R. *v*. Darrach, [2000] 2 S.C.R. 443

Andrew Scott Darrach *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Women's Legal Education and Action Fund,
the Canadian Association of Sexual Assault Centres,
the Disabled Women's Network of Canada and
the National Action Committee on the Status of Women *Interveners*

Indexed as: R. *v*. Darrach

Neutral citation: 2000 SCC 46.

File No.: 26564.

2000: February 23; 2000: October 12.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Fair trial -- Right to make full answer and defence -- Sexual assault -- Evidence of complainant's sexual activity -- Whether substantive aspect of s. 276 of Criminal Code infringing accused's right to make full answer and defence or his right to a fair trial -- Canadian Charter of Rights and Freedoms, ss. 7, 11(d) -- Criminal Code, R.S.C., 1985, c. C-46, ss. 276(1), (2)(c), 276.2(2).

Constitutional law -- Charter of Rights -- Right to silence -- Right not to be compelled to be a witness in proceedings against oneself -- Sexual assault -- Evidence of complainant's sexual activity -- Whether procedural aspect of s. 276 of Criminal Code infringing accused's right to silence and his right not to be compelled to be a witness in proceedings against him -- Canadian Charter of Rights and Freedoms, ss. 7, 11(c) -- Criminal Code, R.S.C., 1985, c. C-46, ss. 276.1(2), 276.2(2).

Constitutional law -- Charter of Rights -- Self-incrimination -- Voir dire – Whether s. 13 of Canadian Charter of Rights and Freedoms protecting accused against self-incrimination on voir dire – Criminal Code, R.S.C., 1985, c. C-46, s. 276.2.

The accused was charged with sexual assault and, at his trial, attempted to introduce evidence of the complainant's sexual history. He unsuccessfully challenged the constitutionality of s. 276.1(2)(*a*) of the *Criminal Code* (which requires that the affidavit contain "detailed particulars" about the evidence), ss. 276(1) and 276(2)(*c*) (which govern the admissibility of sexual conduct evidence generally), and s. 276.2(2) (which provides that the complainant is not a compellable witness at the hearing determining the admissibility of evidence of prior sexual activity). At the trial proper, the complainant testified and was cross-examined. The defence was allowed a *voir dire* to introduce evidence about her past sexual activity where the accused presented his own

detailed affidavit but refused to be cross-examined on it. After the *voir dire*, the trial judge refused to allow the accused to adduce the evidence of the complainant's sexual history. The accused was subsequently convicted of sexual assault. The Court of Appeal dismissed the accused's appeal, concluding that the impugned provisions did not violate the accused's right to make full answer and defence, his right not to be compelled to testify against himself or his right to a fair trial as protected by ss. 7, 11(*c*) and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be dismissed.

The current version of s. 276 of the *Criminal Code* is in essence a codification by Parliament of the Court's guidelines in *Seaboyer*. Section 276 contains both a substantive part that prevents a complainant's past sexual activity from being used for improper purposes and a procedural part that enforces this rule. In view of *Seaboyer*, the constitutionality of both the rule and the procedure has already been established at a general level. Section 276 is carefully crafted to comport with the principles of fundamental justice. It protects the integrity of the judicial process while at the same time respecting the rights of the people involved.

The substantive aspect of s. 276 does not infringe the accused's s. 7 right to make full answer and defence or his s. 11(*d*) right to a fair trial. Far from being a "blanket exclusion", s. 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences, namely, that a complainant is more likely to have consented to the alleged assault and that she is less credible as a witness by virtue of her prior sexual experience. These "twin myths" are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process. Because s. 276(1) is an evidentiary rule that only

excludes material that is not relevant, it cannot infringe an accused's right to make full answer and defence. An accused has never had a right to adduce irrelevant or misleading evidence. Further, the fact that s. 276(2)(*c*) requires that the evidence tendered to support a permitted inference has "significant probative value" does not raise the threshold for the admissibility of evidence to the point that it is unfair to the accused. The word "significant", on a textual level, is reasonably capable of being read in accordance with ss. 7 and 11(*d*) and the fair trial they protect. The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice". In sum, s. 276 enhances the fairness of the hearing by excluding misleading evidence from trials of sexual offences. It preserves the accused's right to adduce relevant evidence that meets certain criteria and so to make full answer and defence.

With respect to the procedural aspect of s. 276, the requirement that an accused present an affidavit and establish on a *voir dire* that the evidence is admissible in accordance with established criteria does not infringe his right not to be compelled to be a witness in proceedings against him, nor a right not to reveal his defence. The procedure mandated by s. 276 is consistent with the law of evidence and with *Seaboyer*. It is a basic rule of evidence that the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible. Therefore, if the defence seeks to adduce evidence of sexual activity, it must establish that it supports at least some relevant inference. Further, the particular *voir dire* required by s. 276 does not offend the principle against self-incrimination because the requirement that the accused establish a legitimate use for evidence of sexual activity does not compel him to testify. In applications under s. 276, there is free and informed consent when the accused participates in order to exculpate himself. Where there is neither a legal obligation nor

an evidentiary burden on the accused, the mere tactical pressure on the accused to participate in the trial does not offend the principle against self-incrimination or the right to a fair trial. Lastly, s. 276 does not offend the presumption of innocence because nothing in s. 276 obviates the Crown's basic duty to establish all the elements of a sexual offence beyond a reasonable doubt.

Section 276.1(2)(*a*) of the *Code* requires the defence to enter an affidavit with "detailed particulars" of the evidence it seeks to adduce. The affidavit requirement does not infringe the accused's right to silence. The right to silence in s. 7 comprises the right to silence before trial and the privilege against self-incrimination at trial; it is inaccurate to speak of an absolute right to silence at the trial stage of the criminal process. Moreover, s. 276 does not require the accused to make premature or inappropriate disclosure to the Crown. The accused is not forced to embark upon the process under s. 276 at all. If the defence is going to raise the complainant's prior sexual activity, it cannot do so in such a way as to surprise the complainant. The right to make full answer and defence does not include the right to defend by ambush.

If the trial judge is satisfied that the affidavit meets the requirements of s. 276.1, the accused has the right under s. 276.2 of the *Code* to an *in camera* hearing to decide whether the evidence is admissible. The non-compellability of the complainant at the *voir dire* and the requirement to submit to cross-examination on the affidavit do not infringe the accused's right not to be compelled to testify at his own trial. An accused does not face a legal compulsion to testify and the tactical pressure he encounters is not unfair. The basic rules of evidence require the accused, having produced his affidavit, to submit to cross-examination because the right to cross-examine is essential to give any weight to an affidavit. An accused's refusal to submit to cross-examination on his sworn affidavit in effect reduces its weight to that of an unsworn statement, and it is well settled

that an accused cannot make an unsworn statement. The Crown's right to cross-examine on the affidavit under s. 276 is essential to protect the fairness of the trial. Cross-examination is required to enable the trial judge to decide relevance by assessing the affiant's credibility and the use to which he intends to put the evidence. The cross-examination must be confined to what is necessary to determine whether the evidence is admissible. Furthermore, on the *voir dire*, s. 13 of the *Charter* protects an accused against self-incrimination. This privilege against self-incrimination applies because a *voir dire* is an "other proceeding" within the meaning of s. 13.

The complainant's non-compellability at the *voir dire* is based on sound legislative goals. To compel the complainant to be examined on her sexual history before the subject has been found to be relevant to the trial would invade the complainant's privacy and discourage the reporting of crimes of sexual violence. The right to make full answer and defence, moreover, does not provide a right to cross-examine an accuser. The fair trial protected by s. 11(*d*) is one that does justice to all the parties.

