FEMINIST ARGUMENTATION BEFORE THE SUPREME COURT OF CANADA IN *R. v. SEABOYER*; *R. v. GAYME*: THE SOUND OF ONE HAND CLAPPING

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A. *INTRODUCTION*

The Canadian Charter of Rights and Freedoms[1] and, more specifically, the sections which 'guarantee' equality, sections 15 and 28,[2] present Canadian feminist litigators with a unique opportunity to articulate women's realities within a constitutional framework and to demand a legal response. The recent decision of the Supreme Court of Canada in *R. v. Seaboyer*; *R. v. Gayme*[3] makes it plain, however, that the right to speak and make an argument does not include a corresponding obligation on the part of judges to listen, to understand, or even to answer feminist analysis.

The case law decided pursuant to the Charter attests to the prescience of those Canadian academics who articulated a critique of Charter rights. These authors warned that the Charter would prove most advantageous to the interests already served by law, to those with the wealth and wherewithal to use legal means, and to those whose 'rights' in fact present little by way of challenge to our economic and political structures.[4] Furthermore, they predicted that legislative gains achieved through the democratic process such as social welfare legislation, workplace safety laws and collective bargaining rights would become vulnerable to Charter challenge, and that our ability to recover from such losses would be extremely limited given that other forms of political struggle have been weakened by the emphasis on the Charter.

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1 Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), c. 11 [hereinafter 'Charter'].

2 Section 15(1) reads as follows: 'Every individual is equal before and under the law and has the right to the equal protection ... of the law without discrimination ... based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' This section was not declared in force until 1985. Section 28 reads: 'Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.'

3 (1991) 48 O.A.C. 81 (S.C.C.).

4 For a sampling of this very important literature, see: Fudge, J., 'The Effect of Entrenching a Bill of Rights Upon Political Discourse: Feminist Demands and Sexual Violence in Canada' (1989) 17 *International Journal of the Sociology of Law* 445; Fudge, J., 'The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases' (1989) 3 *Canadian Journal of Women and the Law* 246; Ison, T. G., 'The Sovereignty of the Judiciary' (1985-6) 10 *Adelaide Law Review* 1; Petter, A., 'The Politics of the Charter' (1986) 8 *Supreme Court Law Review* 473; Petter, A., 'Legitimizing Sexual Inequality: Three Early Charter Cases' (1989) 34 *McGill Law Journal* 358; McIntyre, S., 'Journey Through Unchartered Territory' (1983) 4 *Broadside* 8; McIntyre, S., 'The Charter: Driving Women to Abstraction' (1985) 6 *Broadside* 8; Glasbeek, H. J. and Mandel, M., 'The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms' (1984) 2 *Socialist Studies* 84; and Hasson, R., 'What's Your Favourite Right? The Charter and Income Maintenance Legislation' (1989) 5 *Journal of Law and Social Policy* 1.

The negative implications of the Charter are starkly illustrated in the area of women's rights. Feminist litigators have had an influence upon the shape of equality doctrine as it emerges from the Supreme Court[5] and there have been several victories which benefit women.[6] However, not one of the successful cases was decided in reliance upon women's section 15 equality rights. The narrowness of those cases and the overall patterns of Charter litigation suggest that the gains which women have made through the political process are in jeopardy.

In this comment, I roundly criticize the majority opinion in *Seaboyer*, both in terms of result and in terms of failure to grapple with the challenging feminist arguments put to the Court. I argue that the result in *Seaboyer* is reflective of larger patterns of Charter outcomes which are shaped by, among other things, the underlying structures of the criminal trial and of the Charter itself. This is not to suggest that feminists should disengage altogether from Charter litigation: we do not have much choice other than to defend legislative gains against Charter challenge and Charter test cases may be one of several significant strategies available to oppose repressive laws and policies. I am, however, arguing that the structures and patterns of Charter litigation pose significant limitations on what we can achieve or preserve through this avenue. And, while our efforts in this regard will provide valuable lessons for our future strategies, in some areas of the law — and rape may well be one of them — decisions like *Seaboyer* may demand that we shift our focus away from reliance on litigation, and perhaps away from law altogether, in light of these constraints.

In the first part of this comment I summarize the ruling in the *Seaboyer* case. In the second part I use other Charter cases and, more particularly, *Seaboyer*, to demonstrate how and why women have so much to lose through the operation of the Charter. In my conclusion, I raise questions as to the directions that our future efforts around ending rape might take.

[5] See for example, *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 and *R. v. Turpin* [1989] 1 S.C.R. 1296 where interventions by the Women's Legal Education and Action Fund, a feminist litigation foundation, apparently influenced the Court in its rejection of a formal equality model, *i.e.* 'treating likes alike', in favour of a substantive equality theory. For a commentary on the equality model adopted by the Courts in *Andrews* see Eaton, M., '*Andrews v. Law Society of British Columbia*' (1990) 4(1) *Canadian Journal of Women and the Law* 276.

[6] In *Brooks v. Canada Safeway Ltd* [1989] 1 S.C.R. 1219 the Court interpreted a human rights code prohibition against sex discrimination as including discrimination based upon pregnancy; in *Janzen v. Platy Enterprises Ltd* [1989] 1 S.C.R. 1252 it held that sexual harassment also amounts to sex discrimination under human rights law; in *R. v. Morgentaler* [1988] 1 S.C.R. 30 the Court struck down the Criminal Code prohibition against abortion as offending s. 7 of the Charter; in *Tremblay v. Daigle* [1989] 2 S.C.R. 530 the Court refused to permit the alleged 'father' of a foetus to intervene to prevent the woman from securing an abortion; in *R. v. Canadian Newspapers Co. Ltd* [1988] 2 S.C.R. 122 the Court upheld the section of the Criminal Code which prohibits publication of identifying information about a woman who has been raped against a 'free speech and press' Charter claim by the newspapers; in *R. v. Lavallee* (1990) 55 C.C.C. (3d) 97 (S.C.C.) the Court produced a generous interpretation of the defence of self defence for women who kill their abusive partners; and finally, in *R. v. Sullivan* (1991) 3 C.R. (4th) 277, in the context of prosecutions against two midwives, the Court held that the words 'person' and 'human being' in the Criminal Code offence of criminal negligence do not include a foetus. For an assessment of the impact of *Andrews*, *Janzen*, and *Brooks* upon equality doctrine from a feminist standpoint see Majury, D., 'Equality and Discrimination According to the Supreme Court of Canada' (1991) 4(2) *Canadian Journal of Women and the Law* 407.

