PROPOSED AMENDMENTS TO THE CRIMINAL CODE WITH RESPECT TO THE VICTIMS OF RAPE AND RELATED SEXUAL OFFENCES

> "It seems clear that the magistrate was in error in refusing to allow counsel for the defendant to cross-examine the complainant as to her previous life and conduct under the general rules of cross-examination as to credibility, although the matter had nothing to do with the particular facts of the charge in question."
>
> "In Phipson on Evidence, 4th Edition, page 463, it is stated that a witness may be cross-examined concerning his antecedents, associations or mode of life, which, although irrelevant to the issue, would be likely to discredit his testimony or degrade his character."

R. vs. Bell **[1930]** 1 W.W.R. 433 at p. 433, a unanimous decision of five Judges of the Alberta Supreme Court per Hyndman, J. A.

In *The King vs. Bishop et al* (1906) 11 C.C.C. 30, it is reported as follows:

> "The defence endeavoured to introduce evidence of the general bad reputation of the prosecutrix for unchastity. The Crown objected, citing *R. vs. Laliberte* (1877) 1 S.C.R. 117. Counsel for the accused contended that the last case cited was only authority for the proposition that if the prosecutrix is asked as to her alleged specific acts of immorality with persons other than the accused, her answer is conclusive; that in the present instance only general evidence was being attempted to be given (Phipson on Evidence, p. 146; Wigmore on Evidence, Vol. 1, p. 130); that this evidence is permitted to be given to show consent, as probably a strumpet would more likely consent than a virgin."
>
> "Graham, J. (of the Supreme Court of Nova Scotia) admitted the evidence as to the general bad reputation for unchastity (of the prosecutrix)."

In *The King vs. Finnessey* (1906) 10 C.C.C. 347 at p. 351, Osler, J. A. in the judgment of the Court of Appeal for Ontario, stated:

> "The prosecutrix may be asked questions to shew that her general character of chastity is bad. She is bound to answer such questions and if she refuses to do so the fact may be shewn: *Rex* v. *Clarke* (1817), 2 Stark. 244; *Rex* v. *Barker* (1829) 3 C. & P. 589; *Regina* v. *Holmes* (1871), L.R. 1 C.C.R. 334, 337. So too she may be asked whether she has previously had connection with prisoner and if she denies it that may be shewn; *Rex* v. *Martin* (1834), 6 C. & P. 562. Such evidence is relevant to the issue since both cases it bears directly upon the question of consent and the improbability of the connection complained of having taken place against the will of the prosecutrix."
>
> "And she may be asked, but, inasmuch as the question is one going strictly to her credit, she is not generally compellable to answer whether she has had connection with persons other than the prisoner. This seems to rest to some extent in the discretion of the trial judge. Whether, however, she answers it or not that is an end of the matter, otherwise as many collateral, and therefore irrelevant issues might be raised as there were specific charges of immorality suggested, and the prosecutrix could not be expected to come prepared to meet them, though she might well be prepared to repel an attack upon her general character for chastity: *Rex* v. *Hodgson* (1811), R. & R. 211; *Regina* v. *Laliberte*, 1 S.C.R. 117; *Regina* v. *Holmes*, L. R. 1 C.C.R. 334; Phipson on Evidence, 3rd ed. 158, 453."

Recently, there has been considerable discussion of proposed amendments to the Criminal Code for the protection of the victims of rape and other related sexual offences. The Attorney-General and Minister of Justice of Canada, the Honourable Otto Lang, has indicated that the Criminal Code will be amended to limit the introduction of evidence as to character of a victim with respect to her character, except in two situations.

The first is where the victim introduces evidence of her own good character. The second is where her character has some particular relevance and the defence counsel can satisfy a judge of such relevance on a *voir dire* in the absence of the jury.

If a prostitute was standing at a bus stop and was struck by a vehicle driven by a drunken driver, in any prosecution of the driver, the character of

the prostitute would not be relevant or a matter in issue. Why then, if she were forcibly abducted at the bus stop and subsequently subjected to a sexual assault, should her character be considered to be relevant and a matter in issue?

A spectator at a trial on a charge of rape or some other related sexual offence who was unfamiliar with the legal process and the scope of cross-examination allowed, may well gain the impression that it is the prosecutrix and not the accused who is on trial. The scene where the witness is reduced to tears or the unscheduled recess to allow the witness to regain her composure is all too familiar to experienced trial counsel. Surely, we should have instituted the reforms proposed by Justice Minister Otto Lang a long time ago.