Cases Cited

Applied: *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. Jones*, [1994] 2 S.C.R. 229; *Erven v. The Queen*, [1979] 1 S.C.R. 926; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Underwood*, [1998] 1 S.C.R. 77; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Kuldip*, [1990] 3 S.C.R. 618; *R. v. Cook*, [1997] 1 S.C.R. 1113; **approved:** *R. v. Stoddart* (1987), 37 C.C.C. (3d) 351; *R. v. Boss* (1988), 30 O.A.C. 184; *R. v. Frederick* (1931), 57 C.C.C. 340; *R. v. Tarafa*, [1990] R.J.Q. 427;

referred to: *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Crosby*, [1995] 2 S.C.R. 912; *R. v. Santocono* (1996), 91 O.A.C. 26; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Whyte*, [1988] 2 S.C.R 3; *R. v. Dickson*, [1994] 1 S.C.R. 153, aff'g (1993), 81 C.C.C. (3d) 224.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11, 13.

Criminal Code, R.S.C., 1985, c. C-46, ss. 271 [am. c. 19 (3rd Supp.), s. 10; am. 1994, c. 44, s. 19], 276 [am. c. 27 (1st Supp.), s. 203; am. c. 19 (3rd Supp.), s. 12; rep. & sub. 1992, c. 38, s. 2], 276.1 [ad. 1992, c. 38, s. 2], 276.2 [*idem*], 278.3 [ad. 1997, c. 30 s. 1].

Authors Cited

Boyle, Christine, and Marilyn MacCrimmon. "The Constitutionality of Bill C-49: Analyzing Sexual Assault As If Equality Really Mattered" (1999), 41 *Crim. L.Q.* 198.

Kelly, Katharine D. "'You must be crazy if you think you were raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997), 9 *C.J.W.L.* 178.

Schwartz, Hart. "Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1994), 31 C.R. (4th) 232.

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

APPEAL from a judgment of the Ontario Court of Appeal (1998), 38 O.R. (3d) 1, 107 O.A.C. 81, 122 C.C.C. (3d) 225, 13 C.R. (5th) 283 (*sub nom. R. v. D. (A.S.)*), [1998] O.J. No. 397 (QL), dismissing the accused's appeal from his conviction for sexual assault. Appeal dismissed.

Lawrence Greenspon and *Blair Crew*, for the appellant.

Rosella M. Cornaviera and *Karen Shai*, for the respondent.

Graham R. Garton, Q.C., and *Robin Parker*, for the intervener the Attorney General of Canada.

Joanne Marceau and *Marie-Claude Gilbert*, for the intervener the Attorney General of Quebec.

Cynthia Devine, for the intervener the Attorney General of Manitoba.

Alexander Budlovsky and *Marian K. Brown*, for the intervener the Attorney General of British Columbia.

Elizabeth Thomas and *Carissima Mathen*, for the interveners the Women's Legal Education and Action Fund, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network of Canada and the National Action Committee on the Status of Women.

The judgment of the Court was delivered by

GONTHIER J. –

I. Introduction

1 The proper use of a complainant's sexual history in sexual offence prosecutions was last before this Court in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. There the Court struck down an earlier version of s. 276 of the *Criminal Code*, R.S.C., 1985, c. C-46, because it excluded all evidence about a complainant's sexual history from the judicial process, subject to three exceptions. The majority found that s. 276 could potentially exclude evidence of critical relevance (at p. 616). Parliament then enacted the current s. 276 in Bill C-49 in 1992 (now S.C. 1992, c. 38). It essentially codifies the decision in *Seaboyer* and provides a mechanism for the trial judge to determine the admissibility of evidence of prior sexual activity.

2 The current s. 276 categorically prohibits evidence of a complainant's sexual history only when it is used to support one of two general inferences. These are that a person is more likely to have consented to the alleged assault and that she is less credible as a witness by virtue of her prior sexual experience. Evidence of sexual activity may be admissible, however, to substantiate other inferences. Sections 276.1 and 276.2 provide a procedure to determine the admissibility of such evidence. In brief, the defence must file a written affidavit; if the judge finds that it discloses relevant evidence capable of being admissible under s. 276(2), the judge will hold a *voir dire* to determine the admissibility of the evidence the defence seeks to adduce.

3 The accused challenges the constitutionality of parts of s. 276 under the *Canadian Charter of Rights and Freedoms* and the way in which they were interpreted by the trial judge. In my view, his challenge fails. The current version of s. 276 is carefully crafted to comport with the principles of fundamental justice. It protects the integrity of the judicial process while at the same time respecting the rights of the people involved. The complainant's privacy and dignity are protected by a procedure that also vindicates the accused's right to make full answer and defence. The procedure does not

violate the accused's s. 7 *Charter* right to a fair trial nor his s. 11(*c*) right not to testify against himself or his s. 11(*d*) right to a fair hearing. For the reasons below, I find that the impugned sections of the law are constitutional and that their application by the trial judge was beyond reproach.

II. Facts

4 The accused met the complainant in October 1991, when she began working at the retail store where he worked as a supervisor. They became friends and began a sexual relationship. After their sexual relationship ended, they saw each other casually, largely because they lived two doors apart on the same street. At some point, the accused lent the complainant $20. On November 6, 1992, he called her at work (he no longer worked there) and asked to be repaid. The complainant met him that night and, later that evening, they walked home together. The accused asked her to come into his apartment. Once inside, the accused sexually assaulted the complainant.

5 The trial judge accepted the complainant's testimony about the assault as "clear, she was consistent and straightforward". It was uncontradicted and unshaken by cross-examination. The accused called no evidence and made no submissions. All the elements of the offence were proven by the Crown and the accused was convicted of sexual assault under s. 271 of the *Criminal Code*. He was sentenced to nine months' imprisonment.

III. Judgments Below

A. *Ontario Court of Justice (Provincial Division)*

6 The trial judge, Judge Blishen, made many rulings in the course of the trial, which lasted over a year. Most were about the constitutionality of subsections of s. 276, all of which she upheld. She also ruled on the procedure to be followed on applications under s. 276.1 and s. 276.2 to introduce evidence of the complainant's prior sexual activity. I shall discuss only those findings that were appealed before this Court. The correctness of the others is not in dispute. The operation of the legislation is best understood in the context of the proceedings, so I shall discuss the issues in the order in which they arose at trial.

7 The accused tried early on to introduce evidence about the complainant's sexual history in the form of a brief affidavit signed by a lawyer at the firm by which he was represented. He also initially challenged the constitutionality of s. 276.1(2)(*a*), which requires that the affidavit contain "detailed particulars" about the evidence, on the grounds that it violates his rights under ss. 7, 11(*c*) and 11(*d*) of the *Charter*. The trial judge ruled on December 20, 1993 that the affidavit must contain detailed particulars if she is to be able to decide whether to proceed to a *voir dire*. Although this may require the accused to reveal his defence, the rule is constitutional on the basis of *Seaboyer* and consistent with the procedure for *Charter* applications. Before she would require the detailed particulars, however, the trial judge had to decide the constitutionality of the sections that govern the admissibility of evidence of sexual activity generally, namely s. 276(1) and s. 276(2)(*c*).

