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

Steven Seaboyer *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General for Saskatchewan, the Canadian Civil Liberties Association and Women's Legal Education and Action Fund et al. *Interveners*

and between

Nigel Gayme *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General for Saskatchewan, the Canadian Civil Liberties Association and Women's Legal Education and Action Fund et al. *Interveners*

Indexed as: R. *v*. Seaboyer; R. *v*. Gayme

File Nos.: 20666, 20835.

1991: March 26, 27; 1991: August 22.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Fundamental justice -- Whether ss. 276 and 277 of Criminal Code infringe s. 7 of Charter -- If so, whether infringement justified under s. 1 of Charter -- Whether legislation can be saved by doctrine of constitutional exemption -- Criminal Code, R.S.C., 1985, c. C-46, ss. 276, 277 -- Canadian Charter of Rights and Freedoms, ss. 1, 7.

Constitutional law -- Charter of Rights -- Presumption of innocence -- Whether ss. 276 and 277 of Criminal Code infringe s. 11(d) of Charter -- If so, whether infringement justified under s. 1 of Charter -- Whether legislation can be saved by doctrine of constitutional exemption -- Criminal Code, R.S.C., 1985, c. C-46, ss. 276, 277 -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d).

Criminal law -- Sexual offences -- Evidence -- "Rape-shield" provisions restricting right of defence to cross-examine and lead evidence of complainant's previous sexual conduct -- Whether provisions infringe s. 7 or s. 11(d) of Canadian

Charter of Rights and Freedoms -- If so, whether infringement justified under s. 1 of Charter or legislation saved by doctrine of constitutional exemption -- Criminal Code, R.S.C., 1985, c. C-46, ss. 276, 277.

Criminal law -- Preliminary inquiry -- Jurisdiction -- Whether preliminary inquiry judge has jurisdiction to decide constitutionality of legislation relating to evidence.

At issue here was whether the *Criminal Code*'s "rape-shield" provisions (R.S.C., 1985, c. C-46, ss. 276 and 277) infringe the principles of fundamental justice or the right to a fair trial found in ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The "rape-shield" provisions restrict the right of the defence on a trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on other occasions.

Seaboyer was charged with sexual assault of a woman with whom he had been drinking in a bar. The judge at the preliminary inquiry refused to allow the accused to cross-examine the complainant on her sexual conduct on other occasions. The appellant contended that he should have been permitted to cross-examine 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. Such evidence might arguably be relevant to consent since it might provide other explanations for the physical evidence tendered by the Crown in support of the use of force against the complainant.

The *Gayme* case arose in different circumstances. The complainant was 15, the appellant 18. They were friends. The Crown alleged that the appellant sexually assaulted the complainant at his school. The defence, relying on the defences of consent and honest belief in consent, contended that there was no assault and that the complainant was the sexual aggressor. In pursuance of this defence, the appellant at the preliminary inquiry sought to cross-examine and present evidence on prior and subsequent sexual conduct of the complainant. Accordingly, he brought a motion that ss. 276 and 277 of the *Code* were unconstitutional. The judge rejected the motion, on the ground that he lacked jurisdiction to hear it, and committed the appellant for trial.

Both Seaboyer and Gayme applied to the Supreme Court of Ontario for an order quashing the committal for trial on the ground that the judge below had exceeded his jurisdiction and deprived the appellant of his right to make full answer and defence by enforcing the provisions of s. 276 of the *Criminal Code*. The orders were granted on the ground that ss. 276 and 277 violate the *Charter*, and the cases were remitted to the preliminary inquiry judges for a ruling on the evidentiary issues unhampered by the statutory provisions. An appeal to the Ontario Court of Appeal was allowed on the ground that the preliminary inquiry judges lacked the jurisdiction to determine the constitutional validity of the sections in question. They accordingly had not erred in applying the sections and the orders quashing the committal therefore had to be set aside. The Court went on, however, to consider the constitutionality of ss. 276 and 277 of the *Criminal Code* and found that the sections were capable of contravening an accused's rights under the *Charter* in some circumstances. It held that while the provisions had a

constitutionally valid purpose, they were not saved by s. 1. The court nevertheless found that the provisions would be operative except in those limited and rare circumstances where they would have an unconstitutional effect.

The constitutional questions stated in this Court queried whether ss. 276 and 277 infringed ss. 7 and 11(*d*) of the *Charter* and, if so, whether they were saved by s. 1. Also queried was whether the constitutional exemptions doctrine applied and, if the legislation was invalid, what was the law. With respect to the jurisdiction of the preliminary inquiry judge, the evidence sought to be tendered in the two cases was not at issue. In neither case did the preliminary inquiry judge consider whether the evidence would have been relevant or admissible in the absence of ss. 276 or 277 of the *Criminal Code*.

Held (L'Heureux-Dubé and Gonthier JJ. dissenting in part): The appeals should be dismissed; however, s. 276 of the *Criminal Code* is inconsistent with ss. 7 and 11(*d*) of the *Charter* and that inconsistency is not justified under s. 1 of the *Charter*. Section 277 is not inconsistent with the *Charter*.

Per Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Stevenson and Iacobucci JJ.: It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. Nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is thus probative should be received absent some other ground for its exclusion. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the

absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial. The trial judge must balance the value of the evidence against its potential prejudice. Virtually all common law jurisdictions recognize a power in the trial judge to exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it. The prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.

Sections 276 and 277 of the *Code* are to be measured against this yardstick. They have the capacity to deprive a person of his or her liberty and they violate the fundamental principles underlying our justice system if they exclude evidence whose probative value is not substantially outweighed by its potential prejudice.

Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. Section 277 excludes evidence which can serve no legitimate purpose in the trial but does not touch evidence which may be tendered for valid purposes. It accordingly does not infringe the right to a fair trial.

Section 276 has the potential to exclude evidence which is relevant to the defence and whose probative value is not substantially outweighed by the potential prejudices to the trial process. It constitutes a blanket exclusion, subject to three exceptions -- rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident. The value of the excluded evidence will not always be trifling when compared with its potential to mislead the jury.

Two fundamental flaws mark s. 276. First, the different purposes for which evidence may be tendered are not distinguished. The legislation misdefines the evil to be addressed as evidence of sexual activity, when in fact the evil to be addressed is the narrower evil of the misuse of evidence of sexual activity for irrelevant and misleading purposes--the inference that the complainant consented to the act or that she is an unreliable witness. The result of this misdefinition of the problem is a blanket prohibition of evidence of sexual activity, regardless of whether the evidence is tendered for an illegitimate purpose or for a valid one. Secondly, a "pigeon-hole approach" is adopted which is incapable of dealing adequately with the fundamental evidentiary problem, that of determining whether or not the evidence is truly relevant, and not merely irrelevant and misleading. This amounts, in effect, to predicting relevancy on the basis of a series of categories.

Section 276 has the potential to exclude otherwise admissible evidence which may be highly relevant to the defence. Such evidence is excluded absolutely, without any means of evaluating whether in the circumstances of the

case the integrity of the trial process would be better served by receiving it than by excluding it. Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed absent an assurance that the curtailment is clearly justified by even stronger contrary considerations.

The existence of other exclusionary rules of evidence does not support the contention that such rules are not contrary to the principles of fundamental justice or to our notions of what constitutes a fair trial. These rules are based on the justification that the evidence excluded is likely to do more harm than good to the trial process. They, moreover, admit of a great deal of flexibility, allowing considerable discretion to the trial judge to admit evidence in cases where the value of the evidence outweighs its potential prejudice.

Courts in other jurisdictions have found it necessary to curtail the effect of legislation similar to s. 276 of the *Criminal Code* so as to permit accused persons to present evidence relevant to their defence. This fact reinforces the conclusion that the legislation offends the principles of fundamental justice underlying a fair criminal trial.

The operation of s. 276 permits the infringement of the rights enshrined in ss. 7 and 11(*d*) of the *Charter*. In achieving its purpose -- the abolition of the outmoded, sexist-based use of sexual conduct evidence -- it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for

the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent.

Section 276 is not saved under s. 1 of the *Charter*. It addresses a pressing and substantial objective but the rights infringed are not proportionate to the pressing objective. Section 276 is rationally connected to the objective because it helps to exclude unhelpful and potentially misleading evidence of the complainant's prior sexual conduct. It does not, however, impair the right as little as possible. Even assuming that this case, which is criminal and therefore a contest between the state and the accused, might fall into the class where the state is given more latitude in fixing a balance between competing interests, the degree of impairment effected by s. 276 is still not appropriately restrained. The section excludes relevant defence evidence whose value is not clearly outweighed by the danger it presents and is therefore overbroad. Finally, there is no balance between the objective and the injurious effect of the legislation. 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. The line must be drawn short of the point where it results in an unfair trial and the possible conviction of an innocent person.

The doctrine of constitutional exemption should not be applied here. The exemption, while perhaps saving the law in one sense, dramatically alters it in another. Applying this doctrine would not achieve the end of substantially upholding the law which Parliament enacted. It would import the discretion of the trial judge, which was an element that the legislature specifically chose to exclude from the provision. The will of the legislature would become even more obscured with the addition of a host of judge-made procedures which have been proposed to effect this judicial amendment to the legislation. The result, too, will set up a regime based on discretion and common law notions of relevancy, which is precisely what striking down would do. Finally, this solution would delegate to the trial judge the task of determining when the legislation should not be applied. This result has the effect of placing on the accused the burden of showing that the decision to exclude evidence is unconstitutional.

Striking down s. 276 does not revive the old common law rules of evidence which permitted evidence of sexual conduct and condoned invalid inferences from it. These rules, like other common law rules of evidence, must be adapted to conform to current reality. Evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. The twin myths which s. 276 sought to eradicate have no place in a rational and just system of law.

The inquiry as to what the law is, in the absence of s. 276 of the *Code*, must be considered in light of the fundamental principles governing the trial process and the reception of evidence. Legitimate uses should be preserved and

illegitimate uses abolished. The approach of a general exclusion supplemented by categories of exceptions is bound to fail because of the impossibility of predicting in advance what evidence may be relevant in a particular case. Trial judges are not free to act on whim.

The following principles apply:

1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct (a) more likely to have consented to the sexual conduct at issue on the trial; or (b) less worthy of belief as a witness.

2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence.

3. Before evidence of consensual sexual conduct on the part of a victim is received, it must be established on a *voir dire* (which may be held *in camera*) by affidavit or the testimony of the accused or third parties that the proposed use of the evidence of other sexual conduct is legitimate.

4. Where evidence that the complainant has engaged in sexual conduct on other occasions is admitted on a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit.

Section 52 of the *Constitution Act, 1982* does not confer jurisdiction on a tribunal to determine whether a law is constitutional. That jurisdiction must be found in the legislation which defines the powers of the body. The jurisdiction of a judge on a preliminary hearing is conferred exclusively by Part XVIII of the *Criminal Code*. A justice presiding over a preliminary inquiry does not have the jurisdiction to grant a remedy under s. 24 of the *Charter* because a preliminary inquiry is not a "court of competent jurisdiction" under that section. The *Criminal Code* gives the magistrate no jurisdiction which would permit him to hear and determine the question of whether or not a *Charter* right has been infringed or denied. The preliminary inquiry judges therefore did not have power to determine the constitutionality of ss. 276 and 277 of the *Criminal Code*.

It was unnecessary to consider whether the refusal of the preliminary inquiry judges to determine the constitutional question was an error of jurisdiction so as to be reviewable.

The right to appeal from the rulings of preliminary inquiry judges is restricted to questions of loss or excess of jurisdiction. *Charter* violations do not give rise to jurisdictional errors. In criminal cases, *Charter* review will generally

take place at the trial stage. The only exception to this rule would appear to be cases where no other remedy, existing or prospective, lies for a wrong under the *Charter*.

Appeals from rulings on preliminary inquiries are to be discouraged. While the law must afford a remedy where one is needed, the remedy should, in general, be accorded within the normal procedural context in which an issue arises, namely the trial. Such restraint will prevent a plethora of interlocutory appeals and the delays which inevitably flow from them. It will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case.

Per L'Heureux-Dubé and Gonthier JJ. (dissenting in part): Sexual assault is not like any other crime. It is for the most part unreported and the prosecution and conviction rates are among the lowest for all violent crimes. These statistics indicate that prejudicial beliefs may distort our perception of what actually happens. Rape myths still present formidable obstacles for complainants in their dealings with the very system charged with discovering the truth. From the making of the initial complaint down to the determination of the issue at trial, stereotype and mythology are at work, lowering the number of reported cases, influencing police decisions to pursue the case, thereby decreasing the rates of arrest, and finally distorting the issues at trial and, necessarily, the results.

Parliament intervened on two notable occasions. First, it repealed s. 142 of the *Code* and enacted a provision designed to alleviate some of the

problems caused by the virtually unrestricted inquiry into a complainant's previous sexual history allowed at common law. Judicial interpretation of the section thwarted any benefit that might have accrued to the complainant. In fact, the provision, as judicially interpreted, provided less protection to the complainant than that offered at common law. Second, a sweeping reform was introduced in 1982 for the protection of the integrity of the person, the protection of children and special groups, the safeguarding of public decency, and the elimination of sexual discrimination. Sections 246.6 and 246.7 (now ss. 276 and 277) under scrutiny here were enacted as part of that reform.

The concept of relevance has been imbued with stereotypical notions of female complainants and sexual assault. This is plain from the common law which held that evidence of "unchasteness" was relevant to both consent and credibility. Any connection between the evidence sought to be adduced and the fact or matter of which it was supposedly probative must be bridged by stereotype (that "unchaste" women lie and "unchaste" women consent indiscriminately) in order to make sense.

Any relevancy decision is particularly vulnerable to the application of private beliefs whether the test be one of experience, common sense or logic. Generally the determination of what is relevant will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth. This area of the law has been particularly prone to the use of stereotype in determinations of relevance and again this appears to be the unfortunate concomitant of a society which, to a large

extent, holds these beliefs. Recognition of the large role that stereotype may play in such determinations has had surprisingly little impact in this area of the law.

It is contradictory to conclude that "truth" has been found if only stereotype renders a determination of relevancy understandable. And it is perverse to suggest that an objective application of the law of evidence mandates the admission of evidence which exhibits "rank prejudice". The examination of, and responsibility for, individual decision making is excluded. The application of "logic" and "common sense" may, in any given case, show "rank prejudice".

The irrelevance of most evidence of prior sexual history is clear once the mythical basis of relevancy determinations in this area of the law is revealed. Nevertheless, Parliament has provided broad avenues for its admissibility in setting out exceptions to the general rule in s. 276. Moreover, <u>all</u> evidence of the complainant's previous sexual history with the accused is *prima facie* admissible under those provisions. Evidence that is excluded by these provisions is simply irrelevant in a decision-making context free of myth and stereotype.

The exclusion of "pattern" evidence and "habit" evidence is not unconstitutional; the mythical basis of these arguments denies their relevance. "Pattern of conduct evidence" usually occurs where the complainant has had consensual sexual relations in circumstances that look much like those supporting the assault allegation. Such evidence is almost invariably irrelevant. It is highly prejudicial to the integrity and fairness of the trial process and, in any event, is nothing more than a prohibited propensity argument. Arguments in its favour

depend for their vitality on the notion that women consent to sex based upon such extraneous considerations as the location of the act, the race, age or profession of the alleged assaulter and/or considerations of the nature of the sexual act engaged in. Consent is to a person and not to a circumstance; the use of the words "pattern" and "similar fact" deny this reality. Such arguments are implicitly based upon the notion that women will, in the right circumstances, consent to anyone and, more fundamentally, that "unchaste" women have a propensity to consent.

Evidence characterized as habitual, as being more specific than character and as denoting one's regular response to a repeated situation, too, is inadmissible. Adopting such an argument here would lend support to the stereotypical proposition that "unchaste" women have a propensity to consent. No analogy can be drawn between this behaviour and volitional sexual conduct.

The relevance of evidence of mistaken belief in consent in some cases does not conclusively demonstrate the infirmity of the provision. No relevant evidence regarding the defence of honest but mistaken belief in consent is excluded by the legislation under attack here. Assuming that both the trier of fact and the trier of law are operating in an intellectual environment that is free of rape myth and stereotype about women, any evidence excluded by this subsection would not satisfy the "air of reality" that must accompany this defence nor would it provide reasonable grounds for the jury to consider in assessing whether the belief was honestly held. The structure of the exception set out in s. 276(1)(*c*) is thus not offensive to the defence of honest belief.

Evidence of prior acts of prostitution or allegations of prostitution are properly excluded by the provision. This evidence is never relevant and, moreover, is highly prejudicial. A prostitute is not generally more willing to consent to sexual intercourse and is no less credible as a witness because of that mode of life. There is no understandable reason for asking complainants in sexual assault cases if they are prostitutes.

Refutation of stereotype strikes at the heart of the argument that s. 276 does not allow evidence going to show motive to fabricate or bias. Clearly, most such alleged motives or bias will not be grounded in the complainant's past sexual history. Moreover, much of this evidence depends for its relevance on certain stereotypical visions of women -- that women lie about sexual assault and that women who allege sexual assault often do so in order to get back in the good graces of those who may have their sexual conduct under scrutiny. Evidence that a complainant has made prior false allegations of sexual assault is admissible under the existing provision, however, because this evidence does not involve the admission of her previous sexual history.

The evidence excluded by s. 276 is simply irrelevant because it is based upon discriminatory beliefs about women and sexual assault. This provision provides wide avenues for the introduction of sexual history evidence that is relevant. Paradoxically, some of the exceptions may be cast overly broadly with the unfortunate result that a large body of evidence may still be improperly admitted on the basis of specious relevancy claims. Even if relevant sexual history evidence is excluded, such exclusion is proper because of its extremely

prejudicial effect on the trial of the legal issues. The trial judge has a long-recognized discretion to exclude otherwise relevant evidence. Hence, a determination that something is relevant does not answer the further question whether, regardless of its relevance, there exists some rule or policy consideration that nevertheless mandates exclusion of the proffered evidence.

Relevant evidence may be excluded for many reasons and such exclusions play a significant and important role in the traditional law of evidence. Some evidence is excluded in order to protect values that our society holds dear. Other evidence may be excluded because of its inherent unreliability. As well, evidence will be excluded if it distorts rather than enhances the search for truth. The exclusion of evidence of sexual history, rather than negatively affecting decisions of guilt and innocence, rationalizes such determinations. Evidence of sexual history transforms the guilt or innocence determination into an assessment of whether or not the complainant should be protected by the law of sexual assault.

Neither "fairness" nor "the principles of fundamental justice" mandate the constitutional invalidity of s. 276. Rather, in order to achieve fairness and to conduct trials in accordance with fundamental tenets of criminal law, this provision must be upheld in all of its vigour.

An accused does not have a constitutional right to adduce irrelevant evidence. Accordingly, to the extent that much, if not all, of the evidence excluded by s. 276 is irrelevant, there is no constitutional issue. An accused,

furthermore, does not have the right under the *Charter*, whether under the rubric of a right to a fair trial or the right to make full answer and defence, to adduce evidence that prejudices and distorts the fact-finding process at trial. Notions of a "fair trial" and "full answer and defence" do not recognize a right in the accused to adduce any evidence that may lead to an acquittal. Such propositions cast ss. 7 and 11(*d*) in an extremely narrow fashion and deny meaningful content to notions of "fairness" and "principles of fundamental justice".

Because it excludes only irrelevant or prejudicial evidence, s. 276 passes constitutional muster. The accused, on any meaningful and purposive interpretation of the rights involved, has no right to adduce such evidence. Rather than making the ordinary rules of evidence inapplicable and putting an accused charged with sexual assault in a separate and worse position than persons charged with other serious crimes, the provision ensures that the ordinary rules of evidence are applied. Parliament has excluded no evidence that is not properly excluded both at common law and under the *Charter*.

Sections 7 and 11(*d*) of the *Charter* protect not only the accused but other interests as well. The exact nature of the other interests involved depends upon the nature and aspect of the right considered. The complainant, and indeed the community at large, have an interest in the reporting and prosecution of sexual offences. They also have a legitimate interest in ensuring that trials of such matters are conducted in a fashion that does not subordinate the fact-finding process to myth and stereotype. However, a discussion of the community or group interests involved is not strictly necessary as the competing interest in this

case, that of ensuring that trials and thus verdicts are based on fact and not on stereotype and myth, is not one belonging solely to any group or community but rather is an interest which adheres to the system itself; it maintains the integrity and legitimacy of the trial process. This interest is so closely intertwined with the interests of complainants and of the community that the distinction may be unimportant in reality.

The recognition of the accused's unfettered right to adduce all relevant evidence seriously misconstrues the phrase "principles of fundamental justice". Clearly, these principles have developed with an eye to values and interests beyond those of the accused, and thus such values and interests are pertinent in constitutional inquiries. The argument that an accused is prevented from adducing all relevant evidence going to innocence has little weight in this inquiry and must give way to other considerations. Sexual history evidence excluded by the provision is either irrelevant or so prejudicial that its minimal probative value is overwhelmed by its distorting effect on the trial process. It operates as a catalyst for the invocation of stereotype about women and about rape.

The *Code* provision, even if found to be unconstitutional in its effect, is justified under s. 1 of the *Charter*.

By enacting this provision, Parliament sought to minimize sexual discrimination in the trials of sexual offences through the elimination of irrelevant and/or prejudicial sexual history evidence. A further legislative goal, intimately linked to the first, was to encourage women to report their victimization. The

importance of Parliament's objectives in the reform of the law of sexual assault is amplified by the nature of the harm done and by the fact that its legislative effort gives voice to values that are paramount in a free and democratic society.

The measures were proportional. The effort on the part of Parliament to exclude sexual history evidence at trial, evidence which is largely irrelevant and biased, is rationally connected to the stated objectives of ridding the law in this area of discriminatory beliefs and of encouraging increased reporting of such offences.

The measures impair the rights of the accused as little as possible. Parliament weighed the claims of different groups and attempted to balance their concerns. The courts are not better situated than or even as well situated as Parliament to determine whether the "least drastic means" have been chosen. The appropriate standard of review at this stage of the proportionality inquiry is one of reasonableness --whether the government had a reasonable basis for concluding that the legislative solution they chose impaired rights as little as possible given the government's pressing and substantial objective. The legislative choice was, at a minimum, reasonable.

The nature of the problem facing Parliament did not admit of a solution through the exercise of discretion of trial judges. That discretion saturated the law in this area with stereotype and society is still not rid of such beliefs. Discretionary decision making in this area is absolutely antithetical to the achievement of government's pressing and substantial objectives.

Lastly, the effects of the measures were not so deleterious as to outweigh the importance of the objective. The exclusion of largely irrelevant and highly prejudicial sexual history evidence does not significantly entrench upon an accused's right to a fair trial or an accused's right to make full answer and defence. The provision still permits the accused wide avenues of admissibility to adduce evidence of sexual history which is relevant and sufficiently probative that its admission is not outweighed by its discriminatory effect.

Although it is not necessary to consider the doctrine of constitutional exception, the same rationales which make the doctrine inapplicable highlight the infirmity of the guidelines suggested by the majority.

Cases Cited

By McLachlin J.

Followed: *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949; **referred to**: *R. v. Beare*, [1988] 2 S.C.R. 387; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Duke v. The Queen*, [1972] S.C.R. 917; *R. v. Wray*, [1971] S.C.R. 272; *R. v. Scopelliti* (1981), 34 O.R. (2d) 524; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13; *Davis v. Alaska*, 415 U.S. 308 (1974); *Alford v. United States*, 282 U.S. 687 (1931); *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Potvin*, [1989] 1

S.C.R. 525; *State v. Jalo*, 557 P.2d 1359 (1976); *State v. Carpenter*, 447 N.W.2d 436 (1989); *Commonwealth v. Majorana*, 470 A.2d 80 (1983); *People v. Mikula*, 269 N.W.2d 195 (1978); *State ex rel. Pope v. Superior Court*, 545 P.2d 946 (1976); *R. v. LeGallant* (1985), 47 C.R. (3d) 170; *R. v. Greene* (1990), 76 C.R. (3d) 119; *State v. Pulizzano*, 456 N.W.2d 325 (1990); *Commonwealth v. Black*, 487 A.2d 396 (1985); *State v. Oliveira*, 576 A.2d 111 (1990); *State v. Carver*, 678 P.2d 842 (1984); *State v. Howard*, 426 A.2d 457 (1981); *State v. Reinart*, 440 N.W.2d 503 (1989); *Summitt v. State*, 697 P.2d 1374 (1985); *R. v. Wald* (1989), 47 C.C.C. (3d) 315; *Winfield v. Commonwealth*, 301 S.E.2d 15 (1983); *State v. Shoffner*, 302 S.E.2d 830 (1983); *State v. Gonzalez*, 757 P.2d 925 (1988); *State v. Hudlow*, 659 P.2d 514 (1983); *R. v. Morin*, [1988] 2 S.C.R. 345; *Ares v. Venner*, [1970] S.C.R. 608; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Smith*, [1987] 1 S.C.R. 1045; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268.

