Advancing the Rights of Survivors of GBV

Barbra Schlifer Commemorative Clinic

United Way Greater Toronto

Overview

What follows is a collection of Clinic interventions intended to provide the student with an understanding of the work undertaken by the Clinic over the years.

Background

The Clinic is a multi-disciplinary, front-line service provider to women experiencing violence. It was established to honour Barbra Schlifer, who was sexually assaulted and murdered on the night of her call to the Bar. The Clinic's objective is to support women who have experienced violence by, among other things, offering avenues for redressing the harms they have suffered. As part of its mandate, the Clinic works to change the legal conditions that threaten women's safety, dignity, and equality and advocates to improve access to justice for survivors of sexual violence.

The Clinic has a long history of intervening to assist proceedings where the outcome may influence women's safety, dignity, and equality. The Clinic works with survivors of sexual violence and other forms of gender-based violence. It has expertise in intersecting experiences and vulnerabilities that impact a woman's experience of violence.

The Clinic acknowledges that the umbrella term "woman" recognizes gender as a self-identification that does not necessarily correspond with assigned sex at birth. The Clinic recognizes the complexity and diversity of gender and aims to be inclusive to people outside and across the gender spectrum.

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Overview

Cases

1. *Freedom of Press vs. Right of privacy*

CASE CITATION

Canadian Newspapers Co. v. Canada (Attorney General), 1988 CanLII 52 (SCC), [1988] 2 SCR 122

CLINIC'S ROLE

Intervenor

BACKGROUND

The accused was charged with sexual assault under the criminal code. The complainant, who was the accused's wife, applied for an order under s.442(3) of the criminal code directing that her identity and any information that could disclose it should not be published in any newspaper or broadcast.

Canadian Newspapers made a civil application opposing this order on the basis that s.442(3) is unconstitutional by violating s.2(b) of the Canadian Charter of Rights and Freedoms, which guarantees freedom of the press.

DECISION

The SCC decided that s.442(3) of the Criminal Code infringes on s.2(b) of the Charter, but this infringement is justified on the basis of s. 1 of the Charter.

Sexual assault is significantly underreported for many reasons, including victims' fear of treatment by law enforcement, trial procedures, and public opinion. The SCC stated that the publication bans on a victim's identity is a way to assure them that their privacy will be protected from the public if they decide to report their assault.

The SCC affirmed that freedom of the press is an important value in our democratic society, but the limits imposed by s. 442(3) on the media's rights are necessary and minimal, and thus, are justified. S.442(3) applies only to sexual offence cases, and is limited to circumstances where the complainant or prosecutor requests the order, or the court considers it necessary. S.442(3) only restricts publication of facts disclosing the complainant's identity.

IMPLICATION

Upholding s.442(3) of the Criminal Code provides further protection for victims of sexual assault, who are already facing numerous barriers to reporting. Since sexual violence disproportionately impacts women, upholding the publication ban promotes equal access to remedies under the law.

2. SCC: *Rape Shield Laws are unconstitutional*

CASE CITATION

R v Seaboyer, R v Gayme, [1991] 2 SCR 577

CLINIC'S ROLE

Intervenor

BACKGROUND

The accused were on trial for sexual assault. Both accused wanted to introduce evidence about the sexual history of the complainants in their respective cases, and even cross-examine them on their sexual history.

Rape shield provisions prevented this evidence from being entered and the accused challenged the constitutionality of these provisions.

DECISION

The SCC upheld the provision that prevents accused from entering evidence of a complainant's sexual reputation for the purposes of affecting the complainant's credibility.

However, the SCC struck down the rape shield provision that prevented accused persons from entering evidence of the sexual history of a complainant, stating that this provision violated the accused's Charter rights. Specifically, they violate an accused's right to a full answer and defence under s.7 and s.1(d) of the Charter. The SCC found that this charter violation could not be justified, and as such the provision was struck down and deemed of no force or effect.

IMPLICATION

Courts will admit allow for evidence of a complainant's sexual history to be admitted due to its probative value to the accused's defence. Such evidence has limited allowable uses and cannot be used to discredit the complainant's credibility.

3. Clinic's application re: Constitutional challenges to be heard later, but interlocutory injunction denied

CASE CITATION
Barbra Schlifer Commemorative Clinic v. Canada (Attorney General), 2012 ONSC 5577

CLINIC'S ROLE

Applicant

BACKGROUND

The Clinic brought forward an application for an interlocutory injunction against the Canadian Government. In response, an application was brought by the Attorney-General of Canada to strike the clinic's application.

In April 2012, Bill C-19 received Royal Assent. The Act repealed the federal legislative regime which required the registration of non-restricted firearms. Section 29(1) of the Act required the Commissioner of Firearms to ensure the destruction of all records in the Canadian Firearms Registry related to the registration of firearms that were not prohibited or restricted.

Immediately following the enactment of this Act, the Quebec government obtained a preliminary injunction preventing the destruction of the data, which was made final by the Quebec Superior Court.

Ontario did not follow Quebec's approach and as such, the Clinic commenced an application seeking declarations that most of the provisions of this Act violated rights under sections 7 and 15(1) of the Charter and are therefore of no force and effect.

The hearing of this application was set to be heard in March 2013. The Clinic's application alleged that the changes to the existing gun control regime would increase risk of physical violence and homicide to women in situations of domestic violence.

In an order, the Court granted the City of Toronto leave to intervene on the injunction motion and in the application as a friend of the Court.

The Attorney General of Canada (AGC) argued that the court had no jurisdiction over the subject matter of the application and that the application disclosed no reasonable cause of action.

