R. v. Darrach

Regina v. Darrach

122 C.C.C. (3d) 225
CASE-HISTORY : Leave to appeal to the Supreme Court of Canada granted June 4, 1998

Ontario Court of Appeal

Court File No. C19455

Morden A.C.J.O., Osborne and Doherty JJ.A.

November 3, 1997 and November 4, 1997;
FEBRUARY 4, 1998

Application for leave to appeal to the Supreme Court of Canada was filed April 6, 1998.

Charter of Rights — Fundamental justice — Evidentiary provisions — Section 276 of Criminal Code providing that evidence of complainant's previous sexual activity not admissible to support inference that complainant more likely to have consented to sexual activity that is subject of charge or is less worthy of belief — Section 276(2) of Criminal Code providing, inter alia, that no evidence of complainant's previous sexual activity shall be adduced unless evidence has significant probative value that is not substantially outweighed by danger of prejudice — Section 276(3) of Criminal Code requiring that judge determining admissibility of such evidence take into account need to remove discriminatory belief or bias from fact-finding process and potential prejudice to complainant's personal dignity and right to privacy — Provisions not contravening either s. 7 or s. 11(d) of Charter — Canadian Charter of Rights and Freedoms, ss. 7, 11(d) — Cr. Code, s. 276.

Charter of Rights — Right to fair trial — Evidentiary provisions — Section 276 of Criminal Code providing that evidence of complainant's previous sexual activity not admissible to support inference that complainant more likely to have consented to sexual activity that is subject of charge or is less worthy of belief — Section 276(2) of Criminal Code providing, inter alia, that no evidence of complainant's previous sexual activity shall be adduced unless evidence has significant probative value that is not substantially outweighed by danger of prejudice — Section 276(3) of Criminal Code requiring that judge determining admissibility of such evidence take into account need to remove discriminatory belief or bias from fact-finding process and potential prejudice to complainant's personal dignity and right to privacy — Provisions not contravening either s. 7 or s. 11(d) of Charter — Canadian Charter of Rights and Freedoms, ss. 7, 11(d) — Cr. Code, s. 276.

Sexual offences — Sexual conduct of complainant — Section 276 of Criminal Code providing that evidence of complainant's previous sexual activity not admissible to support inference that complainant more likely to have consented to sexual activity that is subject of charge or is less worthy of belief — Section 276(2) of Criminal Code providing, inter alia, that noevidence of ***[page226]*** *complainant's previous sexual activity shall be adduced unless evidence has significant probative value that is not substantially outweighed by danger of prejudice — Section 276(3) of Criminal Code requiring that judge determining admissibility of such evidence take into account need to remove discriminatory belief or bias from fact-finding process and potential prejudice to complainant's personal dignity and right to privacy — Provisions not contravening either s. 7 or s. 11(d) of Charter — Canadian Charter of Rights and Freedoms, ss. 7, 11(d) — Cr. Code, s. 276.*

Charter of Rights — Self-incrimination — Section 276(2) of Criminal Code providing, inter alia, that no evidence of complainant's previous sexual activity shall be adduced unless it is evidence of specific instances of sexual activity — Section 276.1 of Criminal Code providing that application by accused to determine admissibility of such evidence must set out detailed particulars of evidence accused seeks to adduce — Section 276.2(2) of Criminal Code providing that complainant not compellable witness at hearing to determine admissibility of such evidence — Provisions not violating accused'sright to make full answer and defence or right not to be compelled to testify — Canadian Charter of Rights and Freedoms, ss. 7, 11(c) — Cr. Code, ss. 276, 276.1, 276.2.

Charter of Rights — Fundamental justice — Evidentiary provisions — Section 276(2) of Criminal Code providing, inter alia, that no evidence of complainant's previous sexual activity shall be adduced unless it is evidence of specific instances of sexual activity — Section 276.1 of Criminal Code providing that application by accused to determine admissibility of such evidence must set out detailed particulars of evidence accused seeks to adduce — Section 276.2(2) of Criminal Code providing that complainant not compellable witness at hearing to determine admissibility of such evidence — Provisions not violating accused's right to make full answer and defence or right not to be compelled to testify — Canadian Charter of Rights and Freedoms, ss. 7, 11(c) — Cr. Code, ss. 276, 276.1, 276.2.

Sexual offences — Sexual conduct of complainant — Section 276(2) of Criminal Code providing, inter alia, that no evidence of complainant's previous sexual activity shall be adduced unless it is evidence of specific instances of sexual activity — Section 276.1 of Criminal Code providing that application by accused to determine admissibility of such evidence must set out detailed particulars of evidence accused seeks to adduce — Section 276.2(2) of Criminal Code providing that complainant not compellable witness at hearing to determine admissibility of such evidence — Provisions not violating accused's right to make full answer and defence or right not to be compelled to testify - - Trial judge did not err in ruling that accused obliged to submit to cross-examination on affidavit as part of hearing — Canadian Charter of Rights and Freedoms, ss. 7, 11(c) — Cr. Code, ss. 276, 276.1, 276.2.

Charter of Rights — Fundamental justice — Vagueness — Section 273.1 of Criminal Code providing that no consent to engage in sexual activity is ***[page227]*** *obtained where complainant*

expresses lack of agreement by words or conduct — Provision not unconstitutionally vague — Canadian Charter of Rights and Freedoms, s. 7 — Cr. Code, s. 273.1.

Charter of Rights — Fundamental justice — Fault — Section 273.2(b) of Criminal Code providing that belief in consent no defence where accused did not take reasonable steps, in circumstances known to accused at time, to ascertain that complainant consenting — Provision not violating Charter — Canadian Charter of Rights and Freedoms, s. 7 — Cr. Code, s. 273.2(b).

Defences — Consent — Honest but mistaken belief in consent — Section 273.1 of Criminal Code providing that no consent to engage in sexual activity is obtained where complainant expresses lack of agreement by words or conduct — Provision not unconstitutionally vague — Section 273.2(b) of Criminal Code providing that belief in consent no defence where accused did not take reasonable steps, in circumstances known to accused at time, to ascertain that complainant consenting — Provision also not violating Charter — Canadian Charter of Rights and Freedoms, s. 7 — Cr. Code, ss. 273.1, 273.2(b).

The accused was charged with sexual assault. The accused submitted that his intended defence was the complainant's consent and, alternatively, his honest belief that she consented. The trial was largely concerned with the admissibility of evidence of the complainant's prior sexual activity with the accused. The trial judge was required to rule upon the constitutionality of several provisions of the Criminal Code whichrelate to sexual assault. They were: s. 273.1(2)(d); s. 273.2(b); several provisions in s. 276; s. 276.1(2)(a); and s. 276.2(2). The trial judge held that all of these provisions were constitutional.

On appeal by the accused from his conviction, held, the appeal should be dismissed.

Section 276(1) of the Criminal Code provides that in proceedings in respect of various offences, "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." The phrase "by reason of the sexual nature of that activity" in s. 276(1) of the Criminal Code should be read as meaning "solely to support the inference that the complainant is by reason of such conduct". Admissibility of the evidence for other uses will fall to be decided under s. 276(2) of the Criminal Code. When s. 276(1) of the Criminal Code is read in this way, it does not contravene either ss. 7 or 11(d) of the Canadian Charter of Rights and Freedoms. It does not exclude evidence which may fairly be called relevant and probative. To subject evidence of previous sexual activity with the accused to the requirements of s. 276(2) of the Criminal Code also does not result in any infringement of the accused's constitutional rights.