By L'Heureux-Dubé J. (dissenting in part)

Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Timm v. The Queen*, [1981] 2 S.C.R. 315; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268; *Laliberté v. The Queen* (1877), 1 S.C.R. 117; *Gross v. Brodrecht* (1897), 24 O.A.R. 687; *R. v. Konkin*, [1983] 1 S.C.R. 388; *R. v. Camp* (1977), 36 C.C.C. (2d)

511; *R. v. Firkins* (1977), 37 C.C.C. (2d) 227, leave to appeal refused, [1977] 2 S.C.R. vii; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *R. v. Oquataq* (1985), 18 C.C.C. (3d) 440; *R. v. Coombs* (1985), 23 C.C.C. (3d) 356; *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481; *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Corbett*, [1988] 1 S.C.R. 670; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Beare*, [1988] 2 S.C.R. 387; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Swain*, [1991] 1 S.C.R. 933; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

Statutes and Regulations Cited

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, s. 19.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*d*), 15, 24(1), 28.

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1970, c. C-34 [am. 1980-81-82-83, c. 125, s. 19], ss. 139(1), 142, 246.4, 246.5, 246.6, 246.7, 246.8.

Criminal Code, R.S.C., 1985, c. C-46, ss. 276, 277.

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

Authors Cited

Adler, Zsuzsanna. "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation", [1985] *Crim. L.R.* 769.

Backhouse, Constance and Lorna Schoenroth, "A Comparative Survey of Canadian and American Rape Law" (1983), 6 *Can.-U.S. L.J.* 48.

Berger, Vivian. "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom" (1977), 77 *Colum. L. Rev.* 1.

Borgida, Eugene and Phyllis White. "Social Perception of Rape Victims: The Impact of Legal Reform" (1978), 2 *Law and Hum. Behav.* 339.

Boyle, Christine. "Section 142 of the Criminal Code: A Trojan Horse?" (1981), 23 *Crim. L.Q.* 253.

Boyle, Christine, L. M. *Sexual Assault*. Toronto: Carswells, 1984.

Brickman, Julie and John Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1985), 7 *Int'l J. of Women's Stud.* 195.

Canada. Committee on Sexual Offences Against Children and Youths. *Sexual Offences Against Children*. Ottawa: Ministry of Supply and Services, 1984.

Canada. House of Commons. Standing Committee on Justice and Legal Affairs. *Minutes of Proceedings and Evidence*, Issue No. 77, April 22, 1982.

Canada. Law Reform Commission. *Corroboration: A Study Paper Prepared by the Law of Evidence Project*. Ottawa, 1975.

Canada. Solicitor General. *Canadian Urban Victimization Survey: Female Victims of Crime*, 1985.

Canada. Solicitor General. *Canadian Urban Victimization Survey: Reported and Unreported Crimes*, 1984.

Catton, Katherine. "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim -- Its Effect on the Perceived Guilt of the Accused" (1975), 33 *U.T. Fac. L. Rev.* 165.

Check, James V. P. and Neil M. Malamuth. "Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape" (1983), 45 *J. of Pers. and Soc. Psych.* 344.

Clark, Lorenne M. G. and Debra J. Lewis. *Rape: The Price of Coercive Sexuality*. Toronto: Women's Press, 1977.

Clark, Lorenne M. G. and Debra J. Lewis. *A Study of Rape in Canada: Phases `C' and `D': Report to the Donner Foundation of Canada*, 1976 (unpublished).

Cross, Rupert, Sir and Colin Tapper. *Cross on Evidence*, 7th ed. London: Butterworths, 1990.

Dawson, T. Brettel. "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1988), 2 *C.J.W.L.* 310.

Doherty, David H. "`Sparing' the Complainant `Spoils' the Trial" (1984), 40 C.R. (3d) 55.

Elliott, D. W. "Rape Complainants' Sexual Experience with Third Parties", [1984] *Crim. L. Rev.* 4.

Federal/Provincial Task Force on Uniform Rules of Evidence. *Report of the Federal Provincial Task Force on the Uniform Rules of Evidence*. Toronto: Carswells, 1982.

Feild, Hubert S. and Leigh B. Bienen. *Jurors and Rape*. Lexington, Mass.: Lexington Books, 1980.

Galvin, Harriett R. "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 *Minn. L. Rev.* 763.

Gordon, Margaret T. and Stephanie Riger. *The Female Fear*. New York: The Free Press, 1989.

Grant, Yola Althea. "The Penetration of the Rape Shield: *R.* v. *Seaboyer* and *R.* v. *Gayme* in the Ontario Court of Appeal" (1989-1990), 3 *C.J.W.L.* 592.

Haxton, David. "Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence", [1985] *Wis. L. Rev.* 1219.

Holmstrom, Lynda Lytle and Ann Wolbert Burgess. *The Victim of Rape: Institutional Reactions*. New Brunswick, N.J.: Transaction Books, 1983.

Hoskins, Jeffrey G. "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases" (1983), 4 *Can. J. Fam. L.* 173.

House of Commons Debates, 1st sess., 30th Parl.

House of Commons Debates, 1st sess., 32nd Parl.

Howard, Colin. *Criminal Law*, 3rd ed. Sydney: The Law Book Co., 1977.

Informa Inc. "Sexual Assault: Measuring the Impact of the Launch Campaign". Report prepared for the Ontario Women's Directorate, August 1988.

La Free, Gary D. "Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing" (1980), 58 *Soc. Forces* 833.

La Free, Gary D., Barbara F. Reskin and Christy A. Visher. "Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials" (1985), 32 *Soc. Prob.* 389.

LeGrand, Camille E. "Rape and Rape Laws: Sexism in Society and Law" (1973), 61 *Calif. L. Rev.* 919.

MacKinnon, Catharine A. *Toward a Feminist Theory of the State*. Cambridge, Mass.: Harvard University Press, 1989.

Marshall, Patricia. "Sexual Assault, The Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216.

McCormick, Charles Tilford. *McCormick on Evidence*, 3rd ed. By Kenneth S. Brown et al. St. Paul, Minn.: West Pub. Co., 1984.

McCormick, Charles Tilford. *McCormick's Handbook of the Law of Evidence*, 2nd ed. By E. W. Cleary. St. Paul: West Pub. Co., 1972.

McWilliams, Peter K. *Canadian Criminal Evidence*, 3rd ed. Aurora, Ont.: Canada Law Book, 1990.

Ordover, Abraham P. "Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity" (1977), 63 *Cornell L. Rev.* 90.

Paciocco, David M. "The *Charter* and the Rape Shield Provisions of the *Criminal Code*: More About Relevance and the Constitutional Exemptions Doctrine" (1989), 21 *Ottawa L. Rev.* 119.

Renner, K. Edward and Suresh Sahjpaul, "The New Sexual Assault Law: What Has been Its Effect" (1986), 28 *Can. J. Crim.* 407.

Schiff, S. *Evidence in the Litigation Process*, 3rd ed., vol. 2. Toronto: Carswells, 1988.

Sheehy, Elizabeth A. "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989), 21 *Ottawa L. Rev.* 741.

Stanley, Marilyn G. *The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127*. Ottawa: Department of Justice, 1985.

Stephen, James Fitzjames, Sir. *A Digest of the Law of Evidence*, 12th ed. By Sir Harry Lushington Stephen and Lewis Frederick Sturge. London: MacMillan and Co., 1946.

Tanford, J. Alexander and Anthony J. Bocchino. "Rape Victim Shield Laws and the Sixth Amendment" (1980), 128 *U. Pa. L. Rev.* 544.

United States Constitution, Fifth, Sixth, Fourteenth Amendments.

Vandervort, Lucinda. "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987), 2 *C.J.W.L.* 233.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 3A. Revised by James H. Chadbourn. Boston: Little, Brown & Co., 1970.

Williams, Kristen M. *The Prosecution of Sexual Assaults*. Washington: Institute for Law and Social Research, 1978.

United States Constitution, Fifth, Sixth, Fourteenth Amendments.

APPEALS from a judgment of the Ontario Court of Appeal (1987), 61 O.R. (2d) 290, 20 O.A.C. 345, 37 C.C.C. (3d) 53, 58 C.R. (3d) 289, 35 C.R.R. 300, allowing the Crown's appeal from a judgment of Galligan J. quashing appellants' committals for trial on charges of sexual assault. Appeals dismissed, L'Heureux-Dubé and Gonthier JJ. dissenting in part.

Marc Rosenberg and *Keith E. Wright*, for the appellant Seaboyer.

Jan-Paul Waldin and *Allan Herman*, for the appellant Gayme.

Jeff Casey and *Rosella Cornaviera*, for the respondent.

J. E. Thompson, Q.C., and *Adelyn L. Bowland,* for the intervener the Attorney General of Canada.

Jacques Gauvin, for the intervener the Attorney General of Quebec.

Ross MacNab, for the intervener the Attorney General for Saskatchewan.

Daniel V. MacDonald, for the intervener the Canadian Civil Liberties Association.

Elizabeth Shilton and *Anne Derrick,* for the intervener Women's Legal Education and Action Fund et al.

//*McLachlin J.*//

The judgment of Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Stevenson and Iacobucci JJ. was delivered by

MCLACHLIN J. -- These cases raise the issue of the constitutionality of ss. 276 and 277 of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly ss. 246.6 and 246.7), commonly known as the "rape-shield" provisions. The provisions restrict the right of the defence on a trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on other occasions. The

question is whether these restrictions offend the guarantees accorded to an accused person by the *Canadian Charter of Rights and Freedoms*.

My conclusion is that one of the sections in issue, s. 276, offends the *Charter*. While its purpose -- the abolition of outmoded, sexist-based use of sexual conduct evidence -- is laudable, its effect goes beyond what is required or justified by that purpose. At the same time, striking down s. 276 does not imply reversion to the old common law rules, which permitted evidence of the complainant's sexual conduct even though it might have no probative value to the issues on the case and, on the contrary, might mislead the jury. Instead, relying on the basic principles that actuate our law of evidence, the courts must seek a middle way that offers the maximum protection to the complainant compatible with the maintenance of the accused's fundamental right to a fair trial.

A second issue arises as to the procedure to be followed where a constitutional question is raised on a preliminary inquiry to determine if there is sufficient evidence to commit the accused for trial. On this issue I conclude that the preliminary inquiry judges correctly declined to consider the constitutionality of the legislation and that the cases should be remitted for trial in accordance with the principles of evidence as canvassed in these reasons.

The Background

I deal first with *Seaboyer*. The accused was charged with sexual assault of a woman with whom he had been drinking in a bar. On the preliminary

inquiry the judge refused to allow the accused to cross-examine the complainant on her sexual conduct on other occasions. The appellant contends that he should have been permitted to cross-examine 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. While the theory of the defence has not been detailed at this early stage, such evidence might arguably be relevant to consent, since it might provide other explanations for the physical evidence tendered by the Crown in support of the use of force against the complainant.

The *Gayme* case arose in different circumstances. The complainant was 15, the appellant 18. They were friends. The Crown alleges that the appellant sexually assaulted her at his school. The defence, relying on the defences of consent and honest belief in consent, contends that there was no assault and that the complainant was the sexual aggressor. In pursuance of this defence, the appellant at the preliminary inquiry sought to cross-examine and present evidence on prior and subsequent sexual conduct of the complainant. Accordingly, he brought a motion for an order declaring that ss. 276 and 277 of the *Code* were unconstitutional. The judge rejected the motion, on the ground that he lacked jurisdiction to hear it, and committed the appellant for trial.

In neither *Seaboyer* nor *Gayme* did the preliminary inquiry judge consider the questions individually; they ruled that the blanket exclusion in the *Criminal Code* prevented them from considering whether the questions were otherwise relevant and admissible.

Both Seaboyer and Gayme applied to the Supreme Court of Ontario for an order quashing the committal for trial on the ground that the judge below had exceeded his jurisdiction and deprived the appellant of his right to make full answer and defence by enforcing the provisions of s. 276 of the *Criminal Code*. Galligan J. granted the orders on the ground that ss. 276 and 277 violate the *Charter*, and remitted the cases to the preliminary inquiry judge for a ruling on the evidentiary issues unhampered by the statutory provisions.

The Ontario Court of Appeal unanimously reversed the orders of Galligan J. on the ground that the preliminary inquiry judges lacked the jurisdiction to determine the constitutional validity of the sections in question: (1987), 61 O.R. (2d) 290. That being the case, they had not erred in applying the sections, and the orders quashing the committal must be set aside. The court went on, however, to consider the constitutionality of ss. 276 and 277 of the *Criminal Code*. All five judges found that s. 276 was capable of contravening an accused's rights under the *Charter* in some circumstances. They differed, however, on what the consequences of that finding should be. The majority, *per* Grange J.A., held that the section should not be struck down, but that the appropriate course was for a trial judge to decline to apply it where it would lead to a *Charter* breach. The minority, *per* Brooke J.A., would have struck the section down on the ground that it was of no force and effect pursuant to s. 52 of the *Constitution Act, 1982.*

On appeal to this Court, constitutional questions were stated putting in issue the validity of ss. 276 and 277 of the *Criminal Code*.

The Issues

I. *The Constitutional Validity of ss. 276 and 277 of the Criminal Code*

1. Do ss. 276 and 277 infringe ss. 7 and 11(*d*) of the *Charter*?

2. If so, are they saved by s. 1?

3. Does the Constitutional Exemptions Doctrine Apply?

4. If the legislation is invalid, what is the law?

II. *Jurisdiction of the Preliminary Inquiry Judge*

It should be noted that the admissibility of the evidence sought to be tendered in the two cases is not at issue. In neither case did the preliminary inquiry judge consider whether the evidence would have been relevant or admissible in the absence of ss. 276 or 277 of the *Criminal Code*.

Relevant Legislation

Criminal Code, s. 276:

> **276.** (1) In proceedings in respect of an offence under section 271, 272 or 273, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless

(*a*) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;

(*b*) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or

(*c*) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.

(2) No evidence is admissible under paragraph (1)(*c*) unless

(*a*) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and

(*b*) a copy of the notice has been filed with the clerk of the court.

(3) No evidence is admissible under subsection (1) unless the judge, provincial court judge or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.

Criminal Code, s. 277:

277. In proceedings in respect of an offence under section 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

Canadian Charter of Rights and Freedoms, s. 7 and s. 11(*d*):

7. 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.

11. Any person charged with an offence has the right

. . .

> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Constitution Act, 1982, s. 52:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
>
> (*a*) the *Canada Act 1982*, including this Act;
>
> (*b*) the Acts and orders referred to in the schedule; and
>
> (*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).
>
> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Discussion

1. *Do ss. 276 and 277 of the Criminal Code Infringe ss. 7 and 11(d) of the Charter?*

(a) The Approach to ss. 7 and 11(*d*) of the *Charter*

Everyone, under s. 7 of the *Charter*, has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The first branch of s. 7 need not detain us. It is not disputed that ss. 276 and 277 of the *Criminal Code* have the capacity to deprive a person of his or her liberty. A person convicted of sexual assault may be sentenced to life imprisonment. In so far as ss. 276 and 277 may affect conviction, they may deprive a person of his or her liberty.

The real issue under s. 7 is whether the potential for deprivation of liberty flowing from ss. 276 and 277 takes place in a manner that conforms to the principles of fundamental justice. The principles of fundamental justice are the fundamental tenets upon which our legal system is based. We find them in the legal principles which have historically been reflected in the law of this and other similar states: *R. v. Beare*, [1988] 2 S.C.R. 387. The sections which follow s. 7, like the right to a fair trial enshrined in s. 11(*d*), reflect particular principles of fundamental justice: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. Thus the discussion of s. 7 and s. 11(*d*) is inextricably intertwined.

The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and "against the applicable principles and policies that have animated legislative and judicial practice in the field" (*Beare, supra*, at pp. 402-3 *per* La Forest J.). The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.

One way of putting this question is to ask whether the challenged legislation infringes the *Charter* guarantee in purpose or effect: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Purpose, on this test, must be defined generously in terms of the ultimate aim of the legislation. Effect refers to the actual consequences of the legislation. Where the *Charter* guarantee relates to individual rights, as does s. 7, the inquiry as to effect will necessarily concern not only the overall effect of the measure as it operates in the justice system, but will extend to consideration of its impact on the individuals whose rights the *Charter* protects, typically the person charged with an offence.

A final point must be made on the ambit of s. 7 of the *Charter*. It has been suggested that s. 7 should be viewed as concerned with the interest of complainants as a class to security of person and to equal benefit of the law as guaranteed by ss. 15 and 28 of the *Charter*: Yola Althea Grant, "The Penetration of the Rape Shield: *R.* v. *Seaboyer* and *R.* v. *Gayme* in the Ontario Court of Appeal" (1989-1990), 3 *C.J.W.L.* 592, at p. 600. Such an approach is consistent with the view that s. 7 reflects a variety of societal and individual interests. However, all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event.

(b) <u>The Positions of the Parties</u>

(i) *The Arguments in Favour of the Legislation*

The supporters of the legislation submit that it conforms to, and indeed furthers, the principles of fundamental justice, both in purpose and effect.

The main purpose of the legislation is to abolish the old common law rules which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar. In an effort to rid the criminal law of these outmoded and illegitimate notions, legislatures throughout the United States and in England, Australia and Canada passed "rape-shield" laws. (I note that the term "rape shield" is less than fortunate; the legislation offers protection not against rape, but against the questioning of complainants in trials for sexual offences.)

Three subsidiary purposes of such legislation may be discerned. The first, and the one most pressed before us, was the preservation of the integrity of the trial by eliminating evidence which has little or no probative force but which

unduly prejudices the judge or jury against the complainant. If we accept, as we must, that the purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent, then it follows that irrelevant evidence which may mislead the jury should be eliminated in so far as possible. There is no doubt that evidence of the complainant's sexual activities has often had this effect. Empirical studies in the United States suggest that juries often misused evidence of unchastity and improperly considered "victim-precipitating" conduct, such as going to a bar or getting into a car with the defendant, to "penalize" those complainants who did not fit the stereotype of the "good woman" either by convicting the defendant of a lesser charge or by acquitting the defendant: H. Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 *Minn. L. Rev.* 763, at p. 796. It follows that society has a legitimate interest in attempting to eliminate such evidence.

The second rationale cited in support of rape-shield legislation is that it encourages the reporting of crime. Despite the fact that the statistics do not demonstrate with any certainty that reporting of sexual offences has increased in Canada as a consequence of rape-shield provisions, I accept that it is a legitimate legislative goal to attempt to encourage such reporting by eliminating to the greatest extent possible those elements of the trial which cause embarrassment or discomfort to the complainant. As time passes and the existence of such provisions becomes better known, they may well have some effect in promoting reporting. Certainly failure to consider the position of the complainant in the trial process may have the opposite effect.

A third and related reason sometimes offered for rape-shield legislation is protection of the witness's privacy. This is really the private aspect upon which the social interest in encouraging the reporting of sexual offences is based. In addition to furthering reporting, our system of justice has an interest in preventing unnecessary invasion of witnesses' privacy.

The goals of the legislation -- the avoidance of unprobative and misleading evidence, the encouraging of reporting and the protection of the security and privacy of the witnesses -- conform to our fundamental conceptions of justice. The concern with the legislation is not as to its purpose, which is laudable, but with its effect. The reasons for these concerns emerge from a consideration of the appellants' position, to which I now turn.

(ii) *The Arguments Against the Legislation*

The appellants contend that the legislation, however laudable its goals, in fact infringes their right to present evidence relevant to their defence and hence violates their right to a fair trial, one of the most important of the principles of fundamental justice.

The precept that the innocent must not be convicted is basic to our concept of justice. One has only to think of the public revulsion felt at the improper conviction of Donald Marshall in this country or the Birmingham Six in the United Kingdom to appreciate how deeply held is this tenet of justice. Lamer J. (as he then was) put it this way in *Re B.C. Motor Vehicle Act*, *supra*, at p. 513:

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law.

Dickson J. (as he then was) expressed the same view in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, when he stated at p. 1310: "there is a generally held revulsion against punishment of the morally innocent."

It is this fundamental principle -- that the innocent not be punished -- that is urged in support of the contention that ss. 276 and 277 violate the *Charter*. The interest is both individual, in that it affects the accused, and societal, for no just society can tolerate the conviction and punishment of the innocent.

The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s. 11(*d*) of the *Charter*. It has long been recognized that an essential facet of a fair hearing is the "opportunity adequately to state [one's] case": *Duke v. The Queen*, [1972] S.C.R. 917, at p. 923, dealing with s. 2(*e*) of the *Canadian Bill of Rights*. This applies with particular force to the accused, who may not have the resources of the state at his or her disposal. Thus our courts have traditionally been reluctant to exclude even tenuous defence evidence: David H. Doherty, "`Sparing' the Complainant `Spoils' the Trial" (1984), 40 C.R. (3d) 55, at p. 58, citing *R. v. Wray*, [1971] S.C.R. 272, and *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.). For the same reason, our courts have held that even informer privilege and solicitor-client privilege may yield to the accused's right to defend himself on

a criminal charge: *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.).

In other jurisdictions too the right to defend oneself of a criminal charge is regarded as a principle of fundamental importance. The constitution of the United States enshrines the right in the due process guarantees of the Fifth and Fourteenth Amendments and the express right to confront one's accuser embodied in the Sixth Amendment. The jurisprudence of the United States Supreme Court affirms the right's fundamental importance: see *Davis v. Alaska*, 415 U.S. 308 (1974); *Alford v. United States*, 282 U.S. 687 (1931).

The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it:

> If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.
>
> (Doherty, *supra*, at p. 67).

In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other.

Procedural limitations make possible the conviction of persons who the criminal law says are innocent.

(iii) *The Issue Between the Parties*

All the parties agree that the right to a fair trial -- one which permits the trier of fact to get at the truth and properly and fairly dispose of the case -- is a principle of fundamental justice. Nor is there any dispute that encouraging reporting of sexual offences and protection of the complainant's privacy are legitimate goals provided they do not interfere with the primary objective of a fair trial. Where the parties part company is on the issue of whether ss. 276 and 277 of the *Criminal Code* in fact infringe the right to a fair trial. The supporters of the legislation urge that it furthers the right to a fair trial by eliminating evidence of little or no worth and considerable prejudice. The appellants, on the other hand, say that the legislation goes too far and in fact eliminates relevant evidence which should be admitted notwithstanding the possibility of prejudice.

This raises two questions. First, what are the fundamental principles governing the right to introduce relevant defence evidence which may also be prejudicial? Second, does the legislation infringe these principles?

(c) <u>The Principles Governing the Right to Call Defence Evidence</u>

It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the

issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence: see *Morris v. The Queen*, [1983] 2 S.C.R. 190, and *R. v. Corbett*, [1988] 1 S.C.R. 670. In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

The problem which arises is that a trial is a complex affair, raising many different issues. Relevance must be determined not in a vacuum, but in relation to some issue in the trial. Evidence which may be relevant to one issue may be irrelevant to another issue. What is worse, it may actually mislead the trier of fact on the second issue. Thus the same piece of evidence may have value to the trial process but bring with it the danger that it may prejudice the fact-finding process on another issue.

The law of evidence deals with this problem by giving the trial judge the task of balancing the value of the evidence against its potential prejudice. Virtually all common law jurisdictions recognize a power in the trial judge to exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it.

Professor McCormick, in *McCormick's Handbook of the Law of Evidence* (2nd ed. 1972), put this principle, sometimes referred to as the concept of "legal relevancy", as follows at pp. 438-40:

> Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible. But relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it. Often, of course, several of these dangers such as distraction and time consumption, or prejudice and surprise, emerge from a particular offer of evidence. This balancing of intangibles -- probative values against probative dangers -- is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized.