DECISION

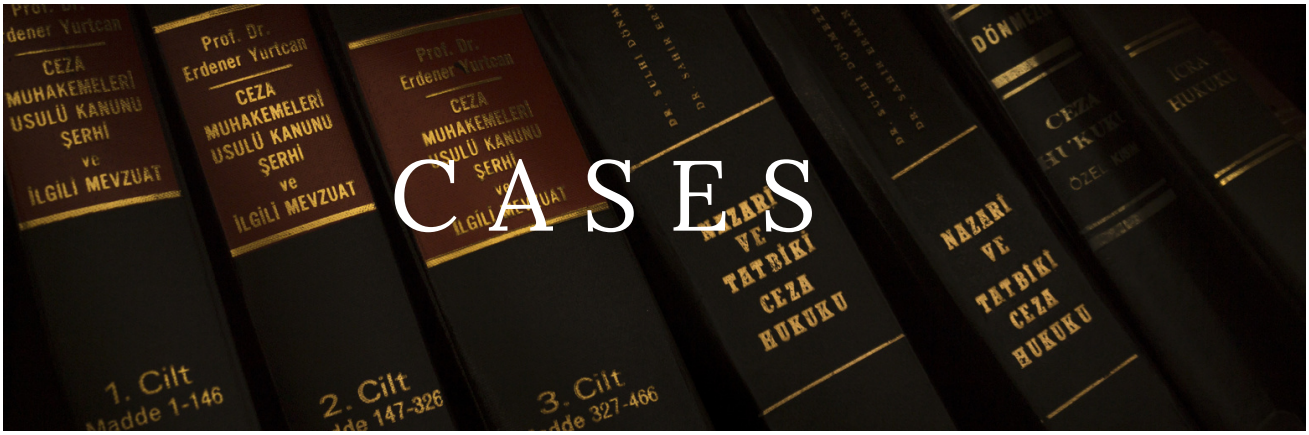
The Court dismissed the motion of the AGC to strike out the application and dismissed the Clinic's motion for an interlocutory injunction.

The court determined that the Act is a form of government subject to scrutiny under the Charter and that the AGC failed to demonstrate that the Clinic's ss. 7 and 15 constitutional challenges stand no chance of success. Therefore, the Court refused to dismiss the motion to strike by the AGC.

The Court found that evidence suggests that the destruction of the Registry data would not cause irreparable harm, just a financial burden on taxpayers for the registry to be re-built. As well, the Court found that the Clinic had not demonstrated that the balance of convenience favours suspending the Act by granting the requested injunctions. Therefore, the court declined to grant the interlocutory injunction requested by the Clinic.

IMPLICATION

No interlocutory injunction granted to prevent the negative impacts of the Act.



4. No interlocutory injunction granted to prevent firearm registry data destruction

CASE CITATION

Barbra Schlifer Commemorative Clinic v. Canada (Attorney General), 2012 ONSC 5577

CLINIC'S ROLE

Moving Party/Applicant

BACKGROUND

The applicant, Barbra Schlifer Clinic, had sought orders restraining the Canadian government from destroying data about unrestricted firearms contained in the Firearms Registry, requiring the government to allow access to all persons legally entitled to have access to the registry, and to continue to register all transfers of non-restricted firearms.

In this matter, the Clinic moved for leave to appeal a decision by Brown J., who refused an interlocutory injunction on the sought orders. In this motion for leave to appeal, the Clinic limited its challenge to the refusal to grant an injunction preventing the destruction of the data.

DECISION

The Court applied the applicable test for a motion for leave to appeal for an interlocutory decision, set out in rule 62.02(4). The Court concluded that there were no errors in principle that would justify appellate intervention in the decision to refuse the interlocutory injunction, and that there were no aspects of the reasons provided that would raise that the approach was arguably incorrect.

Therefore, the Clinic failed to satisfy the relevant test and the motion for leave was dismissed.

IMPLICATION

No interlocutory injunction awarded to prevent the Canadian government from destroying data about unrestricted firearms contained in the Firearms Registry.

CASES

5. *Court declines to award costs against the Clinic*

CASE CITATION

Barbra Schlifer Commemorative Clinic v. Canada, 2012 ONSC 6208

CLINIC'S ROLE

Moving Party/Applicant

BACKGROUND

The motion brought by the Clinic for leave to appeal from the decision of the motion judge, refusing to grant an interlocutory injunction against the Canadian government, was previously dismissed.

Following this, the government sought costs from the Clinic, as well as the City of Toronto (who made a motion for leave to intervene in the motion for leave to appeal from the decision of the motion judge refusing the interlocutory injunction restraining the government from making changes to a firearms registry). The federal government sought costs on a partial indemnity scale in the amount of $16,235.75.

The Clinic and the City both argued that given the important public interests raised by the motions, costs should not be awarded.

DECISION

The Court declined to award costs against the Clinic and the City in favour of the federal government.

The Court accepted the argument of the City, that the usual rule is that intervenors are neither granted nor awarded costs.

On the grounds that the Clinic is a non-profit organization that advanced a position that otherwise may not have been litigated and the fact that there has been no evidence of any negative impact on the public interest from the bringing of the motion for leave to appeal, the Court also declined to award costs against the Clinic.

IMPLICATION

6. SCC: *Removal of niqab while testifying to be determined on case by case basis*

CASE CITATION

R. v. N. S., 2012 SCC 72

CLINIC'S ROLE

Intervenor

BACKGROUND

Two accused were charged with having sexually assaulted S, a Muslim woman. In the criminal trial against the accused, S wished to testify while wearing a niqab. The accused sought an order requiring her to remove the niqab while testifying. The preliminary inquiry judge found that her beliefs were not sufficiently strong and required her to remove the niqab. S applied to the Superior Court of Justice to quash the order.

