent with equality in itself. The requirement for a non-discriminatory finding of relevance includes facts specific to the case as well as background facts.

27. The following is an example relating to a charge of robbery. The connection between evidence that the gun used in the robbery was purchased by the accused and the proposition that the accused committed the robbery rests on the generalization that, "persons who purchase guns subsequently used in a robbery are the robber." Whether decision makers decide this generalization is never, rarely, sometimes, or usually true

depends on their common sense and experience. The strength of this inference is assessed in part by reference to information about the particular accused and situation. For instance, there is no inferential connection between the information a gun was purchased by the accused and the issue of identity, if the gun purchased by the accused was not used in the robbery. The relevance of the accused's purchase of a gun is conditional on the use of the gun in the robbery. Without this foundational fact, evidence the accused owned a gun would be irrelevant and the introduction of such evidence would be prejudicial.

28. The context for assessing relevance also includes propositions about the general behaviour of people and things, sometimes referred to as social facts. Examples are information about the prevalence of personal ownership of guns, the ease or difficulty of acquiring a gun, the possibility of tracing ownership, the feasibility of connecting a particular gun with a particular wounding, etc. These facts are often assumed to be generally known, and indeed are often unarticulated.

29. A sexual assault example can be found in R. v. Riley. The defence sought to cross-examine the complainant concerning other allegations of sexual assault. The accused argued that these allegations implied that the complainant had a propensity to make false allegations. This inference would depend on the foundational fact that the complainant had reliably recanted her earlier accusations or that they were demonstrably false. It would furthermore depend on a generalization about social facts: that women who have made earlier false accusations of sexual assault are making a false allegation in the particular case. Failure to lay a foundation for relevance on both levels would leave the relevance decision-maker open to the danger of using discriminatory generalizations. One could be the generalization that women who have not been believed in the past are more likely to make a false accusation. Another could be that previous experiences of sexual assault make a further allegation of sexual assault less credible. Such generalizations would involve scepticism about vulnerability to sexual assault and repeated sexual assault which would create a built-in bias in the criminal justice system against those most vulnerable to repeated victimization.

R. v. Riley, (1992), 11 O.R. (3d) 151 (C.A.).

30. Thus, both specific and social facts form the foundation for assessments of relevance and both may lead to distorted fact finding. The Supreme Court of Canada in R. v. Seaboyer recognized that scrutiny of relevance assessments is critical. Some determinations of relevance may rest on stereotypes and myths which prejudice the fact finding process.

R. v. Seaboyer, [1991] 2 S.C.R. 577.

31. The fact that Stinchcombe required disclosure of relevant evidence rather than all information implies more than the obvious point that it is impossible to share all information. It implies there are other interests at stake. While the case addresses some interests such as the physical safety of witnesses and the usefulness of informers in law enforcement, it is silent on other interests important in this context. In our submission, other interests include the privacy of witnesses in sexual assault cases as well as the danger of irrelevant information providing a breeding ground for discriminatory fact finding on the part of police, Crown, defence counsel, and the fact finder at trial. For instance, public knowledge that complainants have sought counselling could result in discrimination against them. Since equality in the community is not yet the norm and the disadvantaged are vulnerable to the reapplication of any myths and distorted images of them raised at any stage of the criminal process, a significant interest at stake is the unnecessary social and economic risks to witnesses subjected to a discriminatory pre-trial process.

32. Assessments of relevance should further the goal of ascertaining the truth. Information is irrelevant if it does not contribute to this ultimate goal. In our submission, assessments of relevance which make it more difficult for a witness to give or for fact finders to perceive a full and candid account are inconsistent with the concept of a fair trial. Disclosure of irrelevant information can prevent witnesses from giving a full account and hinders the search for truth in several ways: victims will be discouraged from making complaints, fewer complaints will proceed to trial, and trial outcomes may not be based on rational assessments of evidence.

33. Treating a witness unfairly and with disrespect is a barrier to her giving a full account of what happened--her testimony is likely to be discounted based on irrational, emotional grounds. Both the account delivered by the witness and the account received by the fact finders can be distorted by the introduction of irrelevant material particularly if that material builds prejudicial screens of myths and biases complementing those already prevalent in society.