This Court has affirmed the trial judges' power to exclude Crown evidence the prejudicial effect of which outweighs its probative value in a criminal case, but a narrower formula than that articulated by McCormick has emerged. In *Wray*, *supra*, at p. 293, the Court stated that the judge may exclude only "evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling". More recently, in *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949, at p. 953, an appeal involving a particularly difficult brand of circumstantial evidence offered by the Crown, the Court said that "admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to

the accused by its admission". In *Morris, supra*, at p. 193, the Court without mentioning *Sweitzer* cited the narrower *Wray* formula. But in *R. v. Potvin*, [1989] 1 S.C.R. 525, La Forest J. (Dickson C.J. concurring) affirmed in general terms "the rule that the trial judge may exclude admissible evidence if its prejudicial effect substantially outweighs its probative value" (p. 531).

I am of the view that the more appropriate description of the general power of a judge to exclude relevant evidence on the ground of prejudice is that articulated in *Sweitzer* and generally accepted throughout the common law world. It may be noted that the English case from which the *Wray* formula was adopted has been superseded by more expansive formulae substantially in the language of *Sweitzer*.

The Canadian cases cited above all pertain to evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.

These principles and procedures are familiar to all who practise in our criminal courts. They are common sense rules based on basic notions of fairness,

and as such properly lie at the heart of our trial process. In short, they form part of the principles of fundamental justice enshrined in s. 7 of the *Charter*. They may be circumscribed in some cases by other rules of evidence, but as will be discussed in more detail below, the circumstances where truly relevant and reliable evidence is excluded are few, particularly where the evidence goes to the defence. In most cases, the exclusion of relevant evidence can be justified on the ground that the potential prejudice to the trial process of admitting the evidence clearly outweighs its value.

This then is the yardstick by which ss. 276 and 277 of the *Code* are to be measured. Do they exclude evidence the probative value of which is not substantially outweighed by its potential prejudice? If so, they violate the fundamental principles upon which our justice system is predicated and infringe s. 7 of the *Charter*.

The parties, as I understand their positions, agree on this view of the principles of fundamental justice. The Attorney General for Ontario, for the respondent, does not assert that the *Charter* permits exclusion of evidence of real value to an accused's defence. Rather, he contends that any evidence which might be excluded by ss. 276 and 277 of the *Code* would be of such trifling value in relation to the prejudice that might flow from its reception that its exclusion would enhance rather than detract from the fairness of the trial. Others who defend the legislation, do so on the ground that it does not exclude evidence relevant to the defence, that the exceptions contained in the provisions "encompass *all* potential situations where evidence of a complainant's sexual

history with men other than the accused would be *relevant* to support a legitimate defence" (emphasis in original): see Grant, *supra*, at p. 601. It is to this issue, which I see as the crux of the case, which I now turn.

(d) The Effect of the Legislation -- What Evidence is Excluded?

Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. 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 by s. 277 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 a fair trial.

I turn then to s. 276. Section 276, unlike s. 277, does not condition exclusion on use of the evidence for an illegitimate purpose. Rather, it constitutes a blanket exclusion, subject to three exceptions -- rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident. The question is whether this may exclude evidence which is relevant to the defence and the probative value of which is not substantially outweighed by the potential prejudice to the trial process. To put the matter another way, can it be said *a priori*, as the Attorney General for Ontario contends, that any and all evidence excluded by s. 276 will necessarily be of such

trifling weight in relation to the prejudicial effect of the evidence that it may fairly be excluded?

In my view, the answer to this question must be negative. The Canadian and American jurisprudence affords numerous examples of evidence of sexual conduct which would be excluded by s. 276 but which clearly should be received in the interests of a fair trial, notwithstanding the possibility that it may divert a jury by tempting it to improperly infer consent or lack of credibility in the complainant.

Consider the defence of honest belief. It rests on the concept that the accused may honestly but mistakenly (and not necessarily reasonably) have believed that the complainant was consenting to the sexual act. If the accused can raise a reasonable doubt as to his intention on the basis that he honestly held such a belief, he is not guilty under our law and is entitled to an acquittal. The basis of the accused's honest belief in the complainant's consent may be sexual acts performed by the complainant at some other time or place. Yet section 276 would preclude the accused leading such evidence.

Another category of evidence eliminated by s. 276 relates to the right of the defence to attack the credibility of the complainant on the ground that the complainant was biased or had motive to fabricate the evidence. In *State v. Jalo*, 557 P.2d 1359 (Or. Ct. App. 1976), a father accused of sexual acts with his young daughter sought to present evidence that the source of the accusation was his earlier discovery of the fact that the girl and her brother were engaged in intimate

relations. The defence contended that when the father stopped the relationship, the daughter, out of animus toward him, accused him of the act. The father sought to lead this evidence in support of his defence that the charges were a concoction motivated by animus. Notwithstanding its clear relevance, this evidence would be excluded by s. 276. The respondent submits that the damage caused by its exclusion would not be great, because all that would be forbidden would be evidence of the sexual activities of the children, and the father could still testify that his daughter was angry with him. But surely the father's chance of convincing the jury of the validity of his defence would be greatly diminished if he were reduced to saying, in effect, "My daughter was angry with me, but I can't say why or produce any corroborating evidence." As noted above, to deny a defendant the building blocks of his defence is often to deny him the defence itself.

Other examples abound. Evidence of sexual activity excluded by s. 276 may be relevant to explain the physical conditions on which the Crown relies to establish intercourse or the use of force, such as semen, pregnancy, injury or disease -- evidence which may go to consent: see Galvin, *supra*, at pp. 818-23; J. A. Tanford and A. J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980), 128 *U. Pa. L. Rev.* 544, at pp. 584-85; D. W. Elliott, "Rape Complainants' Sexual Experience with Third Parties", [1984] *Crim. L. Rev.* 4, at p. 7; *State v. Carpenter*, 447 N.W.2d 436 (Minn. Ct. App. 1989), at pp. 440-42; *Commonwealth v. Majorana*, 470 A.2d 80 (Pa. 1983), at pp. 84-85; *People v. Mikula*, 269 N.W.2d 195 (Mich. Ct. App. 1978), at pp. 198-99; *State ex rel. Pope v. Superior Court*, 545 P.2d 946 (Ariz. 1976), at p. 953. In the case of young

complainants where there may be a tendency to believe their story on the ground that the detail of their account must have come from the alleged encounter, it may be relevant to show other activity which provides an explanation for the knowledge: see *R. v. LeGallant* (1985), 47 C.R. (3d) 170 (B.C.S.C.), at pp. 175-76; *R. v. Greene* (1990), 76 C.R. (3d) 119 (Ont. Dist. Ct.), at p. 122; *State v. Pulizzano*, 456 N.W. 2d 325 (Wis. 1990), at pp. 333-35; *Commonwealth v. Black*, 487 A.2d 396 (Pa. Super. Ct. 1985), at p. 400, fn. 10; *State v. Oliveira*, 576 A.2d 111 (R.I. 1990), at pp. 113-14; *State v. Carver*, 678 P.2d 842 (Wash. Ct. App. 1984); *State v. Howard*, 426 A.2d 457 (N.H. 1981); *State v. Reinart*, 440 N.W.2d 503 (N.D. 1989); *Summitt v. State*, 697 P.2d. 1374 (Nev. 1985).

Even evidence as to pattern of conduct may on occasion be relevant. Since this use of evidence of prior sexual conduct draws upon the inference that prior conduct infers similar subsequent conduct, it closely resembles the prohibited use of the evidence and must be carefully scrutinized: *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta. C.A.), at pp. 339-40; *Re Seaboyer and The Queen* (1987), 61 O.R. 290 (C.A.), at p. 300; Tanford and Bocchino, *supra*, at pp. 586-89; Galvin, *supra*, at pp. 831-48; Elliott, *supra*, at pp. 7-8; A. P. Ordover, "Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity" (1977), 63 *Cornell L. Rev.* 90, at pp. 112-19; *Winfield v. Commonwealth*, 301 S.E.2d 15 (Va. 1983), at pp. 19-21; *State v. Shoffner*, 302 S.E.2d 830 (N.C. Ct. App. 1983), at pp. 832-33; *State v. Gonzalez*, 757 P.2d 925 (Wash. 1988), at pp. 929-31; *State v. Hudlow*, 659 P.2d 514 (Wash. 1983), at p. 520. Yet such evidence might be admissible in non-sexual cases under the similar fact rule. Is it fair then to deny it to an accused, merely because the trial

relates to a sexual offence? Consider the example offered by Tanford and Bocchino, *supra*, at p. 588, commenting on the situation in the United States:

> A woman alleges that she was raped. The man she has accused of the act claims that she is a prostitute who agreed to sexual relations for a fee of twenty dollars, and afterwards, threatening to accuse him of rape, she demanded an additional one hundred dollars. The man refused to pay the extra amount. She had him arrested for rape, and he had her arrested for extortion. In the extortion trial, the state would be permitted to introduce evidence of the woman's previous sexual conduct -- the testimony of other men that, using the same method, she had extorted money from them. When the woman is the complaining witness in the rape prosecution, however, evidence of this *modus operandi* would be excluded in most states. The facts are the same in both cases, as is the essential issue whether the woman is a rape victim or a would-be extortionist. Surely the relevance of the testimony should also be identical. If the woman's sexual history is relevant enough to be admitted against her when she is a defendant, entitled to the protections of the Constitution, then certainly it is relevant enough to be admitted in a trial at which she is merely a witness, entitled to no constitutional protection. Relevance depends on the issues that must be resolved at trial, not on the particular crime charged.

These examples leave little doubt that s. 276 has the potential to exclude evidence of critical relevance to the defence. Can it honestly be said, as the Attorney General for Ontario contends, that the value of such evidence will always be trifling when compared with its potential to mislead the jury? I think not. The examples show that the evidence may well be of great importance to getting at the truth and determining whether the accused is guilty or innocent under the law -- the ultimate aim of the trial process. They demonstrate that s. 276, enacted for the purpose of helping judges and juries arrive at the proper and just verdict in the particular case, overshoots the mark, with the result that it may have the opposite effect of impeding them in discovering the truth.

The conclusion that s. 276 overreaches is supported by consideration of how it impacts on the justifications for s. 276 set out above. The first and most important justification for s. 276 is that it prevents the judge or jury from being diverted by irrelevant evidence of other sexual conduct of the complainant which will unfairly prejudice them against the complainant and thus lead to an improper verdict. Accepting that evidence that diverts the trier of fact from the real issue and prejudices the chance of a true verdict can properly be excluded even if it possesses some relevance, the fact remains that a provision which categorically excludes evidence without permitting the trial judge to engage in the exercise of whether the possible prejudicial effect of the evidence outweighs its value to the truth-finding process runs the risk of overbreadth: see Doherty, *supra*, at p. 65.

The argument based on the reporting of sexual offences similarly fails to justify the wide reach of s. 276. As Doherty points out at p. 65, it is counterproductive to encourage reporting by a rule which impairs the ability of the trier of fact to arrive at a just result and determine the truth of the report. Reporting is but the first step in the judicial process, not an end in itself. But even if it is assumed that increased reporting will result in increased convictions, the argument is unpersuasive. Elliott, at p. 14, discounts this justification for prohibitions of relevant evidence on the ground that it "cross[es] a hitherto uncrossed line" to rule out legitimate tactics which may help an innocent man escape conviction. To accept that persuasive evidence for the defence can be categorically excluded on the ground that it may encourage reporting and convictions is, Elliott points out, to say either (a) that we assume the defendant's guilt; or (b) that the defendant must be hampered in his defence so that genuine

rapists can be put down. Neither alternative conforms to our notions of fundamental justice.

Finally, the justification of maintaining the privacy of the witness fails to support the rigid exclusionary rule embodied in s. 276 of the *Code*. First, it can be argued that important as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in case of conflict. As Doherty puts it (at p. 66):

> Every possible procedural step should be taken to minimize the encroachment on the witness's privacy, but in the end if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted.

Secondly, s. 276 goes further than required to protect privacy because it fails to permit an assessment of the effect on the witness of the evidence -- an effect which may be great in some cases and small in others -- in relation to the cogency of the evidence.

The failings of s. 276 are inherent in its concept. Commentators have identified two fundamental flaws in rape-shield provisions similar to s. 276. The first is that such provisions fail to distinguish between the different purposes for which evidence may be tendered. The legislation may misdefine the evil to be addressed as evidence of sexual activity, when in fact the evil to be addressed is the narrower evil of the misuse of evidence of sexual activity for irrelevant and misleading purposes, namely the inference that the complainant consented to the

act or that she is an unreliable witness. The result of this misdefinition of the problem is a blanket prohibition of evidence of sexual activity, regardless of whether the evidence is tendered for an illegitimate purpose or for a valid one. This defect is noted by Professor Galvin in her analysis of the various statutes in force in the United States (at p. 812):

> The basic problem with existing rape-shield legislation is its failure to distinguish between benign and invidious uses of sexual conduct evidence. This failure stems from a misperception by the drafters of the precise wrong to be redressed by reform legislation. The result is not merely bad evidence law; in many instances, the result is constitutional problems that stem from unnecessarily broad enactments. These various problems could have been avoided ... if the legislators had clearly understood the underlying evidentiary concepts and had properly incorporated those concepts in the rape-shield statutes.

Section 276 takes the form of a basic prohibition of evidence of other sexual activity, regardless of the purpose for which it is tendered. It then stipulates three exceptions -- evidence to rebut prosecution evidence of sexual activity; evidence tending to establish the identity of the person who committed the act; and evidence of sexual activity on the same occasion relating to consent. While there is some concession to the need to permit evidence of sexual activity for legitimate purposes, the exceptions exclude other purposes where the evidence would not be merely misleading, but truly relevant and helpful. In so far as they do so, the legislation falls into the trap identified by Professor Galvin.

A second and related criticism of provisions such as s. 276 is that they adopt a "pigeon-hole" approach which is incapable of dealing adequately with the fundamental evidentiary problem at stake, that of determining whether or not the

evidence is truly relevant, and not merely irrelevant and misleading. This amounts, in effect, to predicting relevancy on the basis of a series of categories. Courts and scholars frequently have alluded to the impossibility of predicting relevance in advance by a series of rules or categories. In *R. v. Morin*, [1988] 2 S.C.R. 345, at pp. 370-71, Sopinka J., speaking for the majority of this Court, stated:

> It is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in a case. Attempts in the past to define the criteria for the admission of similar facts have not met with much success .... The test must be sufficiently flexible to accommodate the varying circumstances in which it must be applied.

Scholars have criticized rape-shield legislation adopting the format of a blanket exclusion supplemented by exceptions on the ground that this approach is inherently incapable of permitting the Court sufficient latitude to properly determine relevance in the individual case. Professor Galvin says of this type of provision (the "Michigan" model), at p. 814:

> ... many of the statutes fail to afford the accused the opportunity to present sexual conduct evidence which is indisputably relevant and necessary to the presentation of a legitimate defense theory. On one level, the problem is simply a failure to codify a sufficient number of exceptions; the case law amply demonstrates the need to amend many of these statutes by providing more bases for admitting sexual conduct evidence. More significant, however, is the fact that the common element linking each of these relevant uses of sexual conduct evidence seems to have escaped the notice of the drafters -- none requires reliance on the invidious common-law notions that a woman's consent to sexual relations with one man implies either consent to relations with others or a lack of credibility.

In short, the problem with legislation like s. 276, as Professor Galvin sees it, is its failure to rely on the governing concept of whether the evidence is being tendered for an irrelevant, illegitimate purpose, and its reliance instead on categories of admissible evidence which can never anticipate the multitude of circumstances which may arise in trials for sexual offences. The failing is summed up succinctly by Doherty, *supra*, at p. 57, where he characterizes s. 276 as calling for "a mechanical `pigeon-holing' approach to the question of admissibility based on criteria which may in a given case have little to do with the potential value of the evidence."

To summarize, s. 276 has the potential to exclude otherwise admissible evidence which may in certain cases be relevant to the defence. Such evidence is excluded absolutely, without any means of evaluating whether in the circumstances of the case the integrity of the trial process would be better served by receiving it than by excluding it. Accepting that the rejection of relevant evidence may sometimes be justified for policy reasons, the fact remains that s. 276 may operate to exclude evidence where the very policy which imbues the section -- finding the truth and arriving at the correct verdict -- suggests the evidence should be received. Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed in the absence of an assurance that the curtailment is clearly justified by even stronger contrary considerations. What is required is a law which protects the fundamental right to a fair trial while avoiding the illegitimate inferences from other sexual conduct that the complainant is more likely to have consented to the act or less likely to be telling the truth.

(e) Other Rules of Evidence

It was suggested that s. 276 is only one of many rules of evidence which limit the right to present relevant defence evidence. The rules against hearsay, opinion, and character evidence, as well as the rules of privilege, undeniably limit the right to call evidence. The presence of such rules, it is argued, suggests that rules categorically prohibiting evidence that may be relevant to the defence are not contrary to the principles of fundamental justice nor to our notions of what constitutes a fair trial.

This argument rests on the assumption that rules of evidence commonly exclude evidence relevant to the defence, the value of which is not substantially outweighed by its prejudice. A closer examination of the rules, however, casts doubt on this proposition. In fact, the exclusionary rules of evidence are based on the justification that the evidence excluded is likely to do more harm than good to the trial process. Moreover, these rules, as they have developed in recent years, admit of a great deal of flexibility, allowing considerable discretion to the trial judge to admit evidence in cases where the value of the evidence outweighs its potential prejudice.

Consider the hearsay rule. At one time it was seen as an absolute prohibition subject to a number of limited, rigidly defined exceptions. In this respect, it resembled s. 276 of the *Criminal Code*. But in more recent times, this inflexible approach has been replaced by an approach which allows more discretion to the trial judge. Thus this Court in *Ares v. Venner*, [1970] S.C.R. 608,

held that old categories are no longer exclusive and that hearsay evidence which does not fall within one of the traditional exceptions may be received if it is (a) necessary, and (b) reliable. This approach was recently affirmed by this Court in *R. v. Khan*, [1990] 2 S.C.R. 531. The reason for the change was simple. The judges perceived that the rules of evidence were unfairly restricting the right to bring relevant and helpful evidence before the court, thereby undermining the ability of the court to find the truth and do justice. So the courts broadened the rule to conform to their sense of justice by permitting judges convinced of the reliability and trustworthiness of the evidence to admit it despite its failure to conform to the traditional exceptions to the hearsay rule.

The same is true of privilege. Courts have held that informer and solicitor and client privilege do not apply where the effect would be to prevent the defendant on a criminal charge from bringing forward relevant evidence: *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario), supra*; *R. v. Dunbar and Logan*, *supra*.

The law relating to opinion evidence similarly stops far short of absolute exclusion. The opinion evidence rule is less a rule of exclusion than a means of setting certain conditions for the reception of evidence which might otherwise be unreliable -- evidence which, moreover, is usually collateral to the issues of fact involved in the case and which may arguably infringe on the role of the trier of fact of drawing inferences from the facts as found. Provided the witness can be shown to be qualified to give the opinion and provided the opinion is relevant and does not trench unduly on the judge's or jury's ultimate task, it may

be received. Again, in practice considerable discretion rests with the trial judge in weighing the proper considerations in the particular case.

Similarly, character evidence may be received on a criminal trial where its relevance outweighs its prejudice. The effect of s. 276 may be to exclude such evidence. Consider evidence as to the conduct of the accused on other occasions, sometimes called evidence of similar acts. The law has abandoned the former category approach to similar fact evidence and now permits evidence of similar prior acts, notwithstanding the inference of disposition or character which may be drawn from them, provided their relevance to a specific feature of the case outweighs their prejudicial value. The determination is made by the trial judge on the facts of the particular case. Section 276, on the other hand, excludes evidence of similar sexual acts categorically, without any consideration of the probative value of the evidence in relation to its potential for prejudice.

The common law rules of evidence may not be perfect. Certainly, the rules relating to evidence of sexual conduct which s. 276 abolished often operated unfairly. At the same time, the more flexible approach which the courts of late have taken in decisions on the rules of evidence reflects a keen sensibility to the need to receive evidence which has real probative force in the absence of overriding countervailing considerations. The problem with s. 276 is that it may operate to exclude relevant evidence where there are no countervailing considerations capable of outweighing the value of the evidence.

For these reasons, I cannot accept the argument that the common law approach to the rules of evidence supports the constitutionality of s. 276 of the *Criminal Code*.

(f) Other Jurisdictions

In support of the contention that s. 276 of the *Code* does not infringe the principles of fundamental justice or the right to a fair trial, it is argued that provisions similar to s. 276 have been upheld in other jurisdictions.

The first point to note is that s. 276 is among the most draconian approaches to the problem of eradicating improper inferences as to consent and credibility from the evidence of the sexual activities of the complainant. Section 276 follows the so-called "Michigan" model, which consists in a general prohibition followed by a series of exceptions. The Michigan model is generally regarded as the most invasive of the rape-shield laws in so far as it admits of no judicial discretion to receive relevant evidence which may not fall into the enumerated exceptions. Provisions in England, Australia and many of the United States generally allow for some measure of judicial discretion to deal with the impossibility of foreseeing all eventualities and avoiding the unfairness of excluding evidence which may be highly relevant to the defence. Professor Galvin, at pp. 876-902, identifies three other types of rape-shield provisions found in the United States and elsewhere -- the "Texas", "federal", and "California" models -- which all provide for some judicial discretion.

It is a misleading oversimplification to say that statutes following the Michigan model have been widely upheld. While the courts have avoided striking them down in their entirety, they have used two techniques to permit the reception of relevant evidence which does not fall within the exceptions, thereby circumventing them. The techniques are "reading down" and "constitutional exemption". Professor Galvin comments on these statutes and the judicial response to them as follows at pp. 773-74:

> In effect, these statutes have stripped courts of their discretion to determine the relevancy of sexual conduct evidence on a case-by-case basis. Although these statutes are highly protective of the interests of the complainant and the state, they do not accommodate sufficiently the needs of the accused to present relevant evidence in his behalf.
>
> Indeed, a pattern of judicial response to restrictive Michigan-type statutes has developed. In a significant number of cases, appellate courts have strained to uphold the validity of these statutes while at the same time ordering the introduction of relevant sexual conduct evidence. This result has been achieved by circumventing the explicit statutory prohibitions and by relying instead on legislative history and underlying policy considerations. In a smaller number of cases, courts have held the Michigan-style statutes unconstitutional as applied in particular factual settings. Some of the statutes have been amended in response to cases that demonstrated the need for additional exceptions.

The fact that courts in other jurisdictions have found it necessary to curtail the effect of legislation similar to s. 276 of the *Criminal Code* so as to permit accused persons to present evidence relevant to their defence reinforces the conclusion that the legislation offends the principles of fundamental justice underlying a fair criminal trial.

(g) Summary

I conclude that the operation of s. 276 of the *Criminal Code* permits the infringement of the rights enshrined in ss. 7 and 11(*d*) of the *Charter*. In achieving its purpose -- the abolition of the outmoded, sexist-based use of sexual conduct evidence -- it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent. Support for this conclusion is found in other rules of evidence which have adapted to meet the dangers of arbitrarily excluding valuable evidence, as well as the law in other jurisdictions, which by one means or another rejects the idea that rape-shield legislation, however legitimate its aims, should be cast so widely as to deprive the accused of the tools with which to build a legitimate defence.

Section 277 does not, by contrast, offend the *Charter*.

2. *Is s. 276 Saved by s. 1 of the Charter?*

Is s. 276 of the *Criminal Code* justified in a free and democratic society, notwithstanding the fact that it may lead to infringements of the *Charter*?

The first step under s. 1 is to consider whether the legislation addresses a pressing and substantial objective: *R. v. Oakes*, [1986] 1 S.C.R. 103. As already discussed, it does.