B. *R. v. SEABOYER*; *R. v. GAYME*

The accused in two separate prosecutions challenged the constitutionality of sections 276 and 277 of the Criminal Code of Canada.[7] These sections, which protected a woman who testified as the primary witness[8] in rape prosecutions against questions regarding her past sexual history, were part of a comprehensive rape law reform package enacted in 1982. The precipitating lobby had emphasized the under-reporting and high acquittal rates for rape prosecutions.[9] Through these reforms, rape became a three-tiered, gender neutral offence of sexual assault and the unique evidentiary practices which had previously dominated the prosecution of rape were, for the most part, eliminated from the Code.[10]

Sections 276 and 277 constituted responses to the very specific legacy of judicial rulings on the admissibility of women's sexual history evidence. A predecessor section, section 142, had been enacted by Parliament in 1976 in an effort to curb the unrestricted cross-examination of women in rape trials. This section required notice in writing regarding the proposed evidence and a judicial determination in a *voir dire* that 'the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings . . .'.[11] Subsequent case law interpreting this legislative effort to curb judicial discretion resulted in the *expansion* of defence counsel's scope for cross-examination of women.[12] Commentators have noted that this law reform essentially failed in its purpose.[13]

The 1982 amendments in the form of sections 276 and 277 therefore foreclosed absolutely the exercise of judicial discretion regarding the admissibility of sexual reputation and history evidence. Section 277 rendered evidence of sexual reputation inadmissible in sexual assault prosecutions. Section 276 imposed a strict bar upon evidence of the complainant's sexual activities in such trials with the exception of the following four situations: past sexual relations between the accused and complainant; evidence to rebut prosecution evidence regarding the complainant's sexual history; evidence tending to establish the identity of the assailant; and evidence regarding sexual relations which took place on the same occasion in support of the accused's belief that the complainant consented.

At trial in the *Seaboyer* and *Gayme* cases, each accused claimed that the sections infringed upon the conduct of his defence in violation of sections 7 and

7 The Criminal Law Amendment Act, S.C. 1980-81-82, c. 125, 2. 246.6, renumbered as s. 276, R.S.C. 1985, c. C-46.

8 T. Brettel Dawson is to be credited for her effort to find a descriptive phrase for the woman who has been raped which is not derogatory: Dawson, T. B., 'Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance' (1987-8) 2 *Canadian Journal of Women and the Law* 310.

9 One important study which shaped the lobby and the legislative response was Clark, L. and Lewis, D., *Rape: The Price of Coercive Sexuality* (1977).

10 For a detailed description and analysis of the reforms see Boyle, C., *Sexual Assault* (1984).

11 Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 8.

12 *Forsythe v. R.* [1980] 2 S.C.R. 268 and *R. v. Konkin* [1983] 1 S.C.R. 388. For a commentary upon *Forsythe* see Boyle, C., 'Section 142 of the Criminal Code: A Trojan Horse?' (1981) 23 *Criminal Law Quarterly* 253.

13 See Boyle, *supra* n. 12.

11(d) of the Charter.[14] The two cases were joined on appeal to the Ontario Court of Appeal. At this level and before the Supreme Court of Canada, several public interest groups presented interveners' briefs, including the Canadian Civil Liberties Union (CCLU) (supporting the position of the accused) and the Women's Legal Education and Action Fund (LEAF) (supporting the validity of the legislation).

The Court of Appeal held that there *may* be situations in which an individual accused's Charter rights would be violated, but instead of declaring the legislation invalid, held that trial judges should be able to find a 'constitutional exemption' in particular circumstances and hear the evidence in a *voir dire* in order to decide whether it should be admitted at trial.[15]

On further appeal to the Supreme Court of Canada, the majority, in a 7-2 decision, held that section 276 violated section 7 of the Charter.[16] The Court rejected the 'constitutional exemption' approach used by the Ontario Court of Appeal on the basis that 'the result will accomplish, in essence, precisely what striking down would do — set up a regime based on common law notions of relevancy'.[17] The majority went on to hold that section 276 could not be justified under section 1 as 'demonstrably justified in a free and democratic society'[18] and that therefore the section was void and inoperable.

On behalf of the majority, Justice Beverley McLachlin first dismissed the argument that evidence of past sexual conduct will be used to suggest that a woman who is sexually active is more likely to have consented or to perjure herself by fabricating a rape: 'These twin myths are now discredited.'[19] She then went on to give examples of 'relevant' sexual history evidence which are in fact premised upon these very myths: the extortionate prostitute and the sexually active teenager who 'cries rape' to cover for her own sexual behaviour.[20] In designating these hypotheticals as 'relevant', McLachlin J. simply adopted

[14] Section 7 reads: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' Section 11 reads: 'Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal'.

[15] (1987) 37 C.C.C. (3d) 53. In response to the argument by the C.C.L.U. that the use of the *voir dire* would presuppose the routine admission of evidence to determine its admissibility, the Ontario Court of Appeal stated, at 70:

> Most of the time [a *voir dire*] will not be necessary to hear the evidence at all. On the statement of counsel describing proposed evidence the trial judge can determine whether the evidence is necessary to provide a fair trial. Where there is a doubt a *voir dire* ... will be held to dispel that doubt.

Yola Grant has published a trenchant criticism of the Ontario Court of Appeal decision: Grant, Y., 'The Penetration of the Rape Shield: *R. v. Seaboyer and R. v. Gayme* in the Ontario Court of Appeal' (1989-90) 3(2) *Canadian Journal of Women and the Law* 592.

[16] Section 277 was upheld because: 'There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. It follows that the evidence excluded can serve no legitimate purpose in the trial. Section 277, by limiting the exclusion to a purpose which is clearly illegitimate, does not touch evidence which may be tendered for valid purposes, and hence does not infringe the right to fair trial': (1991) 48 O.A.C. 81, 109.

[17] (1991) 48 O.A.C. 81, 129.

[18] Section 1 reads: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

[19] (1991) 48 O.A.C. 81, 98.

[20] *Ibid.* 113, 110-11.

McCormick's definition: 'Relevant evidence, then, is evidence that in some degree advances the inquiry . . .'.[21]

Referring specifically to McLachlin J.'s two examples, I note that we have neither data nor proven 'experience' to support the ideas that prostitutes are more likely to engage in extortion than others or that young women 'caught out' are more likely to 'cry rape' to cover a pregnancy or to avenge themselves. Given the absence of supporting data, and I do not consider acquittals secured through use of such evidence to be 'proof' of the defence's allegations,[22] this understanding of 'relevance' appears to encompass any evidence capable of belief which might influence the verdict. Needless to say, such an expansive and uncritical understanding of 'relevance' is not necessarily consistent with the search for truth, particularly when we are cognizant of the pervasiveness and influence of rape myths.[23] The only way that evidence that a woman is a prostitute or that a young woman has had sexual relations 'advances the inquiry' is if that information suggests to the trier of fact that such a woman is more likely to have consented and to have lied about the rape.[24] Thus, while McLachlin J. said on the one hand that these are 'improper' inferences,[25] these are in fact the *only* inferences which can be drawn from sexual history evidence in her two hypotheticals. The 'twin myths' have not been 'discredited', but rather enshrined in the majority's own judgment.

McLachlin J. then held that the exclusion of the kinds of exculpatory evidence posited in her judgment (that is, the extortionate prostitute and the devious teenager) violates the accused's 'right' to make full answer and defence in accordance with the concept of 'fundamental justice' embodied in section 7 of the Charter. While she conceded that women and complainants may have countervailing Charter rights in sections 7 (right to security of the person) and 15 (equality), these interests were not determinative because 'a measure which denies the accused the right to present a full and fair defence would violate section 7 in any event'.[26] Using tautological reasoning, she argued that section 1 could not save the law: 'To the extent [section 276] excludes relevant defence evidence whose value is not clearly outweighed by the danger it presents, the section is overbroad.'[27]

21 *Ibid.* 105, quoting McCormick, C., *McCormick's Handbook on the Law of Evidence* (1972) 438-40.