34. A process is necessary to avoid endangering the fairness of the trial by discriminatory determinations of relevance. An appropriate process with respect to requests for disclosure and decisions to disclose or order disclosure should therefore include the following. Where there is potential for infringement of a witness's rights to equality or security of the person, defence counsel should explain how the information sought could contain or might lead to information relevant in the trial sense; establish the foundational facts, including the social facts; articulate the underlying generalizations; and explain how disclosure would be consistent with both fairness and other Charter values. The Crown should refuse disclosure unless such a non-discriminatory

foundation is laid. Where a request is made for disclosure of documents not in the possession of the Crown, Crown should, at a minimum, advise the witness that she is entitled to withhold consent to the release of such records. If the issue goes before a court, both argument and reasons should address the foundation for disclosure; specifically, whether there is a non-discriminatory foundation for a finding that the information sought is relevant.

V An Equality Analysis

35. To ensure a fair trial in the Seaboyer sense, determinations of relevance must meet equality standards. The right to full answer and defence does not conflict with a determination of relevance that respects equality rights. An approach to relevance based on unstated "common sense", but discriminatory, generalizations which promote over-disclosure will have a disparate impact on those most vulnerable to sexual assault and on those most vulnerable to being the subject of records made about them by others.

36. This means that the implications of this case go far beyond the facts themselves. For instance, where children are cared for within a family home, comparatively few records are kept concerning such families. There is far greater documentation of adults and children in institutions, such as psychiatric hospitals or residential schools. To the extent that there is a connection between disadvantage associated with such things as mental disability, Indian status, or, more generally, poverty, and documentation, there is heightened vulnerability to the harms of over-disclosure.

> Affidavit of Lee Lakeman, Joan Meister, Theresa Netsena, and Janet Kee, sworn June 1, 1992, paras. 24-33.

37. The above concerns about discriminatory generalizations are not groundless. Our assumptions about reality can distort the fact finding process and become a part of the unequal treatment by the legal system of certain groups in society. For example, support for the following propositions can be found in the work of Wigmore, a noted scholar whose work is still treated as authoritative in the Canadian legal system: race is relevant to credibility; girls are less truthful than boys, and "an intelligent boy is, as a rule, the best witness in the world...[but it] is a different affair with a young girl of the same age"; and women are inherently unreliable witnesses because they do "not reason or infer" and lack "objectivity". If today the judge had to

warn the jury that witnesses of a certain race or gender are notoriously unreliable, this would not make the trial unfair in the sense that there was a risk of convicting an innocent accused, but it would make it unfair in the broader Seaboyer sense.

> Wigmore, The Principles of Judicial Proof As given by Logic, Psychology, and General Experience (1913), at pp. 314-317 (extract from Edward Westermarck, Origin and Growth of Moral Ideas (1908)); at pp. 333-337 (extract from Hans Gross, Criminal Psychology (1911)); at pp. 340-341 (extract from Hans Gross, Criminal Psychology (1911)).

38. In our submission, recent appeal court decisions on the rules of evidence and trial procedures support the following principles relating to assessments of relevance which respect equality rights.

> Stereotypical assumptions based on race, sex and analogous factors should be eliminated from the fact finding process.
>
> Procedures or rules of evidence should promote the ability of witnesses to give, and for fact finders to perceive, a full, candid account of what happened.
>
> Assessments of relevance and probative value should rest on generalizations that reflect the experiences of disadvantaged groups.
>
> Irrelevant evidence which harms disadvantaged groups is to be excluded.
>
> All participants in the judicial process are to be treated with dignity and respect.

> R. v. Salituro, [1991] 3 S.C.R. 654.
>
> R. v. Levogiannis, (1990), 1 O.R. 351 (C.A.); appeal dismissed S.C.C., June 15, 1993, reasons to follow (upholding the Court of Appeal which held section 486(2.1) of the Criminal Code [complainant may testify behind a screen] does not infringe the right to a fair trial).
>
> R. v. D.O.L. (1991), 65 C.C.C. (3d) 465 (Man. C.A.); appeal reserved S.C.C., June 15, 1993, reasons to follow (overturning Court of Appeal decision which held section 715.1 of the Criminal Code [videotape recording of testimony of complainants may be admissible] infringed the right to a fair trial. Oral decision by S.C.C. that section does not infringe sections 7 or 11(d) of the Charter).
>
> R. v. R.W., [1992] 2 S.C.R. 122 (considers proper approach to evidence of young children).
>
> R. v. Seaboyer, [1991] 2 S.C.R. 577.