The second requirement under s. 1 is that the infringement of rights be proportionate to the pressing objective. This inquiry involves three considerations. The first -- whether there exists a rational connection between the legislative measure and the objective -- is arguably met; s. 276 does help to exclude unhelpful and potentially misleading evidence of the complainant's prior sexual conduct. The second consideration under proportionality is whether the legislation impairs the right as little as possible. It has been suggested that legislatures must be given some room to manoeuvre, particularly where the legislation is attempting to fix a balance between competing groups in society: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. Assuming that this case, although criminal and as such a contest between the state and the accused, might fall into this class, it still cannot be said that the degree of impairment effected by s. 276 is appropriately restrained. In creating exceptions to the exclusion of evidence of the sexual activity of the complainant on other occasions, Parliament correctly recognized that justice requires a measured approach, one which admits evidence which is truly relevant to the defence notwithstanding potential prejudicial effect. Yet Parliament at the same time excluded other evidence of sexual conduct which might be equally relevant to a legitimate defence and which appears to pose no greater danger of prejudice than the exceptions it recognizes. To the extent the section excludes relevant defence

evidence whose value is not clearly outweighed by the danger it presents, the section is overbroad.

I turn finally to the third aspect of the proportionality requirement -- the balance between the importance of the objective and the injurious effect of the legislation. The objective of the legislation, as discussed above, is to eradicate the erroneous inferences from evidence of other sexual encounters that the complainant is more likely to have consented to the sexual act in issue or less likely to be telling the truth. The subsidiary aims are to promote fairer trials and increased reporting of sexual offences and to minimize the invasion of the complainant's privacy. In this way the personal security of women and their right to equal benefit and protection of the law are enhanced. The effect of the legislation, on the other hand, is to exclude relevant defence evidence, the value of which outweighs its potential prejudice. 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. The line must be drawn short of the point where it results in an unfair trial and the possible conviction of an innocent person. Section 276 fails this test.

I conclude that s. 276 is not saved by s. 1 of the *Charter*.

3. *Can the Legislation be Saved by Application of the Doctrine of Constitutional Exemption*?

The majority of the court below, having concluded that s. 276 in some of its applications violated ss. 7 and 11(*d*) of the *Charter*, declined to strike the section down on the ground that the appropriate remedy was for the trial judge to decline to apply the section in the cases where a constitutional violation would occur, which the majority predicted would be rare.

I leave aside the question of whether, having found the legislation suffers from overbreadth which is not cured by s. 1 of the *Charter*, it is open to the Court to declare it valid in part by techniques such as reading down and constitutional exemption. Assuming, without deciding, that this course is open, the question is whether the doctrine of constitutional exemption could appropriately apply in this case. In my opinion, it could not.

The first reason this case is not an appropriate one for application of the doctrine is that it would not achieve the end of substantially upholding the law which Parliament enacted. It would import into the provision an element which the legislature specifically chose to exclude -- the discretion of the trial judge. Add to this the host of judge-made procedures which have been proposed to effect this judicial amendment to the legislation, and the will of the legislature becomes increasingly obscured. The exemption, while perhaps saving the law in one sense, dramatically alters it in another. Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption.

The second objectionable feature of this solution is that the result will accomplish, in essence, precisely what striking down would do -- set up a regime based on common law notions of relevancy. As Professor Paciocco points out in "The *Charter* and the Rape Shield Provisions of the *Criminal Code*: More About Relevance and the Constitutional Exemptions Doctrine" (1989), 21 *Ottawa L. Rev.* 119, at p. 146:

> It would contribute nothing to the resolution of issues of admissibility. The constitutional limit would require that evidence excluded by the provision be admitted where it is relevant and potentially probative enough to cause a reasonable trier of fact to have a reasonable doubt in all of the circumstances of the case. Thus, the only evidence that section 276 would be allowed to exclude would be either irrelevant or non-probative information. According to the ordinary rules of evidence, information that is not relevant is already inadmissible.

A third problem with this solution is the difficulty of application. The doctrine, as applied in this case, delegates to the trial judge the task of determining when the legislation should not be applied. This amounts to saying that it should not be applied when it should not be applied, unless some criterion outside the *Charter* is found. On this reasoning, no law would be required to be struck down under s. 52 of the *Constitution Act, 1982*; the matter could always be resolved by the simple means of instructing trial judges not to apply laws when their effect would be violative.

This result has the effect of placing on the accused the burden of showing that the decision to exclude evidence, for example, is unconstitutional, a burden the accused would not bear if the section were struck out.

It is significant that this Court, in leaving open the "possibility that in certain circumstances a `constitutional exemption' might be granted from otherwise valid legislation to particular individuals" (*R. v. Big M Drug Mart Ltd.*, *supra*, at p. 315; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 783-85), did so in the context of arguments that certain groups (e.g. those which close their businesses for religious reasons on days other than Sunday) should be exempted from the operation of the legislation. Such a classification would provide a criterion external to the *Charter* whereby applicability could be determined, and thus satisfy the requirements of the law for certainty and predictability. Conversely, this Court has declined to read constitutional standards into legislation: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and has rejected the notion that the constitutional validity of a statute which has the potential to violate constitutional rights may be upheld on the basis that the prosecution may, by exercising its discretion, avoid breaching the constitutional rights of the accused. In *R. v. Smith*, [1987] 1 S.C.R. 1045, Lamer J. (as he then was) stated, for the majority, at p. 1078:

> In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, <u>not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter</u>. [Emphasis added.]

For these reasons I conclude that it is inappropriate to apply the doctrine of constitutional exemption in the case at bar. Section 276 must be

struck down under s. 52 of the *Constitution Act, 1982*. In so holding, I should not be taken as foreclosing the possibility that the solution of constitutional exemption may be appropriate in some other case.

4. *What Follows From Striking Down s. 276?*

The first question is whether the striking down of s. 276 revives the old common law rules of evidence permitting liberal and often inappropriate reception of evidence of the complainant's sexual conduct. Some inappropriate uses of such evidence are precluded by s. 277, which I have found to be valid. But other common law rules fall outside s. 277. Does striking s. 276 revive them?

The answer to this question is no. The rules in question are common law rules. Like other common law rules of evidence, they must be adapted to conform to current reality. As all counsel on these appeals accepted, the reality in 1991 is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. Although they still may inform the thinking of many, the twin myths which s. 276 sought to eradicate are just that -- myths -- and have no place in a rational and just system of law. It follows that the old rules which permitted evidence of sexual conduct and condoned invalid inferences from it solely for these purposes have no place in our law.

The inquiry as to what the law is in the absence of s. 276 of the *Code* is thus remitted to consideration of the fundamental principles governing the trial

process and the reception of evidence. Harking back to Thayer's maxim, relevant evidence should be admitted, and irrelevant evidence excluded, subject to the qualification that the value of the evidence must outweigh its potential prejudice to the conduct of a fair trial. Moreover, the focus must be not on the evidence itself, but on the use to which it is put. As Professor Galvin puts it, our aim is "to abolish the outmoded, sexist-based use of sexual conduct evidence while permitting other uses of such evidence to remain": *supra*, at p. 809.

This definition of the problem suggests an approach which abolishes illegitimate uses and inferences, while preserving legitimate uses. There is wide agreement that the approach of a general exclusion supplemented by categories of exceptions is bound to fail because of the impossibility of predicting in advance what evidence may be relevant in a particular case: see Galvin, *supra*, Doherty, *supra*, and Elliott, *supra*. On the other hand, judges are not free to act on whim. As Professor Vivian Berger puts it in her article "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom" (1977), 77 *Colum. L. Rev.* 1, at p. 69:

> The problem is to chart a course between inflexible legislative rules and wholly untrammelled judicial discretion: The former threatens the rights of defendants; the latter may ignore the needs of complainants.

Professor Galvin, after a comprehensive review of the various approaches to rape-shield legislation which have been adopted in different jurisdictions, proposes a prohibition on illegitimate uses of the evidence, combined with case by case judgment exercised with the aid of guidelines. Her proposal is as follows (at pp. 903-4):

> *Sexual conduct of victim of rape. In a prosecution for rape, evidence that the victim has engaged in consensual sexual conduct with persons other than the accused is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason more likely to consent to the sexual conduct with respect to which rape is alleged. Evidence of consensual sexual conduct on the part of the victim may, however, be admissible for other purposes.*
>
> *(1) By way of illustration only, and not by way of limitation, the following are examples of evidence admissible under this section:*
>
> *(A) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;*
>
> *(B) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the victim;*
>
> *(C) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of the alleged encounter with the victim as to tend to prove that the victim consented to the act charged or behaved in such a manner as to lead the accused reasonably to believe that the victim consented;*
>
> *(D) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused reasonably believed that the victim was consenting to the act charged;*
>
> *(E) Evidence tending to rebut proof introduced by the prosecution regarding the victim's sexual conduct;*
>
> *(F) Evidence that the victim has made false allegations of rape;*

Galvin's proposal, with some modification, reflects an appropriate response to the problem of avoiding illegitimate inferences from evidence of the complainant's sexual conduct, while preserving the general right to a fair trial. It is, moreover, a response which is open to trial judges in the absence of legislation. It reflects, in essence, an application of the fundamental common law notions which govern the reception of evidence on trials. The general prohibition

on improper use of evidence of sexual conduct reflects the fact that it is always open to a judge to warn against using a particular piece of evidence for an inference on an issue for which that evidence has no probative force. Similarly, the mandate to the judge to determine when the evidence may be properly receivable is a reflection of the basic function of the trial judge of determining the relevance of evidence and whether it should be received bearing in mind the balance between its probative value and its potential prejudice.

As for the procedures which should govern the determination of whether the sexual conduct evidence should be admitted, Galvin proposes a written motion followed by an *in camera* hearing (p. 904). The devices of a preliminary affidavit and an *in camera* hearing are designed to minimize the invasion of the complainant's privacy. If the affidavit does not show the evidence to be relevant, it will not be heard at all. Where this threshold is met, the evidence will be heard *in camera* so that, in the event the judge finds its value is outweighed by its potential prejudice, it will not enter the public domain. Such procedures do not require legislation. It has always been open to the courts to devise such procedures as may be necessary to ensure a fair trial. The requirement of a *voir dire* before a confession can be admitted, for example, is judge-made law.

While accepting the premise and the general thrust of Galvin's proposal, I suggest certain modifications. There seems little purpose in having separate rules for the use of sexual conduct evidence for illegitimate inferences of consent and credibility in the Canadian context. Again, I question whether

evidence of other sexual conduct with the accused should automatically be admissible in all cases; sometimes the value of such evidence might be little or none. The word "complainant" is more compatible with the presumption of innocence of the accused than the word "victim". Professor Galvin's reference to the defence of reasonable belief in consent must be adapted to meet Canadian law, which does not require reasonableness. And the need to warn the jury clearly against improper uses of the evidence should be emphasized, in my view.

In the absence of legislation, it is open to this Court to suggest guidelines for the reception and use of sexual conduct evidence. Such guidelines should be seen for what they are -- an attempt to describe the consequences of the application of the general rules of evidence governing relevance and the reception of evidence -- and not as judicial legislation cast in stone.

In my view the trial judge under this new regime shoulders a dual responsibility. First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence. The examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional. The trial judge must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence. The fishing expeditions which unfortunately did occur in the past should not be permitted. The trial judge's discretion must be exercised to ensure that neither the *in camera*

procedure nor the trial become forums for demeaning and abusive conduct by defence counsel.

The trial judge's second responsibility will be to take special care to ensure that, in the exceptional case where circumstances demand that such evidence be permitted, the jury is fully and properly instructed as to its appropriate use. The jurors must be cautioned that they should not draw impermissible inferences from evidence of previous sexual activity. While such evidence may be tendered for a purpose logically probative of the defence to be presented, it may be important to remind jurors that they not allow the allegations of past sexual activity to lead them to the view that the complainant is less worthy of belief, or was more likely to have consented for that reason. It is hoped that a sensitive and responsive exercise of discretion by the judiciary will reduce and even eliminate the concerns which provoked legislation such as s. 276, while at the same time preserving the right of an accused to a fair trial.

I would summarize the applicable principles as follows:

1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:

(a) more likely to have consented to the sexual conduct at issue in the trial;

(b) less worthy of belief as a witness.

2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence.

By way of illustration only, and not by way of limitation, the following are examples of admissible evidence:

(A) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;

(B) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant;

(C) 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 to the act charged

(without laying down absolute rules, normally one would expect some proximity in time between the conduct that is alleged to have given rise to an honest belief and the conduct charged);

(D) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness;

(E) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.

3. Before evidence of consensual sexual conduct on the part of a victim is received, it must be established on a *voir dire* (which may be held *in camera*) by affidavit or the testimony of the accused or third parties, that the proposed use of the evidence of other sexual conduct is legitimate.

4. Where evidence that the complainant has engaged in sexual conduct on other occasions is admitted on a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit.

II. *The Jurisdiction of the Preliminary Inquiry Judge and the Reviewability of the Judge's Error by way of Certiorari*

The preliminary inquiry judge in each of the cases before us decided that he did not have jurisdiction to decide whether ss. 276 and 277 should be struck down under the *Charter*, and went on to commit the accused for trial after excluding evidence pursuant to those sections.

Galligan J. ruled in each case that the preliminary inquiry judge had the jurisdiction to determine the constitutional question and sent the matter back to him for continuance of the preliminary inquiry on the basis that ss. 276 and 277 were invalid.

The Seaboyer motion to Galligan J. was by way of *certiorari* from which the *Criminal Code* grants a right of appeal. Gayme also applied under s. 24(1) of the *Charter*, from which no appeal lies under the *Criminal Code*.

The Court of Appeal held that the preliminary inquiry judges were correct in concluding that they did not possess jurisdiction to determine the validity of ss. 276 and 277 of the *Code*, and accordingly that Galligan J. had erred in granting the orders sought and remitting the matters back to the preliminary inquiry judges. The Court of Appeal ordered that the trials proceed.

Three issues arise from these facts:

(1) Do judges on a preliminary inquiry have the power to decide the constitutionality of legislation relating to evidence?

(2) If they do have this power and erred in holding they did not, was that error reviewable on the motion before Galligan J.?

(3) Does the Crown have a right of appeal from the order of Galligan J.in the *Gayme* case?

I will deal with each issue in turn.

1. Do Preliminary Inquiry Judges Have Jurisdiction to Determine the Constitutionality of Evidentiary Legislation Under s. 52 of the *Constitution Act, 1982*?

I would answer this question in the negative on the ground that the *Criminal Code* does not authorize judges sitting on preliminary inquiries to enter into constitutional questions.

Section 52 of the *Constitution Act, 1982* does not confer jurisdiction on a tribunal to determine whether a law is constitutional. That jurisdiction must be found in the legislation which defines the powers of the body: *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.

The jurisdiction of a judge on a preliminary hearing is conferred exclusively by Part XVIII of the *Criminal Code*. In *Mills* this Court found that a justice presiding over a preliminary inquiry does not have the jurisdiction to grant a remedy under s. 24 of the *Charter* because a preliminary inquiry is not a "court

of competent jurisdiction" under that section. The majority held that the magistrate sitting on a preliminary inquiry is not a court of competent jurisdiction because the *Criminal Code* gives the magistrate "no jurisdiction which would permit him to hear and determine the question of whether or not a *Charter* right has been infringed or denied" (*per* McIntyre J. at p. 954). La Forest J., agreeing with this view, elaborated on the task of the magistrate at p. 970:

> The task of the preliminary hearing magistrate under the *Criminal Code* is by the *Code* limited in essence to determining whether, in his opinion, the evidence presented before him is or is not sufficient to commit the accused for trial; if it is, he is to commit the accused; otherwise, he must discharge him.
>
> I see no warrant in the *Charter* for extending the ambit of the specific task assigned to the magistrate by the *Code*. From a practical standpoint, too, I would think this would unnecessarily complicate his task, require more evidence or at least a more thorough sifting of evidence than is required at a preliminary hearing, and in any event require the magistrate to look at the issues before him in a manner different from that contemplated by the *Code*.

I see no reason to depart from the statement of McIntyre J. in *Mills* that the *Criminal Code* does not permit a preliminary inquiry judge to determine whether a *Charter* right has been infringed or denied. Both statutory interpretation and policy support this view. The *Criminal Code* restricts the task of the preliminary inquiry judge to determining if there is a sufficient case to warrant prosecution. While evidentiary rulings may be made in the course of discharging this function, they have no effect on the outcome of the trial or the accused's guilt or innocence. To discharge the function of determining if there is sufficient evidence to warrant committal it is sufficient to accept the rules of evidence as they stand; the rights of the accused do not require more at this stage.

As for policy, there is much to be said for leaving *Charter* challenges in so far as possible to the trial judge. The trial judge is likely to have a more complete picture of the evidence and its significance in the context of the case and is thus better situated to decide such questions. Moreover, permitting constitutional challenges before the preliminary court judge is likely, as in this case, to produce interlocutory appeals on narrow issues which may take years to complete, during which time the trial is delayed. All these reasons suggest constitutional questions are best left to the trial judge.

The position of a judge or magistrate on a preliminary inquiry is readily distinguished from the position of the arbitrator in *Douglas College*. The legislation governing the arbitrator in that case conferred on him wide powers to decide both questions of fact and law and to finally resolve the dispute between the parties. That task could not be achieved without deciding the *Charter* issue. As La Forest J. put it in *Douglas College*, at p. 604: "The citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution." The contrary is true for a judge on a preliminary inquiry, whose only task is to determine whether prosecution in other proceedings is warranted. The rights of the accused need not and should not be resolved at this initial stage. The lack of power in a preliminary inquiry judge to decide constitutional questions does not prevent an accused from asserting his or her *Charter* rights; it merely defers the process until the accused is before the decision-making body charged with the task of fully determining the accused's "rights and duties" -- the trial court.

For these reasons, I agree with the Court of Appeal that the preliminary inquiry judges were correct in holding that they did not have power to determine the constitutionality of ss. 276 and 277 of the *Code*.

2. Was There a Right of Review of the Decision of the Preliminary Inquiry Judges?

If the preliminary inquiry judges in the cases under review had the power to determine the constitutional question, was their refusal to do so and their consequent decision to rule out the evidence of other sexual conduct of the complainants an error of jurisdiction so as to be reviewable?

Given my answer to the first question, it is unnecessary to consider this issue. However, in view of the debate before us, it may be useful to review the principles governing *Charter* review at the stage of the preliminary inquiry. This Court has restricted the right to appeal from the rulings of preliminary inquiry judges to questions of loss or excess of jurisdiction: *Forsythe v. The Queen*, [1980] 2 S.C.R. 268. It has also said that *Charter* violations do not in themselves give rise to jurisdictional errors: *Mills*, *supra*. It follows that generally speaking in criminal cases, *Charter* review will take place at the trial stage: *Mills*.

The only exception to this rule would appear to be cases where no other remedy, existing or prospective, lies for a wrong under the *Charter*. In *Mills*, Lamer J. (as he then was) identified instances where an immediate or early remedy may be appropriately considered, referring to applications arising under

s. 11 on account of delay, denial of reasonable bail, retrial for a second time, and bias in the proceedings. La Forest J. agreed (at p. 972):

> While ... the trial court will ordinarily be the appropriate court to grant the remedy, situations can arise where a trial court has not yet been set at the time when a remedy is required, or where a court is an inappropriate forum to seek a remedy because it is itself implicated in the breach of a constitutional right. In such cases, the competent court must be the superior court of the province in the exercise of its inherent jurisdiction.

Thus while *Charter* review will normally take place at trial, it may be possible to seek earlier review in cases where there is no other remedy for a wrong.

Having said this, I would associate myself with the view that appeals from rulings on preliminary inquiries are to be discouraged. While the law must afford a remedy where one is needed, the remedy should, in general, be accorded within the normal procedural context in which an issue arises, namely the trial. Such restraint will prevent a plethora of interlocutory appeals and the delays which inevitably flow from them. It will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case.

3. Was the Order Made With Respect to Gayme Reviewable?

Gayme argues that Galligan J.'s order remitting his case to the preliminary inquiry judge was made under s. 24(1), from which there is no review under the *Criminal Code*: *Mills*, pp. 959-60. His application was framed both in

terms of *certiorari* and a declaration under s. 24(1). The *Criminal Code* grants an appeal from an order for jurisdictional review in the nature of *certiorari*, but none from a declaration under s. 24 of the *Charter*.

While the matter is not entirely clear, the reasons of Galligan J. suggest that he was not proceeding under s. 24(l). Thus he states: "it is unnecessary to deal with the Gayme application for declaratory relief." On the whole of the record, I am satisfied that the matter should be viewed as having proceeded as a simple application for judicial review, and that an appeal lay to the Ontario Court of Appeal.

4. Disposition

The conclusion that the preliminary inquiry judges lacked jurisdiction to determine the constitutionality of ss. 276 and 277 of the *Criminal Code* led the Court of Appeal to conclude that the committals were correct and that the matters should proceed to trial. I agree that these matters cannot be sent back to the preliminary inquiry judges; given that their committals have been upheld, they are now *functus*. Nothing would be gained by remitting the matters to the preliminary inquiry judges. The proper evidence will be admitted at trial, where the guilt or innocence of the accused stands to be determined.

I wish to add that, given the conclusions of the Court on the jurisdictional issue, it was not strictly necessary, for the Court of Appeal or this Court, to consider the constitutional issues. Due to the importance of these

issues, the full analysis in the lower courts and in argument on these appeals, and the desirability in the circumstances of ensuring that the trial proceed on the correct basis, this Court has chosen to deal with the constitutional issues. However, in view of the unusual circumstances giving rise to these appeals (including the fact that the decision of Galligan J. raising the constitutional questions was decided before *R. v. Mills*), this case should not be used as precedent to support a *Charter* challenge in cases where the *Charter* issue is not necessary for a disposition of the case.

Conclusion

I would dismiss the appeals and affirm the order of the Court of Appeal that these cases proceed to trial. I would answer the constitutional questions as follows:

1. Whether s. 246.6 [now 276] or 246.7 [now 277] of the *Criminal Code* is inconsistent with s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

   Yes, s. 276 is inconsistent with s. 7 and s. 11(*d*). Section 277 is not.

2. If s. 246.6 or 246.7 of the *Criminal Code* is inconsistent with either s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, whether that inconsistency is justified on the basis of s. 1 thereof.

   No.

//*L'Heureux-Dubé*//

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting in part):

Introduction

These two appeals are about relevance, myths and stereotypes in the context of sexual assaults. More particularly, is the prior sexual history of a complainant, in the trial of an accused charged with sexual assault, relevant and/or admissible? In that regard, the constitutionality of ss. 276 and 277 of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly ss. 246.6 and 246.7) is challenged as violating ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Both appellants, Seaboyer and Gayme, were charged with sexual assault. During his preliminary inquiry, the appellant Gayme sought to adduce evidence of the complainant's prior sexual history. Since ss. 276 and 277 of the *Code* prohibit the admission of the evidence, Gayme asked the preliminary hearing judge to strike down the impugned provisions on the basis that they violated his *Charter* right to a fair trial. The judge determined that he had no jurisdiction to apply s. 52 of the *Constitution Act, 1982*, and disallowed the proposed evidence and cross-examination. The appellant Gayme was committed for trial.

The appellant Seaboyer was committed for trial after the conclusion of his preliminary inquiry. Along with the appellant Gayme, Seaboyer applied to the Supreme Court of Ontario for an order quashing his committal. The appellant Gayme also applied for declaratory relief, but this application was not addressed by the court. Galligan J. heard the appellants' applications together. He struck down ss. 276 and 277 of the *Code*, holding that they infringed ss. 7 and 11(*d*) of the *Charter*, and quashed the committals. He referred the cases back for a continuation of the preliminary inquiries. The appellants have yet to be tried for the offences charged.

The Crown appealed the order of Galligan J. The Ontario Court of Appeal allowed the appeal and restored the committals: (1987), 61 O.R. 290. The majority held that the refusal of the preliminary inquiry judge to permit the cross-examination of the complainant on her prior sexual history did not amount to jurisdictional error, hence *certiorari* to quash the committal did not lie. Further, a preliminary hearing judge was not a court of competent jurisdiction, and thus had no jurisdiction to grant a remedy to the accused for a breach of the *Charter*. In the words of the majority, "[t]he Provincial Court judges could hardly be said to have lost jurisdiction by failing to take action which they had no jurisdiction to take" (p. 296). Although this was sufficient to dispose of the appeals, the Court of Appeal considered the merits of the substantive constitutional question in order to provide guidance to the trial judges who would be hearing the cases. The majority held that, while the provisions had a constitutionally valid purpose, they may, in effect, violate *Charter* rights on rare occasions. They further held that the provisions could not be saved under s. 1. Instead, however, of declaring them

invalid, the Court of Appeal held that, since the occasions where they would have an unconstitutional effect would be rare, the provisions would be operative except in those limited circumstances.