8 The trial judge upheld the constitutionality of ss. 276(1) and 276(2)(*c*) on February 3, 1994 ((1994), 17 O.R. (3d) 481, at pp. 493 and 497). She found that these sections are faithful to *Seaboyer* and that they are capable of being read so as not to offend the Constitution. Section 276(1) prohibits only general inferences about consent and credibility. Evidence to support specific inferences may be admissible if it meets the

criteria in ss. 276(2) and 276(3). Section 276(2)(*c*) requires that evidence have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". The trial judge upheld this section because it too faithfully "mirror[s]" Justice McLachlin's (as she then was) requirement in *Seaboyer* that the trial judge exercise discretion to admit only evidence with "sufficient probative value" (p. 495). The balance between protecting the accused's right to present evidence and ensuring that the court is not misled by highly prejudicial material is properly struck. Last, *Seaboyer* contemplated that the accused may have to testify on a *voir dire* before the evidence of sexual activity could be admitted. This requirement does not offend s. 7 or s. 11(*c*).

9 On May 3, 1994, the trial judge confirmed that the Crown has the right to see the particulars and to review them with the complainant "to properly prepare a response" for the *voir dire*. The accused's lawyer had argued against this on the grounds that the element of surprise was essential to his cross-examination, but the trial judge rejected this notion. Part of the purpose of the s. 276.1 proceeding was to prepare the witness for a potential intrusion into her privacy.

10 The trial judge then ruled on a new information and belief affidavit signed by a lawyer and submitted on May 10, 1994. The threshold test in s. 276.1(4)(*c*) for admitting the affidavit is whether the evidence is "capable of being admissible under s. 276(2)" ([1994] O.J. No. 3162 (QL), at para. 19). She found that there was no requirement for a hearing at this stage; the point of the two-stage process is to have a hearing at the second stage, and only if it is warranted (para. 21). There is inconsistent case law on the application of the test to the affidavit. The trial judge concluded that the proper approach was to ask "firstly, whether [the evidence] was barred absolutely by s. 276(1), and secondly, whether it was capable of meeting the criteria outlined in

s. 276(2), and the general concerns and interests of justice as outlined in s. 276(3)" (para. 28).

11 The affidavit met this test and the accused was allowed to proceed to a *voir dire*. The defence then challenged the non-compellability of the complainant at the *voir dire* according to s. 276.2(2). The trial judge upheld the constitutionality of this section on May 17, 1994, on the basis that in the description of the procedure in *Seaboyer*, "[t]he complainant is specifically not included, and the accused is included" as possible witnesses at the *voir dire* ([1994] O.J. No. 3161 (QL), at para. 11). To permit a cross-examination of the complainant before the affidavit has been ruled admissible would defeat the purpose of s. 276. The complainant's right to equality in ss. 15 and 28 of the *Charter* should be taken into account when putting reasonable limits on her cross-examination. This provision does not violate the accused's s. 7 or s. 11(*c*) rights not to be compelled to testify against himself because his decision to put her sexual history in issue was a tactical one and not a legal compulsion.

12 In her next ruling, on May 30, 1994, the trial judge decided how the *voir dire* in s. 276.2(2) should be conducted ([1994] O.J. No. 3160 (QL)). First she held that an information and belief affidavit, such as the one she had accepted at the first stage, would not suffice at the second stage. "[S]ome direct evidence" must be led (para. 11). She accepted the analogy to *Charter* applications, where "the onus will be on the accused, and the burden of proof will be on a balance of probabilities" (para. 15). To meet the mandate of the legislation and to determine admissibility properly, the trial judge also found that the Crown had the right to cross-examine the accused on the evidence he sought to adduce. The legislation requires "some weighing and some assessing of the evidence" (para. 20).

13 The court proceeded with the trial proper. The complainant was cross-examined and the defence renewed its application for a *voir dire* to introduce evidence about her past sexual activity. At the *voir dire*, the accused presented his own detailed affidavit but refused to be cross-examined on it. The trial judge found that without cross-examination, "the court can not attribute much, if any, weight to such evidence" because it is impossible to assess its probative value and prejudicial effect as the legislation requires. There were other problems with the affidavit. The trial judge also found that the sexual activity described in the affidavit was "in no way corroborated by the complainant". The accused failed to lead any evidence "as to a link between the proposed evidence ... and the possible defence of honest mistaken belief in consent. He has provided no evidence as to his own state of mind resulting from the alleged previous sexual conduct". The trial judge refused to admit the evidence of prior sexual activity and the trial ended.

B. *Ontario Court of Appeal*

14 The Court of Appeal upheld the trial judge's findings about the constitutionality of the law and about the procedure the law requires: (1998), 38 O.R. (3d) 1. The law does not violate the accused's right to make full answer and defence, his right not to be compelled to testify against himself or his right to a fair trial as protected by ss. 7, 11(*c*) and 11(*d*) of the *Charter*.

15 The Court of Appeal affirmed that s. 276(1) is not a blanket prohibition on evidence of a complainant's sexual history. The requirement of "significant probative value" in s. 276(2)(*c*) mirrors *Seaboyer* and can be read in accord with ss. 7 and 11(*d*). Because the evidence at issue will "inherently" prejudice the complainant, its probative value will have to be high in any case, even at common law. With respect to

s. 276.1(2)(*a*), the Court of Appeal agreed that requiring detailed particulars in the affidavit does not violate the accused's s. 7 or s. 11 rights. They list several other contexts in which the accused may have to disclose a defence. Last, the Court of Appeal agreed that the complainant is not compellable in law at the hearing.

16 The Court of Appeal affirmed that the accused's right to make full answer and defence should be protected as fully as possible while preserving the complainant's legitimate privacy interest. Recognizing interests other than the accused's does not in itself infringe the Constitution. "[A] decision [of a judge] could ... deny an accused the right to a fair trial. In such a case it would be the decision, not the legislation, which infringed the accused's constitutional rights" (p. 17).

IV. Relevant Statutory Provisions

17 *Criminal Code*, R.S.C., 1985, c. C-46

> **276.** (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> (*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (*b*) is less worthy of belief.
>
> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
>
> (*a*) is of specific instances of sexual activity;

(*b*) is relevant to an issue at trial; and

(*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(*a*) the interests of justice, including the right of the accused to make a full answer and defence;

(*b*) society's interest in encouraging the reporting of sexual assault offences;

(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(*h*) any other factor that the judge, provincial court judge or justice considers relevant.

276.1 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

(2) An application referred to in subsection (1) must be made in writing and set out

(*a*) detailed particulars of the evidence that the accused seeks to adduce, and

(*b*) the relevance of that evidence to an issue at trial,

and a copy of the application must be given to the prosecutor and to the clerk of the court.

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

(4) Where the judge, provincial court judge or justice is satisfied

(*a*) that the application was made in accordance with subsection (2),

(*b*) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and

(*c*) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),

the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

276.2 (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

(2) The complainant is not a compellable witness at the hearing.

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

(*a*) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(*b*) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and

(*c*) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

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

. . .

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

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

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

V. Issues

18 The points in issue are, by order of Lamer C.J., the following constitutional questions:

1. Do ss. 276.1(2)(*a*) and 276.2(2) of the *Criminal Code* of Canada infringe upon an accused's right to silence and the right not to be compelled to be a witness in proceedings against himself in respect to the offence pursuant to s. 7 and/or s. 11(*c*) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question number one is yes, are the infringements demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*?

3. Do ss. 276(1), 276(2)(*c*) and 276.2(2) of the *Criminal Code* of Canada infringe upon an accused's right to make full answer and defence pursuant to s. 7 and/or s. 11(*d*) of the *Charter*?

4. If the answer to question number three is yes, are the infringements demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*?

VI. Analysis

19 In *Seaboyer*, the Court unanimously affirmed the legitimate purposes of s. 276 as being to protect the integrity of the trial by excluding evidence that is misleading, to protect the rights of the accused as well as to encourage reporting of sexual offences by protecting the security and privacy of complainants (at p. 606). The

majority found that the earlier version of s. 276 was unconstitutional because it was a blanket exclusion of evidence of sexual activity, subject to three categorical exceptions. It did not allow for the potential multiple relevance of this evidence or for the exercise of judicial discretion to determine its relevance (at p. 618). The law was struck down and in its place the Court provided guidelines for the admission of evidence designed to remedy these defects while preserving the intent of s. 276.