39. These principles can be applied to numerous specific disclosure issues in the context of sexual assault trials: medical records, mental health records, welfare and child protection records, letters, diaries, and

educational records. The following submissions address some forms of information that are particularly significant in this case.

1. The Records of Therapists, Counsellors, Psychologists, and Psychiatrists ("Therapists'" Records)

(a) Assumptions Underlying Requests for Disclosure of Therapists' Records

40. Requests for disclosure of therapists' records rest in part on an assumption that the private, personal background of complainants of sexual assault is relevant. This is in contrast to victims of other crimes, such as robbery, who are typically not asked to produce these records. The investigation of personal background information rests on stereotypes about sexual assault and complainants of sexual assault, such as: false accusations are easily made and result from fantasy; women are mentally unstable; certain women have a propensity to consent such as aboriginal women, sexually experienced women, and sex trade workers; and false allegations are often made to obtain revenge or to cover up sexual activity.

41. The investigation of complainants' backgrounds rests often on a belief that they precipitate the assault by their lifestyle, relationships, sexual permissiveness, degree of respectability, etc. Victims are assumed to be likely to "have a psychological propensity, or even possess 'basic inner drives' leading toward victimization." There is an assumption that examination of the complainant's personal background, behaviour and characteristics will help us to determine her role in the assault.

> Robert Elias, The Politics of Victimization (New York: Oxford University Press, 1986) at pp. 83-85.

42. The unreasonableness of such fishing expeditions is illustrated by imagining how the legal system would operate if all witnesses faced the prospect of disclosure of all their personal records, such as income tax and banking records, prior to a criminal proceeding.

(b) Grounds for Requests for Disclosure of Therapists' Records

43. In O'Connor, defence counsel argued that the records were self- evidently relevant to credibility, recent complaint, corroboration, and contradictory statements. It is submitted that such assertions should be analyzed for their consistency with the right to a fair trial, equality and security of the person. Such an analysis reveals

that these assertions are demonstrably inconsistent with fair trial and equality rights. Indeed, discriminatory rules of evidence such as those relating to corroboration, recent complaint, and past sexual history have been abandoned or changed to meet equality standards. If the routine search for corroboration, recent complaint, and past inconsistent statements were to re-emerge at the pre-trial stage, it would be a significant step backwards.

Statement of Facts, paragraph 3.

(i) Recent Complaint

44. The presence or absence of a recent complaint does not tell the court anything about the truthfulness of an allegation of sexual assault. Women are just as likely to wait to tell a person they trust, than to make an allegation at the first reasonable opportunity. The Supreme Court of Canada recently acknowledged that the presence or absence of a recent complaint is irrelevant:

> Finally, the Court of Appeal relied on the fact that neither of the older children was 'aware or concerned that anything untoward occurred which is really the best test of the quality of the acts.' This reference reveals reliance on the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, the literature suggests the converse may be true; victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed."

R. v. R.W., [1992] 2 S.C.R. 122, per McLachlin J., at p. 136.

45. The common law rule regulating the admissibility of recent complaints was abrogated by Criminal Code section 275 in 1983. Lack of complaint (or even the presence of complaint) is not probative of anything. The accused is therefore not being denied relevant evidence if defence counsel is denied the opportunity to see a therapist's recorded view of whether a complaint was or was not made.

The Criminal Law Amendment Act, S.C. 1980-81-82, c. 125, (now s. 275 of the Criminal Code).

(ii) Corroboration

46. Information can only be corroborative if it is relevant, so that the concept standing by itself does not assist with the relevance determination. Furthermore, Parliament has made it clear that conviction for sexual assault is not unsafe in the absence of corroboration. This is consistent with an equality analysis since fact

finders cannot be told that sexual assault complainants are to be treated with a scepticism beyond that implied in the requirement that there must be proof beyond reasonable doubt. A generalization that uncorroborated complaints of sexual assault are less likely to be true than those supported by evidence other than that of complainants (primarily women and children) would be a discriminatory generalization inconsistent with legislative policy.

Criminal Code, R.S.C. 1985, c. C-46, s. 274.

(iii) Inconsistent Statements

47. The Respondent has argued that "[p]rior inconsistent statements...must be compared with statements made at trial in order for those witnesses to be properly examined and cross-examined, to test their credibility and obtain the truth of what occurred ... Therefore statements made to psychiatrists, counsellors or others while the complainants were in therapy...were essential for an adequate defence."