The Superior Court held that S should be allowed to wear a niqab if she asserted a sincere religious reason for doing so, but that the preliminary inquiry judge would have the option to exclude her evidence if the niqab prevented true cross-examination. S appealed this.

The Court of Appeal held that if the accused's right to a fair trial could not be reconciled with court procedures to accommodate the witness's religious practice, the accused's fair trial interest may require that the witness remove the niqab. The Court laid out factors to consider, such as whether the credibility of the witness was at issue, how much the niqab interfered with the demeanor assessment, and the nature of the evidence given.

The Court laid out factors to consider, such as whether the credibility of the witness was at issue, how much the niqab interfered with the demeanor assessment, and the nature of the evidence given. The Court of Appeal returned the matter to the preliminary inquiry judge to address in accordance with the guidance provided. S appealed this.

DECISION

The SCC dismissed the appeal.

Chief Justice McLachlin, for the majority, provided a framework to be considered when determining if a witness should be permitted to testify wearing a niqab. The 4 questions to consider include:

1. Would requiring the witness to remove the niqab while testifying interfere with her religion freedom?
2. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
3. Is there a way to accommodate both rights and avoid the conflict between them?
4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

The majority concluded that the matter must be returned to the preliminary inquiry judge to assess according to the guidance provided by the framework above.

IMPLICATION

Determining whether a witness is allowed to wear a niqab for religious reasons when testifying will be decided on a case-by-case basis, according to the framework laid out by the SCC.

7. The privacy rights of victims and witnesses restored

CASE CITATION

R. v. Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390

CLINIC'S ROLE

Intervenor

BACKGROUND

Mr. Quesnelle was charged with assault, sexual assault, sexual assault with a weapon, robbery, threatening to kill, and threatening serious bodily harm. Mr. Quesnelle denied all charges against him, thus, the case turned on credibility. As part of a radio documentary, a police detective was interviewed who indicated that she reviewed the complainant's police file in preparation for the trial and referred to a number of other police occurrence reports relating to the complainant. Mr. Quesnelle sought disclosure of all police occurrence reports reviewed by the police that pertained to the complainant.

Sections 278.1 to 278.91 of the Criminal Code contain the procedure for the disclosure of private records in the context of sexual offences. The regime was created by Parliament in response to the trend of defendants seeking to obtain such records to attack the credibility of witnesses and complainants. If a record contains personal information for which there is a "reasonable expectation of privacy," the regime applies.

A list of exemptions is mentioned in section 278.1 of the Code. Once the Crown receives a record subject to the Mills regime, it must inform the accused and provide an opinion on its possible relevance and the basis for this assessment. Such records can only be disclosed upon application by the accused

At trial, Justice Thorburn held that the reports contained information for which there was a "reasonable expectation of privacy" and did not fall into any one of the listed exemptions. She denied Mr. Quesnelle's application for disclosure and he was ultimately convicted. However, the Court of Appeal held that these police records had information for which there was no reasonable expectation of privacy. Furthermore, in any case, section 278.1 of the Code exempts all records prepared by the police regardless of their relevance and a new trial was ordered.

DECISION

The Court stated that these reports are private and protected by the definition of "record" within the legislation. Police-occurrence reports for other offences are not subject to the exclusion in section 278.1 of the Criminal Code. Rather, the exclusions are limited to police occurrence reports related to the offence at hand (s. 278.1).

IMPLICATION

This legislation aims to balance the privacy interests of complainants and witnesses with the right of the accused making a full answer and defence. Disclosure of evidence continues to be recognized in a number of SCC decisions as an essential component to the right of an accused protected under s. 7 of the Canadian Charter of Rights and Freedoms. However, the disclosure of evidence is limited to material relating to the case under investigation or that is being prosecuted.

7. The privacy rights of victims and witnesses restored

IMPLICATION (CONT'D

As stated in the decision: “Privacy is not an all or nothing right. Individuals involved in a criminal investigation do not forfeit their privacy interest for all future purposes; they reasonably expect that personal information in police reports will not be disclosed in unrelated matters. Moreover, while the regime exempts investigatory and prosecutorial records, that exemption applies only to records made in relation to the particular offence in question” (para 2).

The ruling at the Court of Appeal would have had a horrifying effect on reporting sexual assault occurrences. If the complainant knew that everything they mention or discuss with the police may thereinafter be provided to every accused person on every cause in which they are a witness or a victim, it will likely lead to hesitations. The 278.1 regime provides a necessary and valuable level of protection in maintaining the privacy rights of the victims and witnesses.

The right to a full answer and defence is not a right to pursue every conceivable tactic to be used in defending oneself against criminal prosecution. The right to a full answer and defence has its limits.

8. *Expanding the definition of "Humanitarian and Compassionate"*

CASE CITATION

Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61, [2015] 3 S.C.R. 909

CLINIC'S ROLE

Intervenor

BACKGROUND

At the time of the hearing, the appellant, Mr. Kanthasamy, was a 21-year old Tamil from the northern region of Sri Lanka. He arrived in Canada in 2010, when he was still a minor. When he arrived to Canada, he applied for refugee protection under ss. 96 and 97 the Act; provisions concerning a well-founded fear of persecution in one's home country. The persecution faced by Tamils in Sri Lanka by the Sinhalese majority is well documented, with reports that tension and "recriminations" continue to exist. However, the Canadian government and courts have previously taken a narrow approach to this issue, towing the Sri Lankan government's official stance that the situation has improved for Tamils in that country.