The accused also challenged the constitutionality of s. 276(2)(a) and (c) of the ***[page228]*** Criminal Code. Section 276(2) provides that in proceedings in respect of an offence referred to in s. 276(1), no evidence of the complainant's sexual history shall be adduced by the accused unless

the judge determines 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. The requirement in s. 276(2)(a) that the evidence be of specific instances of sexual activity does not compel the accused to give evidence contrary to s. 11(c) of the Charter. Section 276(2)(c) of the Criminal Code, requiring that the evidence have specific probative value that is not substantially outweighed by the danger of prejudice, does not place undue restrictions on an accused's right to make full answer and defence. "Significant probative value" is reasonably capable of being read as being in accord with the requirements of ss. 7 and 11(d) of the Charter, as requiring no more than evidence which is, together with the other evidence, capable of enabling a reasonable jury properly instructed to have a reasonable doubt on the guilt of the accused.

Section 276(3) of the Criminal Code provides that, in determining whether evidence is admissible under s. 276(2) of the Criminal Code, the judge shall take into account, inter alia, "(d) the need to remove from the fact-finding process any discriminatory belief or bias;" and "(f) the potential prejudice to the complainant's personal dignity and right of privacy". Neither of clauses (d) or (f) are unconstitutional.

Section 276.1(2)(a) of the Criminal Code provides that an application by the accused for a hearing under s. 276.2 of the Criminal Code to determine whether evidence is admissible under s. 276(2) of the Criminal Code, must be made in writing and set out detailed particulars of the evidence that the accused seeks to adduce. This provision does not infringe the accused's right to remain silent as guaranteed by s. 7 of the Charter, nor does it infringe his right not to be compelled to be a witness in proceedings against him as guaranteed by s. 11(c) of the Charter.

Section 276.2(2) of the Criminal Code provides that the complainant is not a compellable witness at a hearing to determine whether evidence is admissible under s. 276.2 of the Criminal Code. This provision does not violate the accused's right to full answer and defence or his right not to be compelled to testify. It is antithetical to the purpose of s. 276 of the Criminal Code that an accused should have the right to cross-examine a complainant with respect to sensitive personal matters without establishing the relevance of the questions. If the accused chooses to testify at the s. 276.2 hearing he does so, not under a legal compulsion contrary to s. 11(c) of the Charter but, rather, a tactical one. The trial judge did not err in ruling that the accused was obliged to submit to cross-examination on his affidavit as a necessary part of the s. 276.2 hearing. A trial judge in addressing the probative value limb of s. 276(2)(c) of the Criminal Code must take credibility into account in order to arrive at a proper conclusion. An untested affidavit may not provide a sufficient basis to carry out the statutory mandate.

As a matter of general observation on the requirements of ss. 276, 276.1 and 276.2 of the Criminal Code, neither the common law nor the Charter require that any specific procedure be followed in determining the admissibility of evidence. ***[page229]***

The admission of evidence of the prior sexual activity of a complainant clearly infringes the complainant's privacy interests. The mere existence of procedures which recognize interests other than the accused's and provide for something less than an unrestricted opportunity to inquire into previous sexual activity does not give rise to any constitutional infringement.

Section 273.1(2)(d) of the Criminal Code provides that, for the purposes of ss. 271, 272 and 273 of the Criminal Code, no consent to engage in the sexual activity in question is provided where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity. This provision does not give rise to any real debate on its meaning and is not void for vagueness.

Section 273.2(b) of the Criminal Code provides that the accused's belief that the complainant consented to the activity that forms the subject-matter of a charge under ss. 271, 272 or 273 of the Criminal Code is not a defence where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting. Notwithstanding some reservations, this issue could be decided on the basis that the offence of sexual assault carries with it a sufficient social stigma to require subjective fault on the part of the accused. Notwithstanding s. 273.2(b), the offence is still largely one based on subjective fault, at least to a level that would satisfy constitutional requirements. The subjective mens rea component of the offence remains largely intact. Section 11(c) of the Charter has no application to s. 273.2(b) of the Criminal Code. There is no testimonial compulsion. Neither does s. 273.2(b) of the Criminal Code shift any onus to the accused. It may be that this provision, and s. 265(4) of the Criminal Code, will, in some cases, have the effect of placing a tactical or evidential burden on an accused person to adduce some evidence capable of raising a reasonable doubt. This does not involve any constitutional infringement.

Cases referred to

Michigan v. Lucas, 500 U.S. 145 (1991) -- refd to

R. v. Boss (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123, 42 C.R.R. 166, 30 O.A.C. 184, 7 W.C.B. (2d) 88 -- refd to

R. v. Chaplin (1995), 96 C.C.C. (3d) 225, [1995] 1 S.C.R. 727, 36 C.R. (4th) 201, 26 C.R.R. (2d) 189, 83 W.A.C. 272, 27 Alta. L.R. (3d) 1, 162 A.R. 272, 178 N.R. 118, 26 W.C.B. (2d) 197 -- refd to

R. v. Cleghorn (1995), 100 C.C.C. (3d) 393, [1995] 3 S.C.R. 175, 41 C.R. (4th) 282, 32 C.R.R. (2d) 41, 85 O.A.C. 129, 186 N.R. 49, 28 W.C.B. (2d) 226 -- refd to

R. v. Corbett (1988), 41 C.C.C. (3d) 385, [1988] 1 S.C.R. 670, 64 C.R. (3d) 1, 34 C.R.R. 54, [1988] 4 W.W.R. 481, 28 B.C.L.R. (2d) 145, 85 N.R. 81, 4 W.C.B. (2d) 148 -- refd to

R. v. Creighton (1993), 83 C.C.C. (3d) 346, 105 D.L.R. (4th) 632, [1993] 3 S.C.R. 3, 23 C.R. (4th) 189, 17 C.R.R. (2d) 1, 65 O.A.C. 321, 157 N.R. 1, 20 W.C.B. (2d) 435 -- refd to

R. v. Crosby (1995), 98 C.C.C. (3d) 225, [1995] 2 S.C.R. 912, 39 C.R. (4th) 315, 143 N.S.R. (2d) 57, 183 N.R. 22, 27 W.C.B. (2d) 409 -- refd to