In November, 1974, in a front-page article in one of the Winnipeg daily newspapers under the headline "Girl, 16, won't testify; rape charge dismissed", it was reported as follows:

> "A rape trial Monday was cut short when the 16-year-old complainant refused to testify because she feared the trauma of cross-examination.
>
> "As a result, the 20-year-old man charged with rape and gross indecency was acquitted."
>
> "The girl claimed that due to the extensive cross-examination by defence counsel at the preliminary hearing, she had to go to hospital and almost suffered a miscarriage. She was reluctant to go through the experience again Crown Counsel told court."
>
> "She was pregnant at the time of the preliminary hearing, although not as a result of the alleged rape, he said."
>
> "Still pregnant Monday morning, she did not show up in court, despite the fact she had been subpoenaed. A warrant was issued and she was arrested and brought to court at 2 p.m."
>
> "She took the stand, but after only a few minutes of questioning by Crown Counsel she left the stand without a word and walked out of the courtroom."
>
> "Crown Counsel had asked her to describe the incident, which occurred after 3 a.m. March 15, after she was picked up when hitch-hiking downtown. She was 15 at the time."
>
> "When she walked out of the courtroom, Crown Counsel closed the Crown's case. (The trial Judge) then directed the jury to acquit."

At the preliminary inquiry into the charge, the complainant had testified that:

> "He started oral and then he raped me."

Requested to explain this, she testified:

> "He starting licking me — in the vagina — (and then) he climbed on top of me and penetrated me — (with) his penis — (in) — my vagina."

The transcript of the cross-examination of the complainant on the preliminary inquiry includes the following:

> Q And I take it you couldn't see the person's face when he was supposedly licking you?
> A No, I couldn't.
> Q I see. How do you know he was licking you?
> A I could feel that.
> Q What could you feel?
> A His tongue.
> Q How do you know it wasn't his finger?
> A I don't know. You can tell.
> Q Oh, you can tell. I see. How can you tell? What's the difference in feeling between a tongue and a finger?
> A I don't know. You can just tell.
> Q Have you ever had someone lick you before?
> A No.
> Q No?
> A Shakes head.
> Q Have you had someone ever put his finger in your vagina before?

A What has that got to do with it?
CROWN ATTORNEY:
That's quite true. I don't want to object to these questions, but they are not really questions I don't think that would be of any assistance to the accused and they are to a certain extent harassing to the witness.
THE COURT:
It's a very pertinent substance on this charge, unless the lady has so alleged in her evidence in response to your question that this is what has happened.
CROWN ATTORNEY:
Your Honour, with the utmost of respect, it is my understanding that a witness may be asked if she's had intercourse before. The witness was asked that.
She said she had. That is the end of it. You don't probe, I submit, into these questions. Any further or previous acts have been admitted and they are not acts which are, as my understanding, are matters that can be explored by my learned friend. They are collateral matters that go to credibility. She has answered yes, she has had previous sexual involvement and my learned friend is suggesting —
THE COURT:
That's not the nature of the cross-examination as I understand it. Her evidence has described certain actions that took place inside the car. One of her, part of her evidence relates to what happened before intercourse. Now the basis of her observations and/or her opinions are certainly the subject of cross-examination.
CROWN ATTORNEY:
Thank you Your Honour.
THE COURT:
This lady has stated and as I understand her evidence in no uncertain terms what she described as licking. Was it as a result of observations? Was it as a result of inference? Both, or something else? That certainly would be very germane being part of the *res gestae,* that is, on that basis that Counsel is permitted to proceed.
CROWN ATTORNEY:
Thank you, Your Honour.
DEFENCE COUNSEL:
Q Have you ever had someone put his fingers in your vagina before?
A I'm not going to answer that.
DEFENCE COUNSEL:
I ask for instructions from Your Honour.
THE COURT:
The question I suppose should be rephrased, sir. Counsel might wish to consider insofar as determining your prior question whether or not she is able to state affirmatively that it was not the finger rather than a tongue. It's not the basis on which she makes her opinion.
DEFENCE COUNSEL:
Q How can you positively state that it wasn't the finger that was placed in your vagina rather than a tongue?
A I'm not going to go into great detail.
DEFENCE COUNSEL:
Again I ask for directions from the bench.
THE COURT:
The charge that has been laid against the man is particularly serious ma'am. You may find it difficult for a number of reasons to answer the questions.
WITNESS:
Yeah, well, I'm not going into my personal life.
THE COURT:
Your personal life is not the subject, but the reason why you say that he was licking rather than possibly a finger is something that certainly you can answer. If you can't answer that question or you don't know the answer you can simply state that to the Court. Why do you, for instance, think that he was licking you? Is it possible that it was his finger or something else?
WITNESS:
No.
THE COURT:
The reason why you are positive is what defence counsel is asking you and I would like to know why you think, why you are positive that it was the licking rather than a finger.

