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**THE TRANSFORMATION OF MYTHS AND STEREOTYPES
INTO 'TRUTH'
AN EXAMINATION OF DEFENCE APPLICATIONS FOR THE
DISCLOSURE OF WOMEN'S PERSONAL RECORDS IN RAPE CASES**

by

Ruth Code

B.A., Simon Fraser University, 1994

**Thesis Submitted in Partial Fulfillment of the Requirements
For the Degree of Master of Arts**

in the Department of Law

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CARLETON UNIVERSITY**

September 2001

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**THE TRANSFORMATION OF MYTHS
AND STEREOTYPES INTO 'TRUTH'
AN EXAMINATION OF DEFENCE APPLICATIONS FOR THE
DISCLOSURE OF WOMEN'S PERSONAL RECORDS IN RAPE CASES**

Submitted by

Ruth Code, B. A.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

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September 2001**

ABSTRACT

This thesis examines the categories of myths and stereotypes about women who have been raped that have been relied upon in judicial interpretations of rape laws. These myths and stereotypes have persisted through a number of rounds of feminist initiated rape law reforms and have permitted the re-surfacing of evidentiary rules and procedures previously eliminated by these law reforms. The problems identified in judicial interpretation of rape law reform are then situated within an exploration of judges' decisions in defence applications for the disclosure of women's personal records in rape cases. The thesis explores the impact that categories of myths and stereotypes have had on the construction of women's claims of rape by routing out the discriminatory beliefs and biases on which the decisions are based. It concludes that feminist inspired law reform strategies are inherently limited by the interplay between the construction of women in rape laws and legal concepts, allegedly imbued with neutrality, that together operate to obscure the fact that rape is a function of gendered inequalities.

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CHAPTER ONE

INTRODUCTION

The last three decades of feminist struggles against male violence against women have been marked by demands for change in legal responses to women who have been raped.¹ Feminists have argued that rape laws were antiquated and sexist and that criminal justice personnel operated on stereotypic assumptions and biased perceptions of women. In attempts to effect reform of these practices, feminists extensively documented and demonstrated their impact. Research conducted in the 1970's, disclosed among other things that over fifty percent of all reported sexual attacks were classified by police as unfounded, that prosecutors were failing dismally in securing convictions of the few men who were charged and that sentences meted out were inadequate for the seriousness of the crime.² Women's groups from across Canada demanded changes to the *Criminal Code* of Canada arguing that the laws were antiquated and sexist and resulted in blatant unequal and discriminatory treatment of women who were raped.

It was demonstrated that judges and lawyers re-victimized women when cases did reach the courtroom. The type and range of potentially damaging questions into a woman's past and character and the unrestricted process of asking them transformed the courtroom experience of many women who had been raped into a second rape or a re-rape. The painful and objectifying nature of rape investigations and trials was identified as one of the main reasons reporting rates, founding rates and conviction rates were so

¹ I have had difficulty finding a term to refer to women who bring forth charges of rape. As many feminist authors have pointed out, the term complainant reduces women's experience of rape to the individual problem of a whining and complaining woman. Having said that, when I am discussing the cases I often use the term complainant as it is the term used by judges in their analysis.

² Lorene Clark and Debra Lewis. *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977) at 14.

low.³ Legal rules specific to rape trials were clearly premised on the assumption that women are prone to lie or fantasize about having been raped.

The struggles of feminist and other advocates have led to change in the rape laws. In response to feminist demands, over the past thirty years, Parliament has formalized a number of evidentiary and procedural safeguards directed at mitigating the ordeal of the trial process. The feminist inspired statutory reforms of 1983, 1992 and 1997 attempted to decode the discriminatory logic and outcome of rape myths and rationalizations, and remove them from criminal law and its application.

Under the 1983 changes, the term rape was replaced by the term sexual assault. At the same time, the gender-specific terminology of rape was changed to gender neutral sexual assault. Prior to 1983 proof of vaginal penetration was a requirement in rape trials. The change in terminology from rape to the three tiered sexual assault expanded the definition to include all acts that are of a sexual nature and violate the complainant's sexual integrity. Rules of evidence were re-formulated in order to address the pain and humiliation suffered by women during the trial. The rule requiring corroboration of a rape and the rule governing recent complaint were repealed and the marital rape exemption rule was eliminated. Prior to the 1983 changes, sexual offences focused on whether the complainant was "of previously chaste character." The 1983 revised rape law included section 276 of the *Criminal Code* which placed restrictions on the admissibility of evidence pertaining to the previous sexual history of the woman who was raped. The 1983 provisions attempted to infuse an understanding of power dynamics into the meaning of consent. For example, the new provisions provided some clarity with respect to the line between consent and submission. Consent was deemed not to have occurred in

³ Ibid at 16.

circumstances of application of force, threats or fear of application of force, fraud and the exercise of authority.

However, judges thought Parliament had gone too far in the protections provided to the complainant. Section 276 of the 1983 reforms, which restricted evidence of the prior sexual history of the woman who was raped, was struck down by a majority decision of the Supreme Court of Canada in the 1991 case of *R. v Seaboyer and Gayme*⁴ as an infringement on the accused's right to a fair trial.

The *Seaboyer* decision spawned the second major overhaul of sexual offence law and in 1992 Bill C-49 was introduced. Among other things, the 1992 reforms codified the prohibition of sexual history evidence that was based on myths and stereotypes of women who allege that they have been raped. It included eight detailed factors judges must consider before admitting sexual history evidence. The feminist inspired Bill also introduced amendments to the definitions of consent and non-consent. The strategy was to narrow the range of evidence considered relevant in sexual assault trials and mitigate the use of myths and stereotypes. In addition, the preamble and the text of the Bill were designed to prevent judges from continuing to subordinate women's equality rights to men's fair trial rights.

The Underlying Myths and Stereotypes

Not all women, nor all feminists, applauded these changes to the rape laws, including the earlier ones. Women's organizations, particularly rape crisis centres questioned the wisdom of creating more legal structures upon which women whose rape

4 ((1991), 66 C.C.C (3d) 321 (S.C.C.))(herein after referred to as *Seaboyer*).

complaints proceeded to trial would have to rely. Feminist critics argued that redefining the substantive elements of rape or reforming evidentiary rules would not eliminate the discretion used by individual legal agents and the culturally dominant notions of gender, sexuality and race reflected in those discretionary judgments would remain intact. Feminists argued that decision-makers were limited in their ability to make determinations of relevancy or guilt by the gendered social context in which the act occurred and in which laws are made and interpreted. Many pointed out that rape cannot be explained apart from dominant cultural notions of gender roles and power relations and that any legal change to rape laws occurs within the context of a system that is male dominated, permeated by symbols of male culture and deep-seated hostility and distrust toward women. Feminists pointed to the law's adoption of, or at least willingness to tolerate, the many myths and stereotypes about rape as a potent barrier to feminist ambitions of law reform.

Stereotypes of women who have been raped can be loosely grouped into three non-mutually exclusive categories: situational, perceptual and behavioural. While these myths and stereotypes and categories are present and at work throughout every stage of the processing of a rape charge, I am only focusing in this thesis on their affect at the level of judicial decision making.

Women in the situational category are constructed as unwilling to take responsibility for their sexual behaviour once they have been caught in a 'compromising' or difficult position. Instead they lie and say they have been raped. The myths that make up this category include: women accuse men of rape to explain loss of virginity; women accuse men of rape to explain "illicit" sexual activity, such as "adultery," that has been discovered; women accuse men of rape to cover up an "illegitimate" pregnancy; women accuse men of rape to avoid admitting that they had sex on the first date.⁵

⁵ Morrison Torrey, "When Will We Be Believed? Rape Myths And The Idea Of A Fair Trial In Rape Prosecutions" , (1991)24 *U.C. Davis Law Review* at 3.

Women in the perceptual category are constructed as having faulty sexual perceptions, that lead them to falsely believe they have been raped. Women subject to the perceptual category of rape myths and stereotypes are constructed as subjects of psychological or altered state disorders that are beyond their control and lead them to misperceive reality. The myths that make up this category include: women mistakenly believe they were raped because they suffer some form of psychiatric disorder and are subject to hallucinations or delusions of rape;⁶ women mistakenly believe they were raped because they were drunk or stoned and their ability to accurately perceive the situation was compromised; women mistakenly believe they were raped because of a deep-seeded hatred for all men and their ability to perceive sexual relations as consensual is compromised by their need to seek revenge; women mistakenly believe they were raped because of their weak mental state which makes them susceptible to the counselling tactics of unscrupulous therapists who indoctrinate their clients into making false allegations of rape; women mistakenly believe someone other than the rapist raped them because they suffer from a sexual perception disorder referred to as “blurring,” caused by previous incidents of sexual abuse.

Women who fall into the behavioural category of rape myths are those who have been constructed as unlikely to have been raped because they are identified as deviating from appropriate female roles in their behaviour at the time of the rape or as deviant in a broader context. Women who fall under this category include sex trade workers, racialized women, women with a criminal record, and women with a reputation for “promiscuity.” The myths that feed this category include: women are asking for it when they wear provocative clothes or go to bars alone; only virgins can be raped; if a woman

⁶ Sadie Bond, “Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance”, (1993) 16 *Dalhousie Law Journal* at 426.

says yes once there is no need to believe her no the next time; Black women and Aboriginal women are sexually promiscuous and Asian women are sexually compliant.

Despite the feminist law reform efforts, there are clear indications that legal reforms have had minimal impact on limiting or obliterating the use of myths and stereotypes in the evidence adduced and in judicial decision-making. Defence lawyers continue to be successful in applications to admit sexual history evidence on the basis of categories of myths and stereotypes. While law reform attempted to limit or close avenues through which myths and stereotypes could enter legal decision-making, the same myths and stereotypes have re-surfaced via new routes. Most recently women have been confronted with the threat of disclosure of their personal records which are used by the defence counsel at trial to undermine the woman's credibility or to provide the basis for an inference of consent. The prospect of such public exposure has been used to intimidate women into dropping rape charges. The Supreme Court of Canada, in an attempt to restrict defence access to these records, has in effect not only endorsed but encouraged the practice of applying for disclosure by defence counsel. What had previously been a little used avenue has become common practice in rape cases. The admissibility of these records is an issue that has been a tug of war between federal legislators and the Supreme Court of Canada over the past eight years.

The purpose of this thesis is to rout out the categories of myths and stereotypes that continue to inform judges' decisions in rape trials. This project will examine how myth based categories of false rape charges are re-surfacing in private records cases and the forms these myths are taking in these cases. The overarching goal of this research is to expose how judges' use of these categories inhibits an interrogation into the sources of violence against women and how judges label some women's experiences of sexual violence as something other than violence.

The rise in the use of women's private and personal records in rape cases, since the implementation of the 1992 reforms, and the judiciary's support of the practice raises

a number of questions and concerns that are particularly troubling. The use of such evidence in a rape trial clearly exemplifies the continued disbelief of some women's testimony in rape cases. Defence gathering of the woman's history in rape cases is about establishing 'who' the woman is and into what category informed by myth and stereotype she falls in order to determine whether her allegation is more likely to be 'true' or less likely to be 'true.' While feminists have for decades critiqued judicial decision-making on the basis that it is informed by myths and stereotypes, I think the problem is more deeply rooted and entrenched than this critique reflects. The problem is that myths and stereotypes are the bedrock on which some judicial decisions are made. By starting with indisputable categories of myths and stereotypes, the courts remain mired in an ideological mode and miss the opportunity to examine the gendered relations of power, and inequalities that have formed these categories.⁷ Without this examination, the Court presumes the "truth" that underlies the myths and stereotypes that provide relevance to evidence in rape trials and removes them from the social context in which they are created.

Thus reform strategies that focus on reducing or eliminating the laws or practices that reflect the myth-based categories under which women who have been raped were characterized and thus less likely to be believed, are susceptible to a judicial response that simply re-asserts the same category or expands the category on the basis of either the same or a slightly altered variation of the myths and stereotypes. Categories of myths and stereotypes provide the judiciary with justifications to attempt to correct a perceived imbalance created by reform.

There is a considerable amount of feminist scholarship on this subject, particularly in the area of rape law reform and I will draw on this to contextualize my exploration of

⁷ Dorothy Smith. *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Toronto: University of Toronto Press, 1990) at 89.

the tug of war between the courts and federal legislators over the disclosure of women's private and personal records. In so doing, I will explore how the myths and stereotypes that historically coalesced around the marital rape exemption, the recent complaint doctrine, rules of corroboration and past sexual history evidence re-appear in present day disclosure cases, despite the elimination or limitation of all four doctrines.

Methodology, Scope and Limitations

This research project reviewed cases on records applications involving sexual assault charges available on Quick Law, decided between December 1995 and the passage of Bill C-46 in May 1997 and again from May 1997 to the Supreme Court of Canada decision in *R. v. Mills*.⁸ This research is based only on information contained in the reasons for decisions available on Quick Law. I excluded cases where the rationale for the decision to disclose or not to disclose was not given. All of the cases analyzed in this examination involve sexual offences.

Case law analysis has some limitations as it may not be an accurate determinant of the range of situations in which records applications are being made. Formal reasons for decisions are not issued in every case and in many cases the reasons are provided orally.⁹ The danger of any case law analysis is that it may only represent unusual cases. However common law judicial decision-making is heavily influenced by precedent and as only cases that have reasons can be precedential, such cases are an important source of information on legal trends. Finally a case law review cannot determine how a defendant actually used the record.

⁸ (1999) 3 S.C.R. 688

⁹ Karen Busby, "Third Party Records Cases Since *R. v. O'Connor*," 27 *Manitoba Law Journal* 3, 1999 at 358.

Organization of Thesis

In chapters two and three I examine the presence of gendered myths and stereotypes and their categorization in the history of Canada's rape laws, the struggle to eliminate or reduce them through legislative action and the subsequent judicial responses. This examination draws from feminist theory that explores the problems inherent in defining a gendered problem in law as an imbalance of competing rights. I provide this contextualization in order to frame my discussion of the disclosure cases. In chapter four I explore how some of the problems inherent in the conceptualization of rape as an imbalance of rights have been actualized through an examination of how disclosure of private and personal records became the new legal problem for reformers following judicial response to rape law reform efforts in 1983 and 1992. Chapter five is an extension of this examination and looks at disclosure cases, subsequent legislative action in the form of Bill C-46, and present day judicial interpretation of Bill C-46. In chapter six I briefly discuss some of the questions that are raised in this paper about rape law reform and future directions for feminist engagement with these reforms.

CHAPTER TWO

THE HISTORICAL CONSTRUCTION OF RAPE

When male violence against women was initially documented during the 1970's the magnitude of the problem demanded serious responses. The pain, anguish and mistreatment of victims, combined with the revelation that criminal justice personnel operated on stereotypical assumptions and biases against women, led to demands for legal reform in areas such as rape, pornography, sexual harassment and wife abuse. Women's organizations began drawing attention to the sexism inherent in rape laws, arguing that they contributed to the oppression of all women. Backed by research and documentation, feminists asserted that the legal system was not adequately responding to men's sexual violence against women and was in fact contributing to the violence by maintaining and perpetuating sexist assumptions about women.

Debates about whether it is useful to try to use the law to promote women's emancipation, generally, and to address violence against women, specifically have a long history in feminist legal scholarship.¹⁰ Many feminists argue that engaging the law simply reaffirms the same values that negate and distort women's realities and experiences by attempting to turn them into legally acceptable forms of evidence, while violence against women continues unabated.¹¹ Feminists further assert that criminal law

¹⁰ Examples of this material include, *supra* note 2; Kathleen A. Lahey, "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory", in Richard F. Devlin (ed.) *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery, 1991); Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987); Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989); Lorene Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns", (1990) *10 Studies in Law, Politics and Society* at 143; Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991).

¹¹ Examples of this material include L. Snider, "Legal Reform and Social Control: The Dangers of Abolishing Rape" in Ronald Hinch (ed.), *Readings in Critical Criminology*, (Scarborough: Prentice-Hall Canada, 1994), 86-87; Sherene Razack, "What Is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence", (1994) *19 Signs: Journal of Women in Culture and Society* at 41, and "From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities", (1995) *Law and Social Inquiry*,

is not flexible enough to address women's concerns and needs because it is designed to punish, not empower. The law's emphasis on punishment merely widens the net for punishment of poor and racialized men and at the same time affirms a "victim-status" for women.¹² Still other feminists argue that ideological constructions of women and women's sexuality found in extra-legal discourses, such as psychiatry, psychology, gynecology and everyday discourses, permeate legal decision-making.¹³ The judiciary is not immune from societal misperceptions about rape such that judicial decision-making has and continues to be informed by myths and stereotypes of women who have been raped. Feminists point out that changes to the law do not address the fundamental ways that myths and stereotypes limit the abilities of some women to tell their stories about rape. Legal tests, standards and practices are determined and applied in accordance with the myths and stereotypes of the dominant culture. Tinkering with law reform does not address the fundamental and causal problems. Minor changes on the surface leave the sexist underpinnings intact. Law reform cannot "re-appropriate the definition and meaning of rape" because "the state is guided by men's ideologies and interests."¹⁴

In this chapter I will illustrate some of the ways judges either expand or re-assert the same categories of slightly varied myths and stereotypes and the role these myths and stereotypes play in the tug of war between the courts and the goals of rape law reform. In so doing, I will explore how the myths and stereotypes that historically coalesced around

891-922; Christine Boyle, "A Feminist Approach to Criminal Defences," in Richard F. Devlin (ed.) *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery, 1991).

¹² Laureen Snider, "Feminism, Punishment and the Potential for Empowerment", (1994) 9 *Canadian Journal of Law and Society* at 85.

¹³ Susan Edwards. *Female Sexuality and the Law* (Oxford: Martin Robertson, 1981) at 51.

¹⁴ Maria Los, "The Struggle to Redefine Rape in the Early 1980s" in Julian V. Roberts and Renate M. Mohr, (eds.) *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 40; J. Radford, "Policing Male Violence - Policing Women" in J. Hamner and M. Maynard (eds.) *Women, Violence and Social Control*. (London: MacMillan Press, 1987) at 43.

the marital rape exemption, the recent complaint doctrine, rules of corroboration and past sexual evidence appear in present day rape cases despite the elimination or limitation of all four of these historical doctrines. This contextualization is necessary for the second part of my exploration. I will argue that judges, in fact, believe the myths and stereotypes that underlie their decisions. These judges perceive attempts to allay these myths and stereotypes as giving a benefit to the victim rather than as addressing sexism. Consequently, some judges circumvent legislation designed to mitigate the impact of myths by constructing the problem as an imbalance between the rights of the woman and the rights of the accused. This chapter will provide the framework which will be used to examine the current issue of disclosure of personal records in rape cases.

Historical Construction of Rape

Contemporary rape law and judicial interpretation are on the trajectory of historical legal relations that once prosecuted rape as a property offence.¹⁵ Historically rape was considered an offence against the property of particular men, that is fathers and husbands. The law focused almost exclusively on the defilement of the virgin and the impact this would have on male property owners. The law protected only those women “affiliated with the protection of father-care or husband ownership.”¹⁶ The only credible women who brought forth charges of rape were, “...those firmly ensconced within the bonds of monogamous marriage” who were raped by a man other than their husband.¹⁷

¹⁵ Lorene Clark and Debra Lewis, “Women, Property and Rape,” in Jane Banfield (ed.) *Readings in Law and Society* (North York: Captus Press, 1991) at 294-5; Constance Backhouse, “Nineteenth Century Canadian Rape Law 1800-92,” in David H. Flaherty (ed.) *Essays in the History of Canadian Law* (Toronto: Osgoode Society, 1981) at 200-247; Constance Backhouse, *Petticoats and Prejudice* (Toronto: The Osgoode Society, 1991) at 44-45.

¹⁶ Lorene Clark and Debra Lewis *Ibid.* at 296.

¹⁷ *Ibid.*

Women were expected to live in the private sphere, and tend to home and the family. Owning and controlling their sexual and reproductive power was not an option for women. The justification to exclude sexually active women from legal protection against rape was based on the “behavioural” category of myths and stereotypes. It was assumed that because sexually active women deviated from their appropriate female role of sexual passivity, at the time of the rape and in the broader context, it was unlikely they were raped. Women who were sexually active before or outside marriage or had reputations of “promiscuity” were deemed to have “little sexual value.” These women were constructed as flouting the dominant, white, middle-class normality of heterosexual marriage and motherhood and were therefore placed outside the purview of legal protection from rape.¹⁸ The “situational” category of myth and stereotypes provided the rationale to question the veracity of sexually active women. This category of myths and stereotypes reflected and reinforced the notion that “promiscuous” women would falsely accuse men of rape if caught in a “compromising” or difficult position, such as loss of virginity, “illicit” sex, or an “illegitimate” pregnancy. The behavioural myth grounded the assurance that she was not raped and the situational myth provided the explanations for why she would lie about it.

In a similar vein, married women were denied legal protection from rape by their husbands based on the assumption that a man could not rape a woman who was already his own property. The law protected men’s appropriated interests in women’s labour and sexuality by granting husbands who raped their wives immunity, and by characterizing the rape of a married woman as an offence against her husband.