Upon an appeal to this Court by the two accused, this Court now dismisses the two appeals and upholds the decision of the Ontario Court of Appeal regarding the jurisdiction of the judge conducting the preliminary hearing. I agree with the majority in that respect. The majority also rejects the contention that s. 277 of the *Code* is unconstitutional and I heartily agree with their conclusion. However, the majority of this Court also finds s. 276 of the *Criminal Code* unconstitutional as infringing ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, not capable of being saved by s. 1 of the *Charter*. With that finding I strongly disagree.

In the discussion that follows, I refrain from discussing the facts of the two cases since trial awaits and it will be the responsibility of the triers of fact to make the pertinent findings. The present discussion thus only addresses the constitutional questions as regards s. 276 of the *Criminal Code*.

Relevant Statutory Provisions

Sections 276 and 277 (formerly ss. 246.6 and 246.7) are the *Criminal Code* sections under constitutional attack in these two appeals. The provisions apply to charges of sexual assault, sexual assault with a weapon, sexual assault

causing bodily harm or accompanied with threats to a third party, and aggravated sexual assault.

Criminal Code

> **276.** (1) In proceedings in respect of an offence under section 271, 272 or 273, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless
>
> (*a*) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
>
> (*b*) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
>
> (*c*) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.
>
> (2) No evidence is admissible under paragraph (1)(*c*) unless
>
> (*a*) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and
>
> (*b*) a copy of the notice has been filed with the clerk of the court.
>
> (3) No evidence is admissible under subsection (1) unless the judge, provincial court judge or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.
>
> **277.** In proceedings in respect of an offence under section 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

Canadian Charter of Rights and Freedoms

> **7.** 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.
>
> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> **28.** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Issues

The following constitutional questions were stated by Dickson C.J. on September 28, 1988:

1. Whether s. 246.6 or 246.7 of the *Criminal Code* is inconsistent with s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. If s. 246.6 or 246.7 of the *Criminal Code* is inconsistent with either s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, whether that inconsistency is justified on the basis of s. 1 thereof?

The other issues are as follows:

1. If ss. 246.6 and/or 246.7 of the *Criminal Code* are declared inoperative, what is the governing law?

2. If the sections are inconsistent with the *Canadian Charter of Rights and Freedoms* and not justified, is this an appropriate case to declare a constitutional exemption in favour of the accused?

3. Does a judge conducting a preliminary inquiry have the jurisdiction to grant relief under s. 24 of the *Canadian Charter of Rights and Freedoms* or s. 52 of the *Constitution Act, 1982*?

4. Whether the remedy of *certiorari* is available in the circumstances of this case.

Analysis

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 when and if 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. The strength of this approach was discussed by Wilson J., in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1352. She states at p. 1355 that, "[o]ne virtue of the contextual

approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context."

An introductory note of more than passing importance is the use of terminology in these reasons. A woman who has been sexually assaulted may be referred to, in reported decisions, as the "prosecutrix", the "alleged victim" or the "complainant". The use of the term prosecutrix stems from the historical fact that the victim of the assault was responsible for bringing a civil suit in order that her injury could be redressed. Presently, it is the state that initiates and directs the prosecution of such offences; nevertheless this phrase may still be employed. As the phrase is clearly archaic and has pejorative connotations, I will avoid its usage. A more difficult choice presents itself regarding the characterization of a sexually assaulted woman as "complainant" or "alleged victim". In my view these descriptions are also problematic, the former in its harshness (especially in this context) and the latter in its presumption that the woman has nothing to complain of. The latter description is, however, accurate in that, in law, one cannot be the victim of the assaultive conduct of an accused until the accused has been found guilty beyond a reasonable doubt. In this sense, the phrase is accurate (excepting of course those cases where an assault occurred but the accused successfully pleads the defence of honest but mistaken belief in consent). Due, however, to its overinclusiveness and presumptive character, I will avoid using the term "alleged victim" in these reasons. While "complainant" suffers from many of the same defects as the previous terms, it is nevertheless the least infirm of the three and, thus, I will use it throughout these reasons.

Finally, the provisions that are the subject of the constitutional challenge in the present case are commonly referred to as "rape shield" provisions. Implicit in this description is a presumption as to their purpose: that it is solely to shield a complainant from the rigours of cross-examination at trial. As I hope to make clear through the course of my reasons, although protecting the complainant may be one of the purposes of the provisions, it is neither the only one, nor necessarily the most important. As a result, I will not use this inaccurate shorthand in referring to these provisions.

Sexual Assault

Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man (98.7 percent of those charged with sexual assault are men: *Crime Statistics 1986*, quoted in T. Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1988), 2 *C.J.W.L.* 310, at note 72, p. 326). Unlike other crimes of a violent nature, it is for the most part unreported. Yet, by all accounts, women are victimized at an alarming rate and there is some evidence that an already frighteningly high rate of sexual assault is on the increase. The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime.

Conservative estimates inform us that, in Canada, at least one woman in five will be sexually assaulted during her lifetime (see J. Brickman and J. Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1985), 7 *Int'l J. of Women's Stud.* 195). The Report of the Committee on Sexual Offences Against Children and Youths warns that one in two females will be the victim of unwanted sexual acts (*Sexual Offences Against Children* (1984)). While social scientists agree that the incidence of sexual assault is great, they also agree that it is impossible, for a variety of reasons, to measure accurately the actual rate of victimization. However, Brickman and Briere, *supra*, report that police figures "may be multiplied anywhere from five to twenty times to correct for victim under-reporting". (See also LeGrand, "Rape and Rape Laws: Sexism in Society and Law" (1973), 61 *Calif. L. Rev.* 919, at p. 939, and L. Clark and D. Lewis, *Rape: The Price of Coercive Sexuality* (1977), at p. 57.) While there is a large gap between reported incidents and actual victimization, there is a further gap between what researchers tell us are the actual numbers and what the actual numbers are.

There are a number of reasons why women may not report their victimization: fear of reprisal, fear of a continuation of their trauma at the hands of the police and the criminal justice system, fear of a perceived loss of status and lack of desire to report due to the typical effects of sexual assault such as depression, self-blame or loss of self-esteem. Although all of the reasons for failing to report are significant and important, more relevant to the present inquiry are the numbers of victims who choose not to bring their victimization to the attention of the authorities due to their perception that the institutions with which

they would have to become involved will view their victimization in a stereotypical and biased fashion. In the report of the Solicitor General of Canada, *Canadian Urban Victimization Survey*: *Reported and Unreported Crimes* (1984), the statistics in this regard are noted at p. 10:

> Analysis of reasons for failure to report incidents confirms many of the concerns which have already been noted by rape crisis workers -- that women fear revenge from the offender (a factor in 33% of the unreported incidents) and, even more disturbingly, that they often fail to report because of their concern about the attitude of police or courts to this type of offence (43% of unreported incidents).

(See also L. Holmstrom and A. Burgess, *The Victim of Rape: Institutional Reactions* (1983), at p. 58, and P. Marshall, "Sexual Assault, The Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216, at p. 217.)

The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e. who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimization does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained. As prosecutors and police often suggest, in an attempt to excuse their application of stereotype, there is no point in directing cases toward the justice system if juries and judges will acquit on the basis of their stereotypical perceptions of the "supposed victim" and her "supposed" victimization. K. Williams, *The Prosecution of Sexual Assaults* (1978), discusses, at p. 42, the attrition rate for sexual assault cases as they progress through the system:

> . . . the D.C. Task Force on Rape reported their concern that sexual assault cases did not fare well in the courts. They were not sure, however, whether this reflected normal attrition, experienced with all cases, or whether rape cases were particularly prone to dismissal. The latter seems to be true. In our analysis, rape cases were less likely to result in conviction than cases of robbery, burglary, and murder. The only crime with an attrition rate at all comparable was aggravated assault. There is an explanation for a large part of the attrition rate of assault cases, but it does not apply to rape. Over 60 percent of the rejections at screening and over one-half of the later dismissals in aggravated assault cases can be attributed to the complaining witness's decision to stop cooperating with the prosecutor. The attrition that results from such a decision on the part of the victim does *not* account for the attrition in rape cases. Attrition in rape cases is more likely to be the result of the prosecutor's judgment that the victim's credibility is questionable. . . . Few cases . . . go to trial . . . . Most fall out of the system before they reach that stage. [Emphasis added.][Italics in original.]

More specifically, police rely in large measure upon popular conceptions of sexual assault in order to classify incoming cases as "founded" or "unfounded". It would appear as though most forces have developed a convenient shorthand regarding their decisions to proceed in any given case. This shorthand is composed of popular myth regarding rapists (distinguishing them from men as a whole), and stereotype about women's character and sexuality. Holmstrom and Burgess, *supra*, at pp. 174-99, conveniently set out and explain the most common of these myths and stereotypes:

1. *Struggle and Force: Woman As Defender of Her Honor.* There is a myth that a woman cannot be raped against her will, that if she really wants to prevent a rape she can.

The prosecution attempts to show that she did struggle, or had no opportunity to do so, while the defence attempts to show that she did not.

Women know that there is no response on their part that will assure their safety. The experience and knowledge of women is borne out by the *Canadian Urban Victimization Survey: Female Victims of Crime* (1985). At page 7 of the report the authors note:

> Sixty percent of those who tried reasoning with their attackers, and 60% of those who resisted actively by fighting or using weapon [*sic*] were injured. Every sexual assault incident is unique and so many factors are unknown (physical size of victims and offenders, verbal or physical threats, etc.) that no single course of action can be recommended unqualifiedly.

2. *Knowing the Defendant: The Rapist As a Stranger.* There is a myth that rapists are strangers who leap out of bushes to attack their victims. . . . the view that interaction between friends or between relatives does not result in rape is prevalent.

The defence uses the existence of a relationship between the parties to blame the victim. (Feild and Bienen, *infra*, report at p. 76 that "a significant proportion of reported rapes involve an assailant known by the victim." See also J. Check and N. Malamuth, "Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape" (1983), 45 *J. of Pers. and Soc. Psych.* 344, at pp. 344-45.)

3. *Sexual Reputation: The Madonna--Whore Complex.* . . . women . . . are categorized into one-dimensional types. They are maternal or they are sexy. They are good or they are bad. They are madonnas or they are whores.

The legal rules use these distinctions.

4. *General Character: Anything Not 100 Percent Proper and Respectable.* . . . Being on welfare or drinking or drug use could be used to discredit anyone, but where women are involved, these issues are used to imply that the woman consented to sex with the defendant or that she contracted to have sex for money.

5. *Emotionality of Females.* Females are assumed to be "more emotional" than males. The expectation is that if a woman is raped, she will get hysterical during the event and she will be visibly upset afterward. If she is able to "retain her cool," then people assume that "nothing happened". . . .

6. *Reporting Rape*. Two conflicting expectations exist concerning the reporting of rape. One is that if a woman is raped she will be too upset and ashamed to report it, and hence most of the time this crime goes unreported. The other is that if a woman is raped she will be so upset that she will report it. Both expectations exist simultaneously.

7. *Woman as Fickle and Full of Spite.* Another stereotype is that the feminine character is especially filled with malice. Woman is seen as fickle and as seeking revenge on past lovers.

8. *The Female Under Surveillance: Is the Victim Trying to Escape Punishment?* . . . It is assumed that the female's sexual behavior, depending on her age, is under the surveillance of her parents or her husband, and also more generally of the community. Thus, the defense argues, if a woman says she was raped it must be because she consented to sex that she was not supposed to have. She got caught, and now she wants to get back in the good graces of whomever's surveillance she is under.

9. *Disputing That Sex Occurred*. That females fantasize rape is another common stereotype. Females are assumed to make up stories that sex occurred when in fact nothing happened. . . . Similarly, women are thought to fabricate the sexual activity not as part of a fantasy life, but out of spite.

10. *Stereotype of the Rapist.* One stereotype of the rapist is that of a stranger who leaps out of the bushes to attack his victim and later abruptly leaves her .... stereotypes of the rapist can be used to blame the victim. She tells what he did. And because it often does not match what jurors *think* rapists do, his behavior is held against her.

A corollary of this myth is the belief that rapists are not "normal" and are "mentally ill".

This Court has previously examined the application of myth and stereotype to women in the realm of the criminal law. In *R. v. Lavallee*, [1990] 1

S.C.R. 852, this Court considered the negative impact of stereotypes about battered women and held at p. 890 that "[e]xpert evidence can assist the jury in dispelling these myths." L. Vandervort, "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987), 2 *C.J.W.L.* 233, at p. 258, note 43, suggests that, "[t]he criminal justice system can play a major role in the process of replacing "mythical" views of sexual assault, and the social definitions of sexual assault based on these myths, with views based on fact and the results of empirical studies".

This list of stereotypical conceptions about women and sexual assault is by no means exhaustive. Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly. This mythology finds its way into the decisions of the police regarding their "founded"/"unfounded" categorization, operates in the mind of the Crown when deciding whether or not to prosecute, influences a judge's or juror's perception of guilt or innocence of the accused and the "goodness" or "badness" of the victim, and finally, has carved out a niche in both the evidentiary and substantive law governing the trial of the matter.

Regarding the utilization of these beliefs by police, in their study of police practices Clark and Lewis (*A Study of Rape in Canada*: *Phases `C' and `D'*: *Report to the Donner Foundation of Canada*, 1976 (unpublished)), quoted in M. Stanley, *The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127* (1985), at p. 20, found at p. 57 that:

> The progress of a rape case through the criminal justice system reflects a highly selective process of elimination. Only a fraction of all rapes are reported; only a fraction of reported rapes are classified as founded; only a fraction of founded cases lead to an arrest; and only a fraction of suspects arrested are convicted.

As I discussed earlier, rape myths are commonly the tools used to select out those cases not worthy of further attention. Whether or not the police use these beliefs consciously, in order to "rape-myth-proof" cases prior to trial, in an attempt to ensure a respectable level of convictions, or whether they employ these beliefs unconsciously, it is clear that very few cases that come to the attention of the police are classified as founded. Clark and Lewis, *supra,* suggest that "only the `best' of even the founded cases proceed" (p. 22). And while founded rates may be on the increase, a complaint of sexual assault is still "three times more likely to be considered unfounded than most other offences" (Renner and Sahjpaul, "The New Sexual Assault Law" at pp. 408-9, quoted in T. Dawson, *supra,* at p. 327). A startling summary of the findings of Clark and Lewis, *supra,* regarding the type of case that is most likely to be classified as founded is provided by M. Stanley, *supra,* at pp. 39-40:

> In reviewing the factors which influenced the police classification of cases as "founded" and "unfounded", a general profile emerged of women who, according to Clark and Lewis, "can't be raped". [They] . . . concluded that the major factor in the judgment made to proceed with a case or to terminate investigation was based upon the character of the reporting rape victim. If the victim was drunk when she was first interviewed by the police, if she was a runaway teenager who did not live at home and was unemployed, if she was between the ages of thirty and forty years of age and separated, divorced, or living in a common law relationship, or if she was "idle", unemployed or on welfare, or receiving psychiatric care, generally the police would not pursue the case. Further, if the victim was not hysterical when she reported the crime, or if she waited too long to report the crime, or if she knew the offender, or if she voluntarily accompanied the offender

> to his residence, or accepted a ride in his car, it was likely that the police would not designate the case as "founded". Where there was evidence of violence, especially where a weapon was used, or where other crimes were committed contemporaneously with the rape, or where more than one assailant was involved in the commission of the rape, the police were more inclined to pursue the investigation.

Holmstrom and Burgess, *supra*, at pp. 43-44, come to much the same conclusion:

> In summary, police have in their minds an image of the ideal rape victim and the ideal rape case. They are most enthusiastic about legally pursuing a "strong" case. Putting their criteria together into an "ideal type" composite, the perfect case would be one in which all the information checks out, there are police witnesses to the crime, the victim can provide a good description of the assailant, there is supporting medical evidence including sperm and injuries, the story remains completely consistent and unchanging, the victim is forced to accompany the assailant, was previously minding her own business, a virgin, sober, stable emotionally, upset by the rape, did not know the offender, and the assailant has a prison record and a long list of current charges against him.

The effect of this filtering process is evident when one examines the end result: conviction rates. Clark and Lewis, in *Rape: The Price of Coercive Sexuality*, *supra*, quoted in C. Backhouse and L. Schoenroth, "A Comparative Survey of Canadian and American Rape Law" (1983), 6 *Can.-U.S. L.J.* 48, note 278, at p. 81, provide us with an estimate of the actual conviction rate in rape cases. Based upon a reporting rate of 40 percent (which is one of the highest estimates of reporting), a founding rate of 36 percent, an arrest rate of 75 percent and a conviction rate of 51 percent they concluded that only 7 percent of rapists are likely to be convicted. Although their conclusions are based upon Toronto crime statistics for 1970, their data and conclusions bring home the limited utility

of statistics which use only reported cases in estimating incidence, arrest and conviction rates. Moreover, their conclusions are supported by more recent data. H. Feild and L. Bienen, *Jurors and Rape* (1980), suggest, at p. 95, that, "based upon recent crime statistics, an individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense." The conviction rates for those who are actually arrested and prosecuted are little better. Williams, *supra*, tells us at p. 19 that:

> Sexual assault cases infrequently result in a conviction. Of the arrests that had reached final disposition at the time of this analysis, 22 percent resulted in conviction -- on some charge. This rate is not only low, it is much lower than the rate for other crimes, which is between 30 and 35 percent. . . . the conviction rates were low regardless of the age or sex of the victim.

Canadian statistics are no more encouraging. Statistics Canada reports that the conviction rate for all crimes against the person in 1973 was 66.7 percent whereas the comparable rate for rape was 39.3 percent.

The previous discussion about reporting rates, rates of arrest and conviction, and the practices of the police in classifying sexual assaults, informs us as to the approximate number of women who are actually victimized. It also tells us something about the gloss that prejudicial beliefs can place on what actually happens, but it does not tell us much about a related and perhaps much larger effect. Whether or not a particular woman has been sexually assaulted, the high rate of assault works to shape the daily life of all women. The fact is that many, if not most women live in fear of victimization. The fear can become such a constant companion that its effect remains largely unnoticed and, sadly,

unremarkable. In their study of this phenomenon, M. Gordon and S. Riger, *The Female Fear* (1989), conclude that, ". . . women restrict their behavior -- even isolate themselves -- in order to avoid being harmed." The point is made dramatically at pp. 1-2 of the *Canadian Urban Victimization Survey: Female Victims of Crime*, *supra*:

> We now know from recent research on fear of crime that first-hand experience with victimization is only one dimension of fear. . . . Particularly relevant in understanding women's fear is an appreciation of the kinds of violence women are most vulnerable to, especially the experience and the impact of domestic and sexual violence. Some women live with the imminent threat of assault from someone in their own households, and many women live with the more general fear of sexual assault, concerns which rarely intrude into the lives of men.
>
> . . . Any form of sexual aggression may feed women's fears by sensitizing them to the possibility of violent attack. Victimization surveys obviously cannot address all the subtle reminders to women of their vulnerability.
>
> . . . While avoidance of high risk situations may well be an important element of victimization prevention, there are obvious limits and costs to a strategy of withdrawal. . . . Even moderate withdrawal in order to prevent violent victimization can diminish an individual's sense of personal autonomy and have a negative impact on the overall quality of life.

In his reasons for judgment in *R. v. Keegstra*, [1990] 3 S.C.R. 697, Dickson C.J. at pp. 746-47 discusses this phenomenon in the context of minority groups targeted by hate propaganda. His words are instructive:

> The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the

> majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity . . . .

This brings us much closer towards a recognition of the impact of societal and legal responses to the sexual victimization of women.

Forgetting about the microcosm of the criminal justice system for a moment, one must not lose sight of the fact that the individuals involved in the processing of complaints are a product of our larger society. While it is clear that those who are so involved hold and utilize stereotypical beliefs about women and rape, this should not be taken to mean that, perhaps as a result of their close association with the matter, they are unique in this respect. In a report prepared for the Ontario Women's Directorate in 1988, by Informa Inc., "Sexual Assault: Measuring the Impact of the Launch Campaign", the prevalence among Ontario residents of a number of stereotypical and discriminatory beliefs was measured. The results indicate that similar stereotypes are held by a surprising number of individuals, for example: that men who assault are not like normal men, the "mad rapist" myth; that women often provoke or precipitate sexual assault; that women are assaulted by strangers; that women often agree to have sex but later complain of rape; and the related myth that men are often convicted on the false testimony of the complainant; that women are as likely to commit sexual assault as are men and that when women say no they do not necessarily mean no. This baggage belongs to us <u>all</u>. (See also Feild and Bienen, *supra*.)

Absolutely pivotal to an understanding of the nature and purpose of the provisions and constitutional questions at issue in this case is the realization

of how widespread the stereotypes and myths about rape are, notwithstanding their inaccuracy.

The appellants argue that we, as a society, have become more enlightened, that prosecutors, police, judges and jurors can be trusted to perform their tasks without recourse to discriminatory views about women manifested through rape myth. Unfortunately, social science evidence suggests otherwise. Rape myths still present formidable obstacles for complainants in their dealings with the very system charged with discovering the truth. Their experience in this regard is illustrated by the following remarks of surprisingly recent vintage:

> Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she has only to keep her legs shut and she would not get it without force and there would be marks of force being used.
>
> (Judge David Wild, Cambridge Crown Court, 1982, quoted in Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989), 21 *Ottawa L. Rev.* 741, at p. 741.)
>
> Unless you have no worldly experience at all, you'll agree that women occasionally resist at first but later give in to either persuasion or their own instincts.
>
> (Judge Frank Allen, Manitoba Provincial Court, 1984, quoted in Sheehy, *supra*, at p. 741.)

> . . . it is easy for a man intent upon his own desires to mistake the intentions of a woman or girl who may herself be in two minds about what to do. Even if he makes no mistake it is not unknown for a woman afterwards either to take fright or for some other reason to regret what has happened and seek to justify herself retrospectively by accusing the man of rape.
>
> (Howard, *Criminal Law* (3rd ed. 1977), at p. 149.)
>
> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.
>
> (Wigmore, *Evidence in Trials at Common Law*, vol. 3A (1970), at p. 736.)

Regrettably, these remarks demonstrate that many in society hold inappropriate stereotypical beliefs and apply them when the opportunity presents itself.

Feild and Bienen, *supra*, write at p. 139 that, "[t]he results reported in this study confirmed what many writers and researchers studying rape have suggested: extra-evidential factors were found to influence the outcome of the rape trials." When juries are provided with certain types of information about the complainant, such as evidence regarding past sexual conduct, the weight of the evidence is that they then utilize the myths and stereotypes discussed above and focus on them in "resolving" the particular legal issues raised by the case.

Though these researchers found that the effect of sexual history evidence was more complex than originally thought, they do note at pp. 118-19 that:

> Along with race of the defendant, sexual experience of the victim proved to have important effects on juror decision making as it was involved in four of the seven significant interactions. Support for the reformers' sentiments concerning the elimination of evidence regarding third-party sexual relations is indicated by the presence of these interactions.
>
> . . .
>
> In the present research, the assailant in the nonprecipitory assault was given a more severe sentence than the offender in the precipitory case indicating that the jurors appeared to attribute blame to the victim when contributory behavior was implied. Several writers (Frederick and Luginbuhl 1976; Jones and Aronson 1973; Landy and Aronson 1969) have documented similar effects. Brooks, Doob, and Kirshenbaum (1975) found that jurors were more likely to convict a defendant accused of raping a woman with a chaste reputation than an identical defendant charged with assaulting a prostitute. Information on the "good" or "bad" character of the victim appears to affect the decisions of the jurors, and the definitions of good or bad are likely to be broadly defined. [Emphasis added.]