22 McLachlin J.'s majority judgment used examples from cases (*supra* n. 3, 110-12), but oddly enough, failed to square this reliance with her own acknowledgement (*ibid.*, 98) of a history of discriminatory beliefs about women in the context of rape trials.

23 For a discussion of the studies which document the impact of these beliefs and sexual history evidence upon the outcome of rape trials see the dissent in *Seaboyer*, *supra* n. 3.

24 For more detailed feminist analyses of the concept of 'relevance' see Dawson, *supra* n. 8; Boyle, *supra* n. 12; Temkin, J., 'Regulating Sexual History Evidence — The Limits of Discretionary Legislation' (1984) 33 *International and Comparative Law Quarterly* 942, and *Rape and the Legal Process* (1987); Tong, R., *Women, Sex and the Law* (1984), 106-9; Estrich, S., *Real Rape* (1987), 50-53; Adler, Z., 'The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation' [1985] *Criminal Law Review* 769; Scutt, J., 'Admissibility of Sexual History Evidence and Allegations in Rape Cases' (1982) 45 *Modern Law Review* 664; and Sheehy, E., 'Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?' (1989) 21 *Ottawa Law Review* 741.

25 *Seaboyer*, *supra* n. 3, 110.

26 *Ibid.* 98.

27 *Ibid.* 127.

The majority judgment thus reinstituted the *voir dire* system rejected by Parliament in its 1982 amendments, while expressing the hope that sexual history evidence could now be used by both judges and jurors without the influence of discriminatory beliefs.[28] Although she claimed that the situations in which such evidence will be admissible will be 'exceptional',[29] McLachlin J.'s non-exhaustive list of appropriate evidence invites defence counsel and judges to use their imaginations: 'Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant'; 'Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused believed that the complainant was consenting . . .'; and 'Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence . . .'.[30]

The dissent in *Seaboyer* challenged the majority opinion on every point regarding section 276. In this dissent, we see feminist argumentation reflected and indeed further developed in an incisive, uncompromising judgment. The marked constrast in method and stance between the majority and dissenting opinions is amply illustrated by the opening sentences of Justice Claire L'Heureux-Dubé's judgment:

> Of tantamount importance in answering the constitutional questions in this case is a consideration of the prevalence and impact of discriminatory beliefs on trials of sexual offences. These beliefs affect the processing of complaints, the law applied if and when the case proceeds to trial, the trial itself and the ultimate verdict. It is my view that the constitutional questions must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis.[31]

Unlike McLachlin J., L'Heureux-Dubé J. used statistics, legislative history, feminist jurisprudence and a contextual analysis grounded in the reality of rape in women's lives to address fully the arguments and interests on both sides of the issue of the constitutionality of section 276. The paradox is that while *Seaboyer* represents a devastating loss for individual women and for the feminist movement, L'Heureux-Dubé J.'s dissent, joined by Gonthier J., is likely to receive academic attention as an example of feminist jurisprudence rivalling the judgments of Justice Bertha Wilson[32] (as she then was) and, ultimately, this dissent is likely to become the majority judgment in the future.

C. *THE IMPACT OF THE CHARTER*

Having described and commented briefly upon *Seaboyer*, I now propose to use *Seaboyer* to extend the critical analysis of Charter litigation in light of feminist agendas. In the section which follows I use the various arguments which together make up a critique of the Charter to structure my analysis. For each argument, I provide examples drawn from other Charter cases to illustrate the ways in which Charter litigation is either damaging or limiting for women's interests. I then underline these points by reference to the majority judgment in *Seaboyer*.

28 *Ibid.* 137.
29 *Ibid.*
30 *Ibid.* 138-39.
31 *Ibid.* 154.
32 See the judgments in *Morgentaler* and *Lavallee*, *supra* n. 6.

Women are Rarely the Primary Litigants

Women are very much on the defensive in the scheme of Charter litigation. In a 1989 publication, *Women and the Canadian Charter of Rights and Freedoms: One Step Forward or Two Steps Back?*[33] the authors found that in the first three years of equality litigation, 17 of 591 cases were argued by or on behalf of 'disadvantaged' groups; the rest were forwarded by men and corporations![34] Fifty-two of these claims were sex equality claims, but only *nine* were pursued by women. The remaining cases were litigated by men on behalf of themselves or foetuses.[35] Therefore, in many of the major cases involving women's rights, feminist litigators have acted as either parties or interveners *defending* against Charter challenges to sex specific sexual assault laws,[36] evidence laws,[37] a 'women only' teachers' union,[38] hate propaganda laws[39] and the obscenity law,[40] among others.

Women's low rate of initiating Charter claims is unlikely to change dramatically in the future.[41] The prohibitive costs of Charter litigation[42] and the survival needs of those who have suffered discrimination (who are therefore reluctant to take on the social consequences of assuming the legal status of 'victim'[43]) are continuing obstacles to women's participation in Charter litigation.

Furthermore, it is neither simple nor certain that we can articulate a 'women's' position on many issues involving claims to equality. Women of colour, white women and First Nations women may start with different understandings of their oppression; white women may stand in relations of dominance and racism with respect to non-white women; and we may have political priorities which are not identical.[44] It may also be difficult to prepare a 'women's' position in the context of litigation given class differences[45] and competing feminist visions.[46]

33 Brodsky, G. and Day, S. (1989).

34 *Ibid.* 118-19.

35 *Ibid.* 119, 128.

36 *R. v. Hess; R. v. Nguyen* [1990] 2 S.C.R. 906.

37 *Seaboyer, supra* n. 3.

38 *Re Tomen and Federation of Women Teachers' Association of Ontario* (1987) 61 O.R. (2d) 489, affirmed (1989) 70 O.R. (2d) 48.

39 *R. v. Keegstra* [1990] 3 S.C.R. 697 (defended by LEAF on the basis that 'obscenity' laws also constitute a form of 'hate propaganda').

40 See *R. v. Butler* [1991] 1 W.W.R. 97 (legislation upheld as valid), argued before the Supreme Court of Canada on June 6, 1991: 'LEAF urges Court to uphold obscenity provision using harm-based approach in pornography case' (1991) 4(3) *Leaflines* 3.

41 While Brodsky and Day, *supra* n. 33, 210 argue that women should increase their efforts to be heard in Charter litigation, one author has noted that Brodsky and Day's own data suggest that 'more Charter' is unlikely to advance women's claims: Cossman, B., 'Dancing in the Dark: A review of Gwen Brodsky and Shelagh Day's *Canadian Charter Rights for Women: One Step Forwards or Two Steps Back?*' (1990) 10 *Windsor Yearbook of Access to Justice* 223, 232.

42 The cost of litigating an important case (to the highest court) was estimated at between $250,000 and $300,000 as of 1989: Brodsky and Day, *supra* n. 33, 44, n. 39.

43 Bumiller, K., 'Victims in the Shadow of the Law: A Critique of the Model of Legal Protection' (1987) 12 *Signs: A Journal of Women in Culture and Society* 421.