The marital rape exemption invoked notions of women’s sexual passivity and lack of sexual autonomy. It implied that sex is something a man does to a woman, where the

¹⁸ Ibid at 297.

woman's will is not relevant.¹⁹ The "perceptual" category of myths and stereotypes was used to justify the marital rape exemption. The notion that charges of marital rape would be concocted by vengeful ex-wives out to "extort better property or custody settlements on divorce," was repeatedly claimed to support the marital rape exemption.²⁰ This argument reflected the myth that women were susceptible to "perceptual" disorders, in which their abilities to perceive consensual sex were distorted by bitterness or a desire for revenge which rendered them unreliable and not credible witnesses in rape cases. The perceived threat that married women posed to the determination of the "truth" in a rape case provided the rationale to support the argument that marital rape was too difficult a charge for a man to protect himself against. The marital rape exemption provided legal support for husbands' appropriation of their wives' sexual and reproductive services, and fueled myths and stereotypes that rendered invisible the inequalities to which married women were subjected. The negative myths and stereotypes that attached to women who "deviated" from the goal of marriage and motherhood maintained and promoted this legally sanctioned norm of gender hierarchy.

The historical construction of rape laws as the protection of male property rights set the stage for the legal analysis of rape cases as, on the one hand being about the protection of "appropriate" women and on the other hand about the protection of men from false allegations of rape. Underpinning rape laws was women's marginalization in both private and public divisions of labour and at the same time the notion of female sexuality as a commodity and rape as an expression of masculine power.²¹

¹⁹ Sheila L. Martin, "The Control of Women Through Gender-Biased Laws on Human Reproduction," in Richard F. Devlin (ed.) *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery, 1991) at 300.

²⁰ Ibid.

²¹ *Supra* note 15 at 297

Corroboration and Recent Complaint

Assumptions based on the untrustworthiness of women and the vulnerability of men to false allegations of rape historically resulted in evidentiary requirements in rape cases such as the doctrine of recent complaint and the corroboration requirement. Under the traditional evidentiary rules of criminal law, the testimony of one witness to a crime was sufficient, if believed, to convict an accused. The corroboration requirement was an exception to this rule and reflected a distrust of the veracity of the witness. Although there were other criminal offences that required corroboration prior to a conviction, the requirement was attached primarily to allegations involving sexual violence. The focus of the requirement was on the difficulty of a man to refute a false charge of rape. Under the corroboration requirement, judges directed juries not to convict a man of rape in the absence of corroborative evidence. What constituted adequate corroboration shifted and narrowed over time. In the early period, evidence such as physical bruising, trauma, ripped clothing and/or an eyewitness to the attack were the corroborative evidence required to substantiate a woman's claim of rape.²² It was assumed that rape usually produced physical evidence which would then corroborate the assault. In the absence of physical evidence the woman had to produce an eye witness to corroborate her story. Without one of these forms of corroboration, she was considered not believable and there could be no conviction. By the mid twentieth century, in order to prove corroboration, the evidence had not only to support the testimony of the woman who was raped but also to confirm that the accused was the individual who committed the rape.²³ Women were not believed about what happened or who did it. In order to justify the use of this exception to traditional evidence principles, judges assumed and reinforced all three

²² *Supra* note 5 at 31.

²³ Constance Backhouse. "The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth Century Canada and Australia" (2001) 26 *Queen's Law Journal* 297.

categories of myths and stereotypes of women who have been raped. Judges focused on perceptual qualities alleged to be significant in female psychology and nature such as neurosis, jealousy, spite, fantasy and shame and provided a legal basis to exclude women who exercised independence and sexual autonomy. Some women were predetermined as liars on the basis of a “perceptual” disorder brought on by a psychiatric problem or by “disorder” in their “character.” The belief that some women were adept at concealing such qualities also underscored the need to warn jurors and some commentators recommended that no rape case should go forward unless the woman had a psychiatric examination or was subjected to a lie detector test.²⁴ The perceptual category of myths provided the basis for the belief that women were prone to lie about rape; the situational myths, such as an “unchaste” woman is more likely than others to consent to sexual advances, and/or behavioural myths, such as women who say no do not always mean no, provided the explanation for why she would lie about it.

The law’s acceptance of myths and stereotypes about the behaviour of a woman who was raped gave rise to the perceived need to advise jurors of the relevance of evidence of recent complaint in a rape trial and provided further justification for denying some women fundamental legal rights of protection. Judicial explanation for admitting evidence that the complainant raised a “hue and cry” immediately after the rape was the notion that if a woman did not report a rape as soon as possible following the incident then the rape allegation was likely false. The jury was instructed to draw an adverse inference from the absence of a recent complaint. The recent complaint doctrine derived from a basic distrust of the sworn testimony of women. It was assumed that any woman who was raped would tell someone at her first opportunity. There was no recognition that there might be any number of reasons why a woman would not immediately report a rape

²⁴ *Supra* note 5 at 28.

including fear, stigma, embarrassment, vulnerability and self-protection. In the absence of a recent complaint, the rape allegation was presumed to have been fabricated.

Legislative Reforms, 1983

In the 1970's, advocates for women began demanding social and legal reform relating to rape. As a result of these struggles, feminists and women's organizations secured funding for rape crisis centres and transition homes, state provision of support services and later programs for abusive men and an extensive overhaul of rape laws. After a series of prolonged campaigns by feminist scholars, activists and women's organizations, the struggle for legal reform culminated in a series of changes to the *Criminal Code*.

In 1983 extensive changes to the *Code* rape provisions were enacted.²⁵ Under the 1983 changes, the term rape was replaced by the term sexual assault. This change in terminology from rape and indecent assault to sexual assault was based on the feminist argument that women's experience of rape was not reflected in the narrow legal definition of rape and that some women were thereby excluded from legal protection. These crimes were transferred from the *Code's* section on sexual offences and public morals to the section dealing with offences against the person. The change in terminology was designed to send the message that rape was not about sex but was about violence and as such should be treated like other crimes of violence.

Under the new definition of sexual assault, the onus was on the Crown to prove that the accused committed a "sexual" act, using an application of force applied without consent. Consent was deemed not to have occurred in circumstances of application of force, threats or fear of application of force, fraud or the exercise of authority. A standard

²⁵ For more detailed analysis of the 1983 reforms refer to Boyle, C. *Sexual Assault* (Toronto: Carswell, 1984).

of “reasonableness” was incorporated into the defence of mistaken belief in consent; the marital rape exemption rule was repealed; and judges were prohibited, expressly and without exception, from warning that it would be unsafe to convict in a rape case without corroboration. In 1975 the legislature had attempted to mitigate the assumption that women who allege rape are uniquely unreliable witnesses by repealing the rule governing recent complaint and by removing the corroboration requirement. However judges had continued to warn juries of the dangers of convicting a man for rape based on the uncorroborated evidence of the woman. While the warning was no longer required, it had not been expressly prohibited and recalcitrant judges felt the warning provided a necessary protection against false rape allegations.

The 1983 revised rape law included section 276 of the *Criminal Code* which placed restrictions on the admissibility of evidence pertaining to the previous sexual history of the woman who was raped. Under section 276, such evidence was only admissible to rebut evidence introduced by the Crown, to establish the identity of the accused, or to lay the foundation of the defence of honest but mistaken belief in consent.

Many feminist and women’s organizations considered the changes a vast improvement. It was hoped that the change in terminology would broaden the definition of rape to include not just sexual intercourse but virtually any form of unwanted sexual contact. It was also hoped that on a symbolic level the change in definition would send the message that sexual aggression toward women should be viewed as a crime of violence and domination rather than sex and signify a shift from viewing the woman as a body to viewing her as a person. The change from gender specific rape to gender neutral sexual assault was directed at reorienting the perception of sexual aggression away from the assumption that women are the natural victims of rape and that their sexuality predestined them as rape victims. Furthermore with rape re-defined as a type of assault, feminists anticipated that evidence of a woman’s sexual conduct with persons other than the accused could not be justified as relevant. In positioning rape as analogous to non

sexual assault offences, the reforms were supposed to place less pressure on women who brought a charge of rape and reduce the humiliation and sexual objectification women suffered under the old law. Rape was to be seen as, and treated like, other forms of assault.²⁶

Judicial Responses to the Legislative Reforms

These rape reforms met with tremendous resistance from within the legal system and consequently did not have the impact that was hoped for and needed. Little evidence exists that the changes had any positive bearing on charging or conviction rates. While sexual assault reporting rates have increased, police founding and charging rates have remained unchanged.²⁷

An examination of judicial interpretation of the term “sexual” and of the factors that determine the difficult line between submission and consent reveals that the categories of myths and stereotypes that are inimical to an understanding of women’s experiences of rape re-surfaced in slightly different forms or via different routes. Nuances that underscored the historical evidentiary rules relating to corroboration, recent complaint, past sexual history evidence and the marital exemption re-appear; and the need for protection against the possibility of convicting an innocent man continues to be the primary focus.

²⁶ For a discussion of the effect and subsequent changes to the reforms, refer to Christine Boyle, Marie-Andree Bertrand, Celine Lacerte-Lamentagne and Rebecca Shamaï “A Feminist Review of Criminal Law” (Ottawa: Status of Women Canada 1986); Brett Dawson, “Legal Structures: A Feminist Critique of Sexual Assault Reform”, (1985) 14 R.F.R. 40-43; and Julian V. Roberts and Renate M. Mohr, (eds) *Confronting Sexual Assault : A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994).

²⁷ Julian V. Roberts and Michelle G. Grossman, “Changing Definition of Sexual Assault: An Analysis of Police Statistics,” in Julian V. Roberts and Renate M. Mohr (eds.) *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 61.

The “Sexual” Components

The term “sexual” under the new three tiered offence of sexual assault was not defined in the 1983 legislation. The question of the meaning of the term sexual was left to the courts. The Supreme Court of Canada, in the 1987 case of *R.v.Chase* defined an assault as “sexual,” if committed “in circumstances of a sexual nature such that the integrity of the victim is violated.”²⁸ The Court adopted a “reasonable observer” test and various factors were deemed relevant for consideration. These included “...the part of the body touched, the nature of the contact, the situation in which it occurred, accompanying words or gestures” or a motive of self - gratification. The Court made it clear that while these factors were relevant, the part of the body touched or the motive of the assaulter was not determinative of whether the assault was sexual.²⁹ However the Court’s reference to body parts and the pleasure motivation as defining features narrowed the focus and re-inscribed the notion of rape as sexually motivated. This provided an avenue for the re-insertion of categories of myths and stereotypes of woman who have been raped and undermined the feminist inspired goal of broadening the definition of sexual violations that constituted sexual assault. The broader terminology was intended to more easily locate the offender in the broader cultural context that promotes and perpetuates male domination over women and equates sex with violence.³⁰

Despite the feminist inspired goal of re-defining rape as an assault rather than a sexual act, the specific nature of the sexual violation remained extremely important in a rape trial and the woman who had been raped continued to be subjected to humiliating

²⁸ Christine Boyle, “The Judicial Construction of Sexual Assault Offences,” in Julian V. Roberts and Renate M. Mohr (eds.) *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 137.

²⁹ Ibid.

³⁰ Maria Los, *Supra* note 14 at 43.

and embarrassing questions focused directly on those sexual aspects and her participation in them. During sentencing the presence or absence of vaginal penetration remained a very important consideration.³¹ Despite the elimination of the corroboration requirement, and of the recent complaint rule, it remained the case that evidence deemed corroborative, such as physical evidence of bruising or trauma, display of distress upon reporting or an immediate complaint significantly enhanced the likelihood of prosecution and conviction. Underlying the continued relevance of this evidence was the assumption that it is unlikely that certain types of women could be raped. The perceived need for evidence of physical trauma to prove whether or not a sexual assault occurred was used to illicit information about a woman's sexual history, whether she had engaged in consensual sex on the same day as the incident in question, and whether she had previously given birth.³² Evidence of a woman's sexual history as relevant to an assessemnt of physical evidence could only be justified if it was based on the assumption that a sexually active woman is a "promiscuous" woman and that a "promiscuous" woman is indiscriminate in her choice of sexual partners. Despite reform efforts to restrict this stereotyped thinking, these myths continued unabated to raise the inference that consent to previous acts of intercourse increased the likelihood of consent in the current situation. This was serious because evidence of a woman's past sexual history, combined with the absence of or inconclusiveness of physical corroborative evidence,³³ was used by the defence to dispute non-consent and provide the basis for a defence. This then provided the grounding for the defence to successfully introduce further damaging evidence by and about the woman

³¹ Ibid. at 36.

³² Georgina Feldberg, "Defining the Facts of Rape: The Uses of Medical Evidence in Sexual Assault Trials," 7 *Canadian Journal of Women and the Law* 9, 1997, at 96.

³³ Ibid. at 103. Feldberg's research also revealed that physical evidence of a rape rarely substantiates women claims of rape and in fact judges use the ambiguity of this evidence to rely on other information about the woman who was raped.

who was raped, such as evidence of substance use or abuse and/or inconsistencies in the details reported. These factors significantly increased the unfounding, non-prosecution rates and reduced acquittal rates.³⁴

Evidence of a woman's intoxicated state because of drug and/or alcohol use raised the inference that a woman was too drunk or too stoned to accurately perceive whether she had extended consent or not. Evidence of inconsistencies in the details reported raised the inference that a woman was too confused or psychologically debilitated to understand whether or not she had been raped. Research revealed that evidence of a woman's hysterical, emotional and/or intoxicated state was most often used when a woman did not agree to submit to a physical exam or use the support services made available to her, immediately following the rape.³⁵ This evidence was used by judges to infer that the rape allegation was a symptom of a disorder inherent to the woman and thus was not serious, and/or that the rape did not occur.³⁶ The relevance of this evidence to an assessment of why she was unwilling to immediately report or seek help from support services following the rape could only be justified if it was based on myths about a woman's mental state or behavioural choices. A woman's unwillingness to immediately report the rape combined with the myth that some women mistakenly believe they were raped has permitted the re-surfacing of the recent complaint doctrine. Some judges have come to believe that if a rape allegation is "real" the woman will immediately turn to support and/or medical services available to her, just as earlier judges believed a woman who was raped would immediately raise a hue and cry.³⁷ Evidence of a woman's

³⁴ Sheila McIntyre, Christine Boyle, Lee Lakeman, and Elizabeth Sheehy, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Laws", (2000) 20 *Canadian Women Studies* at 75.

³⁵ *Supra* note 32 at 106.

³⁶ *R. v Davidson*; *R. v Albert Bernard* as cited at *Ibid.* at 107.

³⁷ *Ibid.*

criminal conviction for drug use, drug trafficking and /or a prostitution related offences has combined with myths of women's sexuality, such as consistent sexual availability or uncontrolled sexuality, to place some women not only outside the ambit of legal protection, but has rendered some women unrapeable. Some judges filtered evidence of recent complaint and physically corroborative evidence through this framework of myths and stereotypes and transformed the rape of women who use or traffic drugs and/or are street prostitutes into free and voluntary sexual conduct.³⁸ The sexual violence to which women who are prostitutes, particularly street prostitutes and women who are addicted to drugs, particularly poor women, are subjected is rendered invisible. Rape is re-defined as the by-product of the lifestyle choices made by the women. This echoes the marital rape exemption under which some women's exposure to illegitimate sexual force in marriage was transformed into consensual intercourse, simply as a by-product of the marriage contract.

Consent

The list of factors used to clarify the difficult line between consent and submission under the definition of sexual assault is derived from a definition of assault that focuses on purely physical characteristics. This focus on physical force ignores many women's experiences of other equally powerful forms of force or coercion. According to the *Criminal Code* provision, one submits rather than consents when force is present. The notion of submission placed within a framework of consent anticipates some men's misinterpretation of women's desires, and allows the use of myths and stereotypes to provide the authority for the misinterpretation. Consent is assumed; submission is the deviation. In this context women's past sexual history with the accused provided the

³⁸ *R. v Parniak* as cited in *Supra* note 32 at 109.

basis for the reconfiguration of submission into consent. For example, based on the fact that she consented in the past the threats involved in “have sex with me or I won’t give you money for groceries,” “have sex with me or I’ll give you a C rather than an A,” or “have sex with me or I’ll beat you senseless tomorrow,” are transformed into patterns of consensual sexual activity that the woman has misperceived as non-consensual. Alternatively, the myth of the vengeful, scorned woman reconfigures a rape allegation into an act of revenge. Submissive sexual relations with a boss are thus translated into a false allegation of rape made by a vengeful woman involved in a relationship with her boss that soured. Along similar lines, “Have sex with me or I won’t give you money for groceries,” may be translated into a false allegation of rape by a married woman attempting to extort money or custody of children upon divorce. Similarly, women rendered unconscious or debilitated because of terror, inexperience, a disability and/or drug and alcohol consumption can be transformed into free and voluntary participants in sex. A woman’s debilitated state provided evidence of consent because it was used to show she did not expressly resist or failed to resist. Further a woman’s inability to recall the events, or her feelings of guilt or shame were used as evidence that her abilities to perceive reality were compromised and were then argued as providing the basis for a defence of a mistaken belief in consent.³⁹

This legal framing of submission as consent, combines with myths about some women’s inappropriate sexuality to place the emphasis on the woman’s sexual motivations. Myths such as women with developmental disabilities are asexual or, conversely cannot control their sexual behaviour, combine with some women’s histories of sexual abuse and coercion to de-value and/or neutralize the rape of those women. The submissive sexual relations of women with disabilities are transformed into consent by

³⁹ Elizabeth Sheehy, “From Women’s Duty to Resist To Men’s Duty to Ask: How Far Have We Come?”, (2000) 20 *Canadian Woman's Studies* at 101.

the myth that because she does not know what happened to her, no one can ascertain whether she granted consent or not. Similarly, submissive sexual relations of racialized and Aboriginal women are transformed into consent by the racist and sexist myths of depraved and/or uncontrollable sexuality. Evidence of racialized women's histories of sexual violence is transformed into the aggressive conduct of women who will stop at nothing to get the male attention usually denied her.

The transformation of submission into consent assumes that the accused and the woman who was raped are social, economic, physical and psychological equals. Women's inequalities are obscured through the invocation of myths and stereotypes. The onus is placed on women subjected to forms of pressure that are a reflection of women's inequalities to withstand that pressure rather than on the individual exerting the pressure.⁴⁰ The woman's characterization of that pressure as rape is interpreted as a failing in her - either a perceptual problem or a character flaw. On the basis of myth and stereotype, women's submission to sexual assault is characterized as consent and the rape allegation is seen as a function of women lying.

Judicial interpretation of legislated limits imposed on evidence reflects and reinforces categories of myths and stereotypes of women who have been raped. The use of all categories of myths and stereotypes transform what men do to women into defining features of women and prefigures some women who have been raped as liars or incapable of knowing and/or understanding whether or not a rape occurred. A woman's consent is assumed, non physical and equally powerful forms of coercion and force are ignored and myths and stereotypes are permitted to re-surface in order to link the use of evidence, that the reforms were designed to curb, to a determination of consent. Echoes of the rules of corroboration, recent complaint, past sexual history and the marital rape exemption rule persist because the behavioural, perceptual and situational myths and stereotypes upon

⁴⁰ T.B. Dawson *supra* note 26 at 40-3; Christine Boyle *supra* note 26 at 141.

which those rules were founded are alive and well. Without reforms that adequately address the very real inequalities that structure women's vulnerability to rape, myths and stereotypes continue to mire cases in a historical context that is about balancing the protection of "appropriate" women and the protection of men from false allegations of rape.

The Supreme Court of Canada's decision in *Seaboyer* went one step further by using categories of myths and stereotypes to construct women as unreliable and non-credible and thus instill the accused, the vast majority of whom are men, with reason and the possibility of acting on that reason. Men are granted the choice to recognize or ignore whether or not their actions constitute a violation of a woman's sexual integrity.

R. v Seaboyer and Gayme

The constitutional validity of section 276 of the *Criminal Code*, enacted in 1983, was at issue before the Supreme Court of Canada in *Seaboyer*. Section 276 limited the use of evidence of a woman's past sexual history with persons other than the accused. The majority of the Court, L'Heureux-Dube and Gonthier dissenting, held that section 276 violated sections 7 and 11(d) of the Charter and was not saved by section 1 of the Charter. In their decision, the majority decided that section 276 infringed the rights of the accused to evidence that may go toward their defence and therefore violated their right to a fair trial, which the Court identified as, "one of the most important of the principles of fundamental justice."⁴¹ While the majority recognized, what they considered the "laudable" purposes of the legislation - "the avoidance of unprobative and misleading evidence, the encouraging of reporting and the protection of security and privacy of the witness," - they went on to consider the effect of the legislation in order to determine what evidence was excluded from the trial process and whether it was relevant. The

⁴¹ *Supra* note 4 at 387.

majority concluded that the exclusion of evidence of sexual conduct under Section 276 created the risk of conviction of innocent persons.⁴²

The majority decision struck down the section that restricted the use of past sexual history evidence as unconstitutional. The majority's constitutional analysis of the problem excluded considerations of women's equality rights from the list of relevant constitutional factors. The Court's analysis centred on the issue of balancing protection against a woman's discomfort during the trial process against the possibility of convicting an innocent man.⁴³ In siding with the accused, the majority decided that the statutory exclusion of sexual history evidence "overreaches," "overshoots the mark," and is "cast so widely as to deprive the accused of the tools with which to build a legitimate defence."⁴⁴ In striking down the limitation placed on the use of women's sexual history evidence, the Court outlined five categories of sexual history evidence it decided should not be excluded from a rape trial. These included evidence that goes toward establishing the defence of honest belief; evidence providing a motive to fabricate on the part of the woman who was raped; evidence relating to the physical condition of the woman who was raped; evidence that provides an explanation for the sexual knowledge of a young person who was sexually assaulted; and similar fact evidence that shows a pattern of conduct on the part of the woman who was raped.⁴⁵

Each time the Court has been asked to rule on the issue of rape generally and the admission of past sexual history specifically, including instances attempting to insulate women from 'facts' that have no bearing on legal issues, subtexts of women's sexuality

⁴² Ibid. at 286.