WITNESS:
Well you can feel his breathing.
DEFENCE COUNSEL:
Q Where were you feeling the breathing?
A Where do you think. On my vagina.
Q Is it not possible his hand could have been close to your vagina, the driver's?
A No.
Q Finger? Why not? Again I ask you.
A I don't know. It's possible, but it's not true.
Q So really, the only way you're basing it, the fact that you say he was licking you was because of breath that you felt?
THE COURT:
In regards to the witness she is also referring to —
DEFENCE COUNSEL:
The breathing, excuse me.
THE COURT:
As well as the touch.
WITNESS:
Well what do you want me to say?
CROWN ATTORNEY:
Well that wasn't a question. I don't know whether the witness understands that is a question or just a statement of fact.
DEFENCE COUNSEL:
Q All right, you state the fact or you've told the Court that one of the reasons you felt that you were being licked was because of the breathing you felt, is that correct?
A I don't think, I know.
Q You know?
A Nods head in the affirmative.
Q And that's because of breathing, is that correct?
A Yep.
Q I see. And are you able also to be able to tell the Court that you can tell the difference between a finger in your vagina and a tongue in your vagina?
A Nods head in the ffirmative.
Q You can tell the difference?
Q You can't tell the difference, is that your answer?
A Yes, I could.
Q You could tell the difference?
A Yep.
Q Well if you could tell the difference, why? Because of touch or feel?
A Yep.
Q All right.
A Touch.
Q Pardon?
A Because the way you feel it. It feels different.
Q It feels different?
A Yeah.
Q Okay. If that is your answer then, again I ask you, have you ever had a tongue —
A I'm not going to answer any questions about my personal life.

FURTHER ARGUMENT ENSUED AT THIS POINT
The complainant then testified under cross-examination as follows:

DEFENCE COUNSEL:
Q And you say he put his penis where?
A In my vagina.
Q Did you see him do this?
A No.
Q No?
A. How could I see anything when my head was on the seat?
Q Well how do you know it was the penis?
A There is a difference.
Q There's a difference between —
A You can tell.
Q How can you tell?
A You can feel it.

Q Well how can you tell the difference between the penis in your vagina and a finger in your vagina?
A I don't know, you can just feel it.
Q Well again I ask you, can you tell the difference between a penis —
A I'm not going to answer that.
FURTHER ARGUMENT ENSUED AT THIS POINT.
She was then cross-examined as follows:
DEFENCE COUNSEL:
Q You couldn't see where the other, his other hand was, could you?
A I don't remember where it was.
Q I see. So it's possible that not being able to see where the other hand was or where the other five fingers were, instead of it being a penis that had penetrated you, it could have been a finger, isn't that correct?
A No.
Q Why not?
A I just told you, you can tell the difference.
Q Well I'm submitting, Your Honour, we are back to peg one.
THE COURT:
Is there any special reason why you feel that you're confident that in your mind it wasn't a finger or fingers of the accused, Miss?
WITNESS:
Well any female can tell what's what.
DEFENCE COUNSEL:
May I be permitted to carry on with this line of questioning?
THE COURT:
It's proper, if the question is objectionable I'm sure (the Crown Attorney) will object.
DEFENCE COUNSEL:
Q I'll try not to be irrelevant with my questioning of you. We are dealing with you, not with every other female. You say you can tell the difference between a vagina, a penis and a finger —
A Yeah.
Q Inside of you?
A Yeah.
Q Since you couldn't see his finger you say you could tell that it wasn't his finger?
A Yeah.
Q By touch? Now we are not dealing with breathing now, we are dealing with touch. You are saying you could tell the difference between the feel of a penis inside you and the feel of a finger?
A Nods head in the affirmative. It feels different.
Q All right. Have you ever had then a finger inside you?
A I'm not going to answer those questions.
FURTHER ARGUMENT ENSUED AT THIS POINT.

This is only a portion of a lengthy cross-examination of the complainant skilfully conducted by an experienced and very competent defence counsel. I have no complaint whatsoever about the conduct of counsel in the case; my complaint is that the law would permit this type of cross-examination.

In analyzing the cross-examination of the complainant, is it not cross-examination as to her character when defence counsel asks whether someone had licked her before or whether someone had put his finger in her vagina before? Or is her character impugned only when she is asked whether she had previous sexual intercourse; thereby distinguishing the tongue and the finger from the penis?