R. v. Darrach (1994), 24 W.C.B. (2d) 378 -- refd to

R. v. Darrach (1994), 24 W.C.B. (2d) 391 -- refd to R. v. Darrach (1994), 24 W.C.B. (2d) 392 -- refd to R. v. Darrach (1994), 28 C.R. (4th) 201 sub nom. R. v. D. (A.S.), 17 O.R. (3d) 481, 22 W.C.B. (2d) 581 -- refd to R. v. Ecker (1995), 96 C.C.C. (3d) 161, 37 C.R. (4th) 51, 85 W.A.C. 161, 128 Sask. R. 161, 26 W.C.B. (2d) 242 -- refd to R. v. Esau (1997), 116 C.C.C. (3d) 289, [1997] 2 S.C.R. 777, 7 C.R. (5th) 357, [1997] 7 W.W.R. 1, 214 N.R. 241, 35 W.C.B. (2d) 67 -- refd to R. v. Harris (1997), 118 C.C.C. (3d) 498, 10 C.R. (5th) 287, 102 O.A.C. 374, 35 W.C.B. (2d) 481 -- refd to R. v. Kutynec (1992), 70 C.C.C. (3d) 289, 12 C.R. (4th) 152, 8 C.R.R. (2d) 300, 7 O.R. (3d) 277, 52 O.A.C. 59, 15 W.C.B. (2d) 387 -- refd to R. v. Lovie (1995), 100 C.C.C. (3d) 68, 24 O.R. (3d) 836, 83 O.A.C. 208, 28 W.C.B. (2d) 21 -- refd to R. v. Majid (1995), 98 C.C.C. (3d) 263, 85 W.A.C. 248, 128 Sask. R. 248, 27 W.C.B. (2d) 255; affd 105 C.C.C. (3d) 96, [1996] 1 S.C.R. 472, 124 W.A.C. 9, 144 Sask. R. 9, 195 N.R. 396, 30 W.C.B. (2d) 186 -- refd to R. v. McMullen (1992), 19 W.C.B. (2d) 595 -- overd R. v. Mohamed (1993), 85 C.C.C. (3d) 182, 20 W.C.B. (2d) 485 -- overd R. v. Morrison (1992), 20 W.C.B. (2d) 544 -- overd R. v. Nguyen (1990), 59 C.C.C. (3d) 161, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332, 50 C.R.R. 71, [1990] 6 W.W.R. 289, 3 W.A.C. 1, 73 Man. R. (2d) 1, 46 O.A.C. 13, 119 N.R. 353, 11 W.C.B. (2d) 199 -- refd to R. v. Nova Scotia Pharmaceutical Society (1992), 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1, [1992] 2 S.C.R. 606, 15 C.R. (4th) 1, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 34 A.C.W.S. (3d) 1092, 16 W.C.B. (2d) 460 -- refd to R. v. Ryan (1989), 49 C.C.C. (3d) 490, 76 Nfld. & P.E.I.R. 26, 7 W.C.B. (2d) 410 -- refd to R. v. S. (R.J.) (1995), 96 C.C.C. (3d) 1, 121 D.L.R. (4th) 589, [1995] 1 S.C.R. 451, 36 C.R. (4th) 1, 26 C.R.R. (2d) 1, 78 O.A.C. 161, 177 N.R. 81, 21 O.R. (3d) 797n, 25 W.C.B. (2d) 588 -- refd to R. v. Santocono (1996), 28 O.R. (3d) 630, 91 O.A.C. 26, 30 W.C.B. (2d) 492 -- refd to R. v. Scopelliti (1981), 63 C.C.C. (2d) 481, 34 O.R. (2d) 524 -- refd to R. v. Seaboyer (1991), 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, [1991] 2 S.C.R. 577, 7 C.R. (4th) 117, 6 C.R.R. (2d) 35, 48 O.A.C. 81, 128 N.R. 81, 4 O.R. (3d) 383n, 13 W.C.B. (2d) 624 -- consd R. v. Underwood (1998), 121 C.C.C. (3d) 117, 155 D.L.R. (4th) 13, 221 N.R. 161, 37 W.C.B. (2d) 97 -- refd to R. v. Vaillancourt (1987), 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 32 C.R.R. 18, 68 Nfld. & P.E.I.R. 281, 81 N.R. 115 -- refd to R. v. Yaeck (1991), 68 C.C.C. (3d) 545, 10 C.R. (4th) 1, 6 O.R. (3d) 293, 50 O.A.C. 29, 14 W.C.B. (2d) 441; leave to appeal to S.C.C. refused 71 C.C.C. (3d) vii, [1992] 1 S.C.R. xii, 56 O.A.C. 160n, 139 N.R. 240n -- refd to Reference re: Section 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, 24

D.L.R. (4th) 536, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 15 W.C.B. (2d) 343 -- refd to

Statutes referred to Act to amend the Criminal Code (sexual assault), S.C. 1992, c. 38 preamble s. 1 s. 2 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 s. 7 s. 11(c) s. 11(d) Criminal Code s. 150.1(4) [rep. & sub. R.S.C. 1985, c. 19 (3rd Supp.), s. 1] s. 265(4) s. 271 [am. R.S.C. 1985, c. 19 (3rd Supp.), s. 10; 1994, c. 44, s. 19] s. 273.1(1) [enacted 1992, c. 38, s. 1] s. 273.1(2)(d) [enacted 1992, c. 38, s. 1] s. 273.2(b) [enacted 1992, c. 38, s. 1] s. 276(1) [rep. & sub. 1992, c. 38, s. 2] s. 276(2) [rep. & sub. 1992, c. 38, s. 2] s. 276(3)(a) [rep. & sub. 1992, c. 38, s. 2] s. 276(3)(d) [rep. & sub. 1992, c. 38, s. 2] s. 276(3) (f) [rep. & sub. 1992, c. 38, s. 2] s. 276(3)(h) [rep. & sub. 1992, c. 38, s. 2] s. 276.1(1) [enacted 1992, c. 38, s. 2] s. 276.1(2)(a)

[enacted 1992, c. 38, s. 2] s. 276.2(1) [enacted 1992, c. 38, s. 2] s. 276.2(2) [enacted 1992, c. 38, s. 2] s. 276.4 [enacted 1992, c. 38, s. 2] s. 486(3) [rep. & sub. 1997, c. 16, s. 6]

Authorities referred to Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 Minn. L. Rev. 763 Hogg, Peter W., Constitutional Law of Canada, 3rd ed. (Scarborough, Ont.: Carswell, 1992) (looseleaf) Paciocco, David M., "The New Rape Shield Provisions in Section 276 Should Survive Charter Challenge" (1993), 21 C.R. (4th) 223 Schiff, Stanley A., Evidence in the Litigation Process, 4th ed. (Scarborough, Ont.: Carswell, 1993)

Stuart, Don, Charter Justice in Canadian Criminal Law, 2nd ed. (Scarborough, Ont.: Carswell, 1996) Stuart, Don, "Sexual Assault: Substantive Issues Before and After Bill C-49" (1993), 35 C.L.Q. 241

APPEAL by the accused from his conviction for sexual assault.

Lawrence Greenspon and Judy Chan, for accused, appellant.

Renee M. Pomerance and Rosella Cornaviera, for the Crown, respondent.

Graham R. Garton, Q.C., for intervener, Attorney General of Canada.

Christine Boyle, for interveners, as friends of the court, Women's Legal Education and Action Fund, Canadian Association of Sexual Assault Centres, Disabled Women's Network Canada, National Action Committee on the Status of Women (appeared by factum only).

The judgment of the court was delivered by

MORDEN A.C.J.O.

MORDEN A.C.J.O.

MORDEN A.C.J.O.:—

Introduction

¶ 1 The appellant was convicted by Judge Blishen, in the Ontario Court (Provincial Division), of sexual assault and was sentenced to 9 months' imprisonment. He submitted that his intended defence was the complainant's consent and, alternatively, his honest belief that she consented. The major issue in this appeal is the constitutionality of what is known as the "rape shield" provision, s. 276 of the Criminal Code which was enacted by S.C. 1992, c. 38, s. 2 and came into force on August 15, 1992, and of related provisions which came into force on the same date.

¶ 2 The trial, which took place over several separated days, was largely concerned with the admissibility of evidence of the complainant's prior sexual activity with the appellant. The trial judge was required to rule upon the constitutionality, on Canadian Charter of Rights and

Freedoms grounds, of several provisions in the Criminal Code which relate to sexual assault. They were: s. 273.1(2)(d) (the statement of a condition relevant to the existence of consent); s. 273.2(b) (the statement of a condition relevant to the defence of the accused's belief that the complainant consented); several provisions in s. 276 (which, broadly, relates to the admissibility of evidence of the complainant's previous sexual activity, whether with the accused ***[page233]*** or any other person); s. 276.1(2)(a) (which provides for what must be stated in the application for a hearing under s. 276.2 to determine the admissibility of evidence of the complainant's previous sexual activity); and s. 276.2(2) (which provides that the complainant is not a compellable witness at the admissibility hearing).

¶ 3 The appellant's appeal from conviction is based on the submission that the trial judge erred in rejecting his constitutional challenges. I shall set forth the text of the impugned provisions later in these reasons when I consider the appellant's submissions.