⁴³ Diana Majury, "Seaboyer and Gayme: A Study InEquality," in Julian V. Roberts and Renate M. Mohr (eds.) *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 276.

⁴⁴ Supra note 4

⁴⁵ Supra note 43 at 279.

animate myths and stereotypes. The pattern that emerges is a propensity to entrench woman's victimization, inscribing women ever deeper into a framework that reproduces categories of myth and stereotype. The consistent invocation of these subtexts over time has resulted in a reliance on myths and stereotypes that give meaning and relevance to sexist evidence in rape trials.

The categories of evidence identified by the majority decision in *Seaboyer* as unfair and illegitimate to exclude reflect the myths and stereotypes that have historically been used to raise the inference that some women are less likely to have been raped. Under the majority decision in *Seaboyer*, the myths and stereotypes are no longer only interpretive frameworks that make sense of the admission or restriction of evidence; they have been transformed into "evidence."

The rationale underlying the majority's decision to include as relevant categories of evidence supporting an honest belief and similar fact pattern of conduct is premised on the notion that some behaviors disqualify or put in doubt a woman's claim of rape. The focus is placed on the woman's behaviour at the time of the rape or in a broader social context. Behaviour, characterized as "promiscuous," or "adulterous," contravenes the imposed standard of "appropriate" female behaviour. Sexual history evidence may be used to establish that a woman has a reputation for "promiscuity" or engages in sex outside of "marriage," and thus steps outside her "proper" ascribed gender role. Consequently the believability of her rape diminishes. The pattern of conduct is the myth and stereotype. In the process women, who are raped, are transformed into "victims" - not of male sexual violence but of their own sexual deviance. Implicitly the majority endorses the notion that rape is rare, rape is aberrational and that the women who bring forward "complaints" of rape are also aberrant due to some form of inherent dysfunction. The majority starts with a behavioural myth and stereotype relating to pattern of conduct, in order to provide meaning or 'truth' to these assumptions. The

result is a further entrenchment of women's lack of autonomy over their bodies, especially in the face of their own "sexual mis-perceptions" or "disorders."

This legal framing of some women's inability to know whether or not they consented intersects with myths and stereotypes about women who have sexual histories of abuse and coercion. Pattern of conduct evidence based on myths of uncontrolled sexuality, or consistent sexual availability will combine with "perceptual" myths and stereotypes to transform the abuse and coercion that make up some women's histories into free and voluntary sexual conduct on the part of the woman who was raped. The source of the allegations of previous sexual abuse and coercion are re-defined as a product of a "perceptual" disorder inherent to the woman who was raped which is then used against her in the current case. Filtering women's sexual history of abuse and coercion through this framework of myths and stereotypes places some outside the ambit of legal redress. This echoes the marital rape exemption under which the illegitimate sexual force in marriage was transformed into "consensual intercourse," and was then used to justify the exemption.

Similarly, the myths and stereotypes about women with sexual histories of abuse and coercion intersect with the myths that permit evidence of a young woman's sexual knowledge. The sexual knowledge of a young woman in a rape trial is used as a basis upon which the believability of her claim of rape is assessed against a standard of "appropriate" gender and age based knowledge and behaviour. Evidence of the sexual knowledge of a young person gives rise to the myth that a young woman will lie and allege rape in order to explain her loss of virginity or to avoid punishment for sexual activity that has been discovered by a parent or someone in a position of authority. Child sexual abuse is transformed into free and voluntary sexual conduct and provides the rationale to use sexual history evidence in order to infer that she had the knowledge to know and therefore the capability to make up the particulars of the alleged rape. Evidence of a young woman's past sexual history of sexual abuse will transform

submission or an inability to resist due to her young age into consent and then provide the defence with a basis to argue motive to fabricate or a mistaken belief in consent, as was argued in *Seaboyer*. Motive to fabricate evidence is a myth from the “situational” category in which women are constructed as unwilling to take responsibility for their sexual behaviour and instead lie and claim they have been raped when caught in a “compromising” position.⁴⁶ A woman debilitated through the effects of drugs, alcohol, fear, terror or a disability will be constructed as suffering from some form of “perceptual” disorder in which she mistakenly believes she was raped or is confused over the identity of the perpetrator. What some women have been accused of doing - lying to explain “illicit” sex - has become their defining feature. The transformation of this myth into “truth” colludes with slightly altered myths and stereotypes of women’s “incapacity” and provides justification for the use of evidence that, historically, was based on the distrust of the sworn testimony of women. It is not surprising that the next category of evidence identified by the majority was the physical condition of the woman who was raped.

The inclusion of evidence of the physical condition of the woman illustrates the majority’s belief in the myths that link the presence or absence of corroborative evidence with a woman’s allegation of rape. The presence or absence of evidence of the physical condition of the woman who was raped is based on the myth that outward signs of trauma prove consent or non consent. By linking the physical condition of the woman who was raped to a woman’s sexual history, the Court transforms previous incidents of non physical but equally harmful force and coercion into consensual sex and then uses this as evidence to prove consent in the current context. This provides courts with the justification to use other “evidence,” that provides alternative explanations or motivations for the woman’s allegation of rape. All the factors identified by the majority decision in *Seaboyer*, are the myths and stereotypes that perpetuate the notion that there are

⁴⁶ Ibid. at 280.

“alternate” explanations for a woman’s rape allegation. In other words it is a closed and self perpetuating circle whereby the myths and stereotypes at work in the *Seaboyer* decision provide the rationale or justification for their use.

The categories of evidence identified as potentially relevant by the majority decision in *Seaboyer* are the myths and stereotypes that have historically been used to raise the inference that some women are less likely to be raped. Furthermore the myths and stereotypes at work in *Seaboyer* are used by the majority to provide the rationale or justification for the “truth” that underlies their use. Judges who begin their analysis of rape laws with existing categories locate their legal determinations within an ideological mode constructed from gendered relations of ruling, thereby missing the relations of gendered power that formed those categories. This judicial decision making process starts with gendered, inequality based myths and stereotypes about women and women’s sexuality and then perpetuates those myths and stereotypes through their decisions even in the face of explicit acknowledgment by the legislature and the Court itself of the damaging effects of those myths and stereotypes.

A woman’s lived experience of rape is discounted, disbelieved or seen as a fabrication and at the same time the Court ignores the gender inequalities that place women at greater risk of being raped. The categories of evidence identified by the majority contribute to a legal framework for interpreting, understanding and excusing rape as an “honest mistake,” or as non-existent. In so doing the majority decision anticipates and condones men’s misinterpretation of women’s desires, because some women “misinterpret,” “misperceive” or lie about their experiences.

Legislative Response to Seaboyer

The Supreme Court’s decision in *Seaboyer* was seen as a devastating blow to women’s rights in Canada. After a series of consultations with a variety of women’s

organizations and other legal advocates, legislative guidelines on the admissibility of past sexual history evidence were added to the *Code* in 1992. The amendments, under Bill C-49, contained a preamble that stated sexual history evidence with persons other than the accused was rarely relevant and inherently prejudicial. Guidelines governing the procedures to be used in determining the admissibility of sexual history evidence were introduced. Sexual history evidence was limited to specific instances of sexual activity considered relevant to an issue at trial. In defining relevancy, judges were directed to consider the elimination of discriminatory beliefs and biases from fact-finding and the risk of arousing prejudice, sympathy or hostility in the jury.⁴⁷

The next chapter examines the 1992 legislative reforms to rape laws and judicial interpretation of those reforms.

⁴⁷ Sheilah McIntyre, "The Consultations that Shaped Bill C-49." in Julian V. Roberts and Renate M. Mohr (eds.) *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 307.

CHAPTER THREE

DEFENCE APPLICATION FOR DISCLOSURE OF PERSONAL RECORDS

The Supreme Court decision to strike down section 276 was very controversial. Feminists, women's organization and rape crisis centre workers argued that the decision in effect, gave trial judges *carte blanche* to decide whether or not to admit evidence about a woman's sexual history. An intense period of consultation and debate followed the decision in *Seaboyer*. One of the primary aspirations of feminists and other advocates for women who were involved in the consultation process was to limit the discretion of judges to invoke categories of myths and stereotypes of women who have been raped and admit evidence premised on those myths. The feminist strategy was to narrow the range of "evidence" capable of being legally determined "relevant" by codifying the definition of consent and non-consent. The goal was to require judges to provide constitutional considerations to the narrowed pool of relevant "evidence" and to recognize women as sexual agents, not passive victims, or men's sexual property; consent was to be considered something a woman does and not something men choose for her; and myths and stereotypes proffered as honest but mistaken beliefs in a woman's consent would not constitute a legal defence.⁴⁸

Following the consultations, a number of amendments to the rape laws were introduced in 1992. The 1992 reforms codified the definition of "consent" and provided a non-exhaustive list of circumstances in which the law deemed no consent to exist. The reforms prohibited the mistaken belief in consent defence by an accused who did not take "reasonable steps" to ascertain consent. The feminist inspired amendments also codified a

⁴⁸ *Supra* note 32 at 76.

general prohibition of sexual history evidence plus a list of exceptions and included eight detailed factors judges must consider before admitting sexual history evidence.

Not all feminists considered the amendments a vast improvement. Many argued, as with the 1983 reforms, that a reorganization of legislation or technical changes to legislation leave fundamental and causational problems intact and that as a result, standards and practices will continue to be determined with reference to the myths and stereotypes of the dominant culture. Despite the implementation of the 1992 amendments, there has been consistent evidence that these reforms have been either outright ignored or merely discounted at every level of court across Canada. A 1997 review of the impacts of the 1992 reforms shows that judges followed the enumerated eight factors directed at reducing myths and stereotypes in judicial determinations of the admissibility of sexual history evidence, in form only.⁴⁹

The factors outlined in section 276 of the *Code* that judges were directed to take into account when determining whether or not sexual history evidence is admissible were: the rights of the accused to make full answer and defence; society's interest in encouraging the reporting of sexual offences, whether the evidence will assist in arriving at a just determination in the case; the removal of discriminatory beliefs or biases; whether the evidence may arouse prejudice, sympathy or hostility in the jury; the complainant's dignity and privacy rights; the right of the complainant to personal security and the full benefit of the law; and any other factor the judge considered relevant. Some judges simply recited the eight factors in section 276(3) without actually addressing the relevance of sexual history evidence before admitting the evidence. Judges frequently disregarded the requirement that defence counsel provide "detailed particulars" of the evidence sought to be admitted. Furthermore, where judges applied rather than merely

⁴⁹ Colin Meredith, Renate Mohr and Rosemary Cairns-Way, "Implementation Review of Bill C-49, (Ottawa: Department of Justice, 1997) at 15.

recited the guidelines, between 25 and 50 percent of sexual history evidence was admitted.⁵⁰

Many judges fail to rout out the myths and stereotypes that underlie evidence the defence counsel wants to retain or introduce. Situational, behavioural and perceptual myths about women who report rape continue to ground decisions on the admissibility of evidence and judges continue to participate in the production of a 'truth' that further distorts women's experiences of rape. Defence counsel have been successful in applications to admit sexual history evidence to support an alleged motive to fabricate, including the admission of evidence of childhood sexual abuse. As was the case before the 1992 reforms, women's histories of abuse and coercion are viewed through the myths and stereotypes and thereby transformed into free and voluntary sexual conduct. Defence counsel have been successful in arguing that prior non-consensual sex is not covered by s.276, on the basis that the evidence is relevant to the presence of bias and prejudice against men and a motive to fabricate. Some women's histories of abuse and coercion serve as a justification for inferring that she fabricated allegations of rape out of incidents of "unimportant" or "inconsequential" consensual sex with someone other than the original perpetrator.⁵¹ The reality of some women's experience of rape continues to be transformed into her "perceptual" problem, that figures some women as so incapable that they don't know whether or not they had sex, they don't know with whom they had sex or they are incapable of knowing whether they granted consent. Defence counsel have been successful in arguing that past sexual abuse may affect the reliability of a woman's evidence, that due to past abuses she may be mistaken or deluded about the identity of the true rapist or so damaged that her perceptions are unreliable.⁵²

⁵⁰ Ibid.

⁵¹ *Supra* note 32 at 75.

⁵² Ibid. at 76.

Under these circumstance it is not surprising that defence lawyers have achieved an additional evasion of the stated goals of the 1992 rape law reforms through the expanded use of pre-trial disclosure of women's personal and private records. In this chapter I will provide more detail about responses to the 1992 reforms to rape laws through an examination of private records cases. Through this examination it becomes clear that the admission of women's private records is based on the same categories of myths and stereotypes about women who have been raped that have consistently undermined rape law reform efforts. There is no apparent attempt to include how myth is transformed into 'truth' about some women's experiences of rape, and how the assumptions and beliefs that underlie the use of this evidence in rape trials informs some judges' decision-making. Without challenging underlying assumptions, new legal avenues, in this case the use of women's personal records, arise that allow for the re-assertion of the same categories of myths and stereotypes and provide justification for the focus to remain on protecting men's rights to a fair trial at the expense of the subordination of women's equality rights.

Soon after the implementation of the 1992 reforms, the issue of the defence's use of a woman's personal records to discredit her came to the attention of feminists and through them to legislators and reformers. These records include psychiatric and medical history records, social work files, reporters' notes, school records and personal diaries. The courts admitted evidence from women's personal history records as potentially relating to consent and/or credibility in the rape trial. Defence counsel were routinely applying for and being granted disclosure of women's records from a multitude of sources, including child and social welfare agencies, counselling or therapy services, residential schools, abortion and birth control clinics, adoption agencies, public schools, drug and alcohol treatment centres, doctors, employers, the military, psychiatric hospitals,

the Crown with respect to unrelated charges, victim/witness assistance programs, criminal injuries compensation boards, correction facilities, and immigration offices.⁵³

At common law, the type and range of private history evidence that could be subject to applications for disclosure in sexual assault cases and the process of justifying disclosure of private records were largely unrestricted. But until the implementation of the 1992 reforms, this avenue for grounding rape myths had been largely unexplored. Soon after the implementation of the new legislation attempting to restrict introduction of past sexual history evidence, defence counsel began more routinely to seek access to personal records for the purpose of introducing evidence that would undermine the testimony of women in rape trial proceedings.⁵⁴ Recognizing the damaging effects of a free-ranging inquiry into women's personal histories, women's organizations asked the federal Minister of Justice to pass legislation to limit the burgeoning requests for women's personal records in rape cases. As early as April 1995, the Minister of Justice promised to address the concerns of women's organizations by introducing legislation.⁵⁵ However, before this happened the Supreme Court of Canada, in a series of cases, *R. v. Osolin*,⁵⁶ *R. v. O'Connor*,⁵⁷ *R. v. L.L.(A)*⁵⁸ and *R. v. Carosella*⁵⁹ expanded, and in effect encouraged, applications for production of women's private and personal records in rape cases.

⁵³ Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases", (1997) 9 *Canadian Journal of Women and the Law* at 149-150.

⁵⁴ Ibid.

⁵⁵ *Supra* note 9 at 359.

⁵⁶ [1993] 4 S.C.R. 595 (hereafter *Osolin*).

⁵⁷ (1996) 2 W.W.R. 153 S.C.C. (hereafter *O'Connor*).

⁵⁸ (1996) 44 C.R.(4)91 (S.C.C.). (hereafter *L.L.(A)*)

⁵⁹ (1997) S.C.J. No. 12 (hereafter *Carosella*).

The majority of the Court in *Osolin* reversed the sexual assault conviction of an accused who at trial had failed in his bid to cross-examine the primary witness on the basis of information found in her psychiatric records. The trial judge had permitted disclosure of the woman's psychiatric records as relating to the issue of competency pursuant to the *Canada Evidence Act*. After determining that she was competent to testify, the trial judge refused to permit the defence to use the records to cross-examine her. Defence counsel had wanted to cross-examine her on a notation in her records that she was, "concerned that her attitude and behavior may have influenced the man to some extent and is having second thoughts about the entire case."⁶⁰ This statement was made shortly after the raped woman had been subjected to an intense cross-examination by the defence counsel at the preliminary inquiry. Accepting the defence argument that once the records were properly admitted it was open to the defence to cross examine the primary witness using them, the Supreme Court of Canada overturned the conviction and ordered a new trial.

While acknowledging that the new section 276 enacted in 1992 was developed to limit the accused's right to cross-examination and that Section 15 and Section 28 of the *Charter* also afforded this protection, the majority, in *Osolin*, nonetheless concluded that the trial judge has an independent duty to examine the material available for cross-examination. They ruled that cross-examination of the records was appropriate in order to determine whether or not conduct by the complainant would have led to a belief that there was consent or to determine if the complainant had a motive to fabricate.⁶¹

In December 1995 the Supreme Court of Canada released its second private records decision, *R.v. O'Connor*. Bishop Hubert O'Connor was charged with sexual

⁶⁰ Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto:Edmond Montgomery, 1996) at 466.

⁶¹ *Supra* note 52 at 154.

offences against four Aboriginal women who had been students in the Catholic residential school where he was the principal and priest. O'Connor admitted having had sexual relations with two of the women in the mid-1960's, shortly after the women had finished school and while they were under his supervision as employees. He maintained that this had been consensual sex. He denied the incidents giving rise to the allegations of the two other Aboriginal women during the same time period and while they too were under his supervision. At pre-trial the judge, in response to a request by defence counsel, ordered the women to authorize disclosure of their residential school records, as well as all therapy, counselling, psychological and psychiatric records, including notes, records and tape recordings. The trial judge found that the charges against O'Connor should be stayed on the basis of abuse of process because the Crown Attorney was tardy in handing over the records and because of the possibility that not all the records had been relinquished.⁶² The British Columbia Court of Appeal overturned this decision. The Supreme Court of Canada overturned the stay and held that O'Connor should stand trial, but decided that the women's records should be disclosed.

At the same time as the *O'Connor* decision, the Supreme Court released their decision in *L.L.A. v A.B.* The defendant A.B. wanted disclosure of L.L.A.'s counselling records. The defendant's lawyer argued before a pre-trial judge that the records needed to be reviewed to determine:

What if any statements (the complainant) have made in the past with respect to the incident; whether there have been allegations of sexual abuse to other people, about other people; and what was the method of extracting the information from her during the 14 months she underwent sessions before going to see the police.

The majority reiterated the principles set out in *O'Connor* on disclosure and production and sent the case back to trial to have the records issue determined.⁶³

⁶² Ibid. at 153.

⁶³ Ibid. at 154.

While the majority decisions in *O'Connor* and *L.L.(A). vs. A.B.* did not include examples that would not pass the "likely relevance" threshold for admissibility, the majority did provide examples of ways in which information contained in third party records may be relevant in rape cases. These included records that might contain information concerning the unfolding of events underlying the incident; records that might reveal the use of therapy which influenced the complainant's memory of the event; records that might bear on the complainant's credibility including her perception of the events at the time of the offence; and records that show a "reasonably close connection between the creation of the records and the date of the alleged commission of the offence."⁶⁴

In a decision rendered 13 months after *O'Connor* and three months prior to the enactment of the legislative response to *O'Connor* (Bill C-46), the Supreme Court stayed indecent assault charges against a high school teacher on the grounds that a rape crisis centre had destroyed the records of a counselling session just prior to the woman who was raped reporting the incident to the police. The majority held that the counselling notes would have contained, "the first detailed account of the alleged incidents," and that the notes probably would have met the test for disclosure as they may have contained a prior statement or at least might have assisted the defence in their preparation for cross examination.⁶⁵ The majority expressed outrage at what they described as the centre's "high-handed" policy that represented, "an obstruction of the course of justice."⁶⁶

Rationalizing the disclosure of a woman's private records on the basis of evidence of the influence of therapy on the complainant's memory of the alleged event indicates

⁶⁴ Ibid. at 157.

⁶⁵ Ibid.

⁶⁶ Ibid.

the majority's acceptance of the myth that counsellors and therapists falsely create, recover or contaminate their clients' memories. This evidence is introduced to raise the inference that some women mistakenly believe they were raped through a process of "therapeutic indoctrination." The use of this evidence invokes notions of women as so mentally incapacitated that they are susceptible to 'unscrupulous' counsellors or therapists who counsel them into making false allegations of rape.⁶⁷ This myth flows from the understanding that some women have "perceptual" problems about sex that make them prone to making false rape allegations.

Furthermore, evidence of the temporal connection between a woman's visit to a counsellor or therapist and the reporting of the rape charge permits the re-surfacing of the recent complaint doctrine. Judges and police have come to expect that if the charges are 'real,' a woman will turn to the support services made available to them.⁶⁸ If a woman does not immediately disclose to a counsellor, therapist or other record keeper, the absence of any reference to the rape in those earlier records may be used to challenge the veracity of the rape charge. Conversely the veracity of a woman who discloses to a therapist or counsellor long after the assault, and just prior to reporting to the police, is challenged and used to infer that her memory of the rape has been distorted by the therapy or the therapist.