20 The current version of s. 276 is in essence a codification by Parliament of the Court's guidelines in *Seaboyer*. It contains substantive sections that prevent evidence of a complainant's past sexual activity from being used for improper purposes and procedural sections that enforce this rule. The constitutional challenge in the case at bar focuses on four aspects of s. 276; two of them are substantive and two are procedural. The ultimate justification for all four is that they are found in some form in the *Seaboyer* guidelines (at p. 635). At a general level, the constitutionality of both the rule and the procedure has already been established. The procedure in particular was not discussed in any detail in *Seaboyer*, however, so I shall review why these rules, in the form in which they were ultimately enacted by Parliament, are constitutional.

21 The accused challenges the constitutionality of s. 276 on two grounds. He claims that the substantive sections that exclude evidence violate his s. 7 right to make full answer and defence and his s. 11(*d*) right to a fair trial and the presumption of innocence. As I show below, his argument fails because the legislation enhances the fairness of the hearing by excluding misleading evidence from trials of sexual offences. It preserves the accused's right to adduce relevant evidence that meets certain criteria and so to make full answer and defence.

22 The accused's second challenge is that the procedural sections violate his right not to be compelled to be a witness in proceedings against him, as guaranteed by ss. 7 and 11(*c*). The arguments relating to self-incrimination fail because s. 276 does not create a legal compulsion to testify. The accused participates voluntarily in order to exculpate himself. Because he seeks to introduce evidence about the complainant's sexual activity, it is up to him to show how it is relevant. The presumption of innocence is preserved because the Crown still bears the burden of proving all the elements of the offence. His constitutional rights are not infringed by either the substantive or the procedural parts of s. 276. The balance struck in *Seaboyer* among the interests of justice, the accused and the complainant is preserved in the current legislation.

A. *The Approach to Sections 7, 11(c) and 11(d) of the Charter*

23 The accused claims that his right not to be compelled to testify against himself as protected by s. 11(*c*) and his right to a fair trial with the presumption of innocence as protected by s. 11(*d*) are infringed by s. 276. He therefore claims that he is deprived of his liberty in a way that is not in accordance with the principles of fundamental justice, contrary to s. 7 of the *Charter*. In *R. v. Mills*, [1999] 3 S.C.R. 668, the Court dealt with a claim that s. 11(*d*) was violated in combination with s. 7, and the Court analysed the issues under the rubric of s. 7 on the grounds that the fair trial specifically protected by s. 11(*d*) was itself a principle of fundamental justice under s. 7. In *R. v. White*, [1999] 2 S.C.R. 417, at paras. 40 and 44, Iacobucci J. described s. 11(*c*) as a procedural protection that underlies the principle against self-incrimination, which is also a principle of fundamental justice under s. 7. In both cases, the Court analysed the rights involved in the context of s. 7.

24 These cases are part of the Court's jurisprudence that has consistently held that the principles of fundamental justice enshrined in s. 7 protect more than the rights of the accused. As McLachlin J. wrote in *Seaboyer*, *supra*, at p. 603:

> The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns.... The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.

One of the implications of this analysis is that while the right to make full answer and defence and the principle against self-incrimination are certainly core principles of fundamental justice, they can be respected without the accused being entitled to "the most favourable procedures that could possibly be imagined" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362; cited in *Mills*, *supra*, at para. 72). Nor is the accused entitled to have procedures crafted that take only his interests into account. Still less is he entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial.

25 In *Seaboyer*, the Court found that the principles of fundamental justice include the three purposes of s. 276 identified above: protecting the integrity of the trial by excluding evidence that is misleading, protecting the rights of the accused, as well as encouraging the reporting of sexual violence and protecting "the security and privacy of the witnesses" (p. 606). This was affirmed in *Mills*, *supra*, at para. 72. The Court crafted its guidelines in *Seaboyer* in accordance with these principles, and it is in relation to these principles that the effects of s. 276 on the accused must be evaluated.

26 The Court in *Mills* upheld the constitutionality of the provisions in the *Criminal Code* that control the use of personal and therapeutic records in trials of sexual

offences. The use of these records in evidence is analogous in many ways to the use of evidence of prior sexual activity, and the protections in the *Criminal Code* surrounding the use of records at trial are motivated by similar policy considerations. L'Heureux-Dubé J. has warned that therapeutic records should not become a tool for circumventing s. 276: "[w]e must not allow the defence to do indirectly what it cannot do directly" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 122, and *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 624). Academic commentators have observed that the use of therapeutic records increased with the enactment of s. 276 nonetheless (see K. D. Kelly, "'You must be crazy if you think you were raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997), 9 *C.J.W.L.* 178, at p. 181).

27 The provisions that control the use of personal records contain a two-step procedure like that in s. 276. The defence must first apply in writing under s. 278.3 with grounds to establish that the record is "likely relevant". On a *voir dire*, the judge may order the holder of the record to produce it if the defence can demonstrate that the record is "likely relevant" and "is necessary in the interests of justice". The judge then reviews the material and decides whether or not to produce it to the accused. The *Code* contains a list of factors to help the judge determine the relevance of the record, much like the list in s. 276 to help the trial judge exercise her discretion to admit evidence of prior sexual activity.

28 The constitutional issue in *Mills* was analogous to that in the present case because the therapeutic records provisions can potentially exclude relevant evidence from a trial. Although this is less likely under s. 276, in the sense that the accused is better able to establish the relevance of sexual activity in which he participated than he can describe therapeutic records not in his possession, it is still possible. This is because the test for admissibility in s. 276(2) requires not only that the evidence be relevant but

also that it be more probative than prejudicial. *Mills* dealt with a conflict among the same three *Charter* principles that are in issue in the case at bar: full answer and defence, privacy and equality (at para. 61). The Court defined these rights relationally: "the scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses" (paras. 62-66 and 94). The exclusionary rule was upheld. The privacy and equality concerns involved in protecting the records justified interpreting the right to make full answer and defence in a way that did not include a right to all relevant evidence.

29 The Court has taken a similar approach to the principle against self-incrimination. In *White, supra*, the principle against self-incrimination was also held to require a contextual analysis: "[t]he principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue" (para. 45). At the same time, "[e]ach principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice" (para. 47). In that case, the use at the accused's criminal trial of statements made by her under compulsion of the *Motor Vehicle Act* was found to violate the principle against self-incrimination.

30 In *Mills* and in *White*, the Court defined the scope of the accused's rights in a contextual way that reconciled the principles of fundamental justice. In *Mills*, legislation that excludes evidence was upheld as constitutional, to the benefit of the Crown; in *White*, evidence was excluded to the benefit of the accused, on the grounds that it was unfairly obtained through compulsion. In *Seaboyer*, a blanket exclusionary rule about evidence of prior sexual activity was struck down as unconstitutional in

favour of vesting discretionary power to admit evidence in the trial judge. The old s. 276 was held to violate ss. 7 and 11(*d*) and could not be justified under s. 1. The Court's substitute guidelines were fully constitutional and did not require a s. 1 justification, much like in *Mills*.