44 Thornhill, E., 'Focus on Black Women!' (1985) 1(1) *Canadian Journal of Women and the Law* 153.

45 The case of *Symes v. The Queen* [1989] C.T.C. 476 (since reversed by the F.C.A., decision as yet unreported) involved a sex equality claim by a well known feminist lawyer arguing for the deductability of child care costs as a business expense and as such illustrate how class divides 'women' as a legal category: Woodman, F., 'Child Care Expense Deduction, Tax Reform and the Charter: Some Modest Proposals' (1990) 8 *Canadian Journal of Family Law* 371, 377, 383, and

Many women have exposed the race of the voice used by feminists and have begun to articulate an understanding of racism and sexism.[47] In addition, LEAF has responded with a change in Board membership and a consultative process intended to make its litigation work representative of all women. This project of transformation is of vital political importance. However, its painstaking progress means that feminists cannot (and must not) flood the courts with sex equality claims in numbers comparable to those filed by men and corporations.

The structure of the criminal trial dictates further constraints. Women will rarely act as the primary litigants in criminal law Charter suits: women are infrequently in the position of accused and women in the role of 'complainant' do not have legal status as parties. A 'complainant' will not ordinarily have her own lawyer or be entitled to a legal aid certificate and, even if she retains counsel, it is questionable whether that lawyer would have standing to interfere in the conduct of a criminal trial.

The litigants in *Seaboyer* were of course the accused men and the state as represented by the Crown and those Attorneys-General who decided to argue in favour of the constitutionality of section 276. The interests of women as a group were defended by LEAF in the role of intervener.

Women could have launched a Charter claim to argue that section 276 was not being enforced by Crown attorneys[48] or that the section was unconstitutionally broad because it placed no temporal limit on the use of sexual history evidence if the accused and the primary witness had ever had a prior sexual relationship. Feminist lawyers could also have challenged the subjective basis for the 'mistake of fact' defence.[49] However, finding the context in order to make this kind of claim is problematic. It would have been difficult indeed for women to have initiated a Charter challenge in the form of a reference: the standing rules have been relaxed considerably by the Court,[50] but the availability of other 'reasonable

Maloney, M., '*Symes*: A Case By Yuppies, For Yuppies and About Yuppies' unpublished manuscript available from the author at the University of Victoria Faculty of Law, Victoria, British Columbia.

46 As Laureen Snider has commented, '[S]tudies of women in the criminal justice system point out the dangers of attempting to make women's conditions in prison "equal" to those of men': 'Rethinking Feminism and Law', Draft Plenary paper for the International Feminist Conference on Women, Law and Social Control, Mont Gabriel, Quebec, July, 1991, 11. For example, in the context of claims for sexual and racial equality in terms of the federal prison for women in Canada, arguments regarding the need for First Nations women to serve their sentences close to their communities and demands for improved prison services for women have culminated in a promise by the federal government to build more and better prisons for women! See Hossie, L., 'Women charge discrimination at prison' *The Globe and Mail* (Toronto) 23 June 1990, and Barron, S., 'Life and Death in the Cage' *The Ottawa Citizen* (Ottawa) 9 March 1991.

47 See for example the work of Thornhill, *supra*, n. 44; Hébert, J., '"Otherness" and the Black Woman' (1989) 3(1) *Canadian Journal of Women and the Law* 269; Ng, R. 'Immigrant Women: The Construction of a Labour Market Category' (1990) 4(1) *Canadian Journal of Women and the Law* 96; Monture, P., 'Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah' (1986) 2(1) *Canadian Journal of Women and the Law* 159; and Kline, M., 'Race, Racism and Feminist Legal Theory' (1989) 12 *Harvard Women's Law Journal* 151.

48 McGillicuddy, P., who worked for the Sexual Assault Care Centre at the Women's College Hospital in Toronto, Canada, has said that in attending sexual assault trials, she has rarely seen Crown attorneys enforce the ban on sexual history evidence. Telephone interview, June 16, 1989.

49 See *R. v. Pappajohn* [1980] 2 S.C.R. 120 and Sheehy, *supra* n. 24, 760 ff. for a description of the more recent 'mistake' cases and for a Charter argument.

50 *Borowski v. Canada (No. 1)* [1981] 2 S.C.R. 575.

and effective' means by which the issue could be brought before the courts suggests that a group such as a coalition of rape crisis centres may not have been permitted to pursue a reference.[51] A feminist organization could have perhaps gone on the offensive and sought out a woman testifying as the primary witness in a particular rape trial in order to create a test case. However, apart from the legal hurdles of the woman's non-party status and LEAF's role as an intervener at trial, how can feminists in good faith ask a woman who has survived a rape to sacrifice herself by shouldering a lengthy and painful litigation process through to the Supreme Court?

Defensive Strategies Must be Conservative Strategies

The difficulties presented by operating on the defensive are manifest. Women's groups and lawyers have less time and money to develop their own cases; they must act quickly and sometimes without an opportunity for consultation with the wider feminist community.

An additional difficulty is created by the fact that women's groups do not ordinarily receive notice of an accused's intention to challenge, at trial, the constitutionality of criminal legislation. LEAF lawyers must constantly be on the look-out for appellate cases which raise issues of concern to women so that intervener status can be sought. The problem with intervention at this later stage is that it is extremely difficult to introduce women's experience through oral testimony and statistical and expert evidence in an appellate court as opposed to a trial court. Certainly, Crown Attorneys and Attorneys-General cannot be relied upon to lay an adequate evidentiary groundwork at trial because they have been notoriously remiss in defending against Charter challenges.[52] Failure to comprehend the issues and to properly prepare a Charter argument may be even more prevalent where Crown Attorneys are prosecuting 'gendered' offences such as sexual assault.[53]

A final implication of operating on the defensive in Charter litigation is that feminists must respond to the structure and content of the accused's arguments and we may posit alternative arguments in a last ditch effort to preserve women's gains. While emphasizing that very radical arguments have been advanced by feminist litigators in Canada and that the question of reliance upon more traditional forms of argumentation has been an issue in debate among femin-

51 This test of whether there is some 'other effective and reasonable manner in which the issue may be brought before a court' is from *Borowski (No. 1)*, *ibid.* 598. In another case this test was applied to deny a reference on specific questions which the court held were likely to be raised instead in the criminal context once someone was charged under the law at issue: *Canadian Council of Churches v. Canada* (1990) 46 C.R.R. 290, 307, 310.

52 Brodsky and Day, *supra* n. 33, 62-66. For a recent example of a case in which the Crown failed to present an argument under s. 1 of the Charter (that the infringement upon Charter rights posed by the due diligence defence for the offence of false advertising was 'demonstrably justified in a free and democratic society') see *R. v. Wholesale Travel Group Inc.* (1989) 70 O.R. (2d) 545, reversed and sent back for trial by the Supreme Court: (1991) 4 O.R. (3d) 801.