The Trial Proceedings

¶ 4 An understanding of how the issues arose and were resolved in the trial court can only be gleaned from a review of the chronology of the steps and events in the proceeding.

¶ 5 By information sworn on November 20, 1992, the appellant was charged with committing a sexual assault on the complainant, contrary to s. 271 of the Criminal Code, on November 6, 1992. The Crown elected to proceed by indictment. On or about August 13, 1993, the appellant served and filed a "Notice of Application and Constitutional Issue" which stated, among other matters, that the appellant sought (1) a declaration that the Criminal Code provisions referred to above were unconstitutional and, (2) a stay of the proceedings.

¶ 6 On August 23, 1993 the appellant was arraigned, elected to be tried by a judge of the Provincial Division, and pleaded not guilty. The trial judge made a non-publication order under s. 486(3) of the Code. On August 24, 1993 counsel made their submissions on the constitutionality of the challenged sections.

¶ 7 On December 10, 1993, the trial judge ruled that, at that point in the proceeding, the timing of the application was premature because there was an insufficient factual basis for addressing the Charter challenges and, also, that the appellant lacked standing to challenge the impugned provisions without first establishing that the operation of these provisions disentitled him from adducing evidence that he was constitutionally entitled to adduce. The accused had not yet indicated that he wished to file an application under s. 276.1 of the Code. The trial judge concluded her ruling as follows:I find therefore firstly that the trial should commence, possibly with the ***[page234]*** complainant's evidence in-chief. Secondly, that the applicant must then, if he wishes, make an application pursuant to 276.1 that he's comfortable making, in an attempt to meet the requirements of that section. If the Court finds that the requirements of that section are not met and does not grant the application to hold a hearing under s. 276.2, then the applicant will have standing to argue that his rights have been violated in some way.If, on the other hand, the Court grants the application, a hearing must then be commenced under 276.2. Therefore, it will be necessary for the applicant to go through the arguments on the impugned sections step by

step, once he has standing and once there is a factual context within which to make those arguments.

¶ 8 On December 15, 1993, the defence served the Crown with "Notice of Application 'B'" and "Affidavit 'B'" of Judy Chan, a lawyer in defence counsel's firm. On December 16, 1993, the defence filed with the court "Notice of Application 'A'" and "Affidavit 'A'" of Judy Chan. Both applications were made under s. 276.1 of the Code.

¶ 9 On December 20, 1993, before any argument on the s. 276.1 applications, the complainant gave her evidence in-chief with respect to the alleged sexual assault. In her evidence she said that she had had a prior sexual relationship with the appellant.

¶ 10 Also, on December 20, 1993, the trial judge addressed the s. 276.1 applications. The material served on the Crown, the "B" Notice, did not in any way outline the detailed particulars of the evidence that the appellant was seeking to adduce. The appellant submitted to the trial judge that to provide specific detailed particulars as required by s. 276.1(2)(a) would be to breach his rights to remain silent and not to disclose his defence, protected under ss. 7 and 11(c) and (d) of the Charter.

¶ 11 The trial judge held that the requirement in s. 276.1(2)(a) for particulars did not breach the appellant's Charter rights. She then said:However, in considering the nature of the particulars to be outlined in the s. 276.1 application, it is also necessary for the court to consider the factors outlined in s. 276(2) as to whether or not the evidence as outlined is capable of being admissible.The accused also challenges s. 276(2) (a) and (c) as being contrary to the accused's Charter rights and also challenges the factors which must be considered under s. 276(3)(d) and (f), and in general, s. 276(1)(a) and (b). ***[page235]*** It is, therefore, necessary to rule on the constitutionality of these particular sections before requiring the more detailed notice under s. 276.1(2) to be provided to the Crown and to the court, as it must.At this particular point in time, I am not prepared to rule on the constitutionality of those sections and will reserve with respect to those particular sections to a later date.

¶ 12 On February 3, 1994, the trial judge delivered extensive reasons for her decisions to uphold the validity (in this order) of ss. 276(1)(a) and (b), 276(2)(a) and (c), 276(3)(d) and (f), 273.1(2)(d), and s. 273.2(b). Her reasons for decision are reported in 17 O.R. (3d) 481 and, sub nom. R. v. D. (A.S.), in 28 C.R. (4th) 201.

¶ 13 On May 10, 1994, the appellant served and filed a new s. 276.1 application. On May 17, 1994, the trial judge gave her ruling on this application [summarized 24 W.C.B. (2d) 391]. She noted that she had ruled on December 20, 1993 that s. 276.1(2)(a) was valid. She found that the requirements in s. 276.l(2)(a) for detailed particulars had been met. She concluded:Therefore, the accused has satisfied me, on this preliminary application, that the evidence under the aforementioned paragraphs as to the previous sexual conduct of the complainant in her relationship with the accused is "capable of being admissible" under s. 276.1(4)(c). Clearly, there is a necessity for evidence on the voir dire as to whether it is admissible. I would agree with the Crown that we do not yet have the full picture. I do find that the accused has met the s. 276.1

requirements, and the defence can now proceed to the hearing under s. 276.2 to determine whether the evidence will indeed be admissible at trial.

¶ 14 Also, on May 17, 1994, the trial judge dealt with a challenge to the constitutional validity of s. 276.2(2) which provides that the complainant is not a compellable witness at the s. 276.2 hearing. She ruled that this provision was not a breach of the appellant's rights under ss. 7 or 11(c) of the Charter [summarized 24 W.C.B. (2d) 378].

¶ 15 On May 30, 1994, the trial judge made rulings with respect to the procedure to be followed under s. 276.2. She confirmed what she had indicated in her May 17 ruling on s. 276.1(2)(a) that s. 276.2 requires "some direct evidence to be led" -- that is, it would not be sufficient if an information and belief affidavit were filed (an affidavit of this kind sworn by Ms. Chan had been filed) or if defence counsel stipulated what the evidence would be [summarized 24 W.C.B. (2d) 392]. ***[page236]*** [16] The trial judge also ruled that the onus was on the accused and that the standard of proof was on the balance of probabilities. Finally, she ruled that if the accused proceeded with the s. 276.2 voir dire and gave evidence, the Crown was entitled to cross-examine him.

[17] The appellant deferred embarking on the s. 276.2 hearing. The cross- examination of the complainant took place on June 30, 1994. Near the end of the cross-examination it appears that counsel wished to put questions to the complainant relating to her previous sexual activity. The complainant was excused from the courtroom and the trial judge ruled that the matter was "governed by the requirements of s. 276.2". The appellant then proceeded to a s. 276.2 hearing.

[18] The appellant sought to rely on the evidence of the complainant given in- chief and on cross-examination, and on his affidavit which was sworn on June 2, 1994. Despite the May 30 ruling, counsel for the accused would not accede to the Crown's request to cross-examine the accused on his affidavit. The trial judge ruled as follows:In conclusion, given the fact that the accused has not been cross-examined on any of the facts alleged in his affidavit in support of the 276.2 application, as a trier of fact I am unable to find on a balance of probabilities that the evidence of prior sexual conduct that the accused seeks to adduce through cross-examination or otherwise, as outlined in paragraph 2 of his application, is admissible in considering the requirements of Section 276(2) as to relevance and significant probative value along with the other factors outlined in subsection (3).

[19] The Crown closed its case. The appellant did not testify or call any evidence and made no submissions to the trial judge.

[20] In her reasons for conviction the trial judge accepted the uncontradicted evidence of the complainant and found that all elements of the offence had been proven.