31 In the case at bar, I affirm the reasons in *Seaboyer* and find that none of the accused's rights are infringed by s. 276 as he alleges. *Seaboyer* provides a basic justification for the legislative scheme in s. 276, including the determination of relevance as well as the prejudicial and probative value of the evidence. *Mills* and *White* show how the impact of s. 276 on the principles of fundamental justice relied on by the accused should be assessed in light of the other principles of fundamental justice that s. 276 was designed to protect. The reasons in *Mills* are apposite because they demonstrate how the same principles of equality, privacy and fairness can be reconciled. I shall show below how the procedure created by s. 276 to protect the trial process from distortion and to protect complainants is consistent with the principles of fundamental justice. It is fair to the accused and properly reconciles the divergent interests at play, as the Court suggested in *Seaboyer*.

B. *The Substantive Sections*

(1) Section 276(1) – The Exclusionary Rule

32 The accused objects to the exclusionary rule itself in s. 276(1) on the grounds that it is a "blanket exclusion" that prevents him from adducing evidence necessary to make full answer and defence, as guaranteed by ss. 7 and 11(*d*) of the *Charter*. He is mistaken in his characterization of the rule. Far from being a "blanket exclusion", s. 276(1) only prohibits the use of evidence of past sexual activity when it is offered to

support two specific, illegitimate inferences. These are known as the "twin myths", namely that a complainant is more likely to have consented or that she is less worthy of belief "by reason of the sexual nature of [the] activity" she once engaged in.

33 This section gives effect to McLachlin J.'s finding in *Seaboyer* that the "twin myths" are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process. Section 276(1) also clarifies *Seaboyer* in several respects. Section 276 applies to all sexual activity, whether with the accused or with someone else. It also applies to non-consensual as well as consensual sexual activity, as this Court found implicitly in *R. v. Crosby*, [1995] 2 S.C.R. 912, at para. 17. Although the *Seaboyer* guidelines referred to "consensual sexual conduct" (pp. 634-35), Parliament enacted the new version of s. 276 without the word "consensual". Evidence of non-consensual sexual acts can equally defeat the purposes of s. 276 by distorting the trial process when it is used to evoke stereotypes such as that women who have been assaulted must have deserved it and that they are unreliable witnesses, as well as by deterring people from reporting assault by humiliating them in court. The admissibility of evidence of non-consensual sexual activity is determined by the procedures in s. 276. Section 276 also settles any ambiguity about whether the "twin myths" are limited to inferences about "unchaste" women in particular; they are not (as discussed by C. Boyle and M. MacCrimmon, "The Constitutionality of Bill C-49: Analyzing Sexual Assault As If Equality Really Mattered" (1999), 41 *Crim. L.Q.* 198, at pp. 231-32).

34 The *Criminal Code* excludes all discriminatory generalizations about a complainant's disposition to consent or about her credibility based on the sexual nature of her past sexual activity on the grounds that these are improper lines of reasoning. This was the import of the Court's findings in *Seaboyer* about how sexist beliefs about women distort the trial process. The text of the exclusionary rule in s. 276(1) diverges

very little from the guidelines in *Seaboyer*. The mere fact that the wording differs between the Court's guidelines and Parliament's enactment is itself immaterial. In *Mills*, *supra*, the Court affirmed that "[t]o insist on slavish conformity" by Parliament to judicial pronouncements "would belie the mutual respect that underpins the relationship" between the two institutions (para. 55). In this case, the legislation follows the Court's suggestions very closely.

35 The phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The phrase "by reason of the sexual nature of that activity" has the same effect as the qualification "solely to support the inference" in *Seaboyer* in that it limits the exclusion of evidence to that used to invoke the "twin myths" (p. 635).

36 This Court has already had occasion to admit evidence of prior sexual activity under the current version of s. 276. In *Crosby*, *supra*, such evidence was admissible because it was inextricably linked to a prior inconsistent statement that was relevant to the complainant's credibility (at para. 14). This case itself demonstrates that s. 276 does not function in practice as a blanket exclusion, as alleged by the accused. On the contrary, s. 276 controls the admissibility of evidence of sexual activity by providing judges with criteria and procedures to help them exercise their discretion to admit it. I explain below why the procedure to assess relevance is constitutional. Suffice it here to say that it is this procedure that makes the *Seaboyer* guidelines and the current version of s. 276 constitutional where the earlier version of s. 276 was not.

37 An accused has never had a right to adduce irrelevant evidence. Nor does he have the right to adduce misleading evidence to support illegitimate inferences: "the accused is not permitted to distort the truth-seeking function of the trial process" (*Mills*, *supra*, at para. 74). Because s. 276(1) is an evidentiary rule that only excludes material that is not relevant, it cannot infringe the accused's right to make full answer and defence. Section 276(2) is more complicated, and I turn to it now.

(2) Section 276(2)(*c*) – "Significant Probative Value"

38 If evidence is not barred by s. 276(1) because it is tendered to support a permitted inference, the judge must still weigh its probative value against its prejudicial effect to determine its admissibility. This essentially mirrors the common law guidelines in *Seaboyer* which contained this balancing test (at p. 635). The accused takes issue with the fact that s. 276(2)(*c*) specifically requires that the evidence have "significant probative value". The word "significant" was added by Parliament but it does not render the provision unconstitutional by raising the threshold for the admissibility of evidence to the point that it is unfair to the accused.

39 It may be noted that the word "significant" is not found in the French text; the law speaks simply of "*valeur probante*". The rule of equal authenticity and the rule against unconstitutional interpretation require that the two versions be reconciled where possible. The interpretation of "significant" by the Ontario Court of Appeal satisfies this requirement: Morden A.C.J.O. found that "the evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt" (p. 16). At the same time, Morden A.C.J.O. agrees with *R. v. Santocono* (1996), 91 O.A.C. 26 (C.A.), at p. 29, where s. 276(2)(*c*) was interpreted to mean that "it was not necessary for the appellant to demonstrate 'strong and compelling' reasons for admission of the

evidence". This standard is not a departure from the conventional rules of evidence. I agree with the Court of Appeal that the word "significant", on a textual level, is reasonably capable of being read in accordance with ss. 7 and 11(*d*) and the fair trial they protect.

40 The context of the word "significant" in the provision in which it occurs substantiates this interpretation. Section 276(2)(*c*) allows a judge to admit evidence of "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (emphasis added). The adverb "substantially" serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value. In a sense, both sides of the equation are heightened in this test, which serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties in these cases.

41 In light of the purposes of s. 276, the use of the word "significant" is consistent with both the majority and the minority reasons in *Seaboyer*. Section 276 is designed to prevent the use of evidence of prior sexual activity for improper purposes. The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice". The Court has recognized that there are inherent "damages and disadvantages presented by the admission of such evidence" (*Seaboyer*, *supra*, at p. 634). As Morden A.C.J.O. puts it, evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect. The *Criminal Code* codifies this reality.

42 By excluding misleading evidence while allowing the accused to adduce evidence that meets the criteria of s. 276(2), s. 276 enhances the fairness of trials of sexual offences. Section 11(*d*) guarantees a fair trial. Fairness under s. 11(*d*) is determined in the context of the trial process as a whole (*R. v. Stoddart* (1987), 37 C.C.C. (3d) 351 (Ont. C.A.), at pp. 365-66). As L'Heureux-Dubé J. wrote in *Crosby*, *supra*, at para. 11, "[s]ection 276 cannot be interpreted so as to deprive a person of a fair defence." At the same time, the accused's right to make full answer and defence, as was held in *Mills, supra*, at para. 75, is not "automatically breached where he or she is deprived of relevant information". Nor is it necessarily breached when the accused is not permitted to adduce relevant information that is not "significantly" probative, under a rule of evidence that protects the trial from the distorting effects of evidence of prior sexual activity.