Respondent's Factum, para. 53(b).

48. The assumption that prior statements inconsistent with testimony imply that the witness is lying at trial rests on a broad generalization about self-contradiction: persons who make inconsistent statements about a factual matter may be lying about that factual matter.

49. The Coalition does not question that broad generalization in this case, but questions whether it is possible to lay an adequate foundation for the use of therapists' records in order to trigger that generalization. In other words, can an "inconsistent statement" of the witness be found in therapists' records? In order to use the generalization, therapists' records must be seen as capable of containing a witness's factual statements that were spoken and that those words are statements of fact, capable of being inconsistent with evidence given at trial. In our submission that therapists' records fail to meet these criteria.

50. A conclusion that therapists' records are capable of containing factual statements which can be regarded as inconsistent statements in a legal proceeding depends on a number of sub-generalizations about:

- the maker of the record (the therapist),
- the nature of the therapeutic relationship, and
- the witness.

Examination of such sub-generalizations displays respect for complainants and avoids discriminatory

assumptions.

The Maker of the Record

51. Respecting the maker of the record, one generalization links the record to what was actually said, as a matter of historical fact; that is, that records accurately reproduce what was said. There is, however, an alternative generalization available; that is, that records are not made according to procedures which indicate that they reliably reproduce the statement of the witness. This alternative generalization would lead to the conclusion of irrelevance. It is submitted that the alternative generalization has considerable merit: therapists' records could range from a videotape recording to jottings made during the therapeutic session, to notes made much later; records may not be checked for accuracy and even what appears to be the most reliable record, a videotape, lacks the unrecorded context which could change the meaning of what was recorded. Finally, what one therapist chooses to record will not be the same as another -- it will depend on the biases, philosophies, and approaches of the therapist.

The Therapeutic Relationship

52. Respecting the therapeutic relationship, one generalization is that it is capable of eliciting factual accounts which can be inconsistent with later evidence. However, an alternative generalization is that the role of the therapist and the therapeutic procedure adopted may vary widely. There is no agreement among therapists about what therapy is, what are the best methods, or what professional qualifications should be required. The lack of uniform therapy procedures means that no generalizations can be made about the role of leading questions, assumptions about self-blame, victim precipitation, or assumptions underlying interpretations of behaviour. For instance, were the complainant's responses in response to leading questions which assumed she was to blame? The therapeutic meeting is not designed to produce historical truth; its purpose is to treat the patient and the historical truth is often completely irrelevant to that process.

> Katherine Main, "The Myth of Therapist Expertise", in Windy Dryden and Colin Feltham (eds.), Psychotherapy and Its Discontents, (Buckingham, Philadelphia: Open University Press, 1992) Ch. 6, at pp. 135-166.
>
> Barbara J. Socor, "Listening for Historical Truth: A Relative Discussion" (1989), 17 Clinical Social Work Journal, 103, at pp.113-114.

53. Ideally, the objective of a therapist would be to build a trusting relationship with the witness which

includes elements of insight, analysis, acceptance, sympathy, and understanding. At its worst, "therapy" may revolve around blaming the woman for what has happened, intensifying guilt and self-blame. The nature of the particular ideological screen through which the information has passed will be unknown to the fact finders or else the subject of (potentially discriminatory) guess-work. Few therapists are aboriginal or have lived or worked in residential schools. Even the most supportive (as compared to misogynist) therapist is likely to approach the therapy process with personal, subjective assumptions about reality and about sexual assault.

54. A further generalization respecting the therapeutic relationship is that the participants have knowledge of legal standards and issues to which the matters discussed may be seen as relevant. However, an alternative generalization is that such knowledge is not generally possessed by the therapist or the witness. For instance, a statement by the witness that she "consented" would only have meaning where it is assumed that she knew the legal meaning of consent. As it stands, such a statement is mere opinion incapable of being inconsistent with factual evidence given at trial.

The Witness

55. Respecting the witness, one generalization is that therapy involves the making of a statement capable of being inconsistent with later evidence. An alternative generalization is that therapy is a process by which the witness explores what has happened and attempts to assimilate and integrate past events. The confidentiality not present in other relationships promotes exploration of emotions and feelings. This process could involve self-blame and denial.