The Constitutional Issues

[21] The heart of this appeal is the constitutionality of the impugned parts of s. 276 of the Code, as enacted by S.C. 1992, c. 38, s. 2. It provides rules governing the admissibility of evidence of

the complainant's previous sexual activity whether with the accused or any other person. It is an evidentiary provision.

[22] Part of the s. 276 scheme are two procedural provisions, ss. 276.1 and 276.2. They govern the procedures relating to the application of s. 276. ***[page237]***

[23] The appellant also challenges parts of ss. 273.1 and 273.2 which may be called substantive provisions in that they relate, respectively, to the meaning of "consent" of the complainant and to the accused's belief in the complainant's consent, more specifically, to an aspect of the mental element relating to the offence. These provisions were a part of what was enacted by S.C. 1992, c. 38, in s. 1, along with the other challenged provisions referred to above.

[24] It is useful, as a guide to understanding the purpose and principles underlying all of these provisions to have regard to the preamble to S.C. 1992, c. 38. It reads:WHEREAS the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children;WHEREAS the Parliament of Canada recognizes the unique character of the offence of sexual assault and how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada;WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the Canadian Charter of Rights and Freedoms;WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;WHEREAS the Supreme Court of Canada has declared the existing section 276 of the Criminal Code to be of no force and effect;AND WHEREAS the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence . . .

[25] As is indicated in this preamble and well known, S.C. 1992, c. 38, is Parliament's response to the invalidation by the Supreme Court of Canada in R. v. Seaboyer (1991), 66 C.C.C. (3d) 321, of the predecessor to the current s. 276, which was originally enacted by S.C. 1980-81-82-83, c. 125, s. 19. (For later versions see R.S.C. 1985, c. C-46, s. 276 and R.S.C. 1985, c. 19 (3rd Supp.), s. 12.) The Supreme Court in Seaboyer held that the former s. 276 infringed the principles of fundamental justice and the right to a fair trial by limiting the admissibility of evidence which could be necessary for an accused to make full answer and defence. ***[page238]***

[26] The logical order in which to consider the challenges is to deal with the evidentiary provision, s. 276, first. As indicated, it is the major issue in this appeal. This will be followed by a consideration of the challenged procedural provisions in ss. 276.1 and 276.2. Finally, I shall address the challenges to the substantive provisions in ss. 273.1 and 273.2. I shall set forth the impugned provisions in their immediate context, italicizing the particular provisions themselves.

Section 276(1)

[27] This provision reads: 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.

[28] As I have indicated, in Seaboyer the Supreme Court of Canada held that the predecessor to the current s. 276 of the Criminal Code, s. 276 of R.S.C. 1985 c. C-46, amended by R.S.C. 1985, c. 19 (3rd Supp.) s. 12, which prohibited the admission of evidence of previous sexual conduct in trials of sexual assault charges, except in limited circumstances, was unconstitutional because it infringed principles of fundamental justice (Charter, s. 7) and the right to a fair trial (Charter, s. 11(d)). The effect of the legislation was to prevent the trier of fact from considering relevant and legitimate evidence that could raise a reasonable doubt. Accordingly, it deprived an accused of the right to full answer and defence.

[29] McLachlin J., who gave the majority judgment of the court, held that striking down s. 276 did not revive the common law rules of evidence which permitted liberal and inappropriate reception of evidence of a complainant's previous sexual conduct. She adapted the common law to conform to current reality and set forth "the applicable principles" of the "new" common law. I shall refer to some of these principles in what follows in these reasons.

[30] McLachlin J. said at p. 406:As all counsel on these appeals accepted, the reality in 1991 is that evidence ***[page239]*** 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.

[31] The first principle which she proposed, at p. 409, reads: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.

[32] It must be accepted, particularly in a case concerned with the constitutionality of legislation, that the principles espoused by McLachlin J. were, in her view, in accord with all relevant constitutional requirements. The critical question is the meaning and scopeof s. 276(1) and whether, properly interpreted, it is in accord with the principle set forth above.

[33] The appellant submits, quite simply, that s. 276(1) contains "a blanket prohibition" against evidence of the complainant's previous sexual activity on the issues of consent and credibility and, as such, is more Draconian than the law invalidated in Seaboyer. With respect, I think that this is an incorrect interpretation of the provision. It should be interpreted in the context of what is said in Seaboyer, particularly in light of the preamble to the 1992 legislation. If the provision

is reasonably capable of being read as having a meaning that renders the provision constitutional, then this is the meaning that should be ascribed to it.

[34] The first principle is drawn to exclude resort to evidence of previous sexual activity on the basis of the reasoning underlying the "twin myths" -- i.e., that an unchaste woman is more likely to have consented and is less credible. Evidence of sexual conduct "in itself" (p. 406) cannot be regarded as logically probative of either the complainant's consent or lack of credibility. Inferences "solely" for these purposes are invalid and have no place in our law.

[35] While the wording in s. 276(1) is not, in all respects, the same ***[page240]*** as that in the principle in Seaboyer, it has, in my view, the same meaning. In this regard, I think that the phrase "by reason of the sexual nature of that activity" in the section has the same purpose as "solely to support the inference that the complainant is by reason of such conduct" in the judgment. Both are intended to prohibit the admissibility of evidence sought to be admitted for the purpose of drawing either of the twin myth inferences.

[36] In using the words "is not admissible to support an inference that" it is clear that Parliament contemplated the concept of potential multiple relevance and limited admissibility and intended to prohibit absolutely one particular use only of the evidence -- the use for twin myth purposes. Admissibility of the evidence for other uses will fall to be decided under subsection (2). In this regard, reference may be made to s. 276.4, which reads: 276.4 Where evidence is admitted at trial pursuant to a determination made under section 276.2, the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

[37] When s. 276(1) is read this way, it does not contravene either ss. 7 or 11(d) of the Charter. It does not exclude evidence which may fairly be called relevant and probative. The exclusion of evidence which is not relevant and probative cannot be considered to be a breach of constitutional rights.

[38] The foregoing analysis is that of the trial judge who relied on the useful article by Professor Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive Charter Challenge" (1993), 21 C.R. (4th) 223, in coming to her conclusion. Cameron J.A., speaking for a majority of the Saskatchewan Court of Appeal in R. v. Ecker (1995), 96 C.C.C. (3d) 161, referred to this article at p. 180 and said: ". . . generally speaking I believe it contains an accurate analysis of what was intended by these provisions". See also R. v. Majid (1995), 98 C.C.C. (3d) 263 (Sask. C.A.), affirmed (1996), 105 C.C.C. (3d) 96 (S.C.C.).

[39] Although this analysis is not referred to in the judgment of the Supreme Court of Canada in R. v. Crosby (1995), 39 C.R. (4th) 315, 98 C.C.C. (3d) 225 (in which the constitutionality of the legislation was not raised (see p. 319)), the reasons of L'Heureux-Dube J., for the court, reflect an approach to s. 276 which is fully in accord with it. In Crosby the court held that the trial judge in that case had ***[page241]*** erred in refusing to admit a prior inconsistent statement of the complainant to the effect that she had engaged in consensual sexual intercourse with the accused three days before the alleged assault. It had significant probative value on the issue of the complainant's credibility.

[40] L'Heureux-Dube J., at p. 324, expressed her general approach to s. 276 as follows: "Section 276 cannot be interpreted so as to deprive a person of a fair defence." This is a complete answer to the appellant's interpretation.

[41] R. v. Crosby was applied by this court in R. v. Harris (1997), 118 C.C.C. (3d) 498. Moldaver J.A. for the court said at p. 512:To interpret s. 276 of the Code in a manner that would foreclose the appellant from attempting to rebut this crucial evidence [the complainant's evidence respecting the relationship between the accused and herself] would be to deprive him of his right to make full answer and defence.