The legal framing of some women's susceptibility to therapeutic influences that falsely create or implant memories of sexual abuse, intersect with myths and stereotypes that underlie the "train of inquiry" rationale. The majority ruled that evidence of a "train of inquiry," that is available in part through personal records, may be relevant to establishing information on what, if any, statements the complainant, has made in the past with respect to the incident and whether there have been allegations of sexual abuse

⁶⁷ Ibid at 164.

⁶⁸ *Supra* note 32 at 105.

against other people or about other people. The “train of inquiry,” relies upon the myths and stereotypes in the “behavioural” category to provide the link between a woman’s behaviour and consent or credibility. In the current context, the potential evidence is so broad and open-ended it would seem that almost all evidence of a woman’s personal history would be found admissible. Records containing detailed accounts of women’s lives, including their histories of drug and alcohol use, involvement with the police and previous allegations of sexual abuse and sexual activity, would be admissible as part of this train of inquiry. Evidence of whether there have been allegations of sexual abuse made to other people, or about other people, is a way of re-instating evidence of a woman’s sexual history, which is expressly prohibited by the 1992 reforms. Evidence of a history of sexual abuse introduced indirectly through the disclosure of personal records may then be used to establish a “pattern of conduct,” of the “behaviour” of the woman who was raped in order to promote the inference that the woman has a history of lying about her consent. The majority’s failure to examine the assumptions that underlie the use of this evidence renders some women’s histories of sexual abuse and coercion invisible and and once again transforms rape into “a pattern” of free and voluntary conduct .

Information on a woman’s sexual activity and drug and alcohol use can be used to reinforce the myth of her sexual availability and uncontrolled sexuality and transform her previous allegations of sexual abuse into either consensual sex or the effects of a “perceptual” disorder brought on by her drug and alcohol abuse. By rendering some women’s histories of sexual abuse and coercion invisible, the “new” myth of the unscrupulous counsellor provides the “other” explanation for the source of the current rape allegation. This is particularly serious in cases of historic abuse where the woman has been sexually assaulted by the same perpetrator and her memories of the abuse coincide with her participation in counselling. With the disclosure of such information in women’s records, the accused is provided with the justification for the defence of motive

to fabricate. Information found in women's personal records will be used by the accused as the basis for the defence of motive to fabricate which will then be used to justify the disclosure of further damaging evidence about the woman, despite the feminist inspired goals of severely limiting the use of this defence.

Motive to fabricate is the situational myth that women will lie about rape if caught in a compromised situation and underlies the use of prior inconsistent statements. Evidence of "prior inconsistent statements," or evidence of self blame found in records intersects with the perceptual category of myths in rape law and might be introduced to raise the inference that some women have an underlying motive to fabricate a rape allegation. The use of evidence in women's records has slightly altered the myth that women are prone to lie about rape if caught in a compromising situation to some women mistakenly believe they were raped because their perception of the compromising situation has been distorted. Information in a woman's records that reveals that she is questioning her perceptions and judgments or that reveals inconsistencies between the information recorded and other statements or testimony by the woman who was raped might be used by the defence to infer that she is so incapable or so confused that she might mistakenly believe she did not extend consent with respect to the sexual relations at issue.

These myth based assumptions provide the link between private record evidence and consent and credibility. This inferred link between private record evidence and women's credibility and consent, produces a 'type' of woman, rendered so powerless or pathetic that she is not aware that she consented to the act and/or that she is an 'unreliable witness.' This intersects with myths about a woman's history of sexual abuse and coercion to further pathologize her and transform the source of the current rape allegation into a perceptual disorder in which the woman has mistakenly confused the accused with her previous abusers. The use of personal history evidence on the basis of myths and stereotypes permits the court to re-frame the issue of consent around the pathology of the

woman who was raped. The accused's responsibility to "take reasonable steps" to ascertain that the woman is voluntarily agreeing to the sex, is, at best, evaluated within a framework that has predetermined her as unreliable and non-credible, and at worse is not a consideration. This permits the Court to ignore the gendered power imbalances between an accused and the woman. In the majority decision in O'Connor, the Court did not acknowledge the social history and context of colonization and racism that placed O'Connor in a position of domination and entitlement over the Aboriginal women. The fact that O'Connor was the record keeper at the residential school and the opportunity this granted him to render invisible the violence and degradation suffered by Aboriginal women in his care and how this contributed to his perceived right of sexual entitlement over the women was never addressed or even acknowledged by the majority. The feminist inspired goals of reform to, "....prevent an initiator of sexual activity from relying on his defence of an assumption of consent based on his stereotypes or fantasies about women..."⁶⁹ were severely undermined. Lack of agency and passivity are once again inscribed as defining features of women's sexuality, despite the feminist inspired goal of law reform to have women recognized as sexual agents with the capacity to say no to sexual activity.

The categories of evidence identified by the majority in the private record cases as likely to pass the likely relevant test are the myths and stereotypes that predetermine a "type" of woman that falls outside legal protection. Through a process whereby the majority constructs some women as incapable of possessing "mental" and sexual autonomy and agency, the majority re-centres male subjects as the locus of agency. Men's choice to (mis) recognize or ignore women's consent is bolstered by the assumption that some women are unable to perceive sexual relations as consensual

⁶⁹ Karen Busby, "Why Convictions are Hard to Obtain in Sexual Violence Prosecutions," in Margo Rivera (ed.) *Fragment by Fragment: Feminist Perspectives on Memory and Child Sexual Abuse* (Charlottetown: gynergy books, 1999) at 188.

because of the influence of unscrupulous counsellors, prior histories of sexual abuse and coercion and/or “behavioural” choices.

The ‘rapist,’ animated by the majority construction of some women as not credible or as ‘unreliable’, is then the one instilled with ‘reason’ and the possibilities of acting on that reason. While one of the purposes of the reforms was to re-define “consent” in way that recognizes women as sexual agents and something a woman does, the majority decision re-invokes a lopsided power relationship and imposes it onto the meaning of “consent.”

CHAPTER FOUR

R.v O'CONNOR TO BILL C-46:

The next portion of this paper examines all records application decisions involving sexual violence available from the time between the Supreme Court's 1995 decision in *O'Connor* and the passage of Bill C-46 on January 1, 1997. Whereas the cases that have been discussed up to this point have been extensively reviewed and discussed by feminist scholars, these post 95 cases have had limited scholarly attention. Karen Busby, in her 1999 article, "Third Party Record Cases Since R.v. O'Connor," reviewed applications for disclosure in sexual violence cases within the same time frame as this paper. Busby reviewed the cases for information that could be determined about the complainant and the accused such as their relationship, the kinds of records sought, how frequently the records were ordered produced for the judge and disclosed to the defendant, and what rationales for disclosure were offered by the defendant. While her research provided an invaluable foundation, this paper attempts to rout out the myths and stereotypes under which records are being produced and link them to the broader social and legal implications of record production. Katherine Kelly, Connie M. Kristiansen and Susan J. Haslip also conducted research on cases following the O'Connor decision, however their cases were limited to those that involved the issue of False Memory Syndrome.⁷⁰ My research, on the other hand addresses all rationales used by defence and judges in defence disclosure application cases.

Out of a possible 35 cases, 24 resulted in production of the records being sought. However in only 17 of the 35 cases were the rationales for disclosure or non-disclosure

⁷⁰ Katharine Kelly, Connie Kristiansen and Susan Haslip, "Memory on Trial: The Use of False Memory Syndrome in Court," in Margo Rivera (ed.) *Fragment by Fragment: Feminist Perspectives on Memory and Child Sexual Abuse* (Charlottetown: gnyergy books, 1999).

given by the judges. Because this thesis is concerned with the use of myths and stereotypes by judges, only those 17 cases where the rationale is clearly stated will be examined.⁷¹ A review of these decisions reveals that the judges start their analysis with categories of myths and stereotypes of women who have been raped and rely upon these same categories to justify the disclosure of women's private records. By commencing their analysis with already existing categories of myths and stereotypes, judges are determining the relevance of women's personal records to the issue of whether or not the rape occurred within a framework that pathologizes women and women's sexuality. The gendered imbalances of power, often in these cases compounded by age and professional or familial relationships, are rendered invisible and judges assume equality between the accused, the record producer and the woman who is alleging rape.

Pre Bill C-46 Disclosure Cases

The influence of the myth of "unscrupulous counseling" and "counseling techniques," is so ingrained in some judges that evidence submitted by the defence on this basis is the starting point for their decisions. For example, in the historic abuse case of *R.v Harges*, the judge ruled that the request for the clinical and therapeutic records passed the first stage of the threshold test for production on the basis that:

⁷¹ *R. v. Harges*, (1997) B.C.J.No.32(S.C.); *R. v Nitsiza* (1997) N.W.T.J. No.14(S.C.); *R. v MacCallum*, (1996) N.S.J. No.203 (S.C.); *R. v M.L.W.*, (1996) S.J. No.776(Q.B); *R. v R.H.*, (1996) N.J. No. 344 (S.C.); *R. v N.R.*, (1997) O.J. No.80 (Prov. Div.); *R. v Ross* (1997) O.J. No.4627; *R. v Maramba*, (1996) O.J. No.4721 (Gen.Div.); *R. v A.P.B.*, (1997) O.J. No.1875 (Gen.Div); *R. v Kliman*, (1998) B.C.J. No.49 (S.C.); *R. v D.S.*, (1996) N.J. No. 277 (S.C.)(T.Div.); *R. v J.G.L.*, (1997) O.J. No.4953 (C.A.); *R. v Bane*, (1996) O.J. No. 2750 (Gen.Div); *R. v R.M.* (1997) B.C.J. No.1308 (C.A.); *R. v D.D.W.*, ((1997) B.C.J. No.744 (C.A.).

Dr. Janke is a medical specialist who has expressed opinions which, in my view, are such that if such information as is being sought, should exist, that information is likely to be relevant and may be useful to the defence of the accused."⁷²

The accused, the complainant's stepfather, was charged with rape, sexual intercourse with a female person not his wife and under the age of 14 and gross indecency. The events were alleged to have taken place between 1969 and 1978.

Through the defence psychiatric report, the accused attempted to challenge the veracity of the woman who was raped on the basis of an "expert's" review of a report by the Worker's Compensation Board and the woman's statement to the police. In his report the defence psychiatrist compared the woman's statement that she had "just recently acknowledged being sexually abused as a child by my step-father," to her formal statement to the police which indicates that she had many conversations with a former friend. The defence presumes the conversations occurred many years earlier.

Evidence of the prior inconsistent statement, combined with myths about "unscrupulous counsellors or therapists" who implant false memories, is used to justify the disclosure of the woman's counselling records. The defence psychiatrist's report states that the woman's statement to the police "contains many phrases that in my opinion are typical of comments made by sexual abuse survivor therapists." The psychiatrist refers to examples found in her statement such as, "...comments about boundaries which are certainly not typical of everyday speech and are more reflective of therapeutic explanations for behaviors,"⁷³ as the basis for evidence that she has been exposed to a process of therapeutic indoctrination.

The myth of a "perceptual" disorder brought on by the process of therapeutic indoctrination, combined with further information in the Worker's Compensation Report,

⁷² *R. v Hades*, *supra* note 71 at 2.

⁷³ *Ibid.*

is used to re-instate the doctrine of recent complaint. Information found in the Worker's Compensation Report is used by the defence to establish a temporal connection between the creation of the counselling records, for which disclosure was being sought, and the charge of rape. The defence psychiatrist refers, again, to the language used by the woman in the Worker's Compensation Report as evidence that reflects,, "... a considerable amount of consideration of the impact of the abuse given her apparent recent acknowledgment of it to apparently only lay people."⁷⁴ The defence psychiatrist's comments about the woman's insight into her experience of rape are used to infer that she spent a considerable amount of time in therapy prior to reporting the rape to the police. This evidence will be used by the defence to further challenge the veracity of the rape allegation on the basis of the myth that a woman who was "really" raped would report the rape immediately. The absence of recent complaint is an issue in the vast majority of historic abuse cases. The use of personal records as a back door to re-invoke the adverse inference to be drawn from the absence of a recent complaint is insidious. Equally insidious is the related inference that a delayed complaint to a therapist that is shortly followed by a report to the police is inherently suspect. Here the original adverse inference is compounded by a second inference of therapeutic indoctrination.

The absence of a recent complaint and myths about women's histories of sexual abuse are used by the defence as evidence to support the disclosure of more damaging information about the woman. In this case, the defence refers to information in the report, "...where she shows considerable insight into possible effects of childhood sexual abuse that are not in keeping with what I know of her history," such as "...where she talks of not being able to be a 'little girl' and in the third full paragraph her comments again reflect very common phraseology that has been used by sexual abuse survivor

⁷⁴ Ibid.

therapists.”⁷⁵ The defence witness refers to her final statement, “... regarding her child within which is scared, frightened, and lost right now, is something that I would not expect from a person who is making an initial disclosure regarding their sexual abuse but rather would be more typical of someone who has been intensely involved in therapy...” as the basis to infer that the woman has alleged other incidents of child sexual abuse and on this basis, all clinical notes of any therapies that the woman had been involved in, should be disclosed because they may “...raise significant suspicions about the possible generation of inaccurate or unreliable memories...”⁷⁶ Applications for disclosure of personal records are particularly problematic in cases of historic abuse because, by virtue of the fact that the sexual abuse and coercion may have occurred over a span of many years, the accused will have access to a life history of record production. Information in the records can be used as a basis for a motive to fabricate defence or mistaken identity defence.

By agreeing to review all clinical and therapeutic records for evidence of false memory or contrived memory syndrome on the basis that the records may contain information that may be useful to the defence, the judge shows his/her belief in the myths that transform a woman’s history of sexual abuse into a product of a perceptual disorder brought on by the affects of therapy. Within the context of this category of myths, the source of the rape allegation can be found in the pathologization of the woman’s sexuality, which is then used as further evidence for the basis for a defence of motive to fabricate or mistaken identity. The judge thus opens the door for the full range of myths and stereotypes about woman who have been raped.

⁷⁵ Ibid.

⁷⁶ Ibid at 3.

In the historic abuse case of *R.v Nitzia*, the court demonstrated that all forms of counselling in which a woman discloses are “suspect.” In this case, the woman disclosed to a counsellor at a shelter for abused women whom she was seeing to address difficulties in her marriage. The woman disclosed that 26 or 27 years ago when she was six or seven she was raped by the accused. She testified at the preliminary inquiry that she had attempted to “block out” the abuse from her memory for many years but she had experienced infrequent recollections of the abuse. She testified as well that she decided to disclose the incident when she saw that the accused was working as a school counsellor. The accused submitted an affidavit by an “expert witness,” a professor of psychology, who was to testify at the trial.

In determining that the woman’s counselling records must be disclosed to the accused, the judge states: “In my opinion there are two bases for concluding that the records in this case are likely relevant. First the initial disclosure was made to the counsellor.”⁷⁷ The judge’s belief in the myth that counsellors “indoctrinate” their clients is so ingrained that the mere fact the woman disclosed during counselling, without supporting evidence of its relevancy, is sufficient to justify disclosure. The judge states: “Second, in the particular circumstances of this case, the records may contain information that bears on the complainant’s credibility in the sense that they may reveal factors relevant to the reliability of her memory.”⁷⁸ The “particular circumstances” of this case are that it is an historic abuse case and the woman who was raped disclosed to a counsellor. In this statement, the judge raises the inference that there is a connection between the reliability and credibility of women who disclose to a therapist long after the assault and prior to reporting to the police. The judge continues by connecting her questionable reliability with the process of counselling. The judge states that disclosure

⁷⁷ *R. v Nitsiza*, *supra* note 71 at 5.

⁷⁸ *Ibid.*

of the woman's counselling records will also provide, "...information on the general type of sessions held between the complainant and (the counsellor) and the frequency of them so as to potentially provide some useful information to the defence to explore the issue of what influence, if any, these sessions had on the disclosure."⁷⁹ By focusing on the "type" of sessions, the judge infers that exposure to certain forms of therapy, in this case women-centred therapy, unduly influences some women and the "frequency" of this exposure contributes to the distortion of memories of abuse or the generation of false memories. By connecting the counselling to the disclosure, he raises the inference that the disclosure is the result of therapy and that through this process the woman came to falsely believe she was raped.

Prior to examining the records, the judge has predetermined the woman as unreliable and non credible. By doing so he provides the rationale for completely disregarding the woman's testimony in the preliminary hearing in which she clearly explains the reasons why she disclosed the abuse after 26 or 27 years and indicates that she has always remembered the abuse. Similar to *R. v Hardes*, the inference is raised that her memory of the rape is "distorted," or "planted," and the defence is provided with the opportunity to claim that the source of the rape allegation can be found in the pathology of the woman. Information in the records sought for disclosure will provide information on previous disclosures of sexual abuse which will be used by the accused to bolster his defence, as outlined in the "expert's" affidavit, that she is confused about "her identification of the accused as the perpetrator."⁸⁰

In some cases, judges simply reiterate the *O'Connor* test for production and provide little analysis for the reasoning behind the production. For example, in the case of *R. v MacCallum*, the judge permitted the disclosure of the complainant's medical

⁷⁹ Ibid.

⁸⁰ Ibid. at 2.

records on the basis there was a close temporal connection between the creation of the records and the date of the alleged offence. The judge further states that the doctor accompanied the women to the police station and also gave a statement to the police.⁸¹ Clearly the records are disclosed on the basis of the inference that the woman must have disclosed to the doctor prior to reporting the “complaint,” and may have been unduly influenced by the process of “treatment.” A recent complaint to a therapist is seen to undermine, rather than support, the complainant’s credibility.

Other judges are willing to rely on evidence found in child welfare records to infer that women’s disclosures during certain types of counselling are “unreliable,” and that “behavioural” and “situational” factors in the woman’s life can provide the ‘truth’ behind her “allegation” of rape. In the case of *R.v M.L.W.*, the judge concludes that the woman’s social service (child welfare) records and sexual assault counselling records are “relevant,” because they are logically probative to an issue at trial: the competence and the credibility of the witness and the reliability of other evidence in the case. The judge reaches this conclusion on the basis of evidence submitted by the defence, including a statement made by the complainant, F.C., to the police indicating that she was participating in counselling at a sexual assault centre and had recently begun experiencing a memory of the abuse. The judge clearly relies on the myth that the process of sexual assault counselling results in the generation of “memories” and raises the inference that the “memories” may be false or “implanted” by connecting them to her “competence” and “credibility.” The judge finds support for this rationale in the police statement submitted by the defence in which they speculate that they, “will know more and better details once she’s been in (therapy) for awhile.”⁸² The judge also relies on a videotaped statement made to the police, submitted by the defence, in which F.C.’s brother, the co-

⁸¹ *R. v MacCallum*, *supra* note 71 at 2.

⁸² *R. v M.L.W.* *supra* note 71 at 5.

complainant, states, “ I’m supposed to be going to a psychiatrist to help me remember these things, like my sister is. But like nothing has really happened.” He also states, “Like, I’m supposed to be going to a psychiatrist like my sister and it’s helping her bring back memories of this...”⁸³ Relying on the inference that the counselling process has “confused” or “distorted” F.C.’s “memory,” and thus undermined her reliability as a witness, the judge finds the basis for the disclosure of F.C.’s social services (child welfare) records.

By relying on the disclosure of F.C.’s records as a potential source for a determination of whether or not the child sexual abuse occurred, the court assumes the information contained within the records is “true,” and that the record producer and F.C. are equals. The judge does not acknowledge that the production of F.C.’s child welfare records began when she was removed by social services from the family home because of her allegations of abuse against her mother, which her mother denied. In addition, F.C. admitted to a history of drug and alcohol use, involvement with the police and prior sexual activity.⁸⁴ Any documentation of her sexual history in the records would be used to infer that she is “promiscuous.” Myths about her sexual availability, combined with information about her drug and alcohol use, will be used to reinforce assumptions about her uncontrolled sexuality. Her allegations of abuse against her mother and child sexual abuse against her stepfather will be transformed into acts of revenge by an out of control teenager and will be used as a basis for the defence of motive to fabricate. In this case, her stepfather relied upon, and the judge approved, the disclosure application on the basis of the behavioural myth, that F.C. alleged rape to get revenge against her step-father because he discovered that she had herpes. ⁸⁵

⁸³ Ibid.

⁸⁴ Ibid. at 4.

⁸⁵ Ibid. at 2.

In the absence of evidence of “therapeutic indoctrination,” some judges turn to evidence found in child welfare records to infer that the complainant is unreliable and non credible. In some cases information found in child welfare records is used to justify the admission of evidence of prior sexual history. For example in the case of *R. v R.H.*, the judge permitted the disclosure of the complainant’s, N.C.’s, records from a children’s shelter and the records of the Children’s Protection Services and the admission of evidence of N.C.’s prior sexual activity. At the time N.C. was residing at the shelter and the incident in question came to the attention of Children’s Protective Services, N.C. denied her involvement. N.C. did not report the incident to the police until a year later. The judge ruled that evidence from the records was “relevant” to the nature of the relationship between N.C. and the accused’s daughter, B.H., the unfolding of the events underlying the “complaint” and may bear on the “complainant’s” credibility.⁸⁶ Clearly the perception of the “relevance” of these records was based on evidence of a prior inconsistent statement which was then used to provide the basis to admit further information relating to N.C.’s prior sexual activity.

The judge determined that this information was admissible as evidence of the nature of the relationship between N.C. and B.H., evidence that was relevant to the issue of N.C.’s credibility, and evidence that was relevant to the issue of consent and had some relevance to a motive to fabricate a false charge.⁸⁷ N.C. testified that she and B.H., the daughter of the accused, had a lesbian relationship, and one of the incidents in question involved the accused attempting to rape N.C. while she was kissing B.H. N.C. alleged that the accused then proceeded to have sexual intercourse with his daughter.