Similarly, Borgida and White, "Social Perception of Rape Victims: The Impact of Legal Reform" (1978), 2 *Law and Hum. Behav.* 339, report at p. 349 that:

> . . . when specific evidence of the victim's prior sexual history is admitted in a consent defense rape case . . . jurors infer victim consent, carefully and unfavorably scrutinize the victim's credibility and moral character, and tend to attribute more responsibility to the victim. . . . Although defendant credibility is a consideration, perceptions of the defendant's general moral character are much less of a consideration than the victim's general moral character.
>
> . . . Jurors are reluctant to convict the defendant when any testimony about prior sexual history is introduced in support of the consent defense.

> . . . The admission of this evidence seems to enhance the likelihood that jurors make person attributions and attribute more personal responsibility to the victim for the rape. Jurors also are more likely to infer victim consent from testimony about prior sexual history. [Emphasis added.]

G. La Free, who has done extensive research on this issue, suggests that the research is consistent with respect to the conclusion that when the victim allegedly engaged in "misconduct", acquittals were more likely ("Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing" (1980), 58 *Soc. Forces* 833). In this particular study, La Free examined all of the forcible rape cases in an American midwestern city. He defined misconduct for the purpose of his study as either sexual, i.e. the victim had illegitimate children or was sleeping with her boyfriend, or non-sexual, i.e. the victim was a runaway or drug dealer. As La Free notes, when one realizes that sexual assault cases are extensively screened prior to trial according to their conformity with mythology, it is surprising that there is much of any "deviant" behaviour left to trigger the application of stereotype and myth at trial.

In a later study conducted by La Free (G. La Free, B. Reskin and C.A. Visher, "Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials" (1985), 32 *Soc. Prob.* 389), post-trial interviews were conducted with jurors who had served in forcible sexual assault cases. At page 392 the authors state that, "[o]ur trial observations suggest that a major avenue for challenging the complainant's victimization in consent and no-sex cases is to encourage jurors to scrutinize her `character'." They also suggest at p. 400 that "a victim's nontraditional behavior may act as a catalyst, causing jurors' attitudes

about how women should behave to affect their judgments under certain conditions." Also relevant for our purposes are their findings at p. 397 that, where the issue at trial is whether the act occurred or whether there was consent:

> Of particular interest are the findings regarding evidence. Although any evidence that a woman was forced to submit to a sexual act against her will (including use of a weapon or victim injury) might be expected to persuade jurors of the defendant's guilt, neither variable significantly affected jurors' judgments....
>
> In contrast, jurors were influenced by a victim's "character." They were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank or used drugs, or had been acquainted with the defendant -- however briefly -- prior to the alleged assault. [Emphasis added.]

Although Canadian data are harder to come by, those studies that have been done support the American data. Indeed, it would be somewhat surprising to find that this was not the case. In one Canadian study (K. Catton, "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim -- Its Effect on the Perceived Guilt of the Accused" (1975), 33 *U.T. Fac. L. Rev.* 165), subjects were asked to read a description of a hypothetical rape case. Varied among the descriptions were the nature of the controls placed upon evidence of the complainant's sexual history. At page 173 Catton discusses the results in this fashion:

> . . . when jurors heard information regarding an alleged rape victim's prior sexual history with named persons, whether this information was confirmed or denied, this information decreased their perceived guilt of the accused in comparison with the situation where no information relating to the victim's supposed past sex life was heard. This decrease in the perceived guilt of the accused varied directly with the "amount" of negative information presented about the victim.

> Although the "No information" control condition was not as successful as planned . . . still the accused was seen as most guilty in this condition where no information at all about the victim's prior sexual history was given. Any information at all implying that the victim had a prior sex history had the effect of reducing the perceived guilt of the accused regardless of whether this information was verified. [Emphasis added.]

Importantly, she finds that even if the prior sexual history of the complainant is denied or fails to be confirmed, the perceived guilt of the accused decreases.

It is thus clear that, from the making of the initial complaint down to the determination of the issue at trial, stereotype and mythology are at work, lowering the number of reported cases, influencing police decisions to pursue the case, thereby decreasing the rates of arrest, and finally, distorting the issues at trial and necessarily, the results. Professor Catharine MacKinnon asserts that in the United States:

> It is not only that women are the principal targets of rape, which by conservative definition happens to almost half of all women at least once in their lives. It is not only that over one-third of all women are sexually molested by older trusted male family members or friends or authority figures as an early, perhaps initiatory, interpersonal sexual encounter. . . . All this documents the extent and terrain of abuse and the effectively unrestrained and systematic sexual aggression by less than one-half of the population against the other more than half. It suggests that it is basically allowed.
>
> (C. MacKinnon, *Toward a Feminist Theory of the State* (1989), at pp. 142-43.)

The Larger Legal Context

My discussion to this point has primarily been concerned with the incidence of sexual assault in our society and the role of stereotype in dealing with it. What clearly emerges from this previous discussion is that myths surrounding women and sexual assault affect perceptions of the culpability of the aggressor and the moral "character" and, hence, the credibility of the complainant and, thus, shape the ultimate legal result. While all of this is relevant in a discussion of the larger context of the legislation at issue, my focus here will be on the utilization of these discriminatory beliefs in the development of legal principles applicable in trials of sexual offences and on government attempts to combat it.

The common law has always viewed victims of sexual assault with suspicion and distrust. As a result, unique evidentiary rules were developed. The complainant in a sexual assault trial was treated unlike any other. In the case of sexual offences, the common law "enshrined" prevailing mythology and stereotype by formulating rules that made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her "morality" or "character". The matter is put succinctly by H. Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 *Minn. L. Rev.* 763, at pp. 792-93:

> Traditional ideology also maintained that unchaste women became either vindictive or susceptible to rape fantasies and inclined falsely to charge men with rape. This belief was based on the notion that extramarital sexual activity was abnormal for women. . . . Distrust

> and contempt for the unchaste female accuser was formalized into a set of legal rules unique to rape cases. The most prominent rule allowed the use at trial of evidence of the complainant's unchaste conduct. These rules combined to shift the usual focus of a criminal trial from an inquiry into the conduct of the offender to that of the moral worth of the complainant. [Emphasis added.]

At common law, the prior sexual history of the complainant was admissible on two issues, one material and one collateral. It was thought that "unchasteness" was relevant to the material issue of consent and the collateral issue of credibility. In other words, women who had consensual sex outside of marriage were thought, in essence, to have a dual propensity: to consent to sexual relations at large and to lie. The *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982) summarized what was admissible at common law at pp. 66-67 in this fashion:

> Evidence of the complainant's sexual history, considered at common law to be relevant to consent, consisted of (1) other acts of sexual intercourse with the accused, (2) the opinion of a witness that the complainant is a prostitute, and specific incidents of the complainant's prostitution, (3) the complainant's general reputation as a common prostitute, (4) the complainant's general reputation for unchastity or "notoriously bad character for chastity", and (5) evidence that the complainant "is in the habit of submitting her body to different men, without discrimination, whether for pay or not". The relevance of this evidence to consent was based on the moral judgement that such a woman would be more likely to have consented to the act with which the accused had been charged.
>
> The complainant's lack of consent was an essential element of an offence of rape or indecent assault. Thus the accused, at common law, could cross-examine the complainant concerning matters deemed relevant to consent, and the complainant was required to answer. Because consent was a material issue, the trial judge had no discretion to excuse the complainant from answering such questions on the ground that they were degrading. If the complainant denied the questions, the accused person could contradict her answers, or if the complainant refused to answer, the accused could prove the matters alleged.

> At common law, a witness could be cross-examined as to any matter of conduct, including sexual conduct, which was relevant to impeach the witness's credibility. At common law, it was assumed that an unchaste woman was more likely to be an untruthful witness. Thus, in a prosecution for rape or indecent assault, a complainant could be cross-examined as to her sexual history to impeach her credibility. There were two limitations on the accused's right, on the issue of credibility, to confront a complainant with her sexual history. First, the trial judge had some discretion to excuse the complainant from answering degrading questions. Second, if the complainant denied the question or refused to answer, whether with the judge's approval or not, since the matter was relevant only to the collateral issue of the complainant's credibility, the accused could not call evidence on it.

Under the guise of a principled application of the legal concept of relevance, the common law allowed the accused to delve at great length into the moral character of the complainant by adducing "relevant" sexual history. The prejudicial impact of such an inquiry has already been discussed at length. The true nature and purpose of the inquiry into sexual history is revealed by the resulting prejudice and by the fact that these concepts were only applicable in respect of sexual offences and, in addition, were not deemed relevant to the credibility of the male accused.

Application of the relevance concept was not the only way in which the common law integrated stereotype and myth into trials of sexual offences. Also part of the unique body of evidentiary law surrounding sexual offences were, among other things, the doctrine of recent complaint and corroboration rules. These evidentiary concepts were also based upon stereotypes of the female complainant requiring independent evidence to support her evidence and, in addition, evidence that she raised a "hue and cry" after her assault. It is

noteworthy that both recent complaint and corroboration rules formed exceptions to general rules of evidence.

Evidence of a recent complaint in sexual assault cases is an exception to the general rule that self-serving statements are inadmissible. Such evidence is described in *Cross on Evidence* (7th ed. 1990), at p. 281, as superfluous, "for the assertions of a witness are to be regarded in general as true, until there is some particular reason for impeaching them as false." However, in the case of sexual offences, either the absence of a recent complaint or its inadmissibility required the trier of fact to draw an adverse inference regarding the complainant's credibility. If evidence of a recent complaint existed, the complainant had to surmount onerous requirements restricting its admissibility. If admissible, such evidence was tendered to show that the complainant's testimony was consistent but was not admitted to show the truth of its contents. The importance of the rule at common law lay not in its ability to enhance the credibility of the complainant, but rather in its ability to counter the presumption that the complainant was lying. (See *Timm v. The Queen*, [1981] 2 S.C.R. 315, wherein the principles regarding this doctrine are fully discussed.) Thus, to a large degree, the myth that complainants in sexual assault cases fabricate their allegations informed the doctrine of recent complaint.

The corroboration rules were also exceptions to traditional evidence principles. Generally, "the court may act upon the uncorroborated testimony of one witness, and such requirements as there are concerning a plurality of witnesses, or some other confirmation of individual testimony are exceptional"

(*Cross, supra*, at p. 224). Certain classes of witnesses were thought to be unreliable such as children of tender years, accomplices and, interestingly, victims of sexual offences, almost always women. The requirement for corroboration may take one of two forms. In some offences corroboration was required for conviction, whereas for others, the jury had to be warned that convicting absent corroboration was dangerous. The rationale for corroboration also finds its genesis in the traditional distrust of a complainant's veracity in sexual offences. J. Hoskins, "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases" (1983), 4 *Can. J. Fam. L.* 173, comes to the same conclusion and states at pp. 177-78 that "[w]hile the rule requiring corroboration or at least a prescribed warning of the danger of convicting without corroborating evidence is a relatively recent development, the law has long held a deep suspicion of female complainants in sexual offence cases." The Law Reform Commission of Canada has similarly questioned the "likely false assumptions upon which our present rules of corroboration rest" (*Corroboration: A Study Paper Prepared by the Law of Evidence Project* (1975), at p. 7).

The preoccupation of the law with the credibility of the complainant in such cases and the blatant stereotyping of such complainants as untrustworthy are difficult to comprehend. As we have seen, sexual assault is the most under-reported of all violent crimes. Even after a report, the police and prosecutors filter out a significant number of the complaints based upon their congruence with rape myth and stereotype. Logically it would seem that the likelihood of false complaints is, in this context, much reduced compared to that for most crime. Indeed, there is no evidence to support the contrary.

Thus, the common law stance in respect of the admission of the past sexual history of the complainant has a larger legal context. A number of other rules were formulated that gave legal voice to stereotypes both about female complainants and about the nature of sexual assault. Legislative intervention must be viewed within this larger context.

Parliament intervened on two notable occasions, both relevant to the inquiry here. In 1976, Parliament repealed the existing s. 142 of the *Criminal Code*, R.S.C. 1970, c. C-34, and enacted a provision designed to alleviate some of the problems caused by the virtually unrestricted inquiry into a complainant's previous sexual history allowed at common law (*Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8). The provision read:

> **142.**(1) Where an accused is charged with an offence under section 144 or 145 or subsection 146(1) or 149(1), no question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless
>
> (*a*) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the court; and
>
> (*b*) the judge, magistrate or justice, after holding a hearing *in camera* in the absence of the jury, if any, is satisfied 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, including the credibility of the complainant.
>
> (2) The notice given under paragraph (1)(*a*) and the evidence taken, the information given or the representations made at a hearing referred to in paragraph (1)(*b*) shall not be published in any newspaper or broadcast.

> (3) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (2) is guilty of an offence punishable on summary conviction.
>
> (4) In this section, "newspaper" has the same meaning as it has in section 261.
>
> (5) In this section and in section 442, "complainant" means the person against whom it is alleged that the offence was committed.

Though the motives of Parliament were commendable, judicial interpretation of the section thwarted any benefit that may have accrued to the complainant. In fact, the provision, as judicially interpreted, provided less protection to the complainant than that offered at common law, surely a surprising result considering the obvious mischief Parliament intended to cure in enacting it.

More specifically, in *Forsythe v. The Queen*, [1980] 2 S.C.R. 268, this Court held at p. 279 that, in order that the trial judge be able to determine whether questioning during the trial proper was necessary, the complainant was compellable at the *in camera* hearing:

> First, the *in camera* hearing is for the purpose, *inter alia*, of enabling the judge or magistrate to satisfy himself as to the weight of the evidence, and I am unable to appreciate how weight can be determined without an assessment of witnesses called to give evidence, an assessment which would take into account their demeanor, their knowledge of the events about which they are examined, the consistency of their testimony and so on. Second, s. 142(2) appears to me to be conclusive that evidence may (not must) be taken in the *in camera* hearing. . . . In my opinion, the judge or magistrate conducting the *in camera* hearing may decide, after hearing submissions or representations of counsel, that he does not need to hear any evidence. . . .
>
> If evidence is taken at the *in camera* hearing, the witnesses proposed to be called must be regarded as compellable, and the complainant, whose credibility is an issue of fact specified in s.

> 142(1)(*b*), must be equally compellable, becoming, however, the accused's witness if called at the *in camera* proceedings.

Not only was the complainant held to be compellable at the instance of the accused at the *in camera* hearing, but, contrary to the position at common law, this Court held that, due to the wording of s. 142(1)(*b*), credibility was elevated to the status of a material issue. Thus, as regards questions about a complainant's sexual "misconduct" with individuals other than the accused, the complainant could no longer refuse to answer these questions and further, the accused could lead evidence to contradict the complainant's testimony.

At common law, a complainant could be asked about specific instances of sexual activity with named individuals other than the accused but could not be contradicted as such evidence went merely to credibility, a collateral issue. (See *Laliberté v. The Queen* (1877), 1 S.C.R. 117, at p. 130, and *Gross v. Brodrecht* (1897), 24 O.A.R. 687, at p. 689, for a statement of the rule in this regard.) The impetus for this contrary conclusion appears to have been a concern for "balancing" the rights of the accused with the new "protection" afforded the complainant. After explaining that Parliament had attempted via s. 142 to alleviate the trauma of the complainant (although it is clear that this was not the only purpose of the legislation), Laskin C.J., at p. 274, for the Court discusses this "balance":

> There has been advertence . . . to . . . the purpose of s. 142, namely, to alleviate the trauma and the humiliation and embarrassment of a complainant by an inquiry into her past sexual conduct with persons other than the accused. The provision also appears, however, to balance the interests of an accused because, under the prior law, a

> denial of sexual misconduct with others precluded any further inquiry into what was considered to be a collateral issue.

To make the position of the complainant under s. 142 plain, Laskin C.J., at p. 275, elaborated on the effect of this "trade-off" in these words:

> The accused, in making his defence, is not limited to cross-examining the complainant to expose the falsity of a denial of sexual encounters with others (if she does deny them), but may put forward other witnesses . . . to impugn the credibility of the complainant. [Emphasis added.]

It may be argued that, not only did the Court feel a somewhat misplaced need to "balance" the "protection" of the complainant against "restrictions" placed upon the accused, it tipped the balance further in favour of the accused. This is obviously a curious result given the fact that the infirmities of the common law led Parliament to intervene. That the complainant should walk away with less than she already had is lamentable. (The same conclusion was reached by Wilson J. (dissenting) in *R. v. Konkin*, [1983] 1 S.C.R. 388, wherein she stated at p. 396 that, "[i]n effect s. 142, instead of minimizing the embarrassment to complainants, increased it.") The *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*, *supra*, also criticized the approach of the Court in *Forsythe*, *supra*, and concluded at p. 72, properly in my view, that "[t]his interpretation defeats the main purpose of the provision." The peculiar nature of the "balance" struck by the Court is commented on by C. Boyle, "Section 142 of the Criminal Code: A Trojan Horse?" (1981), 23 *Crim. L.Q.* 253, at pp. 258-59, in these words:

> This displays a regrettable and unnecessary tit-for-tat approach to judicial law-making, unnecessary because in the judge-made law prior to 1975, there was no perceived need to allow contradictory evidence and nothing has happened since to demonstrate that accused persons then were not receiving a fair trial. . . .
>
> . . . there can be no equivalence between cutting out some irrelevant questions and permitting other irrelevant evidence. [Emphasis added.]

In sum, the response of the courts to s. 142 was decidedly at odds both with a recognition of the discriminatory nature of the common law and with the larger goals of Parliament in enacting the provision. Obviously, the judicial response did not alleviate the problems with the common law, leading Parliament to try once again.

Before delving into the second legislative effort of Parliament, I will briefly discuss a reform that accompanied s. 142, as it forms part of the legal context and also provides a stronger indication of the objectives of Parliament in becoming involved in this area of the law.

Section 142, which I have discussed above, replaced the previous s. 142 which contained a discretionary warning provision. The warning provision was not reenacted. It provided that, where an accused was charged with a certain sexual offence (sexual intercourse with a female under fourteen, sexual intercourse with a female between fourteen and sixteen, rape, attempted rape, and indecent assault on a female), and the only evidence which implicated the accused was the uncorroborated testimony of the female complainant, the judge shall instruct the jury that it is not safe to find the accused guilty in the absence of corroboration but that they were nevertheless entitled to do so. The stereotypical

vision of complainants in sexual assault cases, which informed these rules of corroboration, was discussed earlier. The question that remained was whether the repeal by Parliament of the warning requirement revived the common law rule requiring corroboration in sexual offences. Though the answer reached by most courts was no (see, *R. v. Camp* (1977), 36 C.C.C. (2d) 511 (Ont. C.A.) and *R. v. Firkins* (1977), 37 C.C.C. (2d) 227 (B.C.C.A.), leave to appeal refused, [1977] 2 S.C.R. vii), it was, nevertheless, held that the judge could still comment on the risks of relying on the evidence of a single witness. To some degree then, the objective of the legislation was not met. Repeal of the mandatory corroboration requirement, embodied in s. 139 of the *Code*, was left for a later occasion. Nevertheless, this first reform effort indicates a significant attempt on the part of Parliament to rid trials of sexual offences of certain discriminatory rules and practices.

The failure of the courts, as was indicated earlier, both to take cognizance of and to implement the objectives of Parliament in this earlier legislation, combined with further criticism of the manner in which complainants of sexual offences were treated, generated a sweeping set of reforms in 1982. The Honourable Jean Chrétien, then Minister of Justice and Attorney General of Canada, articulated the principles underlying this second, larger reform package in this manner:

> The inequality of the present law has placed an unfair burden on female victims of sexual assault. It has added to the trauma, stigma and embarrassment of being sexually assaulted, and has deterred many victims from reporting these serious crimes to the police. . . . Bill C-53 would alleviate the legal impediment which allows this to occur.

. . .

> I am pleased to note that there appears to be widespread support for the four basic principles underlying the bill, namely the protection of the integrity of the person, the protection of children and special groups, the safeguarding of public decency, and the elimination of sexual discrimination. [Emphasis added.]

(Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, *supra*, at p. 77:29)

Further, in earlier discussion and debate, Ron Irwin, Parliamentary Secretary to the Minister of Justice and Minister of State for Social Development, referred with more particularity to the significance of the fourth principle:

> Simple equity demands [the elimination of sexual discrimination in criminal law]. . . . hand in hand with the rights of the accused must go the protection of those who are victims.

(*House of Commons Debates*, July 7, 1981, at p. 11300.)

These larger reform purposes must inform any analysis of the legislation.

The *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, extensively altered the law in a number of respects. To begin with, the rules relating to recent complaint were "abrogated" (s. 246.5). However, some questions remained about the scope

and effect of the section; i.e. could the use of the *res gestae* and recent fabrication exceptions to the rule against narrative work to practically revive the recent complaint exception and, further, what offences are covered by the provision? In answering these questions surely some assistance can be obtained by adverting to the larger goals of Parliament in enacting s. 246.5. With these goals in mind, a narrow interpretation of this section would be anomalous. (See C. Boyle, *Sexual Assault* (1984), at p. 154.) Nevertheless, the proper interpretation of this section is not in issue here.

What is important for our purposes is the relationship of this section and its goals to those provisions directly in issue in this case. As I discussed earlier, as a significant barrier to establishing credibility, the operation of the doctrine of recent complaint worked to the disadvantage of complainants and, as the rule found its roots in stereotypes of such complainants, its repeal is in keeping with the articulated goals of Parliament.

Parliament also addressed the mandatory corroboration requirement which escaped repeal in the 1976 set of amendments. This rule, embodied in s. 139(1) of the *Code*, required corroboration for the offences of sexual intercourse with the feeble-minded, incest, seduction of a female of previous chaste character between 16 and 18 years of age, seduction under promise of marriage, sexual intercourse with step-daughters, foster daughters, female wards or female employees, seduction of female passengers on vessels, and parent or guardian procuring defilement. (Note, however, that some of these offences have themselves been repealed.) In this second set of reforms, Parliament repealed s.

139 and also enacted s. 246.4 which provides that, where an accused is charged with incest, gross indecency, or one of the various forms of sexual assault, no corroboration is required for a conviction and, further, the judge shall not instruct the jury that, without corroboration, it would be unsafe to convict. These changes rectify the position that existed after the repeal of s. 142 referred to above, namely that a trial judge could still instruct the jury about the "perils" of relying on the uncorroborated testimony of a single witness.

Another significant step forward in respect of protecting the integrity of the person and the elimination of sexual discrimination is the change relating to the prosecution of husbands who sexually assault their wives. Section 246.8 provides that a husband or a wife may be charged with any of the sexual assault offences in respect of his or her spouse, regardless of whether or not they were living together at the time of the act. Prior to these amendments, rape was defined as occurring where "[a] male person . . . has sexual intercourse with a female person who is not his wife". To give effect to the amendment, Parliament modified the *Canada Evidence Act* and removed spousal incompetence and spousal non-compellability impediments in respect of these offences. Ron Irwin, then Parliamentary Secretary to the Minister of Justice and Minister of State for Social Development, described this change as granting "[e]qual protection under the law. . . to all persons" (*House of Commons Debates*, July 7, 1981, at p. 11301).

Parliament also amended pre-existing provisions which protected the identity of the complainant in sexual offences. The amendments give the complainant independent status to apply for an order directing that her identity

and any information which could disclose her identity not be published and, further, require the judge to grant the order upon her application. In addition, the amendments place upon the judge a duty to inform the complainant of her right to apply for the order. (These provisions were the subject of discussion in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, a judgment that will be discussed later in these reasons.)

Finally, this set of reforms saw the repeal of s. 142 discussed above, and the enactment of ss. 246.6 and 246.7 (now ss. 276 and 277), reproduced at the outset. I will discuss the meaning and scope of the provisions later in these reasons. For the moment, it is sufficient to note that these sections clearly also promote the larger objectives of the reform package. Notwithstanding their congruence with these larger objectives, notably the attempt to eliminate sexual discrimination, they were also viewed as effecting change on a number of other, more specific levels. A further objective of the provisions was the rationalization of trials of sexual offences through restricting the ability of the accused to adduce invasive, prejudicial evidence of sexual history and sexual reputation, except in circumstances where the evidence was sufficiently proximate to the legal issues raised. Along with, and perhaps due to the immediate effect of the provisions at trial, they would fulfil another objective, that of increasing reporting of sexual assault. In this regard the then Minister of Justice stated:

> The reason why we want to get rid of the interminable questioning on a person's reputation is <u>because very often this is precisely why women refuse to make a complaint in the case of rape</u>. . . . Under the bill, in the case of a charge of aggravated sexual assault or sexual assault, <u>the act itself will be discussed and not what may have happened in the previous years.</u> [Emphasis added.]

(Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, *supra*, at p. 77:46.)

Finally, the provisions have an inestimable advantage over both the common law and the previous provision, an advantage that is especially pertinent in this area of law, that of increased certainty. Certainty in and of itself has immeasurable value in this area but it also works to ensure that the other objectives of the legislation are met.

Combined with my discussion at the outset of sexual assault, this discussion of the state of the pertinent law prior and subsequent to legislative intervention and of the legislative goals underlying the reform process provides the larger legal context for the examination of the constitutional questions stated in these cases. This contextual approach is essential in my view for a complete understanding of the role of the legislative provisions at issue in the present case and so that the ultimate constitutional questions may be answered with confidence.

Relevance and Admissibility at Common Law and Under the Legislative Provisions

Like many of the other legal rules and principles that are brought to bear in trials of persons charged with sexual offences, the concept of relevance has been imbued with stereotypical notions of female complainants and sexual assault. That this is so is plain from the common law which held that evidence of "unchasteness" was relevant to both consent and credibility. Any connection

between the evidence sought to be adduced and the fact or matter of which it was supposedly probative must be bridged by stereotype (that "unchaste" women lie and "unchaste" women consent indiscriminately), otherwise the propositions make no sense. While some may think that these represent egregious examples of the use of stereotype, it is well to remember that relevancy determinations such as this are still being made, though the myth which drives the particular determination may be better obscured or, due to the entrenchment of these beliefs, more automatically made.

Traditional definitions of what is relevant include "whatever accords with common sense" (McWilliams, *Canadian Criminal Evidence* (3rd ed. 1990), at p. 3-5); "`relevant' means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other" (Stephen's *A Digest of the Law of Evidence* (12th ed. 1946), art. 1), and finally Thayer's "logically probative" test with relevance as an affair of logic and not of law, a test adopted by this Court in *Morris, infra*.

Whatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience,

common sense and logic are informed by stereotype and myth. As I have made clear, this area of the law has been particularly prone to the utilization of stereotype in determinations of relevance and again, as was demonstrated earlier, this appears to be the unfortunate concomitant of a society which, to a large measure, holds these beliefs. It would also appear that recognition of the large role that stereotype may play in such determinations has had surprisingly little impact in this area of the law. Marshall J. stated in *R. v. Oquataq* (1985), 18 C.C.C. (3d) 440 (N.W.T.S.C.), at p. 450:

> Now, then, in logic, is sexual indulgence outside of marriage or established relationships (one could perhaps still call it unchastity) logically probative of consent on a particular occasion? Does it make consent more harmonious with all the circumstances, and does it move the trier towards one preponderance of possibilities? Does it mean the girl was more likely to have consented?
>
> Or it could be put simply this way. Is the girl who indulges herself sexually outside of marriage or established relationships more likely to consent? The antithesis would be: is a girl who *does not* indulge herself outside of marriage or established relationships ever, as likely to have consented? Applying the test we use to establish judicial truth, I think the answer can only be *No*. The antithesis is also logically probative, I think --though not conclusive, of course, but logically probative.
>
> . . .
>
> What offends one's sense of justice most, I think, is that relating unchastity to a likelihood of consent is unfair and also, of course, not conclusive in any individual case. What one must realize, though, is that our test for judicial truth is based on probabilities. This is, of course, both fallible and flawed. It may also show, in a specific case, rank prejudice; but we use it. [Italics in original.][Emphasis added.]

It seems odd to recognize the use of stereotype in the "test for judicial truth" but nevertheless conclude that the test for "truth" is met. If the only thing that renders a determination of relevancy understandable is underlying stereotype,

it would seem contradictory to conclude then that "truth" has been found. "The trier is . . . trying to ascertain questions of fact, which involve truth, but which can only become fraught with untruth once unsubstantiated cultural beliefs are factored in as "relevant" evidence" (Sheehy, *supra,* at p. 755). It is also somehow perverse to suggest that an objective application of the law of evidence mandates the admission of evidence which exhibits "rank prejudice". This seems to exclude altogether both examination of, and responsibility for, individual decision making. The sticking point is, of course, recognition that the application of "logic" and "common sense" may, in any given case, show "rank prejudice". As Dawson, *supra,* rightfully points out, at p. 316, "[legal standards] are not simply neutral mechanisms to facilitate substantive debates, but take their place in a normative structure." As such they may be used to perpetuate "rank prejudice". Though the determination of what is relevant is often represented as involving a neutral standard applied objectively, both history and the magnitude of the harm done suggest otherwise:

> Definition of reality is one mechanism whereby legal systems serve to disempower and oppress non-dominant segments of a heterogeneous population. A "neutral" rule is no barrier whatsoever; if anything, it may facilitate discrimination by defusing pressure for "equal" application of the law. Only the effects of a legal system provide significant evidence of whether it is non-discriminatory. [Footnotes omitted.][Emphasis added.]

(L. Vandervort, *supra*, at p. 262.)

I have discussed the effects in this area of the law in significant detail at the outset and have concluded that they do provide "significant evidence" of discrimination.

Once the mythical bases of relevancy determinations in this area of the law are revealed (discussed at greater length later in these reasons), the irrelevance of most evidence of prior sexual history is clear. Nevertheless, Parliament has provided broad avenues for its admissibility in the setting out of the exceptions to the general rule in s. 246.6 (now s. 276). Moreover, all evidence of the complainant's previous sexual history with the accused is *prima facie* admissible under those provisions. Evidence that is excluded by these provisions is simply, in a myth- and stereotype-free decision-making context, irrelevant.

The first exception, in subs. (1)(*a*), has the potential for allowing the admission of a wide variety of sexual history evidence. It encompasses situations where the Crown directly or indirectly introduces in evidence the issue of the complainant's sexual history. If the Crown chooses to do so, the door is open for rebuttal evidence. It would allow the defence to adduce sexual history evidence to explain semen, pregnancy, injury or disease that the Crown contends was a consequence of the offence. Such evidence is, however, limited to rebutting this explicit or implicit contention of the Crown. Subsection (1)(*b*) allows the receipt of evidence which goes to show the identity of the person who had sexual relations with the complainant on the pertinent occasion. This subsection and subs. (1)(*a*) overlap to some degree in that rebuttal evidence regarding the physical consequences of the assault would, depending upon the circumstances of

the case, be admissible under one or either subsection. Noteworthy, however, is the caveat in subs. (1)(*b*) that such evidence must go to establishing the identity of the person who had sexual contact with the complainant on the occasion set out in the charge. While these provisions are inherently broad, their interpretation must nevertheless remain true to the wording of the exception otherwise they will have little effect. As for the last exception, subs. (1)(*c*), it allows the receipt of relevant and proximate sexual history evidence that goes to the issue of the consent the accused honestly thought he had been given. In summary, as Grange J.A. pointed out (at p. 307), for the majority of the Court of Appeal, "[t]here is nothing startling or unique about our legislation".

As to s. 246.7 (now s. 277), it merely excludes evidence of sexual reputation used to impeach or support the credibility of the complainant. The notion that reputation for "unchasteness" is relevant to credibility is insupportable and its legislative exclusion uncontentious. Furthermore, evidence of sexual reputation is inherently unreliable. Due to the nature of the activity that forms the subject matter of the reputation, the alleged reputation is often nothing more than "speculation and exaggeration" (see Galvin, *supra*, at p. 801, and A. P. Ordover, "Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity" (1977), 63 *Cornell L. Rev.* 90, at p. 105). In fact, both the appellant Seaboyer and the intervener, the Canadian Civil Liberties Association, concede that the exclusion mandated by s. 277 is uncontentious. Indeed, my colleague reaches the same conclusion at p. 000.

The literature and case law in this area abound with examples of the supposed relevant evidence that is excluded by s. 276. For the most part, however, the "relevant" evidence provided in these examples is, on a principled inquiry, irrelevant; any semblance of relevance depends in large measure upon acceptance of stereotype about women and rape. Much of the remainder is admissible under the provision. One hesitates, however, to construct an argument around the speculative scenarios offered. Many of the scenarios are pure fantasy and have absolutely no grounding in life or experience. Speculating in this manner depends, to some degree, upon the acceptance of stereotypes about women and sexual assault and the will to propagate them. The point is well made by Sheehy, *supra*, at pp. 755-57:

> The indeterminate exceptions [that evidence of sexual history is generally irrelevant] posed by the *Wald* case constitute an open invitation to the "pornographic imagination" with which we have all been culturally endowed. The beliefs which spring from this collective imagination are not only without empirical foundation: they also systematically deny control and credibility to those who do not belong to the dominant culture. Even more problematic is the fact that these beliefs are insidious because they are taken for granted and are therefore almost irresistible to the trier of fact who has absorbed our culture. . . .
>
> In fact, the examples used by defence counsel, academics, and judges to illustrate situations where sexual history evidence is said to be highly "relevant", resemble . . . "pornographic vignettes".... These hypotheticals play upon internalized assumptions about what women really want and male desires for specific sexual scenarios. . . . They evoke highly emotive reactions which bear no relationship to "truth", and they bring out the worst in us. [Footnotes omitted.][Emphasis added.]

I also heartily concur in the submissions at p. 17 of the factum of the intervener Women's Legal Education and Action Fund et al. on this point:

> . . . in all of the hypothetical situations outlined in the Appellants' factums, evidence of sexual history and/or sexual reputation is either totally irrelevant, admissible pursuant to the exceptions provided for in s. 276, or, in the alternative, of very low probative value and highly prejudicial to the interests of the administration of justice . . . [Emphasis added.]

I will, therefore, resist as much as possible joining the discourse at this level and will restrict myself to perhaps a more general discussion of the effect of the provisions.

As I stated above, many of the examples set up by opponents to the legislation are based upon a misapprehension of the scope of the exceptions and, indeed, some of the earlier case law striking down these provisions is, unfortunately, guilty of the same error. In *R. v. Coombs* (1985), 23 C.C.C. (3d) 356 (Nfld. S.C.T.D.) and *R. v. Oquataq*, *supra*, the defence wished to adduce evidence of prior sexual history in response to Crown evidence of physical injury of the complainant. In both cases such evidence would have been admissible under s. 276. In *Coombs*, *supra*, the trial judge held that the evidence was not admissible under the legislation and, as such evidence was relevant and necessary for the accused to make full answer and defence, the provisions excluding it were unconstitutional. In *Oquataq*, *supra*, the same type of evidence was also held to be inadmissible under subs. (1)(*a*) with the same constitutional result. Many of the examples offered by the appellants of "relevant" evidence that is excluded by s. 276 suffer from a similar misapprehension.

I will now turn my attention specifically to the categories of relevant evidence that the appellants suggest are excluded by the provision. I will discuss

only those categories that are commonly referred to in the literature. I will consider the possible ramifications of the *Canadian Charter of Rights and Freedoms* subsequent to this discussion.

Many argue that the most convincing support for the argument that the provision is drawn too narrowly is provided by so-called "similar fact evidence", or "pattern of conduct evidence", i.e. that the complainant has had consensual sexual relations in circumstances that look an awful lot like those supporting the assault allegation and, hence, such evidence is probative of consent. I am of the firm opinion that such evidence is almost invariably irrelevant and, in any event, is nothing more than a prohibited propensity argument, besides being highly prejudicial to the integrity and fairness of the trial process.

Such arguments depend for their vitality on the notion that women consent to sex based upon such extraneous considerations as the location of the act, the race, age or profession of the alleged assaulter and/or considerations of the nature of the sexual act engaged in. Though it feels somewhat odd to have to state this next proposition explicitly, consent is to a person and not to a circumstance. The use of the words "pattern" and "similar fact" deny this reality. Such arguments are implicitly based upon the notion that women will, in the right circumstances, consent to anyone and, more fundamentally, that "unchaste" women have a propensity to consent. While my colleague suggests that this proposition is "now discredited" (at p. 000), and "[has] no place in a rational and just system of law" (at p. 000), she nevertheless concludes that the exclusion of

"pattern" evidence is unconstitutional. In my view, the mythical bases of these arguments deny their relevance.

Although Galvin, *supra*, comes to what is, in my opinion, an erroneous conclusion, namely that "pattern" evidence may be relevant if it is narrowly confined, she nevertheless accurately discusses the problems inherent in this type of evidence. She states at p. 834:

> In the context of a trial for rape, evidence that the complainant previously slept with rock stars or with men she met in singles' bars could only be used to show her propensity to consent in such circumstances; her identity is not a disputed issue. The . . . "common plan or scheme" exception to the propensity rule is similarly inapplicable in this context, because a complainant's pattern of similar sexual encounters can hardly be said to occur as the result of a pre-existing plan or scheme on her part. Moreover, as with all propensity evidence, the danger of jury prejudice is high; the complainant may be viewed as a "loose" woman who "got what she deserved," irrespective of her behavior on this particular occasion.

Furthermore, if there is any evidence of this nature that has any legitimate claim to relevance, and this is already a highly dubious proposition, it is amply covered by the fact that previous sexual contact between the accused and the complainant is admissible under the provision.

Another argument often used in an attempt to get "pattern" or "propensity" evidence admitted is to call the behaviour "habitual". Borrowing from *McCormick on Evidence* (3rd ed. 1984), section 195 at pp. 574-75 (quoted in Galvin, *supra*, at p. 778):

> Habit . . . is more specific [than character]. It denotes one's regular response to a repeated situation. . . . Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving his automobile without using a seatbelt. [Footnotes omitted.]

It is impossible, in my view, to draw an analogy between this behaviour and volitional sexual conduct. The rationale underlying the admissibility of habit evidence has no application in this context.

A similar argument, often made in support of the contention that prior sexual history is relevant and admissible but excluded by the provision, is based upon an extension of the Ontario Court of Appeal's reasoning in *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481. In that case the Court of Appeal held at p. 492 that:

> Obviously, evidence of previous acts of violence by the deceased, not known to the accused, is not relevant to show the reasonableness of the accused's apprehension of an impending attack. However, there is impressive support for the proposition that, where self-defence is raised, evidence of the deceased's character (*i.e.*, disposition) for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased. [Emphasis added.]

Assuming that the Ontario Court of Appeal is correct in its analysis and assuming that such an analysis applies generally, adopting such an argument in the context of this case would lend support to the stereotypical proposition that "unchaste" women have a propensity to consent. I must also confess an inability to grasp how violent behaviour and consensual sexual behaviour are at all analogous. Furthermore, a history of violent conduct is less likely to trigger the invocation of stereotype about the person who engages in such behaviour. Even

so, it is interesting to note that the admissibility of evidence of the deceased's propensity for violence in trials for murder is a matter of some controversy as there is great danger that such evidence may be misused by jurors to improperly blame the deceased. (See McCormick, *supra,* at pp. 571-73, quoted in Galvin, *supra*, at p. 782.) For all of these reasons, the rule in *Scopelliti*, *supra*, is of no avail in the present context.

A second category of so-called relevant evidence is also widely set up as conclusively demonstrating the infirmity of the provision, namely evidence of mistaken belief in consent. Again, I am of the firm opinion that no relevant evidence regarding the defence of honest but mistaken belief in consent is excluded by the provision under attack here.

Although, in Canada, the defence is one of honest belief and not one of reasonable belief, the exception in subs. (1)(*c*) amply provides for this defence. In *R. v. Bulmer*, [1987] 1 S.C.R. 782, this Court discussed the effect of s. 244(4) (now s. 265(4)), which codifies this defence, on the defence of honest but mistaken belief in consent articulated by this Court in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120. For clarity I will reproduce this section.

> **265.** . . .
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

This Court concluded that the *"Pappajohn*" defence had not been legislatively altered. While one may then wonder why Parliament included the codification of this defence in its package of reforms, the decision of this Court in *Bulmer*, *supra*, does not force the conclusion that subs. (1)(*c*) of s. 276 excludes relevant evidence. McIntyre J., for the majority in *Bulmer*, *supra*, held at pp. 790-91 that before the defence of honest but mistaken belief can be put to the jury, the trial judge must conclude that there is an "air of reality" to the defence:

> There will not be an air of reality about a mere statement that "I thought she was consenting" not supported to some degree by other evidence or circumstances arising in the case. . . . The question he [the trial judge] must answer is this. In all the circumstances of this case, is there any reality in the defence? . . .
>
> When the defence of mistake of fact -- or for that matter any other defence -- is raised, two distinct steps are involved. The first step for the trial judge is to decide if the defence should be put to the jury. It is on this question, as I have said, that the "air of reality" test is applied.

Further, when the trier of fact turns his or her mind to the issue of whether the belief was honestly held, McIntyre J. stated at p. 792:

> This section [s. 244(4), now s. 265(4)], in my view, does not change the law as applied in *Pappajohn*. It does not require that the mistaken belief be reasonable or reasonably held. It simply makes it clear that in determining the issue of the honesty of the asserted belief, the presence or absence of reasonable grounds for the belief are relevant factors for the jury's consideration.

It is my view that, assuming that both the trier of fact and the trier of law are operating in an intellectual environment that is free of rape myth and stereotype about women, any evidence excluded by this subsection would not

satisfy the "air of reality" that must accompany this defence nor would it provide reasonable grounds for the jury to consider in assessing whether the belief was honestly held. The structure of the exception provided for in s. 276(1)(*c*) is thus not offensive to such a defence.

Evidence of prior acts of prostitution or allegations of prostitution are properly excluded by the provision. In my opinion, this evidence is never relevant and, besides its irrelevance, is hugely prejudicial. I vehemently disagree with the assertion of the appellant Seaboyer that "a prostitute is generally more willing to consent to sexual intercourse and is less credible as a witness because of that mode of life" (at p. 21 of his factum, quoting the Federal/Provincial Task Force, *supra*). Nor do I particularly understand the phenomenon whereby many complainants in sexual assault cases are asked if they are prostitutes. (See for example, Z. Adler, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation", [1985] *Crim. L.R.* 769, at p. 778.)

Many also argue that the provision does not allow evidence going to show motive to fabricate or bias. Clearly, most such alleged motives or bias will not be grounded in the complainant's past sexual history. Moreover, much of this evidence depends for its relevance on certain stereotypical visions of women; that they lie about sexual assault, and that women who allege sexual assault often do so in order to get back in the good graces of those who may have her sexual conduct under scrutiny. Thus, again, refutation of stereotype strikes at the heart of the argument. As to evidence that a complainant has made prior false allegations of sexual assault, such evidence is admissible under the existing

provision since this evidence does not involve the admission of her previous sexual history.

As I stated at the outset, the evidence which is excluded by the provision is simply irrelevant. It is based upon discriminatory beliefs about women and sexual assault. In addition, the impugned provision provides wide avenues for the introduction of sexual history evidence that is relevant. Paradoxically, some of the exceptions may be cast overly broadly with the unfortunate result that a large body of evidence may still be improperly admitted on the basis of specious relevancy claims.

If I am wrong in concluding that no relevant sexual history evidence is excluded by the contested provision, I am of the view that such exclusion is proper due to its extremely prejudicial effect on the trial of the legal issues.

In *Morris v. The Queen*, [1983] 2 S.C.R. 190, this Court discussed the notion of relevance. Lamer J. (as he then was) discussed at p. 201 the nature of the concept and circumstances where, though relevant, evidence may nonetheless be excluded:

> Thayer's statement of the law which is still the law in Canada, was as follows:
>
> > (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.
>
> To this general statement should be added the discretionary power judges exercise to exclude logically relevant evidence

> . . . as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, in their effect on the jury, and likely to be misused or overestimated by that body; others, as being impolitic, or unsafe on public grounds; others, on the bare ground of precedent. It is this sort of thing . . . the rejection on one or another practical ground, of what is really probative, -- which is the characteristic thing in the law of evidence; stamping it as the child of the jury system. [Footnotes omitted.][Emphasis added.]

Significant for our purposes is the long-recognized discretion in the trial judge to exclude otherwise relevant evidence. Hence, a determination that something is relevant does not answer the further question whether, regardless of its relevance, there exists some rule or policy consideration that nevertheless mandates exclusion of the proffered evidence. Thus, *Cross on Evidence*, *supra*, at p. 60, quoting Wigmore, observes that, "[a]dmissibility signifies that the particular fact is relevant and something more, -- that it has also satisfied all the auxiliary tests and extrinsic policies." Indeed, highly relevant evidence that could greatly benefit the cause of the accused may, in our legal system as it presently exists, be excluded as may evidence that could assist in the judicial "search for truth". Though generally stated, more notable examples of relevant though excluded evidence include: hearsay, opinion, character, conduct on other occasions, the collateral fact rule which treats answers given by witnesses to questions involving collateral facts as final, privilege against self-incrimination, evidence obtained in a manner violating a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*, lawyer-client privilege and other professional relationships that may from time to time be accorded a similar privilege (for a fuller discussion of this type of privilege see S. Schiff, *Evidence in*

the Litigation Process (3rd ed. 1988), vol. 2, at p. 1010), communication between spouses, government information whose disclosure would be "injurious to the public interest", etc.

There are many reasons why relevant evidence may be excluded and such exclusions play a significant and important role in the traditional law of evidence. Some evidence is excluded in order to protect values that our society holds dear. Other evidence may be excluded because of its inherent unreliability. As well, evidence will be excluded if it distorts rather than enhances the search for truth. McCormick, *McCormick's Handbook of the Law of Evidence* (2nd ed. 1972) at pp. 439-40, quoted in J. A. Tanford and A. J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980), 128 *U. Pa. L. Rev.* 544, at p. 569, sets out four reasons for the exclusion of this latter type of "prejudicial" evidence:

> First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.

Any of these four reasons would seem to encompass evidence of prior sexual activity. As La Forest J. (dissenting on other grounds) put it in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 714:

> The organizing principles of the law of evidence may be simply stated. All relevant evidence is admissible, subject to a discretion to

> exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.

As I discussed at the outset, this type of evidence has a significant distorting effect at trial as such evidence "arouses [the jury's] sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action", J. Weinstein and M. Berger, *Weinstein's Evidence* (1976), quoted in Ordover, *supra*, at p. 108. Such evidence allows stereotype and myth to enter into the equation and sidetracks the search for the truth. Such evidence invites a result more in accord with stereotype than truth:

> Defence counsel in rape cases have also used victim history evidence in an effort to suggest that the rape victim "got what she deserved". <u>The truth of what happened becomes concealed by antipathy towards the victim, and belief systems which locate the "fault" in the victim, regardless of the manner in which the offence occurred. The fact that such evidence has a powerful emotional impact upon triers of fact and can result in erroneous verdicts has been well-documented and acknowledged even by judges.</u> [Footnotes omitted.][Emphasis added.]

(Sheehy, *supra*, at pp. 774-75.)

Rather than negatively affecting decisions of guilt and innocence, the exclusion of evidence of sexual history rationalizes such determinations. The discussion at the outset of these reasons conclusively demonstrated that sexual history evidence preempts considered decision making. The words of Catton, *supra*, at p. 173 quoted earlier, bear repeating:

> Any information at all implying that the victim had a prior sex history had the effect of reducing the perceived guilt of the accused regardless of whether this information was verified.

The guilt or innocence determination is transformed into an assessment of whether or not the complainant should be protected by the law of sexual assault. In my view, it is indisputable that this evidence has such a prejudicial effect. Many a defence lawyer knows the effect of such evidence and thus strives to get it admitted. Indeed, during debate in the House of Commons regarding the first effort of Parliament to rationalize this area of law, one member, Mr. Jarvis, commented:

> The myth is that a "bad woman" is incapable of being raped. . . . We have to deal with the myth that the credibility of a "bad woman" is immediately in question. I was never sure what that phrase meant. As a lawyer, all I knew was that it was of benefit to hurl as much dirt as possible in the direction of such a woman, hoping that some of it would stick and that the jury would disbelieve what she said. [Emphasis added.]
>
> (*House of Commons Debates*, November 19, 1975, at p. 9252.)

If, indeed, we are searching for the truth, such a result is repugnant and that which produces it properly inadmissible.

The Constitutional Questions

For convenience I will reproduce the sections of the *Canadian Charter of Rights and Freedoms* relevant to the disposition of these appeals:

> **7.** 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.
>
> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> **28.** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

In discussing the constitutional questions I will treat s. 11(*d*) as a particular manifestation of s. 7 principles of fundamental justice, hence an independent analysis will be unnecessary. Moreover, since I agree with my colleague Justice McLachlin that s. 277 is constitutional, I will restrict this discussion to s. 276.