[42] Following this he said at pp. 512-513: Accordingly, I am satisfied that once the complainant testifiedin-chief, the proposed evidence became relevant and highly probative of the issue of credibility. The probative value of the evidence did not depend upon resort to the now debunked myths suggesting some connection between prior sexual activity and a lack of veracity but in its ability to contradict specific evidence given by the complainant that was central to her version of the relevant events. A sharp warning from the trial judge that the evidence of the Tuesday night incident could only be used to assess the complainant's credibility in relation to the specific events forming the subject-matter of the charge and not to draw the general inferences that she was more likely to have consented or that she was less worthy of belief would have overcome any possible prejudice resulting from its admission.

[43] The appellant has also submitted that the prohibition in s. 276(1) respecting evidence of sexual activity "with the accused" is a new feature in the legislation which is unconstitutional. I gather that, in this regard, the provision is unlike the "rape-shield" legislation in other jurisdictions. It must be noted, however, that this feature follows the guidelines in Seaboyer (seepp. 408 and 409) which I have said must be taken to be constitutional. Quite apart from this, the reasons given by McLachlin J. at p. 408 questioning "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" are unanswerable.

[44] It will likely be that evidence of previous sexual activity with ***[page242]*** the accused will satisfy the requirements of admissibility in s. 276(2) more often than that relating to sexual activity with others. This does not mean that this evidence should always be admissible. If this latter were the rule, it could result, in some cases, in twin myth reasoning. To subject evidence of previous sexual activity with the accused to the requirements of s. 276(2) does not result in any infringement of his constitutional rights.

Section 276(2)(a) and (c)

[45] These provisions, in their context, read: 276(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. [Emphasis added.]

[46] The appellant submits that the requirement in s. 276(2)(a) that the evidence be of specific instances of sexual activity compels the accused to give evidence contrary to s. 11(c). I do not see how the "specific instances" requirement would bring this about any more than a requirement of a general, unfocused, allegation would but, in any event, the accused's decision to give evidence would not be the result of any legal compulsion. I deal with this issue in my reasons relating to s. 276.2(2). I agree with the trial judge that the purpose of s. 276(2)(a) is to make "it clear that there will be an exclusion of what could be character evidence of a more general nature".

[47] The appellant submits that s. 276(2)(c) places undue restrictions on an accused's right to make full answer and defence and, accordingly, is contrary to ss. 7 and 11(d) of the Charter. I note that, apart from "significant" before "probative", and one or two other changes in wording, s. 276(2)(c) mirrors a portion of the second common law guideline in Seaboyer at p. 409. The appellant submits that "significant" places an inordinate burden on an accused's right to adduce defence evidence. ***[page243]***

[48] While it could be argued on the basis of case law that "significant probative value" places a greater burden on an accused than, for example, the relatively common expression "sufficient probative value" (see R. v. Yaeck (1991), 68 C.C.C. (3d) 545 (Ont. C.A.), leave to appeal denied [1992] 1 S.C.R. xii, 71 C.C.C. (3d) vii -- but see R. v. Scopelliti (1981), 63 C.C.C. (2d) 481 (Ont. C.A.) at 494 and 496), the expression is reasonably capable of being read as being in accord with the requirements of ss. 7 and 11(d) -- that is, as requiring no more than evidence which is, together with the other evidence, capable of enabling a reasonable jury properly instructed to have a reasonable doubt on the guilt of the accused. In this regard I would read the expression as making it clear 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. It is, likely, a recognition that, by reason of the inherent nature of the prejudice which will inevitably flow from the reception of evidence of the complainant's sexual activity, the s. 276(2)(c) test for admission will not be met unless the probative value is significant. I refer, again, to L'Heureux- Dube J.'s general statement at p. 324 in Crosby: "Section 276 cannot be interpreted so as to deprive a person of a fair defence."

Section 276(3)(d) and (f)

[49] These clauses, in their context, read: 276(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account. . . . . (d) the need to remove from the fact-finding process any discriminatory belief or bias;. . . . . (f) the potential prejudice to the complainant's personal dignity and right of privacy; [Emphasis added.]

[50] These are but two clauses of eight in a subsection which provides for factors which the judge is to "take into account" in deciding admissibility questions under s. 276(2). The first

clause, (a), provides for "the interests of justice, including the right of the accused to make a full answer and defence"; and the final clause, (h), provides for "any other factor that the judge . . . considers relevant".

[51] The appellant submits that clauses (d) and (f) render the accused's right to make full answer and defence subservient to the interests of the complainant and society. ***[page244]***

[52] I interpret clause (d) as an attempt to remove from the fact-finding process evidence which is based on prejudicial or stereotypical thinking, that is, on views which have no place in a rational and just system of law (Seaboyer at p. 406). Excluding evidence of this kind could not cause a trial to be unfair.

[53] Clause (f), as do others, expresses an important value bearing on the exercise of the discretion provided for in s. 276(2). It undoubtedly relates to the injunction in Seaboyer at p. 408 that the trial judge is to assess the proffered evidence "with a high degree of sensitivity". I refer, also, to the following observation of L'Heureux-Dube J. in R. v. Crosby at 324:[I]t is evident from the majority's remarks in Seaboyer and from the criteria enumerated in s. 276(3) that judges must undertake a balancing exercise under s. 276 that is sensitive to many differing, and potentially conflicting, interests.

See also R. v. Santocono (1996), 28 O.R. (3d) 630 (Ont. C.A.) at 634 with respect to s. 276(3)(f) making "[h]umiliation to the complainant and intrusion into her privacy . . . proper factors to consider".

[54] It might be noted, generally, that the factors in clauses (d) and (f) are not new ones in the admissibility assessment. With respect to clause (d) judges do consider the potential of proposed evidence to mislead a jury or to be misused by it. With respect to clause (f), judges were always entitled to prohibit questions which were unfair in the sense that they unnecessarily embarrassed or humiliated witnesses.

[55] I cannot say that, on their face, either of clauses (d) or (f) are unconstitutional. Everything will depend on the particular use to which they and the other clauses are put in decisions made under s. 276(2). It may be that a decision could, depending on the particular facts and the judge's reasoning, 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. There is no basis for holding that the clauses, in themselves, are necessarily invalid. Cf. R. v. Corbett, [1988] 1 S.C.R. 670 at 692, 41 C.C.C. (3d) 385.

Section 276.1(2)(a)

[56] This provision, in its context, reads: 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). ***[page245]*** (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 . . . [Emphasis added.]

[57] The appellant submits that this provision infringes his right to remain silent as guaranteed by s. 7 of the Charter and also his right not to be compelled to be a witness in proceedings against him as guaranteed by s. 11(c) of the Charter.

[58] In my view, the trial judge correctly rejected this submission. While it may be that the effect of the provision is to cause an accused to furnish to the Crown particulars which relate to his defence, by reason of the legal context in which this takesplace this does not involve an infringement of the constitutional rights asserted. Since the purpose of the provision is obviously not self-incriminatory, it does not provide for a process against which the Charter was designed to protect. See R. v. S. (R.J.), [1995] 1 S.C.R. 451 at 537-38, 96 C.C.C. (3d) 1. Clearly, the purpose of the provision is to frame the evidentiary inquiry and avoid, to the extent possible, an inquiry which would defeat the very purpose of the section, the unwarranted invasion of the complainant's privacy.