As a result, Mr. Kanthasamy's application for humanitarian and compassionate relief under s. 25(1) of the Act was denied. He had also attempted to apply for permanent residence from inside Canada.

The Officer who reviewed the application concluded that humanitarian and compassionate considerations were not present to justify granting relief.

Using the guidelines prepared by the Minister, the Officer noted that she was "not satisfied that return to Sri Lanka would result in hardship that is unusual and undeserved or disproportionate."

The Immigration and Refugee Board further denied Mr. Kanthasamy's claim and concluded that the government of Sri Lanka had tried to improve the situation of Tamils, such that Mr. Kanthasamy would not be at risk if he were to be deported.

Upon judicial review, the Federal Court upheld the decision of the Officer in specifying that the test was indeed whether the hardship was "unusual and deserved or disproportionate" and that Mr. Kanthasamy had not satisfied that test. The Federal Court found the Officer's decision to deny relief was reasonable. This decision was upheld at the Federal Court of Appeal.

DECISION

The decision of the Officer was overturned at the SCC level and remitted back for reconsideration.

The Guidelines note that applicants must demonstrate either "unusual and undeserved" or "disproportionate" hardship for relief under s. 25(1) to be granted. However, the Guidelines are not legally binding and are not intended to be exhaustive or restrictive.

The Court held that the words "unusual and undeserved or disproportionate hardship" should not be interpreted to create three new thresholds for relief, separate and apart from the humanitarian purpose of s. 25(1).

The purpose of s. 25(1) is to offer equitable relief, and as such, it should be read in a way that gives effect to all humanitarian and compassionate issues in a particular case

8. *Expanding the definition of "Humanitarian and Compassionate"*

IMPLICATION

The decision represents a win for immigration and refugee rights. It leads to a broad and inclusive definition of what constitutes humanitarian and compassionate grounds. The court is progressing towards a more equitable and humanitarian approach to immigration and refugee law.

In addition, the role that the interveners played in presenting a better picture of the reality of the situation in Sri Lanka and the hardships that refugees face also requires to be appreciated. The recognition of the ongoing persecution that Tamils face in Sri Lanka is in contrast to the approach of the lower courts in declaring the situation in Sri Lanka was safe for Tamils. The judgments of the lower courts were extremely problematic as they did not recognize the reality of the experiences actually faced by Tamils.

The decision of the SCC majority is provides a more subjective assessment of discrimination faced by Tamils.

9. Face covering during the Citizenship Oath

CASE CITATION

Canada (Citizenship and Immigration) v Ishaq, 2015 FCA 194

CLINIC'S ROLE

Refused to grant leave to intervene

BACKGROUND

Ms. Zunera Ishaq is a devout Sunni Muslim whose religious beliefs obligate her to wear the niqab, a veil covering most of her face". Sections 13.2 and 6.5 of Citizenship and Immigration Canada's policy manual, CP 15: Guide to Citizenship Ceremonies require all candidates to "remove their face covering during the taking of the oath". If they do not, they will not receive their Canadian citizenship on that day, and must re-attend a different ceremony, before being granted full citizenship. If they again fail to comply, "their application for citizenship will be ended" Ishaq's complaint relates to the "manner by which she is compelled to take the oath of citizenship" Ms. Ishaq objects to this requirement, on the basis that it interferes with her freedom of religion.

While Ishaq challenged the Policy on the basis of sections 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms, Justice Boswell at the Federal Court of Canada allowed the appeal on the ground that the Policy is inconsistent with its governing legislation. Justice Boswell reasoned that imposing the Policy on citizenship judges makes it impossible for them to comply with section 17(1)(b) of the Regulations because the Policy is inconsistent with citizenship judges' duty to afford the greatest possible freedom in taking the oath. Accordingly, Justice Boswell found the Policy to be invalid.

DECISION

In its brief, six-paragraph judgment, the unanimous bench upheld Justice Boswell's ultimate disposition. In an unusual move, judgment was rendered from the bench that same day, so as to permit the applicant to participate in this year's federal election

The Federal Court of Appeal further dismissed the government's application for a stay of the decision seeking to put the recent decision in favour of Ms. Ishaq on hold while it seeks an appeal to the Supreme Court of Canada. The government had not demonstrated that refusing the application for a stay would result in irreparable harm to the public interest.

IMPLICATION

Laws and policies that implicitly or explicitly create distinctions and disadvantages for certain groups in Canada are contrary to s. 15(1) Charter substantive equality rights. The intersection of multiple identities, including those of religion and gender, should be considered to understand how otherwise neutral laws and policies can have an adverse impact upon certain groups of individuals.

This Policy disadvantages women by marginalizing them. Despite being qualified to be citizens, because of their religious beliefs and practices, their equality rights are diminished. The appellant's prohibition of the niqab effectively shuts out niqab-wearing women from Canadian democratic processes.

The Policy exacerbates barriers already faced by women in immigration and citizenship processes, and vulnerabilities as a result of their precarious immigration status.

10. Discovery Evidence permitted to be used for impeachment purposes in criminal trial

CASE CITATION

S.C. v. N.S., 2017 ONSC 5566

CLINIC'S ROLE

Intervenor

BACKGROUND

The Respondent/Plaintiff, S.C., alleged that her former boyfriend, the Appellant, assaulted and sexually assaulted her on two occasions in 2014, including once in Waterloo where the appellant was enrolled. Criminal proceedings were then initiated in both Toronto and Waterloo.

In 2015, the respondent also commenced a civil action against the appellant and the University of Waterloo, seeking damages related to the same assault and sexual assault allegations.

The respondent served Discovery Evidence on the appellant, which included her unsworn affidavit and various other records. None of this evidence was used as evidence in the Waterloo criminal trial in 2015, where the trial judge found the appellant not guilty.