The disclosure of N.C.’s child protection records and shelter records is based on the belief that N.C. suffers from a “disordered” sexual perception, evidenced by her

⁸⁶ *R. v R.H. supra* note 71 at 5.

⁸⁷ *Ibid.*

“deviant” and “inappropriate” relationship with B.H.. The myths of uncontrolled and deviant sexuality, combined with information in her records, will be used by the defence as the basis for a defence of motive to fabricate. The pathologization of N.C.’s sexuality will provide the basis for the defence to argue that she is unable to perceive “normal” heterosexual relations as consensual and that she alleged rape because her relationship with the accused’s daughter deteriorated after the daughter discovered that N.C. had “consensual” sex with B.H.’s father. The defence submitted that N.C. alleged rape in order to conceal her consensual sexual relations with the accused in order to save her relationship with the accused’s daughter.

While some judges deny the explicit admission of evidence of prior sexual activity, they construct new rationales to justify the disclosure of child welfare records which lead to the disclosure of prior sexual activity including incidents of sexual abuse and coercion which are used to challenge the veracity of the “complaint.” For example in *R.v N.R.*, the judge permitted disclosure of the complainant’s child welfare records on the basis they may contain information of the initial allegation of sexual assault; may relate to the complainant’s recantation of the allegation; may relate to her attitude toward her step-father, the accused and her mother, particularly her attitude toward discipline in the family home; may relate to the present allegation; and may relate to a pattern of dishonesty.

When the complainant was twelve she complained to her mother that the accused, her step-father raped her. The accused was arrested and charged, but shortly after the conviction she recanted her allegation and the charges against her step-father were dropped. Three years later she left the family home and entered the care of the Children’s Aid Society. While in care she disclosed that she lost her virginity to her step-father. She returned home for a few months, left again and was ultimately made a ward of the state. Once back in care, at the age of seventeen she disclosed that during her brief return home

her step-father raped her and provided an explanation for her earlier recantation of the first allegation.

In the decision to disclose her child welfare records, the judge stated “they might establish when and with whom the complainant lost her virginity,” and that this information is relevant to both the narrative of the original complaint and her recantation and is relevant to a motive to fabricate. The judge relies upon a prior inconsistent statement, evidenced by her recantation and myths about some women’s histories of sexual abuse to justify the disclosure of evidence of her prior sexual activity with the accused. The judge states that the evidence is admissible because, “...the prohibition contained in s.276 of the *Criminal Code* applies only to consensual sexual conduct.”⁸⁸ By linking the complainant’s history of sexual abuse to her recantation, the judge infers that she has confused her history of sexual abuse by the accused with the current rape allegation. On the basis of the myth that she suffers a “perceptual” disorder brought about by her deep-seeded hatred toward her step-father, the judge is justified in his final decision to disclose all information scattered throughout the records about her attitude toward her parents and their discipline and all evidence that touches on the veracity of the complainant.⁸⁹ The step-father’s sexual abuse of the complainant is transformed into a pathology of her sexuality which is then used as the source of the rape allegation. This provides the judge with the justification to disclose further damaging evidence about her and provides the accused with the basis for the defence of a motive to fabricate.

Evidence of venereal disease was used by the judge to justify disclosure of two out of four complainants’ medical and psychiatric records generated when they were “residents” of Grandview correctional facility in the case of *R. v Ross*. The judge ruled that portions of C.H.’s medical history, detailing that she had gonorrhea while at

⁸⁸ *R. v N.R. supra* note 71 at 5.

⁸⁹ *Ibid.* at 6.

Grandview, should be disclosed as they relate to the defence's denial that the rape happened. The judge also ordered parts of her psychiatric history produced. The judge also disclosed D.P.'s medical reports, detailing that she had a venereal disease, despite the fact that at the time of the alleged rape she was not diagnosed with a venereal disease.⁹⁰ In addition the judge approved the disclosure of her behavioral reports while she was a "resident," at Grandview and the behavioural reports of any other facilities she resided in. The behavioural reports contained details of her everyday activities including threats to staff members.⁹¹

The disclosure of D.P.'s and C.H.'s medical reports is based on the inference that they alleged rape in order to explain a sexually transmitted disease or to explain the future diagnosis of a disease. This information combined with the introduction of "behavioural" reports, as in the case of D.P., will be used infer that she is "deviant," both in the broader context and at the time of the alleged incident. Her medical and behavioural records can be used to put forward the myth that she suffers from a "perceptual" disorder brought on by her "deviant" and "inappropriate" lifestyle and choices, and to bolster the defence's contention that her anger at staff led to her mistaken belief that she was raped. In the case of C.H., her medical report and her psychiatric records will be used to infer that she also suffers from a "perceptual" disorder, and mistakenly believes she was raped. The judge does not discuss or even acknowledge in the decision to disclose the records, the power imbalance inherent in the relationship between an incarcerated woman and a person employed by the correctional facility. The judge does not acknowledge the fact that the accused participated in the production of the records by virtue of his position of authority over the women, and that he was in a position to render the rapes invisible.

⁹⁰ *R. v Ross supra.* note 71 at 3.

⁹¹ *Ibid.* at 4.

In some cases the judge's belief in myths is the first and final point for the judge's position. In the case of *R.v Maramba*, the judge agrees to disclose the woman's medical records on the basis that they contain information on the date the woman was diagnosed with a sexually transmitted disease.⁹² The judge sides with the defence's position that there may be information in the records that establishes strong temporal connection between the date of the complaint and the date of the diagnosis of the woman's condition. The judge relies on the myth that some women lie about rape to explain a sexually transmitted disease, and links this to a motive to fabricate and the credibility of the woman. The judge also permits an adverse inference to be raised from the fact that the woman did not report immediately and that the timing of her complaint coincided with the date of her diagnosis. Evidence that the judge relied on this myth that permits the accused to know the "truth" behind the allegations is found in his decision to disclose which is simply a summary of parts of the *Seaboyer* and *O'Connor* decisions that focus on the protection of the accused's right to access information necessary to make full answer and defence.

Child welfare records and medical records were sought to question the veracity of disclosure of sexual abuse that is made incrementally. In the case of *R.v A.P.B.*, the accused was charged and convicted of sexual assault. Two years later the "complainant," B.A.B. disclosed further incidents of sexual assault that occurred at the same time as the incidents for which the accused was convicted. In this case the judge approved the disclosure of B.A.B.'s child welfare and medical records on the basis that they provided information on the number of opportunities B.A.B. had to make disclosure.⁹³ The myth, that the veracity of a "complainant," who discloses to a therapist or counselor long after the abuse and just prior to reporting to the police, must be challenged has been expanded

⁹² *R. v Maramba supra* note 71 at 2.

⁹³ *R. v B.A.B. supra* note 71 at 4.

to include disclosure of the same incident of abuse that is made incrementally. The inference that some complainants are “indoctrinated” through the process of therapy into falsely accusing rape has been expanded to include all incidents in a “complainant’s” life that may lead to a false accusation of rape. In this case all records relating to B.A.B. were considered to be relevant for disclosure. The judge further decides that the Crown’s expert testimony on incremental disclosure is only partially permissible. The judge limits the expert testimony to “the assertion of the negative - that delayed or incremental disclosure, being consistent of both accurate and inaccurate disclosures of sexual abuse are diagnostic of neither.”⁹⁴

Some judges are also willing to rely on the information found in other types of counselling records in which incidents of sexual violence were not disclosed. In the case of *R. v Kliman*, the British Columbia Court of Appeal overturned the conviction of an accused, who had been convicted on charges of gross indecency, indecent assault, rape and engaging in sexual intercourse with a female under the age of 14. The events giving rise to the charges occurred between 1974 and 1977 when the appellant was a teacher at an elementary school and the complainant, D.A., was his student. The Appeal Court considered whether the trial judge erred in her directions for the production and disclosure of therapeutic records made by a clinical psychologist who interviewed D.A. between 1991 and 1993 and whether she erred in her directions for the disclosure of records of a psychiatrist who treated D.A.. D.A. testified that she had been sexually assaulted by the appellant with a classroom pointer. She also testified that the appellant forced her to perform oral sex on him and she testified that in grade 7, during a school camping trip, the appellant came to the tent she was sharing with other girls and told her to join him in his tent. She testified that he had intercourse with her in his tent.⁹⁵

⁹⁴ Ibid. at 5.

⁹⁵ *R. v Kliman* supra note 71 at 3.

In 1983, at the age of 19, D.A. had no memories of the alleged events. In 1985 she began seeing a psychiatrist, Dr. Tyhurst. In 1990 she concluded her treatment with Dr. Tyhurst and still had no memory of these incidents. Dr. Tyhurst testified that she diagnosed D.A. with a borderline personality disorder in which she had an inability to distinguish what was factual and what was not. In 1991 D.A. began seeing a clinical psychologist, Ms. McEvoy. She had no recollections of the assaults at that time. D.A. testified that she had recovered her memories of the sexual abuse through a variety of flashbacks, and that none of the flashbacks had occurred during counselling. The accused sought production of all records that related to the reliability and accuracy of D.A.'s memory. The trial judge directed production of records on a more limited basis. She ordered the production of records related to confusion over the identity of the perpetrator of incidents of sexual assault, specific expressions of D.A. with respect to the veracity of her memories and notes taken during one session with Ms. McEvoy, during which D.A. was said to have "put together a lot of information."⁹⁶ The trial judge also ruled that the defence could not use evidence from Dr. Tyhurst with respect to assertions by D.A. of acts of sexual abuse involving her brother and other individuals. Dr. Tyhurst testified that some of the events related to her by D.A. were, "...statements from a patient who was obviously producing fantasy."⁹⁷ She testified that she would not consider the memories D.A. was describing in therapy as reliable. In her testimony D.A. denied making statements to Dr. Tyhurst about being sexually abused by her brother and others and denied telling Dr. Tyhurst anything about her sexual activity.

The trial judge ruled that she would review all Ms. McEvoy's therapeutic records which referred to the appellant, but that Ms. McEvoy should first edit the records to eliminate any reference to a person, not the appellant, who was alleged to be a security

⁹⁶ Ibid. at 8.

⁹⁷ Ibid. at 5.

risk to D.A.. After reviewing the records, the trial judge produced one page of Ms. McEvoy's notes to the defence counsel. The Appeal Court ruled that the trial judge erred in limiting the scope of questioning of Dr. Tyhurst on allegations of sexual abuse made by D.A. against her brother and others. The Appeal Court ruled that the restrictions the trial judge placed on the disclosure of Dr. Tyhurst's records were too narrow and that the records in their entirety should have been disclosed to the defence as the information being sought may pertain to the accuracy of D.A.'s memory in the following areas: whether the alleged events did occur; the particulars of the events if they did occur; and whether the appellant was the perpetrator.

The Appeal Court referred to testimony that D.A. denied telling Dr. Tyhurst that she had a menstrual period beginning in grade six, despite the fact that her, "...diary makes regular monthly references to her period beginning in October of grade six."⁹⁸ The Appeal Court makes reference to the discrepancy between these two facts in order to introduce evidence of a prior inconsistent statement and raise the inference that D.A. is indeed confused and her memories are unreliable. This evidence combined with Dr. Tyhurst's testimony about D.A.'s delusional and unreliable memories is used to justify the disclosure of all of Dr. Tyhurst and Ms. McEvoy's records. Dr. Tyhurst's diagnosis of D.A. as delusional, combined with information in the records that support Dr. Tyhurst's testimony that D.A. made previous allegations of sexual abuse and details about her sexual activity, will be used to infer that D.A. is out of control sexually. Myths of her uncontrolled sexuality, combined with the testimony of Dr. Tyhurst that D.A. alleged she was sexually assaulted by her brother and others, despite D.A.'s testimony to the contrary, will be used to raise the inference that she has a motive to lie and allege rape against the accused. Her allegations against the accused will be transformed into a product of her delusional state in which she is confusing the identity of the accused with her brother and

⁹⁸ Ibid. at 3.

possibly others. This provides the court with the basis to introduce evidence of D.A.'s past sexual history without consideration for section 276, because the issue has been transformed from whether or not the complainant had engaged in sexual activity with her brother, to whether the complainant's accounts of sexual assault had the character of delusion, as diagnosed by Dr. Tyhurst. Evidence of D.A.'s past sexual history, coupled with evidence of her "delusional" nature, will provide the accused with more information to use as the basis for motive to fabricate or mistaken belief in identity, a by product of a sexual perception disorder brought on by D.A.'s "inappropriate" sexual behaviour.

Judges' decisions to disclose records are based on the notion that they will reveal something about whether or not the rape occurred, within a framework that focuses on a "perceptual," and/or "behavioural," disorder brought on by a situation in which the woman alleging sexual assault or rape finds herself. The possible culpability of the accused is ignored and considerations of the harm and the abuse the accused allegedly committed are not addressed. This is serious in cases of historic child sexual abuse because this is the same message that is used by the perpetrator to place the culpability of the abuse onto the child, in order to create self-blame and secure the child's silence.⁹⁹ By not examining the gendered inequalities between the accused and the woman and/or child alleging sexual abuse and/or rape, judges ignore the fact that most perpetrators are men who are in positions of domination and entitlement over the complainants, by virtue of their familial and/or professional relationships.¹⁰⁰ Judges ignore the gendered, systemic inequalities that grant some men the power to render invisible the sexual violence and degradation forced on women and children. The fact that men whom most people would

⁹⁹ Cindy Veldhuis and Jennifer Freyd, "Groomed for Silence, Groomed for Betrayal," in Margo Rivera (ed.) *Fragment by Fragment: Feminist Perspectives on Memory and Child Sexual Abuse* (Charlottetown: gnyergy books, 1999) at 272.

¹⁰⁰ For further information on the complainant's relationship with the accused see Karen Busby's article, "Private Records Cases After O'Connor," *supra* note 9.

stereotypically not consider “dangerous” (for example, white, middle-class, professional and/or high profile men) can be perpetrators of sexual violence is obscured.

The myth that women's memories are distorted by or through the process of therapy is present even in decisions where disclosure of women's counselling records is denied. For example in *R. v D.S.* the judge states: "In the past we have had cases where the complainant has no memory until therapy takes place and then memory is recovered. In those cases the records are of considerable relevance and are usually made available."¹⁰¹ The starting point for the judge's decision is the belief in the myth that some counsellors implant memories which distort a woman's perceptions of rape. At no point in the decision does the judge point to research or previous cases to support this assertion. The judge continues by making the connection between the influence of counselling and the unreliability of a woman's testimony. In the rationale for refusing disclosure to the defence the judge makes it clear he/she did so, not because he/she did not consider the records “relevant,” but because the defence erred in not questioning the woman during the preliminary inquiry on “what effect the therapy had on her.” The judge further states, “Surely questioning of the complainant as to what suggestions were made to her by the therapists and what effect they had on her memory and her attitude are crucial for the defence...”¹⁰² The ground work has to be laid for the disclosure but this requires no more than making explicit the myth of therapeutic influence. In *R. v D.S.* exposure to therapy is raised by the judge focusing on the fact the woman reported the “complaint” to the police before she began counselling,¹⁰³ thus inferring that had she reported to police after or during the course of therapy her records may have been “relevant” to challenging the truthfulness of her claim. The judge also draws attention to

¹⁰¹ *R. v D.S.* *supra* note 71 at 2.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* at 3.

the fact the woman disclosed to her mother two and half years before she reported to the police.¹⁰⁴ This fact is used as evidence that she did not “recover” the memories during the course of counselling and was not therefore “unduly” influenced by the process of “therapeutic indoctrination.”

The belief that some forms of therapy result in the generation of false memories is so ingrained in some judges that the absence of therapy prior to a “complaint” is used to bolster the credibility of women. At the same time, the notion that therapy results in “false” or distorted memories is reinforced. Once immersed in counselling she is prone to techniques that affect her abilities to perceive sexual relations as consensual.

Similarly, in the case of *R.v J.G.L.*, an appeal court upheld the trial court’s decision not to permit disclosure of the woman’s psychiatric and counselling records on the basis that at the preliminary hearing the defence did not ask the “...questions necessary to lay a proper foundation...,” for the issue of the suggestibility of the complainant, during counselling that led to the allegations of abuse.¹⁰⁵

In *R. v Bane*, the accused requested the production of clinical notes from the complainant’s social worker at a sexual assault program and from her doctor at a psychiatric hospital on the basis they would show a motive for the complainant to allege that she was the victim of a sexual assault and/or animosity or bias against the accused. The timing of the therapy is used in the same way that “perceptual” myths and stereotypes are used against women to promote the inference that they are prone to make false rape allegations. In this case the timing of the report of the “complaint” is key because of the inference that if the counselling had commenced prior to disclosure to the police then it may have been relevant as evidence that the woman was influenced by counselling which effected her ability to remember or perceive sexual relations as consensual. In refusing

¹⁰⁴ Ibid.

¹⁰⁵ *R. v J.G.L. supra* note 71 at 2.

disclosure, the judge relied on the fact that the production of the hospital and counselling records followed the "complaint" to the police and stated:

They cannot be seen as influencing the decision to make the complaint, the content of the complaint, or the complainant's memory of the incident.

The hospitalization and counselling occurring from approximately three and a half years after the claimed event cannot be said to provide insight into any difficulty the complainant may have had in perceiving or recalling the event. At that stage in time there is no likelihood that counselling would contribute to the unfolding of a narrative disclosed to police.¹⁰⁶

The timing, duration, frequency and type of therapy or counselling a woman participates in have evolved into categories of myths and stereotypes that determine the "truth" in rape cases. In this context, a woman's participation in counselling is not only used to raise the inference that she falls under the "spell" of a therapist who plants "false memories," but is also used to give rise to the re-surfacing of the need for corroborative evidence in the form of consistent statements. In the above two cases, the judges drew attention to the fact that the information recorded in the records was consistent with prior statements made by the women who were raped, as corroborative evidence. The inference is that in situations where there are inconsistencies between the information recorded and the woman's statements about the rape to others, the woman has been confused through her involvement in therapy.

As with counselling records, in the case of child welfare records, judges who refuse disclosure do not reach their decision on the basis of challenging categories of myths and stereotypes that work to justify disclosure by other judges. For example, in the case of *R. v R.M.* the judge reaches the decision not to disclose the child welfare records on two daughters, who have alleged incidents of sexual abuse against their parents, on the basis that the defence already had access to evidence of prior inconsistent statements by the two sisters.¹⁰⁷ The notion that inconsistencies between information that has been

¹⁰⁶ *R. v Bane* *supra* note 71 at 5.

¹⁰⁷ *R. v R.M.* *supra* note 71 at 7.

recorded or stated by the complainants, should be used to infer that they lied about the sexual abuse and thus are not credible, has not been challenged. In fact the importance of prior inconsistent statements has been underscored by the judge ruling that because they already had access to the statements, their right to make full answer and defence was not violated by the non-disclosure of the records.

In the case of *R.v D.D.W.* the defence applied for the disclosure of the complainant's child's adoption papers and requested a D.N.A. test of the child. The defence submitted that the complainant, the sister of the accused, falsely alleged raped against the accused in order to cover-up the "illegitimate" birth of her child. In deciding against disclosure the British Columbia Court of Appeal supported the trial court decision not to grant disclosure of the name and whereabouts of the child. The Appeal Court judge stated:

...the right of a possibly innocent person not to be convicted of, and possibly imprisoned weighs heavily on the court's conscience, especially in a case such as this where the complaint is made so long after the alleged offence and the accused has established himself in a life far removed from the circumstances in question.¹⁰⁸

In contrast the Appeal Court does not discuss or acknowledge the impact the rape and subsequent birth and adoption of the woman's child had on her or the impact of revealing the identity and location her child years later in the context of a rape proceeding. In deciding against disclosure the Appeal Court focuses on the child's right to privacy and the confidentiality interests of adopted persons and the compelling policy reasons to support this legislation.¹⁰⁹ While the interests of the child are extremely important the

¹⁰⁸ *R. v D.D.W.* *supra* note 71 at 10.

¹⁰⁹ *Ibid.* at 12.

judge does not challenge the inference raised by the defence that the woman is lying about the paternity of the child and thus about the rape.

On the basis of myths and stereotypes, some women's sworn testimony is constructed as unreliable and some judges proceed with their analysis not on the basis of the complainant's testimony but on the basis of the defence's position. Through the disclosure of information in women's records the accused is provided with the basis to establish a defence which further reinforces myths and stereotypes about women who have been raped.