43 When the trial judge determines the admissibility of evidence under s. 276(2), she is to take into account the multiple factors in s. 276(3), which include "the right of the accused to make a full answer and defence" in s. 276(3)(*a*). Section 276 is designed to exclude irrelevant information and only that relevant information that is more prejudicial to the administration of justice than it is probative. The accused's right to a fair trial is, of course, of fundamental concern to the administration of justice. In a similar situation in *Mills*, the Court preserved the right to make full answer and defence in the following commonsensical way, at para. 94:

> It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.

Thus the threshold criteria that evidence be of "significant" probative value does not prevent an accused from making full answer and defence to the charges against him. Consequently his *Charter* rights under ss. 7 and 11(*d*) are not infringed by s. 276(2)(*c*).

C. *The Procedural Sections to Determine Relevance: The Affidavit and Voir Dire*

44 The constitutionality of the procedure that must be followed to introduce evidence of prior sexual activity has also been challenged. It requires that whoever seeks to introduce it "by or on behalf of the accused" must present an affidavit and establish on a *voir dire* that the evidence is admissible in accordance with the criteria in the *Criminal Code*. The accused in the case at bar protests that both the affidavit and the *voir dire* requirements infringe his right not to be compelled to be a witness in proceedings against him, as well as his right not to reveal his defence. I disagree. A *voir dire* with affidavit or *viva voce* evidence and with the participation of the accused is found, albeit in skeletal form, in the guidelines in *Seaboyer* established by this Court in compliance with the *Charter* (at p. 636). Because there was little direct discussion of the procedure in *Seaboyer* and because the impugned provisions are more detailed than the guidelines, it is useful to elaborate and to explain why they are constitutional.

45 Section 276 and the procedure it mandates are consistent with the law of evidence. Sections 276(1) and 276(2) are rules to determine relevance and admissibility. They were articulated in *Seaboyer* as common law rules and are now codified in the *Criminal Code*. Evidence of prior sexual activity is of limited admissibility: it is admissible for some purposes but not others. This is because it is of limited relevance. In particular, as the Court put it in *Seaboyer*, "[t]here is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness" or whether she is more likely to have consented to an alleged assault (at p. 612).

46 It is a basic rule of evidence that the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible. Lamer C.J. described the burden of proof on a *voir dire* to introduce evidence (in that case prior inconsistent statements) as being "on the balance of probabilities, the normal burden resting upon a party seeking to admit evidence" in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 800 (emphasis added). Prior sexual activity is, like hearsay, character evidence and similar fact evidence, restricted in its admissibility. If the defence seeks to adduce such evidence, it must establish that it supports at least some relevant inference. Parliament has specified criteria for admissibility in s. 276(2) to guide the discretion of trial judges in this area.

47 The Court has not yet pronounced on whether a *voir dire* is an evidentiary proceeding and not a proceeding against the accused to which s. 11(*c*) applies. The issue was not argued in this case. In any event, the particular *voir dire* required by s. 276 does not offend the principle against self-incrimination because the requirement that the accused establish a legitimate use for evidence of sexual activity does not compel him to testify. As the Ontario Court of Appeal found in *R. v. Boss* (1988), 30 O.A.C. 184, at p. 198,

> the tactical obligation which an accused may feel to testify does not constitute a legal obligation or compulsion to testify. The use of the word "compelled" in s. 11(c) indicates to me that the section is referring to a legal compulsion.... The decision whether or not to testify remains with the accused free of any legal compulsion.

48 The distinction between tactical and legal compulsion is consistent with the definition of a compellable witness as "one who may be forced by means of a subpoena to give evidence in court under the threat of contempt proceedings" (J. Sopinka, S.

N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at para. 13.46). Such was the case of the young offender in *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, who was subpoenaed to testify at his co-accused's trial. Although compelled, his s. 11(*c*) right was not engaged because the proceedings were not against him. His broader s. 7 privilege against self-incrimination was protected because he received evidentiary immunity (at para. 204).

49 The accused is not forced to testify by s. 276. Nor is he coerced by the state in any way that engages *Charter* protection. Coercion to testify violates the principle against self-incrimination, but as Lamer C.J. defined it, "[c]oercion ... means the denial of free and informed consent" (*R. v. Jones*, [1994] 2 S.C.R. 229, at p. 249, cited in *White*, *supra*, at para. 42). In *White*, *supra*, at para. 76, Iacobucci J. found that "[i]f a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements." In applications under s. 276, there is free and informed consent when the accused participates in order to exculpate himself. He knows that he is not required to do so.

50 There is an important difference between a burden of proof with regard to an offence or an evidentiary burden, and the tactical need to respond when the Crown establishes a *prima facie* case, in order to raise a reasonable doubt about it. "[T]he criminal law does not allocate an evidential burden to the accused to refute the Crown's case and he or she may decline to adduce any evidence. Nevertheless, if the accused decides not to call any evidence, he or she runs the risk of being convicted" (Sopinka, Lederman and Bryant, *supra*, at para. 3.17). Where there is neither a legal obligation nor an evidentiary burden on the accused, the mere tactical pressure on the accused to

participate in the trial does not offend the principle against self-incrimination (s. 11(*c*)) or the right to a fair trial (s. 11(*d*)).

51 The tactical pressure on the accused to testify at the *voir dire* under s. 276 is neither a burden of proof nor an evidentiary burden. It derives from his desire to raise a reasonable doubt about the Crown's case by adducing evidence of the complainant's prior sexual activity. The sole purpose of this *voir dire* is to establish the admissibility of the evidence he proposes to call. As Dickson J. (as he then was) put it, "[i]t is axiomatic that the *voir dire* and the trial itself have distinct functions. The function of the *voir dire* is to determine admissibility of evidence" (*Erven v. The Queen*, [1979] 1 S.C.R. 926, at p. 931). If the evidence is found to be admissible under s. 276, it may then serve to satisfy the evidentiary burden of adducing a factual basis for a defence (such as honest but mistaken belief in consent) or to raise a reasonable doubt about an element of the offence, but that is a different matter altogether.

52 Nothing in s. 276 obviates the Crown's basic duty to establish all the elements of a sexual offence beyond a reasonable doubt. This burden of proof on the Crown and the fact that the trial must be fair are the essence of the presumption of innocence, as the Court found in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 121, and *R. v. Whyte*, [1988] 2 S.C.R 3, at p. 15. A fair trial includes the right to make full answer and defence, but as I explained above, the admissibility criteria in ss. 276(2) and 276(3) respect this right. In *Osolin*, *supra*, at pp. 688-89, the "evidentiary burden" borne by the accused in a sexual offence trial to substantiate a claim of honest but mistaken belief in consent was held not to offend the presumption of innocence because it did not relieve the Crown of the burden of proof of the elements of the offence. The tactical burden under s. 276 is even less onerous on the accused because it relates only to establishing relevance on a *voir dire*; it does not impose any burden on the accused at trial.

(1) Section 276.1(2)(*a*) – The Affidavit with Detailed Particulars

53 Section 276.1(2)(*a*) requires the defence to enter an affidavit with "detailed particulars" of the evidence it seeks to adduce. The trial judge allowed an information and belief affidavit at this first stage but then insisted on an affidavit from the accused for the *voir dire* stage. In my view, this procedure is permissible. It minimally impinges upon the accused, in the sense that if the information and belief affidavit is not accepted, he has not testified at all. The trial judge was correct to require a personal affidavit at the *voir dire* because part of the purpose of the *voir dire* is to cross-examine the affiant. It need not be the accused himself who presents evidence; it can be anyone with relevant information who can personally testify to its truth. Whoever is the source of the evidence, however, must supply an affidavit with detailed particulars. I also agree that the trial judge's analysis of the evidence provided by the personal affidavit was correct: she asked "firstly, whether it was barred absolutely by s. 276(1), and secondly, whether it was capable of meeting the criteria outlined in s. 276(2), and the general concerns and interests of justice as outlined in s. 276(3)" ([1994] O.J. No. 3162 (QL), at para. 28). Her approach properly construes the legislation.