It is my view that neither "fairness" nor "the principles of fundamental justice" mandate the constitutional invalidity of s. 276. Rather, in order to achieve fairness and to conduct trials in accordance with fundamental tenets of criminal law, this provision must be upheld in all of its vigour. The words of C. Boyle, "Section 142 of the Criminal Code: A Trojan Horse?", *supra*, at p. 265, provide an appropriate introduction to these issues:

> There has been an unfortunate tendency to compare the rights of the accused and the witness and to view any amelioration in the position of the witness as needing some balance. Yet the issue is really one of promoting convictions of guilty persons and not clouding the issue with evidence of collateral issues which may tend to prejudice the trier of fact. This is a serious matter of public interest, not a battle between feminists and defence lawyers. [Emphasis added.]

The constitutional question posed by the present case is whether, notwithstanding the already established irrelevance and/or prejudicial nature of the evidence excluded by the impugned provision, an accused, nevertheless, has a constitutional right to adduce such evidence. On my view of the scope of these constitutional guarantees, this question must be answered with a resounding and compelling no.

It is noncontroversial to state that an accused does not have a constitutional right to adduce irrelevant evidence. To the extent that much, if not all, of the evidence excluded by the provision at issue here is irrelevant, there is no constitutional issue. Nor, in my view, does an accused have the right under the *Charter*, whether under the rubric of a right to a fair trial or the right to make full answer and defence, to adduce evidence that prejudices and distorts the fact-finding process at trial. As a corollary, neither do notions of a "fair trial" or "full answer and defence" recognize a right in the accused to adduce any evidence that may lead to an acquittal. Such propositions cast ss. 7 and 11(*d*) in an extremely narrow fashion and deny meaningful content to notions of "fairness" and "principles of fundamental justice". I agree with the criticism Sheehy, *supra,* at pp. 774-75, levels at such a narrow reading of the constitutional guarantees:

> . . . the accused's "fairness" argument not only presumes that the evidence is objectively "relevant", but also that it can be used appropriately to ascertain the truth of what happened between the accused and the victim. . . . Predictably, victim vilification as a defence has had considerable success in cases where the victim history evidence can be used to invoke negative cultural stereotypes.
>
> . . .
>
> . . . [there is a] need for a realistic and intelligent effort to understand "fairness" as related to the concrete realities of the criminal process and the lives of the women and men implicated, rather than theoretical deprivations of *Charter* rights. [Emphasis added.]

This Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503, held that the principles of fundamental justice are "found in the basic tenets of our legal system." As such, it is plain that the narrow propositions referred to above misconstrue the scope of ss. 7 and 11(*d*). Indeed, parameters developed at common law, which restrict admissibility, go further towards safeguarding fairness than does their absence. As La Forest J. proposed in *Corbett*, *supra*, at p. 744, "the principle of relevancy, helps to ensure that the trial is conducted fairly and that justice is done." Relevance along with other exclusionary rules developed at common law have had an important hand in shaping the notion of "fairness". Although I may disagree with his view of the relevance of evidence of past sexual history, I nevertheless agree with the argument of D. Haxton, "Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence" (1985), *Wis. L. Rev.* 1219, at pp. 1271-72, that:

> The best method to determine whether admission is required by the Constitution is to apply the jurisdiction's standard rules of evidence to the proffered sexual conduct evidence. Because standard rules of evidence are premised on general principles developed over many years, exclusions of evidence under those rules are almost always constitutionally justified.

As the provision at issue here excludes only irrelevant or prejudicial evidence, it passes constitutional muster. The accused, on any meaningful and purposive interpretation of the rights involved, has no right to adduce it. Rather than "render[ing] the ordinary rules of evidence inapplicable . . . [and putting] an accused charged with sexual assault in a separate and worse position than persons charged with other serious crimes" (Brooke J.A. dissenting in part at the Court of Appeal, at pp. 310-11), the sections ensure that the ordinary rules of evidence are applied. Parliament has excluded no evidence that is not properly excluded both at common law and under the *Charter*.

Furthermore, the ss. 7 and 11(*d*) rights of an accused protect, in my view, not only the accused's interest in adducing all exculpatory evidence but other interests as well:

> It is true that s. 11 of the *Charter* constitutionalizes the right of an accused and not that of the state to a fair trial before an impartial tribunal. But "fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise, the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser. [Emphasis added.]
>
> (Reasons of La Forest J. (dissenting on other grounds) in *Corbett*, *supra*, at p. 745.)

The proposition that s. 7 and s. 11 rights involve the consideration of interests outside of the confined interests of the accused has been endorsed by a majority of this Court in *R. v. Askov*, [1990] 2 S.C.R. 1199. In discussing the

nature of the interests protected by s. 11(*b*) of the *Charter*, Cory J., for the majority, remarked at p. 1219:

> Although the primary aim of s. 11(*b*) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in s. 11(*b*).

He further stated at p. 1221:

> All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. . . . The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.

Additional support for a broader analysis of the rights invoked by the appellants in this case can be found in s. 28 of the *Charter*. In the context of this case, this section would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of ss. 7 and 11(*d*) advocated by the appellants.

While the exact nature of the other interests involved depends upon the nature and aspect of the right considered, it is clear from the above that the constitutional inquiry in this area is not confined to the narrow interests of the accused. (See also *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 327-29, *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 403-7, reasons for judgment of La Forest J. in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research,*

Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at p. 539, and *R. v. Swain*, [1991] 1 S.C.R. 933, *per* L'Heureux-Dubé J. dissenting.)

In the present case, the other interests envisaged by ss. 7 and 11(*d*) are not unlike those articulated by Cory J. in *Askov*, *supra*. The complainant, and indeed the community at large, have an interest in the reporting and prosecution of sexual offences. They also have a legitimate interest in ensuring that trials of such matters are conducted in a fashion that does not subordinate the fact-finding process to myth and stereotype. However, a discussion of the community or group interests involved is not strictly necessary as it is clear that the competing interest in this case, that of ensuring that trials and thus verdicts are based on fact and not on stereotype and myth, is not one belonging solely to any group or community but rather is an interest which adheres to the system itself; it maintains the integrity and legitimacy of the trial process. This interest is so closely intertwined with the interests of complainants and of the community that the distinction may be unimportant in reality:

> Given the social science data . . . it should be recognised that these provisions prevent bias in the judicial fact finding process, which bias specifically operates to the disadvantage of women as individual complainants and as a social group. [Emphasis added.]

(Dawson, *supra*, at p. 333.)

The recognition and realization of the ss. 7 and 11(*d*) interest in maintaining the integrity of the trial process ensure the protection of these perhaps more "societal" interests as well.

Regardless of the effects of protecting this interest, it is clear that it merits consideration in the constitutional analysis. The contrary approach, the recognition of an unfettered right in the accused to adduce all relevant evidence, seriously misconstrues the phrase "principles of fundamental justice". Clearly, these principles have developed with an eye to values and interests beyond those of the accused (see the previous discussion of relevance and exclusionary rules), and thus such values and interests are pertinent in constitutional inquiries such as the one here. The contrary approach renders vacuous the fair trial and full answer and defence rights of an accused.

In coming to this conclusion, I am not unmindful of cases in which common law exclusions of evidence have been held to be inapplicable in situations where they impinge upon an accused's ability to demonstrate his/her innocence; that, notwithstanding the importance of other interests, the accused's right to adduce evidence to demonstrate innocence was held to be primary and prevailed. (For example, the police informer privilege which protects the identity of the informer except in cases where such information could demonstrate that the accused was innocent; the solicitor-client privilege may yield in the same circumstances as the police informer privilege. In this regard, see respectively *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494, and *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.).) However, the *Charter* does not *prima facie* invalidate the host of exceptions to the general rule that all relevant evidence is admissible. Sopinka J. for the majority of this Court in *Dersch v. Canada (Attorney General)*, [1990] 2

S.C.R. 1505, discussed the scope of an accused's right to full answer and defence at p. 1515:

> The right to full answer and defence does not imply that an accused can have, under the rubric of the *Charter*, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion, would be admissible if it tended to prove his or her innocence.

Moreover, the situation here differs in a fundamental respect from those above. The provision in the instant case by and large excludes only that which is irrelevant. That small category of sexual history evidence which is relevant and not admissible under any of the exceptions is excluded for a number of reasons, one of which lies in its demonstrated distortion of the trial process. Sexual history evidence excluded by the provision is either irrelevant or so prejudicial that its minimal probative value is overwhelmed by its distorting effect. It operates as a catalyst for the invocation of stereotype about women and about rape, such that the entire trial process is distorted and fairness, in any meaningful sense, is subverted. Thus, the argument that an accused is prevented from adducing all relevant evidence going to innocence has little weight in this inquiry and must give way to other considerations.

> Social science research findings contradict assertions that sexual conduct evidence assists the fact-finding process or the test for "judicial truth". <u>Far from being relevant to ensuring a "fair" hearing or a full defence, the introduction of sexual history evidence may advantage the accused in a way that is not related to innocence. Such evidence has a non-neutral impact on the trial process.</u> [Emphasis added.]

(Dawson, *supra*, at p. 330.)

Unless one accepts the paradoxical assertion that an accused has the right to a biased verdict, or that the principles of fundamental justice constitutionalize the discriminatory application of the law, the provisions cannot be constitutionally impugned. In my view, interpreting the guarantees of the *Charter* in a manner that systematically excludes considerations of the harm done by the evidence sought to be elicited by the accused may, ironically, operate to undermine and trivialize notions of fairness.

Section 1

Although, strictly speaking, it is unnecessary for me to engage in a discussion of section 1, I will nonetheless make some brief comments in order to make it plain that the *Code* provision, even if found to be unconstitutional in its effect, is justified.

This Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39, provided the analysis to be undertaken in determining whether a limit is demonstrably justified.

Briefly stated, the party attempting to uphold the legislation must establish that: (a) the objective which the limit is designed to serve is of sufficient importance to warrant overriding a constitutionally protected right; and (b) the means chosen to attain the objective are reasonable and demonstrably justified, in

that (1) the measures designed to meet the legislative objective must be rationally connected to the objective, (2) the means used should impair as little as possible the right or freedom in question, and (3) there must be a proportionality between the effects of the means chosen and the legislative objective.

As I have discussed earlier, the provision at issue in this case formed but a part of a much larger reform effort on the part of Parliament. Parliament articulated four principles that animated this package: the protection of the integrity of the person; the protection of children and special groups; the safeguarding of public decency; and the elimination of sexual discrimination. It is obvious that in respect of the provision at issue in this case, the goal of Parliament was to eliminate sexual discrimination in the trials of sexual offences through the elimination of irrelevant and/or prejudicial sexual history evidence. A further legislative goal, intimately linked to the first, is to encourage women to report their victimization. My discussion of sexual assault at the outset makes it clear that a factor that loomed large in the failure of women to report, and police to classify complaints as "founded" and in the high rate of acquittal was the admission of evidence of prior sexual history into trials of sexual offences. Such evidence triggered the application of discriminatory beliefs and stereotypes about women and about rape. Attempting to rid the law, in this area, of discrimination and attempting to increase the reporting of a crime that occurs with staggering frequency in this society are obviously sufficiently important objectives to warrant overriding a right of the accused.

While it is, in my view, clear that the objectives of Parliament in enacting this provision are sufficiently important to warrant restricting the rights of an accused, the congruence of Parliament's goals with other *Charter* values strengthens this conclusion. As Wilson J. noted in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 218:

> I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.

I have made it clear throughout these reasons that the reform of the laws of sexual assault in general, and s. 276 in particular, is informed by a dedication to the goal of the eradication of sexual discrimination in the prosecution of sexual offences. Sections 15 and 28 of the *Canadian Charter of Rights and Freedoms* mirror the values which motivate the intervention of Parliament. These values have a legitimate role in shaping the s. 1 inquiry:

> . . . the effects of entrenching a guarantee of equality in the *Charter* are not confined to those instances where it can be invoked by an individual against the state. In so far as it indicates our society's dedication to promoting equality, s. 15 is also relevant in assessing the aims of [the provisions] of the *Criminal Code* under s. 1.
>
> . . .
>
> . . . promoting equality is an undertaking essential to any free and democratic society. . . . The principles underlying s. 15 of the *Charter* are thus integral to the s. 1 analysis.
>
> . . .

> In light of the *Charter* commitment to equality, and the reflection of this commitment in the framework of s. 1, the objective of the impugned legislation is enhanced in so far as it seeks to ensure the equality of all individuals in Canadian society.
>
> (Reasons for judgment of Dickson C.J. in *R. v. Keegstra*, *supra*, at pp. 755-56.)

The importance of Parliament's objectives in the reform of the law of sexual assault is amplified by the nature of the harm done (discussed at length at the beginning of these reasons) and by the fact that its legislative effort gives voice to values that are paramount in a free and democratic society. In the words of McIntyre J. for the Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.

The objectives underlying s. 276 easily satisfy the first stage of the s. 1 inquiry.

The next stage in the analysis requires an examination of the proportionality of the measures and, as the first question, asks whether the measures are rationally connected to the objective. Again, my earlier discussion of the demonstrated effect that sexual history evidence has upon triers of fact shows that

the *Code* provision is rationally connected to Parliament's objective. The *Code* provision excludes evidence that promotes the invocation of stereotype about women and about sexual assault. Such evidence invites triers of fact to indulge themselves in a determination of the extent to which the complainant measures up to the current stereotypes about women and myths about rape. The fact that this happens is irrefutable. As my previous discussion demonstrates, the fact that it impacts negatively upon rates of reporting and "founded" rates and inflates rates of acquittal is also irrefutable. At all stages of the inquiry into the complaint, decisions are made about whether the complaint should proceed. The answer at all stages of the inquiry, as this earlier discussion also showed, lies in the ability of the complainant to conform to discriminatory beliefs. Often, in order to justify this screening process, reference is made to the fact that such beliefs will be applied at trial thus "justifying" decisions to ferret out all those undeserving complainants prior to trial. It is only reasonable then to conclude that any efforts on the part of Parliament to exclude sexual history evidence at trial, evidence which is largely irrelevant and nevertheless biased, are rationally connected to the stated objectives of ridding the law in this area of discriminatory beliefs and encouraging the increased reporting of such offences.

It is my view that the measures, as well as being rationally connected to the objectives, impair the rights of the accused as little as possible. The words of Dickson C.J. for the majority in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at pp. 1137-38, are particularly apposite:

> It is legitimate to take into account the fact that earlier laws and considered alternatives were thought to be less effective than the legislation that is presently being challenged. When Parliament began its examination of the subject of street soliciting, it was presented with

> a spectrum of views and possible approaches. . . . In making a choice to enact s. 195.1(1)(*c*) as it now reads, Parliament had to try to balance its decision to criminalize the nuisance aspects of street soliciting and its desire to take into account the policy arguments regarding the effects of criminalization of any aspect of prostitution. The legislative history of the present provision and, in general, of legislation directed to street solicitation is both long and complicated. The legislative scheme that was eventually implemented and has now been challenged need not be the "perfect" scheme that could be imagined by this Court or any other court. Rather, it is sufficient if it is appropriately and carefully tailored in the context of the infringed right. [Emphasis added.]

I have previously detailed the legislative efforts of Parliament in combatting discriminatory application of the law in trials of sexual offences. It has abrogated certain discriminatory doctrines developed at common law, repealed discriminatory requirements placed on complainants through legislation and attempted to align the admission of evidence of past sexual history with traditional evidentiary principles developed at common law. Resistance to legislative efforts and the continued utilization of stereotypical beliefs required the intervention of Parliament on a second occasion. This second legislative effort culminated in the provisions at issue here.

In the process of drafting legislation to replace the failed s. 142, numerous interest groups presented their views on the issue and Parliament canvassed a number of suggested changes to the legislation. Parliament did not rely solely upon external representations in order to produce alternatives but also initiated research on its own motion in an attempt to strike an appropriate balance of the interests involved. In the face of the numerous options presented, Parliament opted for this one. In the face of a previous legislative provision that was emasculated by the courts and on the heels of this, the continued application of stereotype,

Parliament's measured and considered response was to codify those situations wherein sexual history evidence may be both relevant and sufficiently probative such that its admission was warranted. Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a non-discriminatory application of the law in this area. In view of the history of government attempts, the harm done when discretion is posited in trial judges and the demonstrated inability of the judiciary to change its discriminatory ways, Parliament was justified in so choosing. My attempt to illustrate the tenacity of these discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament.

While some degree of latitude must be accorded to the legislative choice of Parliament due to the troubled history that informed its choice, the fact that Parliament had to choose between the interests of competing groups also requires such an approach. This is not a typical situation where the government and accused persons have squared off or where the government is "best characterized as the singular antagonist of the individual whose right has been infringed" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, *infra*). Rather it is plain that Parliament, in coming to its legislative decision, weighed the claims of different groups and attempted to do that which best balanced their concerns. These circumstances of the legislative decision require that the impugned provisions be accorded a special place in the s. 1 analysis:

> Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that

> balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In *Edwards Books and Art Ltd.*, *supra*, Dickson C.J. expressed an important concern about the situation of vulnerable groups (at p. 779):
>
> > In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.
>
> . . . Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
>
> (Reasons of Dickson C.J. for the majority in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 993.)

Due to the concerns underlying the passage of this legislation and the extensive efforts of Parliament to assess the viability of a number of means, this is not a situation where the courts are better situated than or even as well situated as Parliament to determine whether the "least drastic means" has been chosen. The appropriate standard of review at this stage of the proportionality inquiry is thus one of reasonableness, i.e. whether the government had a reasonable basis for concluding that the legislative solution they chose impaired the right as little as possible given the government's pressing and substantial objective. It is clear from my reasons to this point that the legislative choice is, at a minimum, in the realm of the reasonable.

I have already dismissed the argument that the means would have been better tailored had they left discretion in trial judges. As I said above, the nature of the problem facing Parliament did not admit of a solution through the exercise of

discretion of trial judges. History demonstrates that it was discretion in trial judges that saturated the law in this area with stereotype. My earlier discussion shows that we are not, all of a sudden, a society rid of such beliefs, and hence, discretionary decision making in this realm is absolutely antithetical to the achievement of government's pressing and substantial objective.

This Court has, on a prior occasion, considered the decision of Parliament to remove discretion from trial judges in certain provisions of the reform package. In *Canadian Newspapers Co.*, *supra*, this Court considered the publication ban provided by s. 442 of the *Criminal Code*. On application by the complainant or the prosecutor the trial judge is required to make an order that the identity of the complainant and any information that could reveal it shall not be published. Lamer J. (as he then was), for the Court, discussed the argument that there should be some discretion in trial judges in order to impair as little as possible the right or freedom in question. At pages 131-33, Lamer J. rejected this argument:

> When considering all of the evidence adduced by appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section 442(3) is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it. Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, . . . Assuming that there would be lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is

> clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it.
>
> . . . one is forced to admit that an absolute ban on publication is the only means to reach the desired objective. . . . the discretionary ban is not an option as it is not effective in attaining Parliament's pressing goal. [Emphasis added.]

Much the same can be said of the provision here. In order to effectively combat sex discrimination and increase reporting Parliament has, through this provision, attempted to eliminate the application of discriminatory beliefs at trials of sexual offences. The traditional approach, with discretion in trial judges as regards the admission of sexual history evidence, was, for good reason, rejected. As the Federal/Provincial Task Force on Uniform Rules of Evidence, *supra*, at p. 73 noted, provisions which leave discretion in the hands of trial judges are ". . . innocuous. They have failed to enhance the protection afforded to the complainant at common law." The point is also well put by Sheehy, *supra*, at p. 782:

> What is clear . . . is that no common law system of discretion can possibly achieve the legislative objectives. . . . The best we can hope for will be diverse interpretations of the circumstances in which certain evidence is "relevant" and constitutes a "constitutional exemption". These interpretations will vary from trial judge to trial judge across the country. The worst we might receive are expansive interpretations of "relevance" which will be detrimental to women both individually and collectively. This is of particular concern, given that the abysmal record of the Canadian judiciary under the common law, and under the modified common law regime of the old section 142, was the impetus for the revocation of judicial discretion by Parliament. [Emphasis added.]

Parliament was faced with a historical record which demonstrated that this discretion was abused and exercised in a discriminatory fashion by trial judges and with overwhelming social science research that says things have not changed.

In this context, the notion that Parliament could have, in the name of minimal impairment, awarded a discretion to trial judges, loses sight altogether of the objective that has been found to be pressing and substantial. In the words of Lamer C.J. in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1341, "when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively." It is clear then that Parliament has, in enacting ss. 276 and 277, made a constitutionally permissible choice.

The last stage of the s. 1 analysis requires an examination of whether the effects of the measure are so deleterious that they outweigh the importance of the objective. In my view, the exclusion of largely irrelevant and highly prejudicial sexual history evidence does not significantly entrench upon an accused's right to a fair trial or an accused's right to make full answer and defence. Wide avenues of admissibility are still open to an accused under the provision to adduce evidence of sexual history that is both relevant and sufficiently probative that its admission is not outweighed by its discriminatory effect. Confining the accused to such evidence goes little distance towards the conclusion that the last stage in the proportionality inquiry is not met. Parliament has accorded more than due weight to the accused's constitutional rights in enacting s. 276. It follows that, in my view, the provision, to the extent (if any) that it is unconstitutional in its effect, is easily upheld under s. 1.

In summary, sexual history evidence excluded by s. 276 of the *Criminal Code* is mostly irrelevant and, moreover, so prejudicial that its exclusion both at common law and under the *Canadian Charter of Rights and Freedoms* is mandated.

Neither s. 7 nor s. 11(*d*), upon a principled inquiry, directs a different conclusion. However, even assuming that s. 276 is unconstitutional in its effect, it is easily justified under s. 1. In my view, once the constitutional questions are viewed within their larger context, the conclusions reached in these reasons are absolutely uncontentious.

Although for me the questions pertaining to the constitutional exemption and the effect of striking down s. 276 do not arise, I will nevertheless, before disposing of these appeals, make some brief remarks in respect of them.

My colleague, McLachlin J., articulates three reasons for her rejection of the "doctrine of constitutional exemption" in this case: namely, (1) it would not substantially uphold the law and the will of the legislature would become increasingly obscured; (2) applying the doctrine would be indistinguishable in result from striking down the legislation; and (3) applying the doctrine in this case would be difficult. It seems to me, however, that the same rationales highlight the infirmity of the guidelines suggested by the majority with respect to the admission of evidence of prior sexual history. More particularly, the objectives of Parliament in enacting the legislation, identified earlier in these reasons, are ill served by the guidelines. The view that the objectives of Parliament and the values of the *Charter* are better served in this fashion ignores the larger context within which the guidelines will be applied. Furthermore, as a full discussion of this context shows, any optimism that the guidelines will be effectively and consistently applied in a manner that is cognizant of both the objectives of Parliament and the infirmities of the common law is badly misplaced. My final objection to the guidelines, as my previous discussion

indicates, is that they are entirely too broad and support the very stereotype and myth that they are meant to eradicate.

Disposition and Answers to the Constitutional Questions

For these reasons, I would dismiss the appeals and answer the constitutional questions as follows:

Question 1: Whether s. 246.6 or 246.7 of the *Criminal Code* is inconsistent with s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Question 2: If s. 246.6 or 246.7 of the *Criminal Code* is inconsistent with either s. 7 or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, whether that inconsistency is justified on the basis of s. 1 thereof?

Answer: Yes.

It is not necessary for me to answer the further issues raised in these appeals.

Appeals dismissed, L'HEUREUX-DUBÉ *and* GONTHIER JJ. *dissenting* in part.

Solicitor for the appellant Seaboyer: Keith E. Wright, Toronto.

Solicitors for the appellant Gayme: Waldin, de Kenedy, Toronto.

Solicitor for the respondent: The Attorney General for the province of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: The Deputy Attorney General, Regina.

Solicitors for the intervener the Canadian Civil Liberties Association: McMillan, Binch, Toronto.

Solicitors for the intervener Women's Legal Education and Action Fund et al.: Cavalluzzo, Hayes & Shilton, Toronto.