53 Several Crowns have publicly expressed the view, for instance, that women's sexual history evidence *is* 'relevant' and that men are unfairly disadvantaged by its exclusion: Doherty, D., (now Justice Doherty) '"Sparing" the Complainant "Spoils" the Trial' (1984) 40 C.R. (3d) 55 and Paciocco, D., 'The *Charter* and the Rape Shield Provisions of the *Criminal Code*: More About Relevance and the Constitutional Exemptions Doctrine' (1989) 21 *Ottawa Law Review* 119.

ists,[54] some of the arguments advanced by feminist lawyers in Charter cases could nonetheless be described as conservative of the *status quo*.

As an example, in the case involving the challenge to the 'women only' rule for a teachers' union, one author has noted that the 'women only' rule was first defended by reliance upon sex equality arguments and secondarily on the basis that union rules were outside of Charter scrutiny because the organization was a 'private' entity.[55] The invocation of the 'public/private' distinction was perhaps necessitated by the extreme consequences of losing the case, but it may put at risk our other efforts to dismantle the distinction in the realm of labour and violence within the home.

The *Seaboyer* case also put women in a defensive position. The absence of a feminist voice at the trial level in the role of either litigant or intervener has important implications in terms of the shape of the argument ultimately put before the Court. In *Seaboyer*, LEAF did an excellent job of including affidavit evidence from rape crisis workers and other experts in its brief to the appellate courts. However, this evidence was never referred to by the judges in oral argument at the Supreme Court of Canada or in the written judgment and seemingly had no influence on the outcome. One might speculate that material which does not form part of the record at trial is unlikely to be fully incorporated into the judicial deliberations.

Furthermore, the lawyer who defended section 276 at the Ontario Court of Appeal[56] argued *in favour* of the 'constitutional exemption' approach. He thus conceded that some forms of sexual history evidence are 'relevant' and that the Charter might be violated in particular circumstances, described only as those involving malice, fabrication or fantasies. This tactic may have represented good judgment in terms of salvaging something of the legislation, but it is certainly questionable whether the 'constitutional exemption' doctrine in fact accomplishes this goal. On the other hand, this strategy was not particularly radical in that there was no unequivocal defence of a rape shield law,[57] much less was there a challenge to the defects in section 276 from the point of view of women. In addition, Judy Fudge has noted that the argument presented at this level of court failed to address and question the 'discourse of sexuality' used to represent the experience of rape such as the 'consent' versus 'coercion' dichotomy.[58]

Ironically, the long delays preceding Supreme Court argument permitted LEAF to hold a national consultation to reconsider its argument in the *Seaboyer* case. As a consequence, LEAF's case development process was altered in a very positive way and LEAF's lawyer[59] presented a far more radical argument at the Supreme Court of Canada. Not only did she defend section 276 in a wholehearted fashion, but on behalf of LEAF she also argued that aspects of the rape

54 See McIntyre, *supra*, n. 4.
55 Petter, 'Legitimizing Sexual Inequality', *supra* n. 4, 366.
56 Counsel for LEAF at the Court of Appeal was Mark Sandler.
57 For example, s. 276 permitted the accused to introduce evidence of his past sexual relationship with the woman, even if that relationship took place 20 years before.
58 Fudge, 'The Effect of Entrenching', *supra* n. 4, 458-59.
59 The case before the Supreme Court of Canada was argued by Elizabeth Shilton.

shield law and related rape law doctrine, such as the 'mistake of fact' defence, were unconstitutionally broad in light of women's rights under sections 7 and 15.

It remains the case, however, that in preparing a legal argument which responds within the parameters of a structured Charter argument, lawyers, including feminist lawyers, often 'hedge their bets' by offering alternative, less radical positions. For example, in an effort to have some influence upon the outcome in *Seaboyer*, I have used this form of argument in my own writing by arguing that: first, sexual history evidence is never 'relevant'; second, even if considered 'relevant', its exclusion does not offend section 7 because 'fundamental justice' must also include women's interests in bodily security; third, if section 7 were said to be violated, such violation must be offset against women's equality rights in section 15, and section 28 should be read to mean that section 15 rights prevail;[60] and fourth, even if a section 7 Charter violation were found, the law should be saved under section 1 as 'demonstrably justified in a free and democratic society'.[61]

One risk of this form of alternative argumentation is that judges will not be compelled to address the most radical arguments and thus we will not succeed in challenging the masculine basis of the underlying concepts themselves. Indeed, in her majority judgment McLachlin J. was not obliged to consider LEAF's counter attack on the unconstitutional overbreadth of section 276 or its challenge to the 'honest mistake of fact' doctrine given that these were not issues framed in the original appeal.

Further, the majority opinion also ignored LEAF's arguments regarding the bias inherent in judicial conceptions of 'relevance'. LEAF's points on women's conflicting Charter interests were dismissed in one terse sentence.[62] The only argument which attracted some amount of analysis in the majority judgment was the 'last resort' position on the effect of section 1.[63]

Legal Structures and Values Militate Against the Success of Women's Claims

There are several structural barriers which impede women's claims under the Charter. First, the reliance placed on generalizations by legal method permits judges to abstract legal issues from their social, political and historical contexts.[64] Although Charter litigation clearly invites judicial consideration of context and impact of legislative policy, much of the discourse remains abstract and devoid of context.[65] This feature of Charter litigation means that clients, lawyers and judges may fail to see women's claims as raising 'legal' issues which fit within the recognized paradigms.

Second, barriers to women's claims result from the exclusion of women from

60 For an example of such an argument see McPhedran, M., 'Section 28 — Was it Worth the Fight?' in *The Study Day Papers* (1983) 4.0.

61 Sheehy, *supra* n. 4.

62 *Seaboyer*, *supra* n. 3, 97-98.

63 *Ibid.*, 126-27.

64 Mossman, M. J., 'Feminism and Legal Method: The Difference it Makes' (1986) 3 *Australian Journal of Law and Society* 30.

65 McIntyre, 'Driving Women to Abstraction', *supra* n. 4.

the articulation and design of both criminal law and the Charter itself. For example, the fact that 'complainants' do not have party status in criminal trials means that we lack language, concepts and precedent for the recognition of rights for women who testify in rape trials. Women can utilize sections 15 and 28 as legal grounding for Charter claims, but as yet have been unable to assert successfully the priority of these rights. With the exception of section 28, for which women lobbied long and hard after being excluded from the constitutional drafting process,[66] there is nothing in our Charter to determine contests between conflicting rights. In the absence of specific provisions assigning and ordering rights to women as 'complainants' in the criminal context, we might expect that the accused's 'fundamental freedoms' will trump women's rights at every turn.

Seaboyer illustrates the judicial preference for clean, abstract claims. While LEAF and the Attorney-General for Canada presented affidavit evidence regarding the impact of rape law upon the lives of women who have been sexually assaulted, statistical evidence on the incidence of rape, the under-reporting, prosecution and acquittal rates for rape, the prevalence of rape myths and studies regarding the influence of sexual history evidence upon judges and jurors in support of their arguments, the defence and the CCLU emphasised that the opposition could not 'prove' that the remarkable increase in reporting[67] pursuant to the rape law reforms of 1982 is linked to the ban on the use of sexual history evidence.