54 The accused specifically objects to having to submit the affidavit on the grounds that it compels him to reveal his defence and to disclose evidence he hopes to call at trial. He claims that this violates his right to silence. The right to silence in s. 7 properly speaking comprises the right to silence before trial and the privilege against self-incrimination at trial; it is inaccurate to speak of an absolute right to silence at the trial stage of the criminal process (*R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 164). In *White*, *supra*, at paras. 40-41, Iacobucci J. summarised the Court's position on this subject:

> It is now well-established that there exists, in Canadian law, a principle against self-incrimination that is a principle of fundamental justice under s. 7 of the *Charter*. . . .
>
> The principle against self-incrimination was described by Lamer C.J. in *Jones*, *supra*, at p. 249, as "a general organizing principle of criminal law". The principle is that an accused is not required to respond to an allegation of wrongdoing made by the state until the state has succeeded in making out a *prima facie* case against him or her. It is a basic tenet of our system of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused should respond: *P. (M.B.)*, *supra*, at pp. 577-79, *per* Lamer C.J., *S. (R.J.)*, *supra*, at paras. 81 to 83, *per* Iacobucci J.

The right not to be compelled to testify against oneself is specifically protected by s. 11(*c*); the general principle against self-incrimination resides in s. 7.

55 Section 276 does not require the accused to make premature or inappropriate disclosure to the Crown. For the reasons given above, the accused is not forced to embark upon the process under s. 276 at all. As the trial judge found in the case at bar, if the defence is going to raise the complainant's prior sexual activity, it cannot be done in such a way as to surprise the complainant. The right to make full answer and defence does not include the right to defend by ambush. The Crown as well as the Court must get the detailed affidavit one week before the *voir dire*, according to s. 276.1(4)(*b*), in part to allow the Crown to consult with the complainant. The Crown can oppose the admission of evidence of sexual activity if it does not meet the criteria in s. 276. Neither the accused's s. 11(*c*) right not to be compelled to testify against himself nor his s. 11(*d*) right to be presumed innocent are violated by the affidavit requirement. This is borne out by the way in which the admissibility procedure operates.

56 The defence must satisfy the trial judge that the evidence it seeks to adduce meets the statutory requirements for admissibility. To admit evidence of sexual activity at trial, the judge must provide written reasons about how the evidence "is expected to be

relevant to an issue at trial" and the factors she considered in making this determination (as per ss. 276.2(3)(*b*) and (*c*)). It is perfectly appropriate that, to this end, the affidavit must disclose evidence that is "capable of being admissible under subsection 276(2)". Among other things, the evidence must be adduced for a permissible purpose and must be relevant to an issue at trial. The affidavit must therefore establish a connection between the complainant's sexual history and the accused's defence. As the trial judge put it, "there would have to be evidence to establish the link between the potential defences ... and the prior sexual conduct".

57 The necessity that the connection be drawn between the evidence and the accused's defence was affirmed by this Court in *R. v. Dickson*, [1994] 1 S.C.R. 153, in its adoption of the Yukon Territory Court of Appeal's judgment. In *Dickson*, the accused tendered evidence under s. 276 to support an honest but mistaken belief in consent, but then on the *voir dire* argued consent on one count and denied that two other counts of sexual assault had occurred ((1993), 81 C.C.C. (3d) 224 (Y.T.C.A.), at p. 233). The Yukon Territory Court of Appeal properly found that the trial judge erred in admitting the evidence of sexual activity where the evidence on the *voir dire* did not raise the defence of honest but mistaken belief in consent as the affidavit promised, nor did it raise any other defence.

58 It is common for the defence in sexual offence cases to deny that the assault occurred, to challenge the identity of the assailant, to allege consent or to claim an honest but mistaken belief in consent. Evidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent (see Sopinka, Lederman and Bryant, *supra*, at para. 10.108). As the Court affirmed in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 27, the determination of consent is "only concerned with the

complainant's perspective. The approach is purely subjective." Actual consent must be given for each instance of sexual activity.

59 Section 276 is most often used in attempts to substantiate claims of an honest but mistaken belief in consent. To make out the defence, the accused must show that "he believed that the complainant communicated consent to engage in the sexual activity in question" (*Ewanchuk*, *supra*, at para. 46 (emphasis in original)). To establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what he believed at the time of the alleged assault. This is necessary for the trial judge to be able to assess the relevance of the evidence in accordance with the statute. It is an essential part of the legislative scheme which provides a means by which the accused may establish the relevance of the evidence he chooses to put forward.

(2) Section 276.2 – The *Voir Dire*

60 If the trial judge is satisfied that the affidavit meets the requirements of s. 276.1, the accused has the right to an *in camera* hearing to decide whether the evidence is admissible. If it is admissible, the type of use to which evidence of sexual activity may be put is not controlled by the legislation. It could for instance be used to cross-examine the complainant, in chief by the accused (should he choose to testify himself), or by another witness.

61 The accused challenges the constitutionality of the *voir dire* on the grounds that being required to submit to cross-examination on his affidavit violates his s. 7 and s. 11(*c*) rights not to be compelled to testify at his own trial. He also complains that he is "compelled" to testify because there are usually no witnesses to sexual assaults other

than the accused and the complainant, and the complainant is not compellable at the *voir dire* according to s. 276.2(2). Again, the accused mischaracterises his predicament. He does not face a legal compulsion to testify for the reasons given above, and the tactical pressure he describes is not unfair. Having produced his affidavit, the basic rules of evidence require the accused to submit to cross-examination because the right to cross-examine is essential to give any weight to an affidavit.

62 The accused's refusal to submit to cross-examination on his sworn affidavit in effect reduces its weight to that of an unsworn statement. Yet, it has long been decided that an accused cannot make an unsworn statement because it

> would lead to many dangerous results, the most obvious of which are, the escape from cross-examination; the safe introduction of a concocted defence; the securing of all the benefits of sworn evidence in accused's favour without incurring the consequences of perjury by refraining from going into the witness box; and also depriving the jury of the benefit of appraising his credibility in general from his demeanour therein.
>
> (*R. v. Frederick* (1931), 57 C.C.C. 340 (B.C.C.A.), at p. 342)

63 As Cory J. put it more recently in *Osolin*, *supra*, cross-examination "is of essential importance in determining whether a witness is credible" (p. 663). This applies to all witnesses who offer testimony, whether for the Crown or for the defence. The Crown's right to cross-examine on the affidavit under s. 276 is essential to protect the fairness of the trial. Cross-examination is required to enable the trial judge to decide relevance by assessing the affiant's credibility and the use to which he intends to put the evidence. The trial judge correctly found that the legislation itself requires "some weighing and some assessing of the evidence" before it can be admitted ([1994] O.J. No. 3160 (QL), at para. 20). Without cross-examination, "the court can not attribute

much, if any, weight to such evidence" because it is impossible to assess its probative value and prejudicial effect as the legislation requires.

64 Because the affidavit must show how the prior sexual activity is relevant to the alleged assault, the Crown must have the opportunity to cross-examine on whatever aspects relevant to the charge that the accused chooses to raise. The trial judges who have declined to allow this cross-examination are in error (as discussed by H. Schwartz, "Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1994), 31 C.R. (4th) 232, at p. 250). At the same time, the trial judge in the case at bar was correct that the cross-examination must be "confined to what is necessary to determine . . . whether the proposed evidence is admissible" ((1998), 38 O.R. (3d) 1, at p. 21). The *voir dire* is not a forum for unfair questioning of the accused; the trial judge controls the hearing to meet the statutory goals, which include protecting the rights of the accused in s. 276(3).