I support the proposed amendment to limit the introduction of evidence and the cross-examination of the victim of rape or other related sexual offences with respect to her character. I stress that character may well be relevant and a matter in issue where the defence counsel can satisfy the judge of such relevance on a voir dire in the absence of the jury or where the complainant introduces evidence of her own good character. Certainly, we must always be mindful that there will always be spiteful complainants

who will prosecute unfounded sexual charges. Yet, it is a sign of the times that rapes or other related sexual offences against women frequently involve women who have had previous sexual experience; they need not be embarrassed because of this where it is of no relevance to the issue before the Court.

It is encouraging to note that the Courts are moving towards the position proposed by the Justice Minister. In a recent Assize case in Winnipeg, defence counsel attempted to question the complainant in a sexual assault case with regard to her occupation as masseuse. The learned Trial Judge disallowed this line of questioning as, in the circumstances of the case, her occupation had no relevance whatsoever.

On March 3rd, 1975, a report in a Winnipeg daily newspaper stated as follows:

> "REGINA (CP) — Details of a rape victim's personal life were ruled inadmissible in a Court of queen's Bench trial that ended Thursday with conviction of 24-year-old Robert Oliver Kerr of Regina."
>
> " 'It is not this woman who is on trial.' Mr. Justice R. A. MacDonald said as he cited a recent Saskatchewan Court of Appeal decision limiting the admissibility of such information."
>
> "Evidence was that the 19-year-old victim did not know Kerr previously and that she suffered bruises on her neck from being choked."

The Justice Minister has also indicated that he may introduce legislation to prohibit the publication of the name of the complainant in a case of rape or another related sexual offence. Further, he has indicated that legislation may also be introduced to encourage the Court to hold trials of rape and other related sexual offences *in camera* and to encourage the Courts to order a change of venue for the protection of the complainant.

I do not support the suggestion that the publication of the name of the complainant be prohibited. Further, I am satisfied that Section 442 of the Criminal Code, which permits the Court to exclude the public where it is in the interest of public morals, the maintenance of order or the proper administration of justice, gives more than sufficient scope to the Court in an appropriate case. It is important that justice be administered openly and in public. The public must be assured that trials are not held *in camera* without substantial and real cause being shown.

In the words of Latchford, J. (of the Ontario Supreme Court) in *Reid vs. Aull* (1914) 16 D.L.R. 766 at p. 767:

> "It is to be remembered that here, as in England, the law is administered publicly and openly, and its administration is at once subject to, and protected by, the full and searching light of public opinion and public criticism. The openness and publicity of our Courts forms one of the excellences of our practice of the law —."

It should be further noted that, on a preliminary inquiry, an application is invariably made pursuant to Section 467 of the Criminal Code which requires the Court to forbid the publication of any of the evidence until the trial is ended.

Section 527 of the Criminal Code permits a change of venue where "it appears expedient to the ends of justice". This would appear to give the Court sufficient scope; the application for change of venue may be made by either the prosecutor or the accused. However, in my view the test cannot be that there is some remote possibility that the complainant may be embarrassed. Trial venues cannot and should not be changed on mere speculation or intuition; there must be substance.

A further matter not commented upon by the Justice Minister but where I believe reform is required relates to the instruction to the jury under Section 142 of the Criminal Code. I cannot understand why a jury must be

warned on a charge of rape, attempt rape or indecent assault that, where there is no corroboration of the evidence of the complainant, it is not safe to find the accused person guilty in the absence of corroboration. Why should the complainant in a sexual assault case be distinguished from a complainant in a robbery case? I would urge the repeal of Section 142 in this regard.

In conclusion, in my view, limiting cross-examination of the victim of a rape or other related sexual offence to only what is relevant and material may dispel some of the concern on the part of the victims of these sexual assaults that they will be caused embarrassment if they make a complaint to the authorities. I believe that this is a step in the right direction. However, this will not mean that all victims of sexual assaults will complain to the authorities. Here we come up against community attitudes which cannot and will not be changed overnight. So often we find a daughter that cannot discuss sexual matters with her own mother; how much more likely is she to discuss them with a stranger, be it a police officer, a Crown Attorney or a Judge?

G. R. Goodman, Q.C. *

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* Assistant Deputy Minister (Legal), Department of The Attorney-General of Manitoba, March 27, 1975

Footnote: I wish to acknowledge the assistance given to me in the preparation of this article by M. S. S. Nozick and Mr D Rapersad, Crown Attorneys with the Department of the Attorney-General