Conversely, the defence presented vague outlines of the evidence they wished to elicit if permitted to cross-examine the women. Seaboyer wanted to cross-examine the complainant, whom he had met in a bar, 'as to other acts of sexual intercourse which may have caused bruises and other aspects of the complainant's condition which the Crown had put in evidence'.[68] Gayme proposed to introduce evidence regarding another 15 year old complainant's alleged 'habitual attendance at the school (not the school of the complainant but that of the accused) to perform sexual acts with students and generally that [she] had been very free with sexual favours, sometimes at her own insistence'.[69] Counsel for the accused were not asked to show either statistics or substantiated examples in support of their assertions that the proffered evidence would tend to support the conclusion that the women in question consented.

Furthermore, both the defence and the CCLU asserted blithely that judicial and public adherence to rape myths had diminished such that no further dangers existed of abuse of this kind of evidence, that the Canadian public could rely upon the good sense of our judges, all the while referring to 'unchaste' women! Only one member of the Supreme Court, L'Heureux-Dubé J., asked for evidence in support of this appeal to judicial vanity. Defence counsel's failure to answer

66 Hosek, C., 'Women and the Constitutional Process' in Banting, K. and Simeon, R. (eds), *And No One Cheered: Federalism, Democracy and the Constitution Act* (1983) 280.

67 Roberts, J. V. and Grossman, M. G. 'Reporting Crimes of Sexual Aggression: Recent National Trends' in Roberts, J. V. and Mohr, R. (eds), *Sexual Assault in Canada* (forthcoming) ch. 3, 12, 22, citing an increase in reporting of 127% in the period 1982-1988.

68 *Seaboyer*, *supra* n. 3, 91.

69 This excerpt is from the decision of the Ontario Court of Appeal, *supra* n. 15, 58.

this pointed question seemingly had no impact upon the majority's willingness to accept the abstract proposition that judges and juries are able to overcome the sexism inherent in our culture.

The difficulty posed by our lack of language and concepts to serve women's claims is evidenced by L'Heureux-Dubé J.'s dissent. In the opening pages of her judgment, she grappled with the appropriate terminology to describe the primary witness in rape cases. She discarded 'prosecutrix' as archaic, given that individual women no longer bear the sole responsibility for prosecution of their rapes; she rejected 'alleged victim' as too pejorative. She ultimately settled on the word 'complainant'. Although she described this word as 'harsh', she believed it to be the 'least infirm' of her choices.[70]

The majority judgment also highlights the way in which underlying legal structures contain women's claims. The interests of individual women who attempt to prosecute their rapes and of women as a group were given short shrift by McLachlin J. She clearly perceived the legally significant conflict as that between the state and the accused men and the rights of the accused as paramount regardless of evidence marshalled to demonstrate harm to women.

Judges Will Validate the More Conservative or Simplified Feminist Arguments

If feminist arguments are successful in that they invoke a judicial response or, indeed, win the case, these arguments are often understood only in their simplest or most conservative forms. The more radical feminist arguments are unfamiliar, not within the traditional legal paradigm and profoundly disruptive of established hierarchies. The successful Charter cases involving women's rights have either been won on grounds apart from sex equality rights, or been based on reasoning detrimental to women's other claims.

One example of this phenomenon is the women teachers' union case described above,[71] where the women ultimately succeeded in rebutting a sex discrimination claim on the basis that the union was 'private' and immune from Charter challenges. A more recent example can be found in *R. v. Hess*; *R. v. Nguyen*[72] in which the Court upheld a sex specific statutory rape offence on the basis that: 'there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences'.[73] Needless to say, the grounding of sex specific offences in 'biology' rather than in the social construction of coercive sexual relations between women and men is likely to be counterproductive to our efforts to put an end to rape.

At the Court of Appeal level in *Seaboyer*, the 'successful' arguments were in fact those advanced by counsel for LEAF, which amounted to concessions as to 'relevancy' in some circumstances and partial invalidity of section 276. None of LEAF's more radical arguments found their way into the written judgment.

70 *Seaboyer*, *supra* n. 3, 154-55.
71 See *Re Tomen and Federation of Women Teachers' Association of Ontario*, *supra* n. 38 and accompanying text.
72 *Supra* n. 36.
73 *Ibid.* 929.

In *Seaboyer* at the Supreme Court of Canada, L'Heureux-Dubé J. must be credited for accurately reflecting and enlarging feminist analysis of rape law in her dissent. In contrast, the majority judgment both failed to address feminist arguments regarding 'relevance' and, it seems, misinterpreted the efforts of both the Attorney-General of Canada and LEAF to present arguments in the alternative. At several points in her opinion, McLachlin J. read these arguments as amounting to concessions. With respect to the question of whether section 7 was violated she stated: '[A]ll proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate section 7 in any event.'[74] Similarly, when stating that section 1 could not be invoked to save section 276, she said:

> As indicated in the discussion of s. 7, all parties agree that a provision which rules out probative defence evidence which is not clearly outweighed by the prejudice it may cause to the trial strikes the wrong balance between the rights of complainants and the rights of the accused.[75]

Thus alternative arguments and abstract propositions have been transformed to give the appearance of consensus on the part of all the litigants, including LEAF.

The Masculine Experience Will Shape Equality Jurisprudence

The relative rarity of women's claims means that even if women's organizations achieve intervener status and present briefs in men's litigation, the jurisprudence of equality will be shaped by men's lives and concerns and through the eyes of (mostly) male judges.[76]

In both the United States[77] and Canada[78] commentators have noted that equality cases are more likely to succeed where the litigant is a man in whose context judges can understand 'equality', or where a female litigant claims that she can meet male 'norms' by invoking the liberal model of equality and claiming that she is 'similarly situated'. While the Canadian jurisprudence has evolved in response to feminist argumentation and has seemingly moved towards an 'equality of result' model of equality, this is at best an uneven development.[79]

In a number of cases Canadian courts have sustained men's arguments that sex specific crimes such as incest discriminate against men.[80] Two of the important cases hailed as victories for women, our abortion case[81] and our parental leave case,[82] involved men as claimants: Dr Henry Morgentaler, who challenged the constitutionality of the criminal prohibition on abortions and Shalom Schacter, who claimed entitlement to unemployment benefits as an adoptive father. Finally, our sex segregation in sports case was won in part because Justine

74 *Seaboyer*, *supra* n. 3, 98.
75 *Ibid.* 127.
76 Petter, 'Legitimizing Sexual Inequality', *supra* n. 4.
77 Cole, D., 'Strategies of Difference: Litigating for Women's Rights in a Man's World' (1984) 2 *Law and Inequality: A Journal of Theory and Practice* 33.
78 Petter, 'Legitimizing Sexual Inequality', *supra* n. 4.
79 The articles by Eaton, *supra* n. 5 and Majury, *supra* n. 6 examine the extent to which the Supreme Court has abandoned the liberal model of equality.
80 For the most recent example see *R. v. F. D.* (1991) 3 O.R. (3d) 733.
81 *Morgentaler*, *supra* n. 6.
82 *Schacter v. Canada Employment and Immigration Commission* (1988) 18 F.T.R. 199, affirmed [1990] 2 F.C. 129.

Blainey could show that she was as good a player as, if not better than, the boys on her hockey team.[83] The 'similarly' situated test for equality is clearly of limited value for the vast majority of women's issues.

