Court File No. 26564

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

HER MAJESTY THE QUEEN

RESPONDENT

AND

ANDREW SCOTT DARRACH

APPELLANT

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FACTUM OF THE INTERVENERS WOMEN'S LEGAL EDUCATION AND ACTION FUND, THE CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES, THE DISABLED WOMEN'S NETWORK CANADA AND THE NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN

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PART I - FACTS

1. The Interveners represent equality-seeking organizations, sexual assault counselling centres, advocates for women who experience intersecting and compounded forms of discrimination, and public interest groups which seek to further the rights of women in Canada. This intervention is based on their knowledge of the legal issues related to the prosecution of

sexual assault offences and the impact of sexual assault on the equality rights of women in Canada.

2. The Interveners rely on the facts as set out in Part I of the Respondent's Factum.

PART II - ISSUES

3. The Interveners submit that sections 276(1), 276(2)(c), 276.1(2)(a) and 276.2(2) of the *Criminal Code* do not infringe sections 7, 11(c) or 11(d) of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*). The Interveners submit that the first and third constitutional questions should be answered "no". It is therefore unnecessary to answer the second and fourth questions.

4. The Interveners further submit that the impugned sections are mandated by sections 15 and 28 of the *Charter*. It is submitted that in sexual assault cases, any analysis of fairness as provided for in sections 11(c) and 11(d) of the *Charter*, and the principles of fundamental justice as guaranteed by section 7, must incorporate the values and principles reflected in section 15.

PART III - ARGUMENT

A. General Equality Principles

5. As reaffirmed by this Court in recent cases, section 15 is one of the broadest guarantees in the *Charter*. It gives constitutional force to the goal of protecting and promoting the equal worth and dignity of, and equal respect for, all persons. This Court has rejected the formalistic notion that equality exists when persons similarly situated to each other are treated the same, and

has instead acknowledged that pre-existing conditions of social, political and legal oppression must be recognized and eliminated in order to achieve true equality.

> ...[The] purpose of section 15 of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society...The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to... conditions such as race and sex...

Eaton v. *Brant County Board of Education*, [1997] 1 S.C.R. 241 *per* Sopinka J. at paras. 66-67, cited in *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624 *per* La Forest J. at 673

> ...[The] equality guarantee in s.15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment... Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.

Law v. *Canada*, [1999] 1 S.C.R. 497 *per* Iacobucci J. at 530

6. In order for the values reflected in section 15 to be more than abstract ideals, they must be applied through the law. Where legislation is promulgated expressly to further the purposes of section 15 of the *Charter*, and that legislation is challenged on the basis of other sections of the *Charter*, section 15 is an essential element of the constitutional analysis.

> *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 *per* Dickson C.J. at 755-56, quoting *Singh* v. *Canada*, [1985] 1 S.C.R. 177 *per* Wilson J. at 218

B. Sexual Assault as a Practice of Inequality

7. Sexual assault is not like any other crime. It is one of the clearest expressions of women's subjugation and oppression on the basis of sex, and is closely linked with the overall inferior position of women in society. While not all women are sexually assaulted during the course of

their lives, all women live with the knowledge and fear that they could be. The threat of sexual assault is an ever-present one which influences a woman's daily life and autonomous choices including her mobility, activities and acquaintances.

> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* L'Heureux-Dubé J. (diss.) at 648-49

8. While all women are at risk of sexual assault, some are more targeted than others. Sexual assault is an abuse of power, and women who have, or are perceived to have, diminished social status by reason of, for example, race, sexual orientation, disability or poverty are more likely to be victims. Thus, sexual assault is often another incident of oppression along a continuum of disempowering and dehumanizing experiences. The negative impact of sexual assault is compounded for women who experience discrimination on grounds other than sex, in part because the criminal justice system has failed to protect them.

> Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) 43 *Stanford Law Review* 1241 at 1270-71
> M.L. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 *Ottawa Law Review* 71
> T. Nahanee, "Sexual Assault of Inuit Females: A Comment on 'Cultural Bias'" in R. Mohr and J. Roberts, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 192 at 199

C. The Law of Sexual Assault Pre-1992

9. The practice of sexual inequality in the context of sexual assault is reflected both in the commission of the offence and its prosecution. Historically, discriminatory beliefs about women have resulted in evidentiary and procedural rules which placed sexual assault complainants in a more disadvantaged position than complainants of any other offence. As L'Heureux-Dubé J. pointed out in *Seaboyer*:

> The common law has always viewed victims of sexual assault with suspicion and distrust. As a result, unique evidentiary rules were developed. The complainant in a sexual assault trial was treated unlike any other. In the case of sexual offences, the common law enshrined prevailing mythology and stereotype by formulating rules that made it extremely difficult for the complainant to establish her credibility.
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* L'Heureux-Dubé J. (diss.) at 665

10. For example, although evidence rules of general application permitted proof of an offence upon the uncorroborated evidence of a single witness, in sexual assault cases the common law required that juries be warned of the dangers of convicting without corroboration of the complainant's evidence on each material element of the offence. For some sexual offences corroboration was absolutely required.

> Rep. R.S.C. 1985, c. C-46, s. 274

11. The doctrine of recent complaint was premised on the assumption that a woman who had been sexually assaulted would disclose it at the first "reasonable" opportunity. A recent complaint was not admissible as proof of the truth of its contents, but to negate the adverse inference which could be drawn from the complainant's silence as a result of that assumption.

> *R.* v. *Timm*, [1981] 2 S.C.R. 315 *per* Lamer J. at 322
> Rep. R.S.C. 1985, c. C-46. s. 275

12. The character of the complainant, a consideration in assessing credibility, was defined for a sexual assault complainant by her past sexual history.