Legislative Response to the Use of Women's Personal Records

Women's organizations, feminist legal scholars and sexual assault centre staff expressed outrage over the disclosure of women's private records and forcefully argued that disclosure would discourage women from reporting rape and sexual violence because of the prospect of their private histories being raised in court and disclosed to the very person accused of assaulting them. They argued that the disclosure of women's private records invoked the groundless myth that women's and children's reports of sexual violence are likely to be fabricated. Advocates and particularly feminist legal scholars, pointed out that defence counsel used disclosure of records to justify "fishing expeditions," and that women's privacy was put at risk because records were being sought by the defence as a new way to introduce sexual history to discredit the victim. Feminist legal scholars also pointed out that through the almost unlimited access to records, the rights of the accused are clearly favoured over the rights of women who report incidents of sexual violence. Rape crisis centre workers in particular argued that women involved in supportive counselling and therapeutic relationships were being

denied support services once the counsellor's or therapist's records are subpoenaed. As a result women are denied emotional support in court and during the trial process.¹¹⁰

Parliament responded to the criticisms of feminist scholars and women's organizations with the implementation of Bill C-46 in May 1997. Bill C-46 was incorporated into section 278 of the *Criminal Code* and gave trial judges more guidance on factors to be considered on records applications and explicitly required judges to consider women's equality rights. In addition, Bill C-46 amended the *Criminal Code* to include sections 278.2 and 278.9 which restrict the use of women's past sexual history in rape trials. Legal commentators, including some judges, have pointed out that this new legislation signified Parliament's rejection of the majority decision in O'Connor and its embracement of the minority decision which focused on the impact of discriminatory beliefs in rape trials and specifically on the discriminatory beliefs that inform the disclosure of women's therapeutic and counselling records.

Bill C-46 contains a preamble which sets out Parliament's objectives in introducing the bill. In particular, the preamble recognizes that complainants' constitutional equality rights have to be taken into consideration when judges consider private records applications. The Bill sets out the procedures the defence must follow in seeking disclosure of a complainant's private records. "Record" is defined to include medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social service records, personal journals and diaries. Defendants are required to set out the grounds they intend to use to show the record is likely relevant. The section also lists a series of assertions that are not sufficient on their own to establish that a record is likely relevant. The trial judge must determine whether the defence has established that a record is likely relevant to an issue at trial or the competence of a

¹¹⁰ Katharine D. Kelly, "You must be crazy if you think you were raped: Reflections on the Use of Complainant's Personal and Therapy Records in Sexual Assault Trials." (1997) 7 *Canadian Journal of Women and the Law* at 189.

witness to testify and that production of the record is necessary in the interests of justice. In doing so the judge must assess the “salutary and deleterious” effects of the decision on both the defendant’s right to make full answer and defence and the effect on a complainant’s right to equality and privacy. In this determination the judge must take into account the accused’s right to full answer and defence, the probative value of the record, the expectation of privacy, whether production is based on discriminatory belief or bias, right to privacy, society’s interest in encouraging the reporting of sexual offences, society’s interest in encouraging the obtaining of treatment by complainants of sexual offences and the integrity of the trial process. If the judge decides to review the record, he/she must re-determine that the asserted rationale is not one of the insufficient grounds and again must consider the constitutional rights of the defendant and the constitutional equality and privacy rights of the complainant.

It is disconcerting that the legislation implies that we are at a point where judges can recognize “discriminatory beliefs and biases” at work and are able to divest themselves of the gendered myths and stereotypes that hold a woman responsible for her own rape or deny that she was raped. The Supreme Court of Canada and lower courts have consistently demonstrated that the starting point for their decisions in a sexual assault trial is exactly the categories of myths and stereotypes that permit judges to base disclosure decisions on “discriminatory beliefs and biases,” and at the same time ignore the fact that rape is a gendered offence - that is women are raped because they are women. In cases decided pre Bill C-46, judges, including the majority of the Supreme Court, began their analyses with pre-existing categories of myths and stereotypes of women who have been raped in order to support unsubstantiated and untested claims of “false memory” “recovered memory,” notions such as “blurring” based on the discriminatory assumption that some women confuse the identify of an accused with a previous abuser, or notions of “sexual perception disorders” or “behavioural disorders” brought on by some women’s “unhealthy” lifestyle “choices.” These notions are the “discriminatory

beliefs and biases,” that permit judges to maintain the illusion of gender equality while at the same time ignoring women’s gendered inequalities. Examples of gendered inequalities that were perpetuated in cases pre Bill C-46 include the continued “syndromization” of women’s experiences of abuse and rape, the prevalence of child sexual and physical abuse, the rape and coercion of institutionalized women and the transformation of consensual same-sex relationships into “deviant” sexual disorders. Most private records cases decided before the implementation of Bill C-46 began and ended with categories of myths and stereotypes that provided the rationale for “discriminatory beliefs and biases” that continue the trend of holding a woman responsible for her rape or redefining a rape as consensual sex or denying the existence of the act that was the rape.

Furthermore, despite the efforts of feminist advocates, the legislation does not absolutely prohibit the use of a woman’s private records in a rape trial. The legislation only prohibits some rationales as, on their own, “insufficient grounds” for the disclosure of women’s records. By implication, these assumptions might, in combination with other assertions, constitute sufficient grounds. The subjective determination of the relevance of material to be found in women’s records is left to the judge. While purporting to reduce the use of discriminatory beliefs and biases in disclosure decisions, the legislation may actually contribute to the vulnerability of that process to rape myths by making them harder to detect. Codifying the irrelevance and illegitimate purposes of some private record history evidence facilitates the obscuring of the irrelevance and illegitimate purposes of other private records history evidence in which the discriminatory beliefs may be more deeply entrenched.

The legislation also reinforces the notion that “equality” for women is tangible and achievable, and ignores the fact that legal analysis in rape cases has been and continues to be based on the distorted connections between myths and stereotypes and legal concepts. Without the recognition that the categories of myths and stereotypes that

render information relevant in a rape trial are rooted in women's inequality, notions such as "equality" and "privacy" and even discriminatory beliefs and biases, will simply function to perpetuate that inequality. The next chapter examines disclosure cases decided after the implementation of Bill C-46 and will examine the context in which concepts such as "privacy" and "equality" are being applied in disclosure cases.

CHAPTER FIVE

POST BILL C-46 CASES

This chapter is an examination of defence applications for production of women's records in sexual offence proceedings following the implementation of Bill C-46, section 278.1 to 278.91 of the Criminal Code. The cases examined¹¹¹ span an eighteen month period, covering cases decided after the passage of the Bill up to and including the Supreme Court of Canada's examination of its constitutional validity in *Mills*. As in the previous chapter, only those cases in which the rationales for disclosure or non-disclosure are given by the judges will be examined. Specifically this chapter examines the effectiveness of the Bill in curbing the invocation of categories of myths and stereotypes of women who have been raped in disclosure cases. The question is whether or not some judges' belief in the "truth" of these myth categories continues to transform information about the woman who was raped into 'relevant' information. Furthermore this chapter explores judges' analysis of women's privacy and equality rights as compelled by the legislation. First, I examine the cases in which the defence was successful in its application for disclosure of the complainant's records and then the cases in which the disclosure application was rejected. Finally, I examine the cases in which the accused has brought a constitutional challenge against section 278.3.

Cases Where Disclosure was Permitted

¹¹¹ *R. v I.D.B.*, (1997) O.J. No. 3198 (Gen.Div.); *R.v Herbert*, (1997) O.J. No.4769 (Gen.Div.); *R.v Whitehouse*, (1997) N.S.J. No. 431; *R.v Aka* (1998) O.J. No. 1414 (Gen. Div); *R.v C.V.G.*, (1997) S.J. No.621 (Q.B.); *R.v Romano*, (1997) B.C.J. No.2437 (Prov.Ct.); *R.v Miller*, (1997) N.J. No.207 (Prov. Ct.); *R.v E.A.N.* , (1997) B.C.J. No.3001 (S.C.); *R.v Hurrie*, (1997) B.C.J. O.J. No.2634 (S.C.); *R.v J.F.G.*, (1997)N.W.T.J. No.38 (S.C.); *R.v R.vA.M.*

In the case of *R. v I.D.B.* the defence sought disclosure of H.G.'s counselling records to determine whether or not the form and nature of the interviewing techniques utilized by the counsellors influenced H.G.'s belief as to what she alleges took place between herself and the accused. H.G. testified at the preliminary inquiry that her step-father assaulted her while she slept. She told her mother of the assault and commenced counselling. However a witness for the defence testified that when he asked H.G. if the rumours of her step-father assaulting her were true she said, "No, but I don't know."¹¹² H.G. stated that she told the witness that while she was unsure, she thought her step-father had touched her.¹¹³ The discrepancy between H.G.'s testimony and the testimony of the witness for the defence was used by the defence to introduce evidence of a prior inconsistent statement. At the preliminary inquiry H.G. further testified that she was sure her step-father had touched her and her explanation for being sure was "Yes, because I had gotten counselling, and I realized that, that was what indeed happened."¹¹⁴ In this case, the judge determined that the counselling records sought by the defence were relevant and should be disclosed.

The judge determined that the defence relied upon "other" factors, in this case evidence of a prior inconsistent statement, than those prohibited by section 278.3, to show the "likely relevance" of information in H.G.'s counselling records. The judge states, "For the purposes of this Application I accept the accused's argument that H.G.'s position changed pre and post counselling."¹¹⁵ The relevance of this evidence is based on a myth and stereotype used to infer that H.G. is confused and may mistakenly believe she had been sexually assaulted. This provides the judge with the rationale to conclude that: "The change in H.G.'s recollection after counselling raises the reasonable belief that she or a

¹¹² *R. v I.D.B.* *supra* note 111 at 4.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* at 5.

¹¹⁵ *Ibid.* at 13.

counsellor might have said or done something that influenced the change.”¹¹⁶ In this case the judge relied upon the myths that underlie the relevance of a prior inconsistent statement to rationalize the disclosure of counselling records. The information in counselling records becomes relevant and sufficient when used to raise the specter of the “unscrupulous counsellor.” The myths that underlie the presence of a prior inconsistent statement and the myths of false or implanted memories combine to infer that she is incapable of knowing whether or not she was raped. These myths provide the link between information found in her counselling records and a determination of H.G.’s mental state. The “relevance” of this information is based on a reconstruction of the myths and stereotypes that have been codified as irrelevant and illegitimate, into a “perceptual disorder” on the part of H.G. The judge ruled that the defence’s application passes the “insufficient grounds” test because the records, “... are likely to shed some light on the central issues at trial - those of whether the event of touching occurred at all and, if so, whether it was accidental or intentional.”¹¹⁷

The judge states:

her explanation of realization...“that was what indeed happened”
is her reply to a question about a touch, not about a sexual assault. The
more probable interpretation of that answer is her realization of a touch,
not the sexual nature of it, occurred after the counselling.¹¹⁸

By locating the source of the rape allegation within a disorder inherent to H.G., the judge is justified in ignoring the gendered inequalities that contribute to male sexual violence against women and how those inequalities are exacerbated by the use of myths and stereotypes that render evidence of a prior inconsistent statement and information in counselling records relevant. The judge does not consider that there may be many reasons why there was a discrepancy between H.G.’s testimony and the testimony of the defence

¹¹⁶ Ibid. at 15.

¹¹⁷ Ibid. at 15.

¹¹⁸ Ibid. at 13.

witness. The judge does not consider the fact presented in testimony that the defence witness is an adult, male friend of the accused and the only reason H.G. met with him was because he promised to return photos he had taken of her in a bikini. The imbalances of power created by the fact that the witness had photos of H.G. that she wanted back because she was afraid they could be interpreted as “evidence” of her promiscuity was not considered by the judge as providing a context for the discrepancy in her statements. Feelings of guilt and shame for having accused her step-father and the trauma this will cause other family members may have caused H.G. to second guess her own judgment. The defence witness may have lied. These potential explanations for the discrepancy were ignored by the judge and by implication used against H.G. to infer that she lied in her statement to the police.

Not surprisingly, the judge concludes that “...a determination of the actual salutary and deleterious affects on the privacy and equality rights of the complainant is virtually impossible without the records.”¹¹⁹ By not addressing the gendered inequalities the judge has assumed equality between H.G. and her step-father, and the only relevance the information in H.G.’s records will have is to establish the basis for a defence for the accused.

The judge in the case of *R. v Herbert* disclosed the medical, psychiatric, drug and alcohol counselling, and sexual abuse survivor counselling records and all records of all agencies including the Children's Aid Society and the records of all schools attended by the complainants, W.C.M. and D.B. The judge relied upon evidence presented by the defence's expert witness in the preliminary inquiry in the determination of the relevance of these records. The judge stated, “...the records sought by the defence are likely to be relevant to an issue in the process and to a defence available to the accused. Among other issues, the defence of faulty memory syndrome/repressed memory syndrome is likely to be affected by

¹¹⁹ Ibid. at 15.

the production of these records."¹²⁰ The defence's introduction of "expert" testimony at the preliminary hearing was used to raise the inference that the memories of W.C.M. and D.B. of the alleged incidents were falsely planted or distorted by unscrupulous therapists and counselling techniques. The myth that the therapists and counsellors are the source of the rape allegations is a discriminatory belief that transforms irrelevant information, in this case, W.C.M. and D.B.'s involvement in therapy and counselling, into sufficient and relevant pieces of information. The illegitimate purpose for which this information is introduced, in this case to infer that W.C.M. and D.B. mistakenly believe they were raped because their memories of the alleged incident are "false," or "implanted," becomes the "relevance," which justifies the judge's decision to disclose. In this case the judge's belief in the "truth" behind the myth of "implanted" or "false" memories created in counselling or therapy provided the rationale for the disclosure of the records on the basis of more categories of myths and stereotypes.

The transformation of a discriminatory belief and bias into the "truth" behind a rape allegation creates the impression that the accused is in need of protection from the many circumstances under which he could be falsely accused of rape. In this case the judge ordered the disclosure of all records known to the accused on the basis of a number of categories of myths and stereotypes of women who have been raped. As was the situation before Bill C-46, defence counsel in this case sought to discredit the complainants by using information in their personal records relating to drug/alcohol abuse, prior involvement with the police and prior sexual activity. The judge is permitted to find the "relevance" of irrelevant information in the illegitimate purpose for which it is introduced, completely ignoring the fact that the use of myths and stereotypes perpetuate and ignore gendered inequalities.

¹²⁰ *R. v Herbert supra* note 111 at 9.

In the case of *R.v Whitehouse*, the defence sought disclosure of medical and psychiatric records, as well as school records and notes from family counselling sessions with a psychologist. After simply accepting the accused's position that the application for production of the records was not based on discriminatory beliefs or biases, the judge determined the records were likely relevant to an issue at trial such as the time and place of the alleged incidents, the reliability of the complainant's recollections of the alleged rape and to show a close temporal connection between some of the counselling records and the alleged rape, thus raising as relevant the potential influence therapy had on the woman's perception of the alleged incident.

The myth of the "unscrupulous counsellor" who implants women with "false memories," of rape underlies all of the rationales used by the judge in this case; it is one of the very myths Bill C-46 was designed to curb. After the judge reviewed the records in light of the requirements of section 278.3(4)(a-k), he/she determined that the records from the woman's current therapist, Dr. Clarke, and medical records should be disclosed to the defence because they provide information on "the effect certain books read by the complainant may have had on her perception of the events alleged in this case,"¹²¹ and because they contain notes on discussions between the woman and her physician, which may have effected her view of the alleged relationship she may have had with the accused."¹²² In his/her justification for disclosure, the judge imposed the primary myth of "unscrupulous counsellors" onto information produced to assist the woman in dealing with her experience of rape.

Prior to the implementation of Bill C-46, the perceptual category myths had been expanded from the myth that counsellors and therapists indoctrinate their clients into making false allegations of rape to the myth that women, due to the effect of therapy, suffer

¹²¹ *R.v Whitehouse supra* note 111 at 3.

¹²² *Ibid.*

from a "syndrome" or "disorder" which leads them to mistakenly believe they were raped. The expanded myth renders relevant all records that were created in the process of assisting the woman to deal with her experience of rape. The "relevance" of this information is based on the same myths and stereotypes, that when used within the context of counselling or therapy, have been codified as irrelevant and illegitimate. The myth of the therapist who distorts a woman's memory or perception of rape remains, but is obscured through its post Bill C-46 reconstruction and pathologization as a sickness on the part of the complainant. The judge is able to circumvent the prohibition of this myth and stereotype, mandated by section 278.3 of the Code, by referencing it to books and discussions rather than counselling or therapy types or approaches. The types of books read by the woman and discussions she engaged in become relevant and sufficient pieces of information when they are put forward to justify the disclosure of the notes of a psychiatrist, Dr. DeCourtere, the woman had seen years before. The judge ordered that the notes of the psychiatrist be disclosed to the defence on the basis that they did not contain information the woman testified to at the preliminary hearing. The judge stated:

I have determined that the notes of Dr. DeCourtere ought to be disclosed because the complainant in her statement to the police indicated that she had disclosed the alleged abuse to a psychiatrist in 1983 but that psychiatrist was only interested in knowing whether she enjoyed the sex and whether she was jealous of the accused's wife. The documents reviewed do not address the points mentioned by the complainant in her statement to the police and therefore go directly to her credibility.¹²³

The information found in Dr. DeCourtere's notes becomes a sufficient ground for disclosure because it potentially reveals a prior inconsistent statement, which is used to further reinforce myths about the reliability of the woman's testimony. This information, combined with myths of a "perceptual disorder," reinforce the notion that the woman had

¹²³ Ibid. at 3.

been influenced by her current therapist into falsely believing she had been raped. The judge does not consider that there are any number of explanations for the discrepancy in Dr. DeCourtere's notes and the testimony of the woman. The discrepancy may have occurred because the psychiatrist did not record the disclosure. Based on the complainant's testimony, it was clear the psychiatrist did not believe or at the very least, did not take the disclosure seriously. The presence of the discrepancy has permitted the judge to infer that the absence of corroborative evidence from the notes of the psychiatrist challenges the veracity of the woman's testimony. This has permitted the expansion of the recent complaint doctrine from the myth, pre- Bill C-46, that if the rape allegation is 'real' the woman will disclose to the support services available to her, to, if the rape allegation is 'real' or 'true' the record keeper will record the disclosure. The use of women's personal records is a way to re-invoke the revised version of the recent complaint rule, whereby an adverse inference is to be drawn from the absence of a record of a recent complaint.

The judge in *Whitehouse* determined the impact the disclosure of the records has on the woman's equality and privacy rights and the accused's right to full answer and defence on the basis of the categories of myths and stereotypes the legislation was designed to curb. The gendered inequalities imbued in some record production and all sexual offence proceedings are ignored. The harm the disclosure of the record poses to women is ignored and women's privacy and equality rights are reduced to a procedural issue which the judge addresses by ordering that "...no copies of the disclosed documents are to be made."¹²⁴

The admission of "evidence" on the basis of an application that applies to completely different proceedings has provided some judges with a justification to circumvent the grounds of disclosure prohibited by Section 278.3. In the case of *R.v Aka* the defence sought disclosure of police officers' notes, statements to the police, pre-disposition or pre-sentence reports, all custodial facility reports and the criminal record of

¹²⁴ Ibid at 4.

the complainant, N.L.K.. The accused argued that the allegation of sexual assault against him arose from the investigation of a break and enter and theft from his residence in which N.L.K. had been charged and convicted.¹²⁵

On the basis of the defence argument, the judge decided to review all records in possession of the Crown, which included N.L.K.'s young offender record and notes from the officer who investigated the break and enter. The disclosure of N.L.K.'s young offender record raises the inference that she is generally deviant, a bad girl. Information specific to her conviction for break and enter and theft, combined with the characterization of her as deviant, is used to infer that she has a motive to seek revenge through the fabrication of a false rape allegation against the accused.

The judge was able to circumvent consideration of the prohibited grounds of disclosure, under section 278.3 of the *Code*, ruling, "Commonly accused are cross-examined on their criminal records under...s. 12 of the Canada Evidence Act...In my view, the criminal or young offender record should be released to counsel for the accused for the limited purpose of cross-examination, if he so desires." ¹²⁶ The illegitimate reasons for which this information was introduced are ignored and the judge continues to rely on categories of "behavioural" and "perceptual" myths and stereotypes to transform the gendered reality of a sexual offence proceeding, into the ungendered "truth" of a proceeding commonly used against an accused, now turned against the complainant. Having thus, avoided the requirements of section 278.3 once, the judge proceeded to do so a second time by exercising an abundance of caution in protecting the accused's rights without balancing them against the complainant's rights to privacy and equality as required by the legislation. In order to "save the hearing" from a challenge on the basis of the accused's right to full answer and defence, the judge concludes that "...because it is difficult

¹²⁵ *R. v Aka* *supra* note 111 at 2.

¹²⁶ *Ibid* at 3.

for me to ascertain what portion the accused wishes to adduce for his defence...It is my view that the file, as a whole, should be produced..."¹²⁷

In the case of *R. v J.F.G.*, the accused sought the introduction of evidence of one or more incidents of sexual activity between the complainant and her older brother.¹²⁸ The judge ruled that the grounds set out by the majority decision in *R.v.Seaboyer* apply because at the time of the alleged incidents the section of the *Criminal Code* that dealt with the procedural issue of the admission of past sexual history evidence was no longer in force and effect, (formerly section 142) and therefore the common law rules of *Seaboyer* apply for sexual offences in the absence of statute.¹²⁹ In this case, the alleged incidents of rape and sexual abuse occurred between 1967 and 1976 and the accused was the woman's step-father. The accused argued that the woman fabricated the allegations, motivated by hostility because the accused had discovered the sexual activity between she and her brother. The judge ruled that evidence of the accused's discovery of the sexual activity between her and her brother, the woman's reaction to the discovery, and the accused's reaction in connection with anything he did or said that might affect the woman's feelings toward him could be introduced. The judge relied upon the motive to fabricate myth from the situational category in which the woman was constructed as unwilling to take responsibility for her sexual activity with her brother. Her rape allegation is transformed into a lie motivated by revenge and resentment against her step-father for removing her brother from the family home. The introduction of this evidence on the basis of a motive to fabricate transforms the woman's history of child sexual abuse into free and voluntary sexual conduct and is used to infer that she was inappropriately sexual for her age. Myths about her inappropriate sexuality combined with myths about her overwhelming desire for

¹²⁷ Ibid. at 4.