[59] There are other kinds of issues with respect to which an accused person's right to remain silent is not infringed by an obligation to disclose a defence. One example is the requirement that notice be given of an alibi defence: R. v. Cleghorn, [1995] 3 S.C.R. 175 at 189-90, 100 C.C.C. (3d) 393. Another is where the defence alleges that the Crown has made inadequate disclosure. If the Crown is unaware of the potential relevance of material in its possession which the accused submits is potentially relevant, the accused has an obligation to establish a basis for concluding that there is a reasonable possibility that the material would be useful in making full answer and defence: R. v. Chaplin, [1995] 1 S.C.R. 727 at 743-45, 96 C.C.C. (3d) 225. This could involve disclosure of the defence.

[60] There are other situations in which there may be an obligation to disclose a defence. I refer to the case where the accused wishes to lead evidence of previous acts of violence of the deceased, the "Scopelliti" defence (R. v. Ryan (1989), 49 C.C.C. (3d) 490 (Nfld. C.A.) at 500), and to the obligation of the defence to reveal evidence ***[page246]*** on a Corbett application to have all or part of the accused's criminal record excluded (R. v. Underwood, a judgment of the Supreme Court of Canada released January 22, 1998) [reported 121 C.C.C. (3d) 117].

[61] I refer also to Michigan v. Lucas, 500 U.S. 145 (1991), which held that the refusal to admit evidence of previous sexual conduct between the complainant and the defendant by reason of the failure of the defendant to comply with a "rape shield" statutory requirement of notice was not necessarily unconstitutional. At p. 150 O'Connor J. said for the court:We have upheld notice requirements in analogous settings. In Williams v. Florida, 399 U.S. 78 (1970), for example, this Court upheld a Florida rule that required a criminal defendant to notify the State in advance of trial of any alibi witnesses that he intended to call. The Court observed that the notice requirement "by itself in no way affected [the defendant's] crucial decision to call alibi witnesses . . . At most, the rule only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial." Id., at 85. Accelerating the disclosure of this evidence did not violate the Constitution, the Court explained, because a criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played." Id., at 82. In a subsequent decision, the Court described notice requirements as "a salutary development which, by increasing the evidence

available to both parties, enhances the fairness of the adversary system." Wardius v. Oregon, 412 U.S. 470, 474 (1973).

[62] As the trial judge noted, requiring a party, as a first step in the procedure to obtain a ruling on the admissibility of proposed evidence, to furnish an outline of that evidence to the court is in accord with established trial procedures and a requirement that advance notice be given of the evidence is similarly an accepted procedure. See R. v. Kutynec (1992), 70 C.C.C. (3d) 289 (Ont. C.A.), particularly at pp. 301-302.

[63] The trial judge also noted that in Seaboyer, although the court struck down the former s. 276, it did not comment adversely on the provision in that section (s. 276(2)(a)) which, as a condition of admissibility, required that "reasonable notice in writing has been given to the prosecutor by . . . the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced". In fact, McLachlin J. said at p. 408 of Seaboyer: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 reference is to Galvin ***[page247]*** "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 Minn. L. Rev. 763.] 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. [This is the function of the s. 276.1 application.] 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.

[64] The requirement of the statement of particulars of the evidence sought to be adduced does not amount to a compulsion on the accused to testify. This issue is dealt with in the next part of these reasons in relation to s. 276.2(2).

Section 276.2(2)

[65] This provision, in its context, reads: 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. [Emphasis added.]

[66] The appellant submits that this provision violates his right to full answer and defence and his right not to be compelled to testify. He submits that, where the evidence relates to the past sexual relations between the complainant and the accused, if the complainant is not compellable, the accused will have to testify in violation of s. 11(c) of the Charter. These arguments are based on the premise, which is antithetical to the purpose of s. 276, that an accused should have the right to cross-examine a complainant with respect to sensitive personal matters without establishing the relevance of the questions. More importantly, in relation to the constitutional issues, the arguments, are contrary to the principle in Seaboyer at p. 410 where McLachlin J. said: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.

[67] I do not read "third parties" to include the complainant and I note that McLachlin J. did not comment adversely on the provision in the former s. 276(3) which provided that the complainant was not a compellable witness at the admissibility hearing. ***[page248]***

[68] I agree with the following in the trial judge's reasons on this point:To permit the defence an opportunity to cross-examine the complainant on the voir dire, before the evidence has even been ruled admissible, would be to largely defeat the purpose, principles and philosophy of s. 276, s. 276.1 and s. 276.2. It would be to allow the defence a chance to question, probe and test the complainant's evidence and could well result in an undesirable attack on the privacy and dignity of the complainant, before the evidence had even been ruled admissible.

[69] With respect to the appellant's specific submission, it cannot be said that the provision, which places limits on the accused's rights on a voir dire to determine the admissibility of evidence, which he seeks to adduce, limits his right to full answer and defence. The accused himself must know what evidence he wishes to put before the court and he can do this without the need to call the complainant -- unless his real purpose is to conduct a "fishing expedition".

[70] If the accused chooses to testify at the s. 276.2 hearing he does so, not under a legal compulsion contrary to s. 11(c) but, rather, a tactical one: R. v. Boss (1988), 46 C.C.C. (3d) 523 (Ont. C.A.) at 542.

[71] In this part of the case the appellant also submitted that the trial judge erred when she ruled that he was obliged to submit to cross-examination on his affidavit as a necessary part of the s. 276.2 hearing. With respect to decisions to the contrary (R. v. McMullen, a judgment of the Ontario Court (Provincial Division) released November 10, 1992 [summarized 19 W.C.B. (2d) 595] R. v. Morrison, a judgment of the Ontario Court (General Division) released December 14, 1992 [summarized 20 W.C.B. (2d) 544] and R. v. Mohamed (1993), 85 C.C.C. (3d) 182 (Ont. Ct. (Gen. Div.)), I think she was clearly right on this point. A trial judge in addressing the probative value limb of s. 276(2)(c) must take credibility into account in order to arrive at a proper conclusion. An untested affidavit may not provide a sufficient basis to carry out the statutory mandate.

[72] The cross-examination during this hearing must, of course, be confined to what is necessary to determine the application, that is, to determine whether the proposed evidence is admissible under s. 276(2).

[73] Related to the foregoing, the trial judge did not err in giving ***[page249]*** little or no weight to the untested affidavit in her decision on the application: R. v. Lovie (1995), 100 C.C.C. (3d) 68 (Ont. C.A.) at 85-88 and Schiff, Evidence in the Litigation Process, 4th ed. (Scarborough, Ont.: Carswell, 1993), vol. 2, at pp. 294-5.

General Observation on the Requirements of ss. 276, 276.1 and 276.2

[74] I think it fair to say that the appellant's submissions have, generally, appeared to proceed on the assumption that procedures which depart from those normally followed when the defence seeks to tender evidence at trial over the objection of the Crown are unconstitutional. In response

to this it is worth observing that neither the common law nor the Charter require that any specific procedure be followed in determining the admissibility of evidence. The procedure followed may vary and may be adapted to protect any competing interests that may come into conflict when evidence is proffered at trial.

[75] The admission of evidence of the prior sexual activity of a complainant clearly infringes the complainant's privacy interests. These interests should be protected to the fullest extent possible while maintaining an accused's right to make full answer and defence. It is reasonable that the admissibility of this evidence be determined in accordance with a procedure which recognizes the legitimacy of the complainant's interests.

[76] The mere existence of procedures which recognize interests other than the accused's and provide for something less than an unrestricted opportunity to inquire into previous sexual activity does not give rise to any constitutional infringement. The governing question is -- do those procedures deny the accused the opportunity to make full answer and defence or otherwise infringe his constitutional rights?

Section 273.1(2)(d)

[77] This provision, in its context, reads: 273.1(1) Subject to subsection (2) and subsection 265(3),"consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question. (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where. . . . . (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity . . . [Emphasis added.] ***[page250]***

[78] The appellant submits that this provision is void for vagueness and, accordingly, in breach of the principles of fundamental justice (Charter, s. 7).