Women's equality claim in the *Seaboyer* case was clearly one that would have no resonance for the majority of judges because there was no readily available masculine analogy. In fact, this particular equality claim could be said to be antithetical to men's interests as potential accused.[84] The majority judgment did not take on the arguments with respect to women's rights under sections 7 and 15: it was simply asserted, without discussion of the role of section 28, that these could not outweigh the accused's right not to be 'wrongfully' convicted.[85]

While the majority opinion in *Seaboyer* does not contribute to equality jurisprudence except by way of negative statement, it shapes and reinforces rape law and rights interpretations along the lines of men's experience. The hypothetical examples of 'relevant' evidence, the reopening of a wide berth for the questioning of the primary witness, the return of discretion and power to the judiciary and the priority assigned to the rights of the accused in preference to women's equality rights all serve the interests of men over those of women as a group. The fact that the decision itself was authored by a woman judge does not undermine this point: most people who hold decision-making powers in the major social, economic and political institutions of our society adhere to the patriarchal belief systems of those institutions, regardless of their own sex or class. This is why, for instance, Justice Bertha Wilson, formerly of the Supreme Court of Canada, has posed the question of whether 'women judges will really make a difference',[86] and it is also why many jurisdictions have created judicial task forces to uncover and tackle the biases against women ingrained in the judicial system.[87]

The Charter has Contributed to the Reification of 'Men's Rights'

In Canada, as elsewhere, we have witnessed the growth and reach of the 'men's rights' movement. What perhaps distinguishes Canada is that the movement has access to an authoritative legal language which has not only media currency but also appeals to the judiciary.[88] Men, both as individuals and as part of 'men's rights' groups, have claimed victimization by women in many areas of the law, including family law and reproduction law.[89]

83 Petter, 'Legitimizing Sexual Inequality' *supra* n. 4, 364 describing *Re Blainey and Ontario Hockey Association* (1986) 54 O.R. (2d) 513.

84 Christine Boyle has argued that rape is one of the few offences for which judges seem to place themselves in the shoes of the accused: *supra* n. 10, 5-10, 17, 20-21.

85 *Seaboyer*, *supra* n. 3, 128.

86 Wilson, B., 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507, translated as 'Est-ce que les femmes juges feront une différence?' (1990-1991) 4(2) *Canadian Journal of Women and the Law* 359.

87 See the task forces for the states of New York and New Jersey described by Wilson, *ibid.*

88 For example, the Québec Court of Appeal in a 3-2 decision upheld a man's request to prevent a woman he had impregnated from aborting the foetus before the decision was overturned by the Supreme Court: *Daigle v. Tremblay* (1989) 59 D.L.R. (4th) 609.

89 Dawson, B., 'Fathers' Rights Groups: When Rights Wrong Women' (1988) 9(8) *Broadside* 6.

While *Seaboyer* was not argued as a 'men's rights' case, the rights articulated in this context will benefit men almost exclusively. Public statements made by defence counsel suggest that misogynist attitudes underlie the actions of at least some of those advancing the 'rights' of the accused in the context of rape trials.[90] Interestingly enough, it was Chief Justice Antonio Lamer who brought the flavour of men's rights into oral argument by interrupting counsel for the Attorney-General and counsel for LEAF in order to remind them that 'men can be raped too'. Thus the Chief Justice was concerned to return the issue to the realm of abstraction by emphasizing the physical possibility of men being victimized when it is the very fact that by and large men are *not* assaulted and women *are* which makes rape a sex equality issue.[91]

Furthermore, when those defending the legislation in *Seaboyer* attempted to demonstrate that many of the common law evidence rules and practices, including the use of sexual history evidence regarding the woman who has been raped, were unique and premised upon women's lack of credibility, this point was successfully turned to favour the accused. It was argued, and accepted by McLachlin J., that the ban on sexual history evidence was itself an anomalous limitation upon the accused's otherwise unfettered 'right' to present a defence.[92] In fact, victim history evidence is nowhere else as routinely *useful* to the defence in contexts other than sexual assault.[93]

Women's Legislative Gains are Being Invalidated

The implication of the predominance of men and corporations among Charter litigants is that their claims often challenge legislation which benefits women both indirectly and directly. For example, women as consumers and as workers are affected by successful Charter challenges to competition laws, advertising and product testing laws and workplace health and safety laws.[94]

Furthermore, men's claims may present a direct threat to other laws which specifically benefit women. For example, Shalom Schacter's claim for parental benefits as an adoptive father could well have resulted in a declaration that maternity benefits were unconstitutionally narrow and therefore invalid, or in the

[90] For example, see the comments of an Ottawa defence lawyer reported in Schmitz, C., '"Whack" Sex Assault Complainant at Preliminary Enquiry' *The Lawyer's Weekly* 27 May 1988, 22 wherein Michael Edelson was reported to have coached other defence lawyers at an annual meeting on how to 'whack' or 'slice and dice' the complainant at the preliminary enquiry so that she will abandon her 'cock and bull' story and not proceed with the prosecution. Edelson was interviewed after the *Seaboyer* decision and, strangely, apparently claims that: '[H]e doesn't believe that it has ever been common practice to put rape victims "on trial" and he doesn't believe that will happen now. "That argument has always been specious. The basic concept is that the complainant will be subjected to irrelevant badgering by counsel. I've never seen that."' Payne, E., 'The Rape Shield Ruling. One Woman's Experience From The "Bad Old Days"' *The Ottawa Citizen* (Ottawa) 24 August 1991.

[91] MacKinnon, C., 'Reflections on Sex Equality Under Law' (1991) 100 *Yale Law Journal* 1281, 1301-08.

[92] *Seaboyer*, *supra* n. 3, 120-23.

[93] Pattenden, R., 'The Character of Victims and Third Parties in Criminal Proceedings Other Than Rape Trials' [1986] *Criminal Law Review* 367, 368-69.

[94] See *R. v. Quest Vitamin Supplies Ltd.* [1988] 6 W.W.R. 374; *R. v. Cancoil Thermal Corporation and Parkinson* (1986) 52 C.R. (3d) 188; and *R. v. Ellis-Don Ltd.* (1990) 1 O.R. (3d) 193 (offences under provincial health and safety law violate the presumption of innocence and fair trial rights).

extension of benefits to men through a reduction in maternity benefits.[95] In another case, a man's claim that the social welfare law which provided single mothers with welfare but which denied it to single fathers unless they were disabled, resulted in a declaration that the legislation was inoperative. Therefore, benefits were denied equally to all until the province could re-enact its legislation![96]

The *Seaboyer* case has resulted in the voiding of legislation which was of specific benefit to women. This decision means that Seaboyer and Gayme will each be entitled to a *voir dire*[97] and that the accused in most sexual assault prosecutions will have an incentive to try out 'relevance' scenarios through this same vehicle. The protection of women's security of the person and women's interest in unbiased trials will be entirely dependent upon the biases of individual judges. McLachlin J. provided no specific limits upon the categories of sexual history evidence which will be admissible and the recent record of the Canadian judiciary on issues of sexual violence is appalling.[98] We can expect that other related Charter claims will follow upon *Seaboyer*, including challenges by accused men to the publication ban on the complainant's name[99] and attacks upon some of the reforms intended to facilitate the giving of evidence by children who have been sexually assaulted.[100]