56. It is a generalization that witnesses who have expressed self-blame or denial to a therapist may be fabricating an allegation of sexual assault. However, an alternative generalization is that self-blame and denial are two common adaptive responses to trauma caused by all sorts of crimes, accidents, and diseases rather than "statements" that are capable of being inconsistent. The generalization chosen reflects a view of what the witness is doing in therapy.

57. It is a generalization that therapy is a process sufficiently similar to the criminal justice process to produce "statements" which could be meaningfully compared and found inconsistent. However, an alternative generalization is that therapy is such a different process from the legal process and is one in which the goals of the witness could differ so markedly from her goals in giving evidence in court

that comparisons are unreliable and dangerous.

58. Thus, "denial" could be seen as a statement of "fact" or, alternatively, as a defensive mechanism protecting a victim of a traumatic event from some painful aspect of reality. Denial may be a more prevalent coping strategy in particular religious and cultural contexts. "Denial enables the survivor to more gradually face the realities of the victimization and incorporate the experience into his or her internal world."

> Ronnie Janoff-Bulman, Shattered Assumptions: Towards a New Psychology of Trauma, (New York, The Free Press, 1992) at p. 97-98.
>
> K.M. v. H.M., [1992] 3 S.C.R. 6, at p. 27.

59. Similarly, self-blame can be seen as a statement of fact in a situation in which accuracy of detail would be seen as significant or, conversely, as a defensive mechanism motivated by recovery, a process in which accuracy would not be seen as therapeutically significant to the individual. On this view, self-blame is an interpretation of a traumatic event which may change as the therapeutic process proceeds, not a statement of fact. Self-blame may help make sense of a traumatic event by minimizing the possibility of randomness in the world. "If the woman can believe that somehow she got herself into the situation, if she can make herself responsible for it, then she's established some sort of control over rape. It wasn't someone arbitrarily smashing into her life and wreaking havoc."

> Andra Medea and Kathleen Thompson, Against Rape (New York: Farrar, Straus, & Giroux, 1974), at p. 105.

60. Disclosure of irrelevant information in therapists' records confers clinical decision makers with a major role in assessments of guilt or innocence. The therapist is not merely acting as a "court reporter". Therapists frame the issues and ask questions. Based on the inferences and opinions they form, they make further inquiries. Basing pre-trial and trial findings of fact on records produced by this process necessarily requires placing reliance on the expertise of the therapists. An expert preparing to give expert testimony is performing a very different function from the expert giving therapy and counselling. Preparation of an opinion for a legal case requires that the expert focus on the issues as defined by the law and confines the expert to their area of expertise. Therapists, counsellors, psychiatrists, and psychologists are not experts in determining the historical facts. Their opinion as to what actually happened should not be seen as relevant.

61. The foregoing paragraphs have analyzed the appropriateness of the use of therapists' records as evidence

of recent complaint, corroboration, and prior inconsistent statements. In our submission, should defence counsel request disclosure of therapists' records for any of these reasons and the request were subjected to a fair trial and equality analysis, the request would invariably lead to a refusal to disclose.

(iv) To Prove a Mental Condition Which Implies a Lack of Credibility

62. While not an issue in this case, some witnesses in sexual assault trials will have a recorded background of mental illness or handicap, or what has been deemed to be such an illness or handicap. Disclosure of their therapist and other mental health records will have distinctive and significant costs for them in terms of invasion of privacy, access to justice, and the risk that information in those records could be improperly used. It is submitted that there is a particular danger of discriminatory generalization about such persons, so that the assumptions underlying determinations of relevance deserve particularly careful scrutiny.

63. It has been recognized that persons suffering from a mental disability require legal protection from discrimination.

The Charter, s.15.

Human Rights Act, S.B.C. 1984, c. 22, ss. 3-6, 9.

64. Such persons are vulnerable to various discriminatory assumptions; for instance, that a person who suffers from a mental disability is emotionally or cognitively impaired and that they are indiscriminately sexual, or alternatively, asexual.

65. The legal and constitutional protection from discrimination to which persons with disability are entitled means that there is an obligation on all decision-makers in sexual assault trials to avoid making determinations of relevance without an adequate foundation. Furthermore, an analysis based on the equality approach suggested here would include a willingness to question psychiatric categories of mental illness, the linkage to cognitive impairment, and the necessity for access to mental health records as compared to other methods of testing credibility.