The appellant's criminal and civil counsel discussed how this Discovery Evidence could be used and determined that this evidence would only be used for impeachment purposes. In August 2016, the appellant's Toronto criminal trial began.

On cross examination of the respondent, the appellant's counsel asked questions relating to the medical records in the Discovery Evidence, which was challenged by the respondent.

This case surrounds the Court's review of whether a party must seek directions from the court prior to using this kind of evidence and whether the party should be permitted to use the discovery evidence for the purpose of impeachment in this criminal trial.

DECISION

The declaration sought by the appellant was granted by the Court, stating that Rule 30.1 of the Rules of Civil Procedure, do not prohibit the appellant from using information and documents obtained through discovery in this action to impeach the evidence of a witness in a related criminal proceeding against him.

The court held that the trial judge in a criminal proceeding is in the best position to determine the admissibility issue for this type of evidence. The Court also determined that there was nothing improper with the appellant sharing this Discovery Evidence with any of his legal advisors for the purpose of obtaining advice and assistance in the legal proceedings.

IMPLICATION

This case surrounds the Court's review of whether a party must seek directions from the court prior to using this kind of evidence and whether the party should be permitted to use the discovery evidence for the purpose of impeachment in this criminal trial.

11. Hague convention

CASE CITATION

Office of the Children's Lawyer v. Balev, 2018 SCC 16, [2018] 1 SCR 398.

CLINIC'S ROLE

Intervenor

BACKGROUND

Parental Abductions: one parents moves a child to another country despite the objections of the other parent and in contravention of the existing custody agreements in place.

The court was asked to determine what principles apply when a parent in another country (Germany) seeks to have children located in Canada returned back to the country under the Hague Convention (the Convention on the Civil Aspects of International Child Abduction), which Germany and Canada are parties to.

Under Article 3 of the convention, the children in this case would have to be returned to Germany if that was their place of habitual residence. The words "habitual residence" are not defined in the convention, and the court was tasked with interpreting these words.

DECISION

The majority of the Supreme Court (6-3) held that courts should look at all relevant considerations to determine a child's habitual residence- a hybrid approach. Courts must look at the circumstances and interests of the child, as well as the parents.

This includes the child's links to, and circumstances in each country as well as the circumstances of the parents. However, courts have no definitive list of factors that they must take into account; they must look at the child's complete situation. A court can, however, decline to return a child if an exception listed in the treaty applies.

IMPLICATION

This case has significant impact on how Canadian courts will deal with international child custody disputes. The hybrid approach to determining a child's "habitual residence" quickly allows children to be returned as soon as possible. This protects children, deters abduction by parents, and helps ensure that the proper courts (in the child's country of habitual residence) can decide custody and access issues more quickly.

12. Limitations Period in Association with Sexual Assault

CASE CITATION

Jane Doe v. Weinstein, 2018 ONSC 1126

CLINIC'S ROLE

BACKGROUND

Jane Doe claims damages against Harvey Weinstein for sexual assaults which she alleges occurred in 2000 while working on a film in Toronto.
Barbara Schneeweiss was an employee of film and an assistant to Weinstein at the time. Doe alleges that Schneeweiss facilitated the assaults by Weinstein and has sued Schneeweiss for intentional infliction of mental injury, negligence, negligent misrepresentation and negligent infliction of nervous shock. Schneeweiss argues that, certain of the claims advanced by Doe are statute barred.

DECISION

The ONSC found Schneeweiss arguments unsuccessful, and the motion was dismissed with full costs to jane doe. The ONSC reiterated that s. 16 of the Limitations Act eliminates limitation periods for civil proceedings based on sexual assault or other misconduct of a sexual nature. This includes claims in relation to the applicable sexual misconduct, including negligence, breach of fiduciary duty, and vicarious liability. Thus, Jane Doe's claims are not statute barred.

list of factors that they must take into account; they must look at the child's complete situation. A court can, however, decline to return a child if an exception listed in the treaty applies.

IMPLICATION

As long as there is a connection between the claim and the act of sexual assault, civil proceedings against a 3rd party are not statute barred as there is no limitation period.

13. Clinic deemed to have public interest standing and proceed as co-plaintiff

CASE CITATION

Williams v. London Police Services Board, 2019 ONSC 227

CLINIC'S ROLE

Public Interest Standing - Co-Plaintiff

BACKGROUND

The plaintiff, A.W., commenced the action via a statement of claim in March 2017 in which she alleged that she was sexually assaulted as a party in London, Ontario in 2010. She further alleged that the defendant, Detective Bruce Charteris of the LPS, closed the file as consensual, despite clear evidence to the contrary, and that the defendant suggested that A.W. was dishonest with the police because she was embarrassed by the sexual act.

A.W. sought a declaration that the manner in which the defendants investigated the sexual assault allegations of herself, and another unnamed individual infringed their s. 15 Charter rights. Both plaintiffs sought remedies under s. 24 and s. 52 of the Charter and an order compelling the LPS to allow Court appointed external review panel to review all LPS sexual assault cases that have been closed as "unfounded" in that year.

The defendants, the London Police Services Board, brought forward a motion seeking an order to strike out the statement of claim, dismiss the action on the ground that the Barbra Schlifer Clinic is without legal capacity to be a co-plaintiff in the action, and to strike out 59 paragraphs of the statement of claim.

DECISION

On this first issue, the court applied the principles set out in Drabinksy v KPMG (1999, Ont. Gen. Div.) to determine that the allegations of fact in the Statement of Claim must survive the motion to strike.
On the second issue relating to the Clinic, the court accepted the position of the Plaintiffs, that the Clinic had public standing interest in the matter.