Judicial 'Sovereignty' is Entrenched Through Charter Litigation

As a constitutional document which expressly authorizes the judiciary to invalidate offending legislation subject only to the saving provision contained in section 1, the Charter is anti-democratic. Because the Charter constitutes an invitation to judges to reclaim areas of the law where judicial discretion has been contained through law reform,[101] we cannot expect that judges will remain neutral on such issues. The scope of judicial authority is therefore at stake in Charter litigation. The appearance of this authority as 'objective' and inherently 'right' is of course enhanced when it is rhetorically grounded in concepts such as 'fundamental freedoms'.[102]

While the Charter does contain a provision which permits a legislative body to re-enact a measure with the express intention of overriding the Charter,[103] section

95 While Schacter seemed to be pursuing an egalitarian agenda through this lawsuit, (Schmitz, C., 'Charter Can Extend UI Benefits to Natural Parents, Fed. Court Holds' *The Lawyer's Weekly* 24 June 1988, 24) LEAF sought and secured intervener status because only LEAF 'argued consistently against reducing or eliminating pregnancy benefits': Brodsky and Day, *supra* n. 33, 60.

96 *Re Phillips and Lynch* (1986) 27 D.L.R. (4th) 156, affirmed (1986) 76 N.S.R. (2d) 240.

97 *Seaboyer*, *supra* n. 3, 60.

98 See 'B.C.C.A. affirms penalty in "sexually aggressive tot case"' *The Lawyers Weekly* 9 February 1990, 4. The case reference is *R. v. D.L.* (1990) 53 C.C.C. (3d) 365.

99 While the Supreme Court in the *Canadian Newspapers* case, *supra* n. 6 upheld the legislation as against the claims of newspapers, the author of the opinion (now Chief Justice of Canada) made clear that challenges made by accused men might well be given a different treatment in light of the importance attached to the 'rights' of the accused.

100 At the lower court level this legislation has so far withstood Charter challenges: *R. v. Kilabuk* (1991) 60 C.C.C. (3d) 413 (use of videotaped evidence) and *R. v. A.(B.N.)* (1991) 59 C.C.C. (3d) 403 (use of screen while child testifies).

101 See Ison, *supra* n. 4.

102 For a discussion of the tautological reasoning used by the Supreme Court in interpreting the meaning of these rights, see Petter, 'Politics of the Charter,' *supra* n. 4.

103 Section 33(1) reads: 'Parliament or the legislature of a province may expressly declare . . . that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.'

33 has never yet been used by the federal government. No one seriously expects the override power to be used by Parliament for, as Judy Fudge has observed, what better excuse for failure to take political action than a Supreme Court pronouncement on fundamental freedoms?[104] Thus, what are essentially political questions and choices are resolved as legal issues, with no recourse to the arena of electoral politics.[105] This 'legalization of politics'[106] has almost forced feminists to turn their energies to engagement with law, sometimes to the exclusion of political struggle. And, naturally, our participation in litigation at some level legitimates the judicial process and the results under the Charter.

Seaboyer represents a victory not only for the defence bar and for men as a group, but also for judges. This case proclaims Canadian judges to be capable of rising above our patriarchal culture, history and legal structures. It suggests that the judiciary knows better than Parliament how to resolve the conflict of interests presented by the acknowledged failure of the criminal justice system to deal adequately with the sexual abuse of women. Finally, this case gives judges untrammelled authority and power to hear whatever evidence they wish to in their own courts, and to make decisions accordingly.

It appears that the Supreme Court of Canada has succeeded in having the last word on the validity of section 276. Our Justice Minister has already declined to invoke the section 33 override power to re-enact section 276.

D. *CONCLUSION*

Seaboyer does not, however, mark the end of feminist struggle around this issue. A coalition of feminist groups has persuaded the Justice Minister to introduce a new bill which contains a preamble acknowledging the extent of sexual violence against women and expressing the view that sexual history evidence 'is rarely relevant and that its admission should be subject to particular scrutiny'.[107] This bill is aimed at curtailing judicial discretion regarding the admission of sexual history evidence, and has in fact gone to the heart of the debates around rape by redefining the meaning of 'consent' and by requiring an objective basis for an accused's assertion that he thought the woman was consenting.[108] Huge battles loom ahead as this bill will be opposed by defence lawyers and civil libertarians and, if passed, will be subjected to relentless Charter challenge.[109]

104 Fudge, 'Effect of Entrenching a Bill of Rights', *supra* n. 4, 455.

105 One of the exceptions to this phenomenon is the issue of abortion which, through the narrowness of the reasoning in the *Morgentaler* case, *supra* n. 6 the Court volleyed back to Parliament. Parliament returned the ball to the courts by passing Bill C-43, which was carefully drafted so as to avoid the procedural defects in the prior law (although its constitutionality would certainly have been challenged through further litigation). Astonishingly, the Senate vetoed the bill! See Walker, W., 'Senate kills abortion bill by a tie vote', *Toronto Star* (Toronto) 1 February 1991.

106 See Glasbeek and Mandel, *supra* n. 4.

107 Bill C-49, An Act to amend the Criminal Code (sexual assault), tabled December 12, 1991.

108 For example, the bill requires an accused to take all reasonable steps to ascertain whether a woman consents: *ibid.* s. 273.2 (b). See also Dawson, T. B., 'Is a rape shield law needed?' *The Toronto Star* (Toronto) 8 October 1991.

109 Defence lawyers have already vowed their opposition and their intention to use the Charter: Sallot, J., 'Battle looms over legislation on sex assault' *Globe and Mail* (Toronto) 13 December 1991; Bindman, S., 'Women praise new rape law as "historic"' *The Ottawa Citizen* (Ottawa) 13 December 1991.

Seaboyer leaves us with important questions about feminist strategy. At least until the proposed bill becomes law, we must rethink the extent to which we can, in good conscience, encourage women to resort to the criminal law. It may be that resources should be directed instead to the care needed by women who have lived through rape and to other, perhaps less dangerous forums in which we can challenge the discourse around women's sexuality.[110] The proposed bill will go some distance towards making it more tolerable for women to prosecute rape, but this road is fraught with difficulty given the certainty that its constitutional validity will be fought over the bodies of women who have been raped. While we must continue to disrupt what Carol Smart has called 'law's power to define women's experience', which will involve us in legal struggle, we must at the same time heed her warning that we should not do so with the hope that we will achieve law reform, and we must develop 'a clear insight into the problems of legitimating a mode of social regulation which is deeply antithetical to the myriad concerns and interests of women'.[111]

In the meantime, feminists working within law will devote energy to judicial education, to the exposure of judicial bias and to the judicial disciplinary process as ways of challenging the underlying structures which produced *Seaboyer*. Unfortunately, it will be a long time before we will have two hands clapping in the Supreme Court of Canada: we may wait years for a bench of judges who can understand and respond to feminist litigation.

[110] This was suggested in a conversation with my colleague from Carleton University and dear friend Elizabeth Pickett.

[111] Smart, C., *Feminism and the Power of Law* (1989) 164.