65 The demands on the defence at the *voir dire* are in some ways analogous to the procedure in a *Corbett* application. In *R. v. Underwood,* [1998] 1 S.C.R. 77, at paras. 6-11, Lamer C.J. explained how a *voir dire* in which the defence discloses evidence it intends to call is consistent with a "scrupulously fair" trial that observes the case-to-meet principle. The accused can use the protection of a *voir dire* to apply to have some or all of his criminal record excluded at trial. He reveals the evidence he intends to call for his case, which allows the trial judge properly to apply the factors relevant to his request. As Lamer C.J. explained at para. 10:

> . . . the purpose of this *voir dire* is <u>not</u> "defence disclosure". It creates no independent rights in the Crown, and, therefore should not be treated as an excuse for the Crown to deeply probe the case for the defence. . . . The point is to provide the trial judge with the information he or she needs to make an

> informed decision, but the Crown has no right to require more than that. [Emphasis in original.]

This is also true of the *voir dire* to admit evidence of prior sexual activity.

66 Furthermore, Dickson J., in the pre-*Charter* context, held that "[e]vidence on the *voir dire* cannot be used in the trial itself" (*Erven*, *supra*, at p. 932). Although this Court has not specifically ruled on whether s. 13 of the *Charter* protects an accused against self-incrimination on a *voir dire*, I am of the opinion that it does (as the Superior Court of Quebec found in *R. v. Tarafa*, [1990] R.J.Q. 427, at p. 429). Section 13 provides that:

> **13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

This privilege against self-incrimination applies because a *voir dire* is an "other proceeding" within the meaning of s. 13. In *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 386, McIntyre J. (in dissent, but the only one to address this issue) found that

> [t]he *voir dire* is clearly another proceeding. Its purpose is not to resolve any issue raised in the charge but merely to determine what may be introduced into the proceedings for that purpose. After the *voir dire* the evidence found to be properly admissible in the proceedings is admitted and thereafter forms part of the proceedings. That which is excluded never becomes a part.

This is true of the *voir dire* under s. 276. Its purpose is to enable the judge to determine the admissibility of evidence. The *voir dire* is not itself part of the determination of the guilt or innocence of the accused. When the accused testifies on a *voir dire*, the protection of s. 13 means that his testimony cannot later be used as evidence of guilt at

trial. It was established in *R. v. Kuldip*, [1990] 3 S.C.R. 618, that an accused's testimony from a previous trial on the same charge can be used by the Crown at the retrial only to impeach his credibility, and not as evidence of guilt. In *Kuldip*, at p. 636, Lamer C.J. found that using such a prior inconsistent statement for its truth to incriminate the accused is forbidden by s. 13, but that

> s. 13 does not preclude the use of previous testimony during a subsequent cross-examination if the sole purpose of that cross-examination is to challenge the credibility of an accused who has chosen to testify in the second proceedings.

67 In *B. (K.G.)*, *supra*, when Lamer C.J. reformed the "orthodox rule" of hearsay to allow some prior inconsistent statements as evidence to establish guilt, he specifically noted that *Kuldip* still applied to statements of the kind with which we are concerned. At p. 762, he explained that:

> It must also be remembered that *Kuldip* and s. 13 of the *Charter* refer to a very special subset of prior inconsistent statements, in which the prior statement is made by an accused in a proceeding who testifies at a future proceeding and which, if admitted for the truth of its contents, would incriminate him in the second proceeding. Furthermore, s. 13 applies only to a witness who testifies in a "proceeding"; while this Court has yet to explore the outer boundaries of this term, cases decided to date have concentrated on judicial proceedings such as trials and preliminary inquiries: see *Dubois*. A police interview, even where the witness makes his or her statement under oath, may not be a "proceeding" for the purposes of s. 13. As this precise issue does not arise in this appeal, I will make no further comments on this point.

In my opinion, the *voir dire* under s. 276 is a proceeding that attracts the protection of s. 13. A prior inconsistent statement in the accused's testimony on this *voir dire* could be used later at trial only to impugn his credibility and not to establish his culpability.

(3) Section 276.2(2) – Complainant Non-Compellable

68 The complainant is not compellable at the *voir dire* pursuant to s. 276.2(2). This provision is both constitutional and an important aspect of s. 276. The accused argues that he is *de facto* compellable because the complainant is non-compellable at the *voir dire*. I have already established that he is not compellable nor being compelled at law. His desire to have the complainant testify flows, as would his need to testify himself, from his tactical decision to present evidence and the ensuing need to show its relevance. As we have seen, there is no legal compulsion nor violation of the accused's constitutional rights. Furthermore, the complainant's non-compellability is based on sound legislative goals. To compel the complainant to be examined on her sexual history before the subject has been found to be relevant to the trial would defeat two of the three purposes of the law, as articulated and upheld in *Seaboyer* (at p. 606). It is an invasion of the complainant's privacy and discourages the reporting of crimes of sexual violence. As the Ontario Court of Appeal points out, the accused must know what evidence he wants to introduce on his own; the *voir dire* is not to be a "fishing expedition" (p. 21). The evidence is tested at the *voir dire* and if it meets the criteria in s. 276(2), it may be introduced at trial. The complainant can then be compelled to testify or if the Crown, as it is most likely to do, calls her as a witness, be cross-examined on it.

69 The right to make full answer and defence, moreover, does not provide a right to cross-examine an accuser. This was explicitly held in *R. v. Cook*, [1997] 1 S.C.R. 1113, where the Court affirmed the broad discretion of the Crown to conduct its case. The Crown is free from any requirement to call particular witnesses, and this applies even to the victim of the crime for which the accused faces conviction (at para. 19).

70 The fair trial protected by s. 11(*d*) is one that does justice to all the parties. As Cory J. wrote of sexual assault trials in *Osolin, supra*, at p. 669:

> The provisions of ss. 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant.

VII. Conclusion

71 On the basis of this Court's decision in *Seaboyer*, Parliament gave the trial judge the role of deciding whether a complainant's sexual history is relevant in the trial of a sexual offence. She is to exercise her discretion within the structure of a procedure created by s. 276. The legislation lists factors to take into account, similar to those upheld by this Court's decision in *Mills*, *supra*, which prominently include the accused's right to make full answer and defence in s. 276(3)(*a*). This discretion, of course, cannot be exercised in an unconstitutional manner. The accused's constitutional rights are protected by this legislation.

72 The answers to the constitutional questions are as follows:

> 1. Do ss. 276.1(2)(*a*) and 276.2(2) of the *Criminal Code* of Canada infringe upon an accused's right to silence and the right not to be compelled to be a witness in proceedings against himself in respect to the offence pursuant to s. 7 and/or s. 11(*c*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

> 2. If the answer to question number one is yes, are the infringements demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*?

Answer: Not applicable.

3. Do ss. 276(1), 276(2)(*c*) and 276.2(2) of the *Criminal Code* of Canada infringe upon an accused's right to make full answer and defence pursuant to s. 7 and/or s. 11(*d*) of the *Charter*?

Answer: No.

4. If the answer to question number three is yes, are the infringements demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*?

Answer: Not applicable.

73 The appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Karam, Greenspon, Ottawa.

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

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

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

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Vancouver.

Solicitor for the interveners the Women's Legal Education and Action Fund, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network of Canada and the National Action Committee on the Status of Women: The Women's Legal Education and Action Fund, Toronto.