On the third and final issue, the court struck out only a few of the statements found in the Statement of Claim to have clearly offended the rules of pleading.

IMPLICATION

The Clinic was able to move forward in the matter as a co-plaintiff, rather than having to be removed and re-apply for intervenor status.

14. SCC approves of harsher sentences for sexual offences against children

CASE CITATION

R v Friesen, 2020 SCC 9

CLINIC'S ROLE

BACKGROUND

F and the victim's mother subjected the victim, a four-year-old child, to sexual violence. When the mother's friend intervened and removed the child from the room, F proceeded to threaten the mother.

F was charged and pled guilty to sexual interference with the victim and attempted extortion of the mother. The sentencing judge determined that the four-to-five-year sentencing starting point identified by the Manitoba Court of Appeal for major sexual assault committed on a young person within a trust relationship was appropriate, even though F was not in a position of trust relative to the victim. The sentencing judge imposed a six-year sentence for sexual interference and a concurrent six-year sentence for attempted extortion.

The Court of Appeal held that the sentencing judge erred in principle by applying the starting point when there was no trust relationship. The Court of Appeal reduced the sentence to 4.5 years for sexual interference and 18 months concurrently for attempted extortion.

The Crown appeal the Court of Appeal's changes to the sexual interference sentence to the SCC.

DECISION

The Court allowed the appeal and restored the sentence imposed by the sentencing judge for sexual interference. The Court found that the sentencing judge made no error in principle by using the 4-5 year starting point due to the aggravating circumstances of the case.

The court explained that protecting children from exploitation and harm is an objective of the legislative scheme of sexual offence against children in the Criminal Code. Therefore, sentencing judges must impose a sentence that properly responds to the wrongfulness and harm created by sexual offences against children.

The court provided approval for upward departures from prior precedents of sentencing ranges for sexual offences against children because Parliament has increased maximum sentences for these offences and society's understanding of the gravity and harmfulness of the offences has grown.

IMPLICATION

Harsher sentence is restored for F's incarceration; greater protection advanced for children who are victims of sexual violence.

15. Anti-Slapp Legislation

CASE CITATION

1704604 Ontario Ltd. v. Pointes Protection Association. 2020 SCC 22

CLINIC'S ROLE

BACKGROUND

F and the victim's mother subjected the victim, a four-year-old child, to sexual violence. When the mother's friend intervened and removed the child from the room, F proceeded to threaten the mother.

In 2015, Ontario amended the Courts of Justice Act by introducing ss. 137.1 to 137.5 [anti-SLAPP legislation]. These provisions were aimed at mitigating lawsuits initiated against individuals or organizations that speak out on an issue of public interests as an indirect tool to deter them, or other potential interested parties, from participating in public affairs.

Pointes Protection Association, a not-for-profit corporation, relied on anti-SLAPP legislation to bring a pre-trial motion to have a $6 million action for breach of contract initiated against them by a land developer dismissed. The action was brought in the context of Pointes Protection's opposition to a proposed subdivision development by the developer. The developer claimed that the testimony of the association's president, breached an agreement between the developer and Pointes Protection that imposed limitations on Pointes Protection's conduct.

DECISION

The Court found found that 170 Ontario's action lacked merit, and any harm suffered by the corporation and any public interest in allowing the case to go forward did not outweigh the public interest in protecting Pointes Protection's expression.

SLAPPs hurt people's right to freedom of expression, and that freedom of expression is important to our democracy. The court found that this was a SLAPP lawsuit and granted pointes protection's motion to have the action against them dismissed.

IMPLICATION

Upholding anti-SLAPP legislation works to protect public participation, freedom of expression, and prevent the abuse of court processes by big companies looking to silence their critics and overwhelm them with litigation.

16. Interpretation of Anti-SLAPP Legislations

CASE CITATION

Bent v. Platnick, 2020 SCC 23

CLINIC'S ROLE

Intervenor

BACKGROUND

Bent, a plaintiff-side accident and injury lawyer sent an email to an email listing of the Ontario Trial Lawyers' Association (OTLA), in which she mentioned Platnick (a medical doctor) by name and alleged that he "altered" doctors' reports and "changed" a doctor's decision as to a victim's level of impairment. Platnick commenced a lawsuit in defamation against Bent and her firm. Bent filed a motion under s. 137.1 of the Courts of Justice Act (CJA) to dismiss the lawsuit based on the anti-SLAPP legislation.

The stated purpose of anti-SLAPP legislation ("strategic litigation against public participation") is to remove meritless matters from the court system that have the intended effect of silencing commentary due to public interest. Section 137.1 of the CJA permits the court to dismiss a lawsuit in defamation where, among other things, the defence of qualified privilege is "reasonably likely… [to] succeed". Interpreting anti-SLAPP legislation thus requires a court to balance the fundamental values of protection of reputation against freedom of expression.

At the Ontario Superior Court of Justice, the motion judge, Dunphy J, allowed the dismissal under s. 137.1 to proceed. While Dunphy J did not make a finding as to whether Platnick's claim had substantial merit pursuant to s. 137.1(4)(a)(i), he determined that the public interest in permitting Platnick's defamation suit did not outweigh the public interest in Bent's freedom of expression, pursuant to s. 137.1(4)(b). However, the motion judge's decision was overturned at the Court of Appeal for Ontario ("ONCA") where Doherty JA, writing on behalf of a unanimous Court, refused Bent's request to dismiss the motion under s. 137.1.

DECISION

The majority, 5-4, sided with Platnick, holding that his lawsuit in defamation deserves to be adjudicated on its merits and may continue. The SCC majority preferred the value of protection of reputation over the value of free expression on a matter of public interest.