¹²⁸ *R. v J.F.G. supra* note 111 at 13.

¹²⁹ Ibid. at 8.

revenge to construct her as sexually and perpetually disordered, thus providing more justification for the motive to fabricate defence.

Through the invocation of the common law rules of *Seaboyer* the judge was able to circumvent the requirements of section 276 in the decision to introduce evidence of her sexual history. The judge concluded that the woman's privacy rights must not deny the accused the building blocks for his defence and that the pain and humiliation invoked by her testimony about sexual activity with her brother will be no more difficult than her testimony against her step-father.¹³⁰

Cases Where Disclosure was Refused

In contrast to *R.v Aka*, the case of *R.v T.P.* reveals that some judges are not willing to allow a young offender record to be used against a woman who alleges rape in a sexual offence proceeding. However, the judge in this case did not attempt to unpack the myths and stereotypes that inform the accused's application for disclosure. The judge did not acknowledge that the defence submission that T.P.'s young offender record may reveal "discernible conduct on the part of the complainant,"¹³¹ is the thinly disguised inference that her "delinquent" or "deviant" behaviour, in the past, makes it unlikely that she was "really" raped. The judge did not unpack the myth that the defence request for her child welfare records on the basis that they "might shed light on the motive to lay certain charges against her father," because her father is a disciplinarian, reflects the discriminatory belief that women allege rape out of revenge or to explain their way out of a difficult position.¹³² In addition, the judge did not acknowledge that the defence's introduction of information on

¹³⁰ Ibid. at 20.

¹³¹ *R. v T.P.* *supra* note 111 at 2.

¹³² Ibid. at 3.

T.P's use of drugs and alcohol in order to justify disclosure of the records relies on the myth that she may suffer from a "perceptual" disorder and may be unable to "know" whether or not she was raped. In fact the judge did not, even in general terms, consider the impact myths and stereotypes have on decisions in sexual offence proceedings. Rather the judge focused on abstract notions such as the right to privacy and on the preamble of Bill C-46 to conclude that the defence has, "...failed to submit any credible evidence that additional evidence of her possible lack of credibility can be found in the records..."¹³³

Similarly, in the case of *R. v C.V.G.*, the judge did not challenge the defence's use of a number of myths and stereotypes of women who have been raped in order to justify the disclosure of S.L.'s counselling records and counselling notes prepared by counsellors consulted by S.L.. While the judge did not permit disclosure, he/she did not address the defence's use of the "situational" and "perceptual" myths to argue that S.L.'s counselling records should be disclosed. The defence argued that S.L. alleged rape in order to explain a compromised or difficult position: "... as a result of S.L. having consensual sex with the accused, her relationship with her daughter fell apart and in order to salvage it she laid the rape charge."¹³⁴ The defence also maintained that the records may contain details of the alleged incident that had not been disclosed and that the use of therapy may have had an effect on her recollections of the alleged rape. By attempting to link information in S.L.'s counselling records with the determination of her consent to sex, the practice of invoking the "perceptual" myth that women are "unduly influenced" by "unscrupulous counsellors" into mistakenly believing they were raped is permitted to continue, without challenge by the judge.

R. v Romano is another case in which the judge did not explore the defence's disclosure application within the context of the invocation of categories of myths and

¹³³ Ibid. at 4.

¹³⁴ *R. v C.V.G. supra* note 111 at 24.

stereotypes. Using evidence submitted by the woman to the police and discussed in the preliminary inquiry, the defence attempted to link perceptual myths to situational myths and posit these myths as relevant to the determination of whether or not the rape occurred. The defence argued that the undue influence of counselling, as evidenced by the woman reporting the rape soon after she was involved in counselling, was the source of her rape allegation and that her suicide attempt was evidence of her attempt to escape the wrong of her false allegation.¹³⁵ In this instance the defence relied upon the perceptual myth of implanted or false memory syndrome, derived from the perceptual category, and linked it to the situational myth that the woman attempted suicide to get out of a difficult position created by her false allegation of rape. The defence argued that her suicide attempt was further indication of the effects of her perceptual disorder and that her reliability and credibility were thereby seriously compromised. While the judge did decide that the defence application did not pass the first stage of relevance and therefore the woman's equality rights would be infringed if the records were disclosed, the judge did not discuss the impact disclosure of the records would have on the woman's equality rights, nor did he/she discuss the impact the invocation of myths and stereotypes in the defence's disclosure application has on women's equality rights.¹³⁶

In the case of *R. v Miller*, the judge did acknowledge that the defence disclosure request of the complainant's medical files was based on myths and stereotypes. The judge stated:

However, one must avoid the stereotyping of witnesses or complainants. One such stereotype might be the consideration that simply because a person is receiving or has received psychiatric treatment or indeed, has been assigned a general diagnosis, that person automatically cannot

¹³⁵ *R. v Romano supra* note 111 at 3.

¹³⁶ For a similar case with the the same defence rationale and outcome of the judge's decision see *R. v Murray*, (1997) N.J. No.210 (S.C. (T.D.)).

be relied upon to tell the truth in a judicial proceeding.¹³⁷

However the judge did not unpack the myth to its full extent. The judge did not relate this general concern to the specifics of the case before him/her. She/he did not acknowledge the specific use of this myth or any myths and stereotypes in sexual offence proceedings to infer perceived links between evidence by and about the woman who was raped and whether or not the rape occurred. Within the context of this myth, it is not an issue of whether or not the “person can be relied upon to tell the truth in a judicial proceeding.” The myth is that the woman honestly believes she was raped because she is the “victim” of an “unscrupulous” counsellor or therapist who falsely implanted her memory of the rape.

By relying on discriminatory beliefs and biases to reveal the “truth” behind a rape allegation, the reality of the gendered nature of the myths and stereotypes that are used to link women’s records to the determination of whether the rape “really” happened or not, are ignored. The failure to address the impact the use of categories of myths and stereotypes have on women in rape proceedings means that women and women’s experiences are either excluded or at best are placed at the periphery of the analysis. In the preceding cases, the judges’ decisions not to disclose are not premised on how the invocation of myths and stereotypes perpetuate women’s inequalities and how disclosure further exacerbates those inequalities. The primary focus of the judges’ decisions not to disclose, in all of the above non-disclosure cases, is reduced to problems with the defence's applications.

For example, in *R.v T.P.* the judge stated that the defence, “failed to submit any credible evidence that additional evidence of her possible lack of credibility can be found in the records...”¹³⁸ In *R. v Miller* the judge found that the defence’s rationales for disclosure were not specific enough. The judge stated that the defence’s application for disclosure rested on, “...at best, mere speculations based on textbook generalities and not

¹³⁷ *R. v Miller supra* note 111 at 11.

¹³⁸ *R.v T.P. supra* note 111 at 4.

based on one specific circumstance or situation relating to the complainant.”¹³⁹ In *R. v C.V.G.*, the judge found that the defence’s rationales for disclosure were not “clear and precise” enough.¹⁴⁰ In the case of *R. v Romano*, the judge ruled that the records would not be produced because the, “grounds supplied by this defence application...fail to meet the required criteria,” without assessing the grounds in light of the criteria.¹⁴¹ In all of these cases, the judges did not rule out the use of information to be found in women’s records. Generally the judges do not apply an equality analysis to the defence’s pursuit of women’s records. They do not commence their assessment with suspicion about the possible invocation of gendered myths and stereotypes in order to justify the disclosure of women’s records. Rather they appear to be directing the defence to gather more “credible,” or more “precise” or more “clear” information to support their rationales. This is particularly disconcerting given that under section 278.3 judges are compelled to consider women’s privacy and equality rights. The judges in these cases focused on abstract legal concepts, such as “likely relevance,” and abstract notions such as justice and fairness, and the intent of the legislators, rather than women’s inequalities. In *R. v T.P.* the judge ruled that the defence’s application did not pass the second test because it, “...overlooks the major thrust of the legislation namely to encourage abused persons to report the abuse...”¹⁴² Similarly in *R. v Miler*, the judge stated that the defence’s application, “...flies directly in the face of the stated intent of the legislators.”¹⁴³ In *R. v C.V.G.* the judge avoided the analysis of equality and privacy rights stating instead that: “Mr. Agioritis, (the accused) no doubt, was

¹³⁹ *R. v Miller supra* note 111 at 13.

¹⁴⁰ *R. v C.V.G. supra* note 111 at 24.

¹⁴¹ *R. v Romano supra* note 111 at 5.

¹⁴² *R. v T.P. supra* note 111 at 2.

¹⁴³ *R. v Miller supra* note 111 at 15.

well motivated in fashioning and bringing the application as he did,” and then simply concluding that the defence’s application was not made in accordance with the legislation.¹⁴⁴ In *R. v Romano* the judge’s superficial finding for non-disclosure was qualified by the judge referring to a quote which stated: “Unfortunately the accused is caught in a catch twenty-two position insofar as not having access to the records in question, the ability to lay an evidential foundation may be somewhat difficult.”¹⁴⁵

R. v E.A.N. is a blatant example of a case in which the judge manages to invoke categories of myths and stereotypes of women who have been raped in the decision not to disclose her counselling records to the accused. At the preliminary inquiry the Crown submitted two statements the woman had made to the police. In the second statement to the police, the woman provided new details of the incident described in the first statement. At the preliminary inquiry she was cross-examined by the defence and disclosed that she had been involved in sexual abuse survivor counselling in the time period between the production of the two statements to the police. The defence relied on the testimony of an “expert” in the area of human memory and child sexual abuse. The expert witness testified that the involvement of a therapist in between the time period of two statements may contribute to “confabulation,” and that it may be necessary to review the techniques used by the therapist.¹⁴⁶ In the case of *R. v E.A.N.*, the judge focused on the abstract, legal definition of “likely relevance” and determined that the test of “likely relevance,” “... requires real evidence of relevance to a live issue in any particular proceeding.”¹⁴⁷ The judge continued by defining “real” as requiring a submission by the defence that has more than an air of reality and must be one with “...fully an atmosphere or environment of reality

¹⁴⁴ *R. v C.V.J.* *supra* note 111 at 24.

¹⁴⁵ *R. v Romano* *supra* note 111 at 5.

¹⁴⁶ *R. v E.A.N.* *supra* note 111 at 9.

¹⁴⁷ *Ibid.* at 17.

attached to it."¹⁴⁸ It is on this basis that the judge concluded that the defence application passed the first stage of disclosure. The judge's belief in the myth that counsellors or therapists implant "false" or "distorted" memories is so entrenched that the judge used it as the "real evidence" necessary to pass the "likely relevant" test.

The judge circumvents the purpose of section 278.3, which clearly states that records cannot be disclosed on the basis that the counselling records may relate to the reliability of the testimony of the complainant merely because she has taken counselling, by referring to "other" evidence which raises the inference that the source of the rape allegation is the process of therapy. Specifically the judge relied upon, "therapy bracketed by two statements wherein the later adds to the earlier; an admission that the counsellor helped the complainant to remember more; an admission that in this scenario the therapist's notes may be relevant to the issue of confabulation."¹⁴⁹ These are the discriminatory beliefs and biases that link the myth of "therapy influences," and "false memory syndrome" to the woman's credibility and the reliability of her testimony. The judge relied upon this distorted connection to render information relevant that may be used to infer that the therapist or the type of therapy used was the source of the rape allegation. The judge stated: "Here the relevance of the record centres on the issue of confabulation and the resulting need to understand the techniques employed by the counsellor."¹⁵⁰

It is within the context of an examination of the techniques employed by the counsellor that the judge examines the deleterious and salutary effects of disclosure on the woman's right to equality and privacy and the accused's right to full answer and defence. The gendered reality of the harmful impact of rape and the harmful impact of the disclosure of women's personal records in a rape proceeding on women is transformed into the

¹⁴⁸ Ibid.

¹⁴⁹ Ibid. at 21.

¹⁵⁰ Ibid. at 25.

ungendered truth of the impact therapy has on an accused's rights. The therapist in this case submitted an affidavit in which she identifies the techniques she uses. Specifically she states that she does not employ techniques that are directed toward the "restoration" of memory. She states that the therapeutic process she uses is, "...not directed toward ascertaining historical 'truth' in the legal sense..." but rather is directed toward: "...the fullest understanding possible of my client's subjective experiences, not the external events of her life."¹⁵¹ With the myth still held in tact that the source of the rape allegation may be a "perceptual" disorder brought on by the woman's interpretation of her subjective experiences and not based on the gendered reality of the external events of her life, the judge is satisfied that disclosure does not pass the final stage of the production test.

Constitutional Challenges

Soon after its implementation, Bill C-46 was subjected to a number of constitutional challenges. In the case of *R. v Hurrie*, the accused challenged the constitutional validity of section 287.3(4) and 287.5. Specifically he argued that section 278.5 which required the judge to consider the equality and privacy rights of the "complainant," at the first stage of production violated the accused's right to life, liberty and security of the person under section 7 of the Charter and his right to be presumed innocent under section 11(d).¹⁵² The challenged provisions are those that list the "insufficient grounds" for disclosure. In considering the accused's constitutional challenge, the judge did not address the fact that the defence's application for disclosure of the woman's child welfare records is based on myths and stereotypes. Rather the judge relied on the fact that "assertion" as defined by the provision in question does not limit the accused from raising a question of the credibility

¹⁵¹ Ibid. at 26.

¹⁵² *R. v Hurrie* *supra* note 111.

and reliability of the “complainant” on the basis of the “insufficient grounds.” The judge ruled that an assertion of one or more of the insufficient grounds must be accompanied by some evidentiary basis in order to meet the “likely relevant” test. The judge ignored the fact that it is largely through the invocation of categories of myths and stereotypes that information in women’s records is linked to a determination of her credibility and reliability and thus rendered “relevant.” Furthermore, the judge provided a list of potential sources for the accused to use as the basis to justify use of the prohibited grounds. This illustrates the judge’s belief in the “truth” that forms the categories of myths and stereotypes of women who bring forth rape charges. The judge only discussed the use of “other” evidence to support the “insufficient grounds,” within the context of an exploration of the accused’s section 7 and 11(d) Charter rights. Without an accompanying analysis of how the use of this “other” evidence impacts on women and women’s experiences in a rape proceeding or trial, the irrelevancy of this “other” information is obscured as is the illegitimate purpose for which it is introduced by the defence.

The judge did not consider how the use of irrelevant information in rape trials exacerbates women’s inequalities, in the analysis of women’s equality and privacy rights. Rather, references to women’s equality and privacy rights are only made within the context of the judge’s analysis of the accused’s right to make full answer and defence. In discussing the procedure set up under Bill C-46, the judge stated:

...it establishes an area of societal concern about the privacy rights of complainants and witnesses in the context of sexual conduct and the effects upon such persons of disclosure a low level evidentiary threshold of likely relevance across which an accused must pass to invade the privacy of such persons in pursuit of their constitutional rights.¹⁵³

In this case, the judge upheld the constitutionality of section 278.

¹⁵³ Ibid. at 15.

In a second case, *R. v A.M.*, the accused challenged the constitutionality of section 287.3(5) and 278.4. The judge concurred with the reasoning of *R. v Hurrie*, up to the determination of whether or not consideration for the privacy and equality rights of “complainants” created too much of an evidentiary burden on the part of the accused. More specifically the judge in *R. v A.M.* stated that requiring the accused to provide evidence that went beyond assertions, “...creates a burden that is too high for an accused to meet at this early stage of the proceedings,” and that the requirement that judges consider both the privacy and equality rights of the woman, “...has less force because the privacy rights are apparently not violated if Crown counsel has the records.”¹⁵⁴ The judge further stated, “It is difficult to comprehend how the complainant’s rights to privacy are on one hand at risk if the judge reviews the records in private, but not violated when Crown counsel has the records.”¹⁵⁵ Similar to the approach in *R. v A.M.*, the judge in *Hurrie* had linked these two perceived limitations of the legislation together in order to justify considerations of women’s privacy and equality rights within a context of their adverse impact on the rights of the accused. The judge in *R.v.A.M.* stated, “The complainant’s rights are protected from ‘fishing trips’ into her private life by requiring an evidentiary basis at this stage...”¹⁵⁶ an “evidentiary basis” that the judge had already determined to be “a burden that is too high for an accused to meet.” Despite these concerns about the negative impact of these provisions on the accused, the judge in *R.v A.M.* upheld the constitutionality of section 278, on the basis that he/she is bound by the decision in *R.v Hurrie*. In so doing, the judge would appear to have been setting the case up for an appeal.

¹⁵⁴ Ibid. at 12.

¹⁵⁵ Ibid.

¹⁵⁶ *R. v R.M.* *supra* note 111 at 18.

Supreme Court of Canada

Nineteen months after the implementation of sections 278.1 and 278.91 of the Criminal Code, the Supreme Court of Canada was asked to decide their constitutional validity. Specifically the Court was asked to rule on the constitutional validity of section 287.3, which is the “insufficient grounds” for disclosure list and sections 278.5(1) and 278.5(2), which compel judges to conduct an assessment of the salutary and deleterious effects of production on an accused’s right to full answer and defence and a “complainant’s” right to equality and privacy during the first and second stage of the production analysis.

In the introduction to their analysis, the majority discussed generally that the defence is not permitted to distort the truth-seeking function of the trial process and that full answer and defence does not include the right to evidence that would distort the “search for truth inherent in the trial process.”¹⁵⁷ The majority stressed the importance privacy plays in the protection of therapeutic relationships and that confidentiality is integral to that relationship.¹⁵⁸ They connected the importance of the therapeutic relationship to the psychological integrity of the woman who was raped and acknowledged that a violation of the privacy of this relationship may either reduce, “the complainant’s willingness to report crime or deter him or her from counselling altogether.”¹⁵⁹ The majority stated that, “The values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one’s individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like,

¹⁵⁷ *R.v Mills supra* note 111 at 28.

¹⁵⁸ *Ibid.* at 30.

¹⁵⁹ *Ibid.*

relationship.”¹⁶⁰ The majority determined that in assessing applications for disclosure, courts must strike a balance between the interests protected by privacy and the accused’s right to full answer and defence.

In determining, specifically, the constitutionality of the list of “insufficient grounds,” the majority acknowledged that, “...speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecution of sexual offences.”¹⁶¹ The majority does not acknowledge, however, that some judges’ belief in the “truth” of myths, stereotypes and assumptions, have allowed those judges to invoke categories of myths and stereotypes that have resulted in the transformation of extraneous information about women who have been raped into ‘relevant’ information. It is this very type of thinking that provided the majority with the rationale to ultimately conclude that the purpose and wording of section 278.3, “...does not prevent an accused from relying on the assertions set out in s.278.3(4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance.”¹⁶² In reaching this conclusion, the majority is supporting the invocation of the same myths and stereotypes that they state should not be used in legal determinations of relevance. Up until this point, judges have been using these myths and stereotypes to distort the connections that render any information, let alone “additional” information, relevant.

In upholding the second part of the legislation, section 278.5(2), the majority determined that information that is deemed relevant under the first stage of the legislation, may still result in production of the records not being ordered. The majority ruled that in

¹⁶⁰ Ibid. at 31.

¹⁶¹ Ibid. at 38.

¹⁶² Ibid.

this test of the “salutary and deleterious” effects of production, “the non-disclosure of third party records with a high privacy interest that may contain relevant evidence will not compromise trial fairness where such non-disclosure would not prejudice the accused’s right to full answer and defence.”¹⁶³ However judges have been conducting this analysis through the invocation of myths and stereotypes that has permitted them to conduct the analysis of women’s equality and privacy rights from an assumption of women’s equality, which serves to obscure and ignore the gendered inequality of women’s experience of rape. It is this point that leads the majority to conclude, “where there is a danger that the accused’s right to make full answer and defence will be violated, the trial judge should err on the side of production to the court.”¹⁶⁴ Not considering women’s inequalities has resulted in judges in both disclosure and non-disclosure cases almost always giving primacy to the rights of the accused. The majority judgment exacerbates the problems inherent in an exploration of information in women’s records on the basis of categories of myths and stereotypes of women who have been raped.

In their discussion of the accused’s right to full answer and defence, the majority states that the accused, “will have no right to the records in question insofar as they contain information that is either irrelevant or would serve to distort the search for truth...”¹⁶⁵ The majority assumes that defence counsel and judges are able or willing to disabuse themselves of the discriminatory beliefs and biases of categories of myths and stereotypes of women who have been raped. However, the myths and stereotypes persist and remain the foundational thinking of many judges. Thus defence counsel’s attempts to re introduce perceptual, behavioural and situational myth categories through different types of evidence

¹⁶³ Ibid. at 40.

¹⁶⁴ Ibid. at 42.

¹⁶⁵ Ibid. at 31.

are often successful. The surface strategies shift to accommodate the legislative changes but the underlying problems remain solidly in place.

The majority decision in the case of *R. v Mills* endorsed and upheld the constitutional validity of the 1997 legislation without addressing the reluctance of some judges to eliminate myths and stereotypes from the decision-making process and without addressing some judges' lack of understanding of the issues which necessitated the change in the first place. The majority's support for the legislation serves to mask the underlying issues that exacerbate women's inequalities and contribute to male sexual violence against women and at the same time makes it appear that the issues have been addressed, while striking a balance between the rights of the accused and the rights of the woman who was raped.