> Under the guise of a principled application of the legal concept of relevance, the common law allowed the accused to delve at great length into the moral character of the complainant by adducing "relevant" sexual history. The prejudicial impact of such an inquiry has already been discussed at length. The true nature and

> purpose of the inquiry into sexual history is revealed by the resulting prejudice and by the fact that these concepts were only applicable in respect of sexual offences and in addition, were not deemed relevant to the credibility of the male accused.
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* L'Heureux-Dubé J. (diss.) at 667

13. At common law, a complainant could be questioned about past sexual history with persons other than the accused, although the judge had the discretion to permit the complainant not to answer, and her responses were treated as collateral and could not be contradicted. A restriction on the use of past sexual history with persons other than the accused (s. 142 *Criminal Code*) was enacted to require that the accused provide notice and particulars of the evidence, which became admissible only upon determination at an *in camera* hearing. This provision was interpreted by the Court to require that the complainant answer questions concerning her past sexual history with other persons, and to allow contradiction of her testimony.

> Though the motives of Parliament were commendable, judicial interpretation of the section thwarted any benefit that may have accrued to the complainant. In fact, the provision, as judicially interpreted, provided less protection to the complainant than offered at common law, surely a surprising result concerning the obvious mischief Parliament intend to cure in enacting it.
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* L'Heureux-Dubé J. at 671
> R.S.C. 170 c. C-34 as am. 1974-75-76, c. 93, c. 8, s. 142.
> *R.* v. *Forsythe*, [1980] 2 S.C.R. 268 *per* Laskin C.J. at 274

14. Parliament then enacted sections 246.6 and 246.7 (subsequently sections 276 and 277) to prohibit sexual reputation evidence and restrict the admissibility of past sexual history evidence. In *Seaboyer*, the prohibition on sexual reputation evidence (s. 277) was upheld, but the restrictions on the use of past sexual history evidence in s. 276 were held to exclude potentially

relevant evidence, and the section was struck down. Following the *Seaboyer* decision, Parliament enacted *Bill C-49: An Act to Amend the Criminal Code (sexual assault)* [hereinafter "*Bill C-49*"], to govern the issue of admissibility of past sexual history evidence.

D. Constitutionality of *Bill C-49*

(a) Equality Focus of *Bill C-49*

15. The Interveners submit that the Preamble and the provisions of *Bill C-49* show a clear legislative intent to incorporate the principles of equality, fundamental justice and a fair trial into the substantive, procedural and evidentiary law relating to sexual assault.

10 *Bill C-49, An Act to amend the Criminal Code (sexual assault)*, 3d sess., 34th Parl., 1991-1992

16. In particular, the amendments to section 273 of the *Criminal Code* (substantive provisions relating to consent) promote equality by affirming the basic autonomy of all persons which includes the right to choose whether to engage in sexual activity. The past sexual history amendments (sections 276, 276.1, 276.2 and 276.3) also promote equality by refocusing sexual assault trials on evidence which is relevant to a material issue, rather than on discriminatory myths and stereotypes which distort the trial process. The evidentiary and procedural
20 amendments reflect Parliament's acknowledgment in the Preamble that sexual history evidence is "rarely relevant", "inherently prejudicial" and must therefore be subject to rigorous scrutiny.

Bill C-49, An Act to amend the Criminal Code (sexual assault), 3d sess., 34th Parl., 1991-1992

17. The amendments to s. 276 further provide that the probative value of evidence of the complainant's past sexual history must be balanced against the more general harm wrought by its admission, including the incorporation of discriminatory beliefs into the trial process (s.276(3)(d)), the underreporting of sexual assault offences (s.276(3)(b)), and the violation of the rights to security of the person and to the full protection and equal benefit of the law (s.276(3)(g)).

(b) Evidentiary and Procedural Provisions of *Bill C-49*

18. The evidentiary and procedural provisions of *Bill C-49* are designed to admit into evidence only that which is relevant and which, if admitted, would not significantly distort the truth-seeking purpose of the trial.

> If we accept, as we must, that the purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent, then it follows that irrelevant evidence which may mislead the jury should be eliminated insofar as possible. There is no doubt that evidence of the complainant's sexual activity has often had this effect.
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* McLachlin J. at 605

> It is fundamental to our system of justice that the rules of evidence should permit the judge and the jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence: see *Morris* v. *The Queen*, [1983] 2 S.C.R. 190. *R.* v. *Corbett*, [1998] 1 S.C.R. 670.
>
> *R.* v. *Seaboyer*, *supra*, *per* McLachlin J. at 609
> *R.* v. *Levogiannis*, [1993] 4 S.C.R. 475 *per* L'Heureux-Dubé J. at 486

19. Evidence is relevant if it has a tendency "as a matter of logic and human experience to prove a fact in issue". It is admissible subject to judicial discretion to exclude evidence which

will unduly prejudice, mislead or confuse the trier of fact.

R. v. *Corbett*, [1988] 1 S.C.R. 670 *per* La Forest J. (diss.) at 714-5

20. As L'Heureux-Dubé J. pointed out in *Osolin*, the definition of relevance as "whatever accords with common sense" invokes a subjective exercise, which is "particularly vulnerable to the application of private beliefs." The new provisions eliminate as far as possible the potential for discriminatory beliefs to influence determinations of relevance.

> Of their very nature, beliefs will inform notions of relevance. However, as they often function unconsciously, their effect can be unacknowledged and identifying them may be a difficult and elusive process. In recognition of this fact, Parliament in the amendments to the *Criminal Code*, has now expressly directed the judge to take into account...[the factors set out in section 276(3)]

R. v. *Osolin*, [1993] 4 S.C.R. 595 *per* L'Heureux-Dubé J. at p. 626-27

21. Parliament is entitled to make