IMPLICATION

This decision may create an added barrier to professionals like Bent from coming forward to scrutinize their peers, who may be causing harm to the public. Bent was fulfilling her duty as a personal injury lawyer and president-elect of the OTLA by expressing concerns about Platnick to OTLA members. The reputational harms to Platnick as a result of this expression was a by-product of Bent acting on behalf of the public interest.

The SCC's dismissal of the anti-SLAPP motion inadvertently demonstrates that protecting a powerful individual's professional reputation is more important than preserving the public's right to know what may cause harm to them and the opportunity to hold them accountable. A particular concern could be lawyers who specifically work with marginalized clients, who become privy to knowledge that other professionals are failing to meet the standards of their profession.

17. Access to justice for women labelled with intellectual disabilities

CASE CITATION

R. v. Slatter, 2020 SCC 36

CLINIC'S ROLE

Intervenor

BACKGROUND

The adult complainant testified that between 2009 and 2013, when she was in her late teens and early 20s, her neighbor, Thomas Slatter ("Slatter"), sexually assaulted her on numerous occasions. Dr. Jessica Jones, a forensic clinic psychologist, testified at trial that she had diagnosed the complainant as having an intellectual developmental disorder and found her to academically function at the level of a 10- to 12-year-old. Regardless, Justice Tausendfreund found the complainant's testimony to be compelling and detailed and found Slatter guilty of sexual assault, sentencing him to 27 months in prison.

Slatter appealed this decision and argued that Justice Tausendfreund did not explain in his reasoning the issue of the complainant's reliability and alleged suggestibility. Justices Doherty and Trotter of the Ontario Court of Appeal allowed his appeal and ordered a new trial. However, Justice Pepall provided a dissenting opinion and found that the trial judge's explanation to be adequate. This provided the Crown prosecutor with an automatic right of appeal to the Supreme Court of Canada.

DECISION

The Supreme Court agreed unanimously with Justice Pepall's dissenting opinion. The court emphasized the value of assessing the individual giving the testimony, rather than an expert opinion, with respect to determining a witness' credibility and reliability free from stereotypes.

On behalf of the Court, Justice Moldaver wrote: "*Over-reliance on generalities can perpetuate harmful myths and stereotypes about individuals with disabilities, which is inimical to the truth-seeking process, and creates additional barriers for those seeking access to justice.*"

IMPLICATION

Cases that deal with sexual assault often turn on the credibility and reliability of witnesses, especially the complainant. Credibility deals with a witness' veracity or truthfulness, while reliability deals with the accuracy of a witness' testimony. Both the credibility and reliability of a witness are factual determinations to be made by a trial judge or jury. Women and girls with intellectual disabilities are disproportionately victims of sexual violence, and these assaults often go unreported and are under-prosecuted in comparison to those victims who do not suffer from a disability. Furthermore, females with intellectual disabilities also face barriers in having their allegations believed due to stereotypes about their credibility and reliability as witnesses.

The majority decision of the Court of Appeal creates an additional barrier to access to justice for women labelled with intellectual disabilities by reinforcing harmful stereotypes about them. A substantive equality analysis requires the Court to make assessments based on the actual abilities and individual circumstances of women with disabilities, i.e. their ability to describe what happened, as opposed to generalizations about their disabilities.

17. Access to justice for women labelled with intellectual disabilities

IMPLICATION

Although a step in the right direction by the SCC in dismissing the stereotyping and generalizations towards women with intellectual disabilities, there is a lot more that is required by the Canadian legal system in recognizing gendered sexual violence. The SCC failed to explicitly acknowledge the disproportional number of sexual violence survivors amongst women with disabilities compared to those without. The SCC could have taken additional steps to secure the substantive equality rights of all women more concretely with intellectual disabilities engaging with the court system moving forward.

18. Rights of Refugee Children

CASE CITATION

M.A.A. v. D.E.M.E., 2020 ONCA 486

CLINIC'S ROLE

Intervenor

BACKGROUND

The appellant mother of 3 children brought her kids from Kuwait to Canada without the respondent father's consent. The appellant sought refugee status for herself and her children, alleging that she fled an abusive relationship that put the safety of her family at risk.

The respondent father applied for an order requiring that the children be returned to Kuwait, as he alleges that the mother wrongfully kidnapped the children and denied the allegations of abuse.

The mother asked Ontario to exercise jurisdiction to decide her custody claim, based on s. 23 of the Children's Law Reform Act (CLRA) which allows an Ontario court to exercise jurisdiction to make a custody and access order where the child is physically in Ontario and the court finds that the children would suffer serious harm if removed from Ontario. The application judge found that there was no risk of serious harm to the children and ordered them to return to Kuwait.

The mother appeals this decision. Her appeal was supported by the Office of the Children's Lawyer (OCL) and 4 interveners, including the Clinic. The appellant mother argued that the application judge erred in her credibility analysis of the mother, which tainted her consideration of the children's evidence.

The Clinic submitted that when assessing the credibility of evidence to determine risk of harm under the CLRA, the Family Court should consider the legal framework of the Act holistically and read s. 23 through a gender-based violence lens, which includes the negative effect of domestic violence on children.

DECISION

Appeal allowed.

The Court found that the application judge did err in the treatment of the children's evidence provided through the OCL, which did in fact establish a risk of serious harm. Therefore, Ontario did have jurisdiction to make a s. 23 custody and access order. As such, it was an error to order to the children to return to Kuwait.

The Court ordered a custody and access hearing to proceed in the Superior Court of Justice.