An examination of some application for disclosure cases decided after the implementation of Bill C-46 reveals that "other" information is rendered relevant and sufficient when it is used to support the re-introduction of evidence the 1997 reforms were designed to limit. Evidence submitted by the defence, such as the testimony of a defence witness or defence "expert," has been used to reconstruct myths and stereotypes codified as irrelevant into relevant and sufficient pieces of information in order to provide the justification for the disclosure of women's personal records. Myths codified as irrelevant, have been imposed on "other" information and have provided the basis for the disclosure of women's records. This has resulted in the resurfacing of the recent complaint doctrine, the re-introduction of information on women's sexual activity, and the expansion of already existing myths and stereotypes about women's syndromes and/or pathologies.

The information found in women's records is used to infer that the woman either lied about the rape or to infer that the rape did not happen. The information requested by the defence is itself myth and stereotype or is used to support one or more myths and stereotypes. Regardless of whether disclosure was granted or denied, judges have demonstrated that their understanding of the issue or problem before them is framed by,

and remains mired in, categories of myths and stereotypes about women who have been raped. The impact myths and stereotypes have on the social and legal responses to women who have been raped, including the production of and the defence's request for some women's records, is not seen as an example of gendered inequalities that promote and perpetuate male sexual violence against women. Rather, the information in women's personal records is seen as gender neutral information that provides the 'truth' about the woman and the rape allegation. Judges are justified in using the information in records, and/or other information provided by the defence, to invoke myths and stereotypes that perpetuate and promote the notion that innocent men may be wrongly convicted. This is the framework under which judges consider the competing rights of an accused to full answer and defence and a woman's rights to privacy and equality. The 1997 legislation is seen as creating an imbalance that needs to be corrected through the disclosure of women's records on the basis of "other" information that supports the rationales codified as illegitimate.

The linking of women's equality rights with considerations for the accused's right to make full answer and defence is made possible through the transformation of gendered myths and stereotypes of women who are raped into gender-neutral 'truths.' The gendered reality through which women's equality and privacy rights should be determined is ignored and considerations for a women's privacy and equality rights are only made with reference to their adverse impact on an accused's rights. Gendered myths and stereotypes are permitted to continue and to perpetuate the inequalities of women by removing women and women's experiences of rape from the context of legal determinations in sexual offence proceedings.

CHAPTER SIX

CONCLUSION

Current understanding and knowledge regarding rape, as well as social concern about this issue, are the direct result of the research and activism of feminists and women's organizations during the past thirty years. With the strength and determination of women who have been raped, those who have worked with them, and feminist legal activists, the movement against male sexual violence against women was able to identify the societal attitudes and beliefs shared by criminal justice personnel, that perpetuate the violence and render the responses of legal and social systems and institutions inadequate. On the basis of women's experiences and the realities of sexual violence, feminists and other advocates have demanded social and legal reform. As a result of these struggles for change, feminists and other advocates secured funding for rape crisis centres and transitions homes, state provision of support services and later programs for abusive men and an extensive overhaul of rape laws.

Changes to rape laws have attempted to limit judges' use of specious relevancy claims as justification for the improper admittance of a large body of information about women who have been raped. The inclusion in the 1997 reforms of a list of grounds, which on their own, were insufficient to establish the relevance of information in women's records reflected an understanding on the part of the legislators of the subjective nature of the determination of relevance. The fact that some judges have rejected defence applications for the disclosure of women's personal records is positive. Even if the equality analysis is inadequate or non-existent in these cases, the women are spared the humiliation and distortion that a detailed scrutiny of their past would create.

This is a positive step and illustrates that instrumental change to the law can have a positive impact and some forms of sexist and discriminatory beliefs can be successfully challenged. The most blatant applications of the recent complaint rule, corroboration

requirement, marital rape exemption and past sexual history evidence have been curtailed. There is no doubt there have been improvements. Due to the positive impacts of the public education and consciousness-raising effected by three decades of feminist struggles, the public is more aware that the law doesn't work for women who have been raped, women are more likely to conceive a sexual invasion as criminal, and women are prepared to seek sanction against more powerful men and men who abused their positions of trust or authority.¹⁶⁶ Through improvements to the applications of the legal system, some criminal law professors, defence and Crown counsel and judges consciously acknowledge and reject the overt use of damaging myths and stereotypes about women who have been raped. Conversely however, categories of rape myths and stereotypes continue to be used against women whose lives have been heavily documented and/or who have been subjected to myths and stereotypes about their sexuality and sexual practices. These women are subjected to intersecting inequalities. Myths about Aboriginal women, women who have been imprisoned, women involved with child welfare agencies, racialized women, lesbians and women with disabilities, intertwine to obscure and render unrecognizable gendered inequalities that perpetuate male sexual violence against these women. The tension created by the benefits gained for some women through improvements to the application of the legal system, particularly the trial process and the exacerbation of other women's experiences during the rape trial process, appears on the surface to be contradictory and ripe for the criticism that feminist law reformers and feminists engaging with the law "do not know what they want." However, I believe that the tension is the product of the improvements feminists have made to the law, and is inherent in the feminist pursuit of a notion of equality that is based on revealing the inequalities that women suffer. Both of these are cause for celebration because it means that as feminists we are continuing to push the limits of law reform in

¹⁶⁶ *Supra* note 33 at 74.

order to address the specific needs and problems that *all* women experience. The two are not mutually exclusive and in order to adequately reach this goal we have to continue to raise concerns about focusing solely on one aspect. This leads me to an issue I raised at the beginning of this paper. If we continue to focus solely on legal reforms that only require doctrinal changes, tinkering with legal definitions and technicalities and heightened penalties, we risk reinforcing existing discriminations that result in gendered power imbalances, and gendered systemic inequalities. The underlying problem of male sexual violence against women will not be addressed in a way that promotes the value of all women and redefines rape in a way true to its complex social and political context.¹⁶⁷ This problem brings us to the fundamental challenge: are there steps that can be taken to ensure that we do not exacerbate systemic discrimination and bias and instead ensure that the interests of all women are served by societal and legal reform?

The research in this paper does not offer much in the way of hope or encouragement. The underlying gendered myths and stereotypes seem intractable. Today, categories of myths and stereotypes continue to transform information by and about the women who was raped into “relevant” evidence. There is so little consideration and understanding of the impact that the categories of myths and stereotypes have on judicial assessments of the relevance of particular pieces of information that evidence of a woman’s past sexual history, rules of corroboration, echoes of the marital rape exemption and the doctrine of recent complaint continue to resurface. Assumptions based on myths and stereotypes have led all levels of courts to re-insert legal requirements that were eliminated or limited by reform. As I have demonstrated throughout the paper, some judges start the decision-making process with the existing categories of myths and stereotypes of women who have been raped. Categories of myths and stereotypes combine to provide judges with the rationales to justify the disclosure of personal

¹⁶⁷ Maria Los, *supra* note 14 at 43.

information about a woman. This information is used to infer that a woman's conduct, a woman's choices and/or a disorder attributed to the woman are to blame for the woman's "perceived" experience of rape. This process has resulted in inferences that tend to fault women in virtually every disclosure case examined, regardless of whether or not disclosure was actually ordered. For example, myths and stereotypes were used to justify the introduction of evidence of a woman's past sexual history, which was then used to transform past incidents of sexual abuse and coercion into free and voluntary sexual conduct. Previous allegations of abuse were used to infer that the woman had a "pattern" of falsely alleging rape, which was then used to justify the introduction of detailed information of a woman's personal history such as drug and alcohol use, involvement with the police, involvement with child welfare agencies or counselling and therapeutic relationships.

By not unpacking the myths and stereotypes that permit judges to individualize the problem of rape and place the responsibility onto women, judges reinforce the assumption that equality exists between men and women. The gendered inequalities found in social policies on welfare and unemployment, workplace structures and family patterns that contribute to gendered power imbalances and to women's vulnerability to rape are ignored. Rape as an example of women's inequalities is ignored. Even where there is a legal response designed to curtail defence use of women's personal records, the response, because it remains mired in official legal discourse that is rooted in already existing practices and biases, masks the ultimate inequalities and directs attention away from more basic gendered inequalities. Rape law reform has provided a convenient and safe response to demands for greater equality for women who bring forth charges of rape, without disrupting the social, legal and political institutions that perpetuate inequality.

In the case of the disclosure of women's personal records, legislative changes provided a list of assertions the defence could not rely upon to request the disclosure of women's personal records. A review of the cases on defence disclosure applications

decided after the implementation of Bill C-46, revealed that judges permit the introduction of “other” information similarly premised on myths and stereotypes that promote gendered inequalities. This information is then used to transform insufficient grounds into relevant evidence and the legislative protections are thereby circumvented. The courts then assume equality in their considerations of women’s equality and privacy rights and the accused’s rights.

One of the primary concerns to consider then is the impact these reform efforts have on women who bring forth charges of rape. As discussed, information found in women’s personal records has been used to obscure the possible culpability of the accused and place the responsibility of the rape onto the woman who brings forth a charge of rape. These women are also placed at risk of being forced to expose potentially harmful and damaging information that may undermine current relationships and/or relationships with other family members.

Another concern is whether rape law reform efforts have addressed the fact that most women and children are raped by family members, acquaintances and those with whom they have a personal relationship. The use of women’s personal records in rape trial proceedings reveals that judges are not acknowledging the fact that the accused are, by virtue of their position as a family member, close family friend or teacher, in a position of trust, authority and thus are easily able to threaten the woman or child into remaining silent about the sexual assaults. Years of silence by children and women, combined with information in women’s records, are then used by defence counsel and judges to invoke myths and stereotypes in order to provide “other” explanations for why they are now coming forward with rape allegations. Even if more charges are being laid and cases are advancing through the court system, the use of information in women’s personal records undermines any potential positive effect of law reform.

Given these concerns, I think there is a need to consider what we want from rape law reform, research more fully the effects of rape law reform and the potential effects

given our understanding of the limits of law reform. At the same time, we need to continue to draw attention to and challenge less obvious and more insidious forms of categories of myths and stereotypes that perpetuate gendered inequalities which permit men to sexually assault and abuse women and children.

There is little indication that the legal reforms that have been enacted over the previous thirty years have exposed or challenged the myths and stereotypes that purport to explain or serve to rationalize male sexual violence against women. However, feminist engagement with law reform is one avenue necessary to address the problem of male sexual violence against women and children. It is a significant part of this struggle because it does affect women's lives. Before feminists decide to engage with law reform efforts, I think it is necessary to determine what we should expect from rape law reform and if law reform is an avenue we should pursue to achieve these expectations.

Attempting to codify away the use of myths and stereotypes in judicial decision-making infers that the problem is one of individual judges and/or individual decisions. It does not account for the fact that sexual violence against women is a function of categories of myths and stereotypes¹⁶⁸ which, in turn, are a function of the broader social, economic and political context. Without an understanding of how categories of myths and stereotypes individualize rape and obscure systemic gendered inequalities, we allow categories of myths and stereotypes to continue to construct the framework of social and legal responses to rape. As many feminists have argued¹⁶⁹ the objective of a rape trial, that is the determination of individual guilt or innocence, and the quest for "truth" are incompatible with an understanding of the social context in which the rape occurred. It is the role of the rape trial, and by implication law, in reinforcing categories of myths and

¹⁶⁸ *Supra* note 46 at 282.

¹⁶⁹ For example, Sherene Razack *supra* note 10 at 916; Diana Majury *supra* note 43 at 282; Kevin Bonnycastle, "Rape Uncodified: Reconsidering Bill C-49 Amendments to Canadian Sexual Assault Laws," in Dorothy E. Chunn and Dany Lacombe (eds.) *Law as a Gendering Practice* (Ontario:Oxford University Press, 2000) at 76.

stereotypes about women who have been raped that must be challenged. Categories of myths and stereotypes must be exposed and dismantled from legal concepts such as consent, submission, mistaken belief in consent, mistaken identity and/or motive to fabricate. By not permitting the reconstitution of myths and stereotypes through legal concepts used in rape trials, racists, classist, sexist and homophobic presumptions about women and the gendered inequalities that result in male sexual violence against women may be revealed.

REFERENCES

- Backhouse, Constance (1981) "Nineteenth Century Canadian Rape Law 1800-92", in David H. Flaherty ed., *Essays in the History of Canadian Law*, Toronto:Osgoode Society, 200-247.
- Backhouse, Constance (1991) *Petticoats and Prejudice: Women and Law in the Nineteenth-Century Canada*. Toronto: The Osgoode Society.
- Backhouse, Constance (2001) "The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth Century Canada and Australia", *Queen's Law Journal* 26:297-307.
- Bonnycastle, Kevin (2000) "Rape Uncodified: Reconsidering Bill C-49 Amendments to Canadian Sexual Assault Laws", in Dorothy E. Chunn and Dany Lacombe eds., *Law as a Gendering Practice*. Ontario:Oxford University Press, 60-78.
- Bond, Sadie (1993) "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance", *The Dalhousie Law Journal* 16: 416-447.
- Boyle, Christine (1991) "A Feminist Approach to Criminal Defences", in Richard F. Devlin ed., *Canadian Perspectives on Legal Theory*, Toronto: Edmond Montgomery, 273-289.
- Boyle, Christine (1984) *Sexual Assault*. Toronto: Carswell.
- Boyle, Christine, Marie-Andree Bertrand, Celine Lacerte-Lamentagne and Rebecca Shamia (1986) "A Feminist Review of Criminal Law" Ottawa: Status of Women Canada.
- Boyle, Christine (1994) "The Judicial Construction of Sexual Assault Offences", in Julian V. Roberts and Renate M. Mohr eds. *Confronting Sexual Assault: A Decade of Legal and Social Change*. Toronto: University of Toronto Press, 136-155.
- Busby, Karen (1997) "Discriminatory Uses of Personal Records in Sexual Violence Cases", *Canadian Journal of Women and the Law* 9: 149-177.
- Busby, Karen (1999) "Third Party Records Cases Since R.v.O'Connor", *27 Manitoba Law Journal* 3: 355-390.
- Busby, Karen (1999) "Why Convictions are Hard to Obtain in Sexual Violence Prosecutions", in Margo Rivera ed., *Fragment by Fragment: Feminist*

Perspectives on Memory and Child Sexual Abuse . Charlottetown: gnyergy books, 179-199.

Clark, Lorene and Debra Lewis (1977) *Rape: The Price of Coercive Sexuality*. Toronto: Women's Press.

Clark, Lorene and Debra Lewis (1991) "Women, Property and Rape", in Jane Banfield, ed., *Readings in Law and Society* , North York, Ont.: Captus Press, 291-7.

Dawson, Brettel (1985) "Legal Structures: A Feminist Critique of Sexual Assault Reform", *Resources for Feminist Research* 14: 40-43.

Edwards, Susan (1981) *Female Sexuality and the Law* . Oxford: Martin Robertson.

Feldberg, Georgina "Defining the Facts of Rape: The Uses of Medical Evidence in Sexual Assault Trials", *Canadian Journal of Women and the Law* 9: 89-114.

Kelly, Katharine, Connie Kristiansen and Susan Haslip (1999) "Memory on Trial: The Use of False Memory Syndrome in Court," in Margo Rivera ed., *Fragment by Fragment: Feminist Perspectives on Memory and Child Sexual Abuse* . Charlottetown: gnyergy books, 155-178.

Kelly, Katharine (1997) "You must be crazy if you think you were raped: Reflections on the Use of Complainant's Personal and Therapy Records in Sexual Assault Trials", *Canadian Journal of Women and the Law* 9: 178-195.

Lahey, Kathleen A. (1991) "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory," in Richard F. Devlin ed., *Canadian Perspectives on Legal Theory*, Toronto: Edmond Montgomery, 319-40.

Los, Maria "The Struggle to Redefine Rape in the Early 1980s", in Julian V. Roberts and Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* , Toronto: University of Toronto Press, 20-56.

MacKinnon, Catharine (1987) *Feminism Unmodified: Discourses on Life and Law* . Cambridge: Harvard University Press.

Majury, Diana (1994) "Seaboyer and Gayme: A Study InEquality", in Julian V. Roberts and Renate M. Mohr eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* . Toronto: University of Toronto Press, 268-291.

Martin, Sheila L. (1991) "The Control of Women Through Gender-Biased Laws on Human Reproduction," in Richard F. Devlin ed., *Canadian Perspectives on Legal Theory*. Toronto: Edmond Montgomery, 291-317.

- McIntyre, Sheila, Christine Boyle, Lee Lakeman, and Elizabeth Sheehy (2000) "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Laws", *Canadian Women Studies* 20: 72-83.
- Meredith, Colin, Renate Mohr and Rosemary Cairns Way (1997) "Implementation Review of Bill C-49", Ottawa: Department of Justice.
- Radford, J (1987) "Policing Male Violence - Policing Women", in J. Hamner and M. Maynard eds., *Women, Violence and Social Control*. London: MacMillan Press.
- Razack, Sherene (1994) "What Is to be Gained by Looking White People in the Eye?", *Culture, Race, and Gender in Cases of Sexual Violence*, *Signs* 19: 894-921.
- Razack, Sherene (1995) "From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities", *Law and Social Inquiry*. 891-922.
- Roberts, Julian V. and Renate M. Mohr (1994) *Confronting Sexual Assault : A Decade of Legal and Social Change* , Toronto: University of Toronto Press.
- Roberts, Julian V. and Michelle G. Grossman (1994) "Changing Definition of Sexual Assault: An Analysis of Police Statistics", in Julian V. Roberts and Renate M. Mohr eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* , Toronto: University of Toronto Press, 57-83.
- Sheehy, Elizabeth (2000) "From Women's Duty to Resist To Men's Duty to Ask: How Far Have We Come?", *Canadian Woman's Studies* 20: 98-104.
- Smart, Carol (1989) *Feminism and the Power of Law* , London: Routledge.
- Smith, Dorothy (1990) *The Conceptual Practices of Power: A Feminist Sociology of Knowledge*. Toronto: University of Toronto Press.
- Snider, Laureen (1990) "The Potential of the Criminal Justice System to Promote Feminist Concerns", *Studies in Law, Politics and Society* 10: 143-172.
- Snider, Laureen (1994) " Legal Reform and Social Control: The Dangers of Abolishing Rape" in Ronald Hinch ed., *Readings in Critical Criminology*. Scarborough: Prentice-Hall Canada.
- Snider, Laureen (1994) "Feminism, Punishment and the Potential for Empowerment", *Canadian Journal of Law and Society* 9: 75-105.

Torrey, Morrison (1991) "When Will We Be Believed? Rape Myths And The Idea Of A Fair Trial In Rape Prosecutions," *U.C. Davis Law Review* 24: 1-127.

Veldhuis, Cindy and Jennifer Freyd (1999) "Groomed for Silence, Groomed for Betrayal," in Margo Rivera ed., *Fragment by Fragment: Feminist Perspectives on Memory and Child Sexual Abuse* . Charlottetown:gnyergy books, 253-282.

Williams, Patricia J, (1991) *The Alchemy of Race and Rights: Diary of a Law Professor*. Cambridge: Harvard University Press.

Women's Legal Education and Action Fund (1996) *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* . Toronto:Edmond Montgomery.

CASES

R.v R.v A.M

R.v Aka (1998) O.J. No. 1414 (Gen. Div)

R. v A.P.B., (1997) O.J. No.1875 (Gen.Div)

R. v Bane, (1996) O.J. No. 2750 (Gen.Div)

R.v Carosella (1997) S.C.J. No. 12.

R.v C.V.G., (1997) S.J. No.621 (Q.B.)

R.. v D.D.W., ((1997) B.C.J. No.744 (C.A.)

R. v D.S., (1996) N.J. No. 277 (S.C.)

R.v E.A.N., (1997) B.C.J. No.3001 (S.C.)

R. v Harges, (1997) B.C.J.No.32(S.C.) *R.v Herbert*, (1997) O.J. No.4769 (Gen.Div.)

R.v Hurrie, (1997) B.C.J. O.J. No.2634 (S.C.)

R. v I.D.B., (1997) O.J. No. 3198 (Gen.Div)

R.v J.F.G., (1997)N.W.T.J. No.38 (S.C.)

R. v J.G.L.,(1997) O.J. No.4953 (C.A.)

R. v Kliman, (1998) B.C.J. No.49 (S.C)

R. v L.L.(A) (1996) 44 C.R.(4)91 (S.C.C.).

R. v MacCallum, (1996)N.S.J. No.203 (S.C); *R. vM.L.W.*, (1996)S.J. No.776(Q.B)

R. v Maramba, (1996) O.J. No.4721 (Gen.Div.);

R.v Miller, (1997) N.J. No.207 (Prov. Ct.)

R. v Murray, (1997) N.J. No.210 (S.C. (T.D.))

R. v N.R., (1997)O.J. No.80 (Prov. Div.)

R .v Nitsiza, (1997)N.W.T.J. No.14(S.C.)

R. v O'Connor, (1996) 2 W.W.R. 153 S.C.C.

R. v Osolin, (1993) 4 S.C.R.

R .v R.H., (1996) N.J. No. 344 (S.C.)

R. v R.M., (1997) B.C.J. No.1308 (C.A.);

R.v Romano, (1997) B.C.J. No.2437 (Prov.Ct.)

R. v Ross, (1997) O.J. No.4627

R. v Seaboyer and Gayme ((1991), 66 C.C.C (3d) 321 (S.C.C))

R.v Whitehouse, (1997) N.S.J. No. 431