(v) The Past Sexual History of the Witness

66. It might be argued that therapists' records containing references to the witnesses' past sexual history are relevant since it was held in Seaboyer that such information is sometimes, though rarely, relevant in the trial sense. Indeed, if a broad approach is taken to relevance (as the Coalition argues) without careful attention to the equality rights of witnesses, then defence counsel could ask for a police investigation into the past sexual history of witnesses just in case something that is relevant in the trial sense could be unearthed.

67. Again, an approach which incorporates respect for the equality rights of witnesses would provide a basis for a full analysis of this issue, not possible here. The Coalition would hope that such an analysis would conclude with the rejection as discriminatory of any linkage between sexual history and the issues in a sexual assault trial. However, while Seaboyer rejects as discriminatory a general linkage between sexual history and credibility or consent, it does conclude that sexual history may in rare cases be relevant in the trial sense. This does not mean that the police, Crown or defence counsel can inquire in all cases into the sexual history of a witness. One part of Seaboyer cannot be extracted and applied without treating the whole as authoritative. Read as a whole, Seaboyer makes it clear that fishing expeditions are not permitted, that an adequate foundation must be laid, and that sexist-based assumptions must be avoided.

R. v. Seaboyer, supra.

68. In our submission, the insistence on a foundation and the rejection of sexist-based assumptions would be the minimal protection for witnesses consistent with their rights to equality and security of the person.

2. Diaries

69. Much of the above reasoning applies also to diaries, the writing of which can also be seen as a form of therapy even in the absence of another person. It is submitted that Mr. Justice Thackray was correct in holding that the diary of one of the complainants was not relevant (even though much of it had already been disclosed to the defence.) As Mr. Justice Thackray stated: "Simply because R.D. is a complainant does not subject her to laying her life, soul, and emotions bare to the world."

A.B. p.87, lines 7-14. Judgment of Mr. Justice Thackray, December 6, 1992.

VI Conclusion

70. In our submission, the Crown, in disclosing irrelevant information, Mr. Justice Campbell, in granting the disclosure order of June 4, 1992, and Mr. Justice Thackray, in ordering a stay of proceedings, erred in failing to take into account the witnesses' constitutional rights to equal benefit and protection of the law and to the right to equal security of the person. Accordingly, this is not a case of inadequate disclosure of therapists' records; instead it is a case of over-disclosure.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August, 1993.

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LIST OF AUTHORITIES

3. The Canadian Charter of Rights and Freedoms, Constitution Act, 1982. R.S.C. 1985, App. II, No. 44, ss. 7, 11(d), 15, 28.	3, 4, 5, 9, 11, 20
4. Criminal Code, R.S.C. 1985, c. C-46, ss. 274, 277.	7, 16
5. The Criminal Law Amendment Act, S.C. 1980-81-82, c. 125, (now s. 275 of the Criminal Code).	15
6. Elias, Robert, The Politics of Victimization (New York: Oxford University Press, 1986) at pp. 83-85.	14
7. Human Rights Act, S.B.C. 1984, c. 22, ss. 3-6, 9.	20
8. Janoff-Bulman, Ronnie, Shattered Assumptions: Towards a New Psychology of Trauma, (New York, The Free Press, 1992) at p. 97-98.	20
9. McCormack's Handbook of the Law of Evidence, 2nd ed., p. 438 quoted in Stanley Schiff, Evidence in the Litigation Process, 3rd ed. (Toronto: Carswell, 1988) p. 19.	8
10. MacDonald, The Honourable David C., Legal Rights in the Canadian Charter of Rights and Freedoms, (Toronto: Carswell, 1989) at p. 497-507.	5
11. Main, Katherine, "The Myth of Therapist Expertise", in Windy Dryden and Colin Feltham (eds.), Psychotherapy and Its Discontents, (Buckingham, Philadelphia: Open University Press, 1992) Ch. 6, at pp. 135-166.	17
12. Medea, Andra and Kathleen Thompson, Against Rape (New York: Farrar, Straus, & Giroux, 1974), at p. 105.	20
13. Barbara J. Socor, "Listening for Historical Truth: A Relative Discussion" (1989), 17 Clinical Social Work Journal, 103, at pp.113-114.	17
14. Wigmore, The Principles of Judicial Proof As given by Logic, Psychology, and General Experience (1913).	12