[79] In Professor Hogg's Constitutional Law of Canada, 3rd ed. (Scarborough, Ont.: Carswell, 1992) (looseleaf), vol. 2 at p. 44-44, the values protected by the doctrine are set forth:A vague law offends two values that are fundamental to the legal system. First, the law does not provide fair notice to persons of what is prohibited, which makes it difficult for them to comply with the law. Secondly, the law does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement.

[80] In R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 639-40, 74 C.C.C. (3d) 289, Gonthier J. dealt with the constitutional standard as follows: A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate.

[81] Section 273.1(2)(d) clearly satisfies the constitutional standard, particularly when it is read, as it should be, in the context of the entirety of s. 273.1. In my view, it does not give rise to any real debate on its meaning. Accordingly, it is not necessary to enter into the niceties of an adequate basis for legal debate on meaning. The provision restates the existing common law that consent can be express or implied (Stuart, "Sexual Assault: Substantive Issues Before and After Bill C-49" (1993), 35 C.L.Q. 241 at 250).

[82] As part of his argument on this point, the appellant submitted that the conduct of the complainant may sometimes leave too much room for interpretation "so as to preclude the defence of consent". This is not an argument that the statutory language is imprecise but, rather, that its subject-matter, human conduct, may sometimes be equivocal. What is involved here is a question of fact (the existence of consent) and, with respect to it, the accused is not required to prove consent. Rather, the onus is on the Crown to prove non-consent beyond a reasonable doubt. The doctrine of vagueness has nothing to do with this. ***[page251]***

Section 273.2(b)

[83] This provision, in its context, reads: 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matterof the charge, where. . . . . (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting. [Emphasis added.]

[84] The appellant submits that this provision is in breach of the Charter in two respects: (1) it creates an objective standard by which to judge an accused's conduct, contrary to the principles of fundamental justice in s. 7; and (2) it is in breach of s. 11(c) by placing an onus on the accused to testify in order to demonstrate that he took reasonable steps in the circumstances known to him at the time.

[85] With respect to the challenge based on s. 7, I am far from satisfied that sexual assault is one of those "very few" offences (R. v. Vaillancourt, [1987] 2 S.C.R. 636 at 653, 39 C.C.C. (3d) 118), which carries such a stigma that its mens rea component must be one of subjectivity. See Hogg, Constitutional Law of Canada (1992), looseleaf ed., vol. 2 at pp. 44-34 to 44-35. I say this because: it is an offence of general intent; it can be prosecuted by way of summary conviction; it is a generic offence which covers a broad range of conduct, some of which may be very minor comparedto other offences; there is no minimum penalty, the maximum penalty is 10 years, and within this range the sentence can be tailored to reflect the moral opprobrium of both the offence and the offender. See R. v. Creighton, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346, particularly at pp. 48-49, with respect to the offence of manslaughter.

[86] Further, I accept that the stigma characterization has been fairly criticized as being a most unstable one for making important constitutional decisions on the applicability of s. 7 of the Charter to the substantive elements of offences. See, for example, Hogg, Constitutional Law of

Canada (1992) looseleaf ed., at p. 44-35 and Stuart, Charter Justice in Canadian Criminal Law, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at p. 74.

[87] Notwithstanding the foregoing reservations, I am prepared to ***[page252]*** decide this issue on the basis that the offence of sexual assault carries with it a sufficient social stigma as to require a subjective fault requirement on the part of the accused person. In my view, notwithstanding s. 273.2(b), the offence is still largely one based on subjective fault -- at least to a level that would satisfy constitutional requirements.

[88] No doubt, the provision can be regarded as introducing an objective component into the mental element of the offence but it is one which, in itself, is a modified one. It is personalized according to the subjective awareness of the accused at the time. The accused is to "take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". In other words, the accused is not under an obligation to determine all the relevant circumstances -- the issue is what he actually knew, not what he ought to have known.

[89] In addition, while the provision requires reasonable steps, it does not require that all reasonable steps be taken, as it did in the first version of the bill (Bill C-49, s. 1) that resulted in s. 273.2 and as does s. 150.1(4) of the Criminal Code, which is referred to in the judgment of the Supreme Court of Canada in R. v. Hess; R. v. Nguyen, [1990] 2 S.C.R. 906 at 922 and 925, 59 C.C.C. (3d) 161. Clearly, "all reasonable steps" imposes a more onerous burden than that in s. 273.2(b). I, of course, do not intend to express any view on the constitutionality of s. 150.1(4).

[90] The subjective mens rea component of the offence remains largely intact. The provision does not require that a mistaken belief in consent must be reasonable in order to exculpate. The provision merely requires that a person about to engage in sexual activity take "reasonable steps . . . to ascertain that the complainant was consenting". Were a person to take reasonable steps, and nonetheless make an unreasonable mistake about the presence of consent, he or she would be entitled to ask the trier of fact to acquit on this basis.

[91] The extent to which the provision alters principles of liability underlying the offence of sexual assault is indicated in the reasons of McLachlin J. in R. v. Esau (1997), 116 C.C.C. (3d) 289 (S.C.C.) at 314. Although the statement is in a dissenting judgment I do not think that there is any proposition in the majority judgment of Major J. at variance with it. McLachlin J. said: ***[page253]*** A person is not entitled to take ambiguity as the equivalent of consent. If a person, acting honestly and without wilful blindness, perceives his companion's conduct as ambiguous or unclear, his duty is to abstain or obtain clarification on the issue of consent. This appears to be the rule at common law. In this situation, to use the words of Lord Cross of Chelsea in Morgan, supra, [[1976] A.C. 182] at p. 203, "it is only fair to the woman and not in the least unfair to the man that he should be under a duty to take reasonable care to ascertain that she is consenting to the intercourse and be at risk of a prosecution if he fails to take such care". As Glanville Williams, Textbook of Criminal Law (London: Stevens & Sons, 1978), at p. 101, put it: "the defendant is guilty if he realized the woman might not be consenting and took no steps to find out".

[92] Following this quotation, she said at pp. 314-15: I note that Parliament has affirmed this common sense proposition in enacting s. 273.2 of the Criminal Code of Canada which states that "[i]t is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where . . . the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". See also R. v. Darrach (1994), 17 O.R. (3d) 481 (Prov. Div.) [the judgment under appeal before this court]. The question is whether the defendant at bar, properly attentive to the issue of consent (i.e., not wilfully blind), could have, in light of the ambiguity, honestly concluded that the complainant had the capacity and was consenting to the sexual activity.

[93] Finally, having regard to the basic rationale underlying constitutionally mandated fault requirements that it is wrong to punish a person who is "morally innocent" (Reference re: Section 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 (S.C.C.) at 311), it is difficult to contemplate that a man who has sexual intercourse with a woman who has not consented is morally innocent if he has not taken reasonable steps to ascertain that she was consenting.

[94] With respect to the challenge to s. 273.2(b) based on s. 11(c), I say, quite simply, s. 11(c) has no application. There is no testimonial compulsion. Neither does s. 273.2(b) shift any onus onto the accused. It may be that this provision, and s. 265(4) of the Code (which is concerned with the "defence" of honest belief in consent in assault cases of any kind), will, in some cases, have the effect of placing a tactical or evidential burden on an accused person to adduce some evidence capable of raising a reasonable doubt. This does not involve any constitutional infringement. I refer to my reasons relating to s. 276.2(2). ***[page254]***

Disposition

[95] For these reasons, I would dismiss this appeal.

Appeal dismissed.