IMPLICATION

Harm related to the effects of domestic violence on children to be incorporated in the Court's analysis of risk of serious harm to children when considering important custody and access orders.

19. SCC: *Rape shield laws are constitutional*

CASE CITATION

R. v. J.J. 2022 SCC 28

CLINIC'S ROLE

Intervenor

BACKGROUND

As a part of rape shield laws, The Criminal Code states evidence of a complainant's prior sexual activities that is unrelated to the charges at hand must be admitted with permission of a judge via a private hearing. The purpose is to prevent a bias that the complainant is less trustworthy or more likely to have consented. In 2018, the definition expanded to add communications of a sexual nature such as emails, videos, a complainant's diary, their medical records or personal letters about the complainant that are in the possession of the accused.

SCC decided the case from two appeal courts — one in British Columbia and one in Ontario — both of which had said the changes made to rape shield laws impacted an accused's right to a fair trial, arguing they were "unconstitutional in their entirety."

Joanna Birenbaum, who represented the Barbra Schlifer Clinic, argued that the legislation protected complainants from being humiliated and degraded during trials by irrelevant private records kept by the accused that could include discussions of mental health diagnoses, past sexual abuse, substance use and sexual content.

DECISION

In a 6-3 decision, the majority rules that the law does not "guarantee the most favorable procedures imaginable for the accused." The rights of a complainant, and the public, must weigh on the fairness of a trial as well. The judgment further read: "ambushing complainants with their own highly private records at trial can be unfair to complainants and may be contrary to the search for truth".

Non-enumerated records that contain personal information for which the complainants have a reasonable expectation of privacy must be reviewed by the application judge. These records contain information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. The rights of the defence will only be violated if the accused is prevented from adducing relevant and material evidence, the probative value of which is not outweighed by its prejudicial effect. The admissibility threshold in the record screening regime does not give rise to such a violation.

IMPLICATION

Cases, such as these, assist in moving towards creating a balance between the rights of an accused to a fair trial, the public interest, and the rights of a complainant to dignity, equality and privacy. However, there is still a long way ahead. The myth that a woman's prior sexual history makes her less trustworthy needs to be addressed.

20. Consent involving condom use

CASE CITATION

R. v. Kirkpatrick, 2022 SCC 33

CLINIC'S ROLE

Intervenor

BACKGROUND

Ross McKenzie Kirkpatrick and the complainant met in 2017 and had sex twice one night. The complainant testified that she insisted Kirkpatrick wear a condom prior to them having sex. However, unbeknownst to the complainant, on the second occasion, Kirkpatrick did not wear a condom. The complainant filed a report with police saying she didn't consent to sex without a condom and said she would not have done so if asked.

The Trial Judge acquitted Kirkpatrick of sexual assault, stating that there was no evidence that the complainant had not consented to the sexual activity in question, so Kirkpatrick did not act fraudulently. The complainant appealed the decision, and the Court of Appeal for British Columbia "unanimously" ordered a new trial.

DECISION

The Supreme Court has dismissed Mr. Kirkpatrick's appeal and has confirmed a new trial is needed.

Justice Sheilah L. Martin said that when condom use is a condition for sexual intercourse, "there is no agreement to the physical act of intercourse without a condom". The condom is part of the "sexual activity in question" to which a person consented under section 273.1(1) of the Criminal Code.

"Since only yes means yes and no means no, it cannot be that 'no, not without a condom' means 'yes, without a condom,'" Justice Martin wrote.

IMPLICATION

Condom sabotage and non-consensual condom removal are coercive sexual practices that undermine women's sexual autonomy, bodily integrity, and their right to decide in what sexual activity they are willing to participate. These types of violative condom practices are a common and devastating form of sexual violence. However, the law continues to lag in recognizing violative condom practices as sexual assault in a narrow set of circumstances.

21. SCC: When condom use is a condition of consent, it must form part of the "sexual activity in question" under s.273.1(1)

CASE CITATION

R. v. Kirkpatrick, 2022 SCC 33

CLINIC'S ROLE

Intervenor

BACKGROUND

In 2014 the SCC in Hutchinson rejected condom sabotage as sexual assault under s.273.1 because the ordinary meaning of "sexual activity in question" is the specific physical sex act, like kissing, oral sex, or intercourse, and does not include conditions or qualities of the physical act like birth control measures or the presence of STDs. Condom sabotage should be analyzed under s.265(3) fraud provision rather than s.273.1.

The complaint agreed to have sex with Kirkpatrick on the condition that he wear a condom. He did not wear one. He was charged with sexual assault.

At the Provincial court of B.C. J. Solomon acquitted Kirkpatrick of sexual assault relying on the SCC holding in Hutchinson.

The Court of Appeal for B.C. unanimously allowed the Crown's appeal and ordered a new trial.

Joanna Birenbaum represented the Barbra Schlifer Clinic at the SCC. She argued that non-consensual condom refusal or removal does constitute sexual assault.

DECISION

In a 5-4 decision, the majority rules that if condom use is a condition to someone's consent to sexual activity, and the other person does not wear a condom, that person can be charged with sexual assault.

Condom use may form part of the sexual activity in question because sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom. Condom use is at the core of consent. If a complainant only agreed to sex on condition that the accused wear a condom, and they don't wear one, then the complainant did not consent and there is no consent to be vitiated by fraud.

"*When it is a condition of the complainant's consent, condom use must form part of the "sexual activity in question"* under s.273.1 (1)" [para 25].

IMPLICATION

Clinic clients who agreed to have sex with the other party only on the condition that person wear a condom, and that person didn't wear one, that the other party may be guilty of sexual assault, because the client did not provide consent to the sexual activity in question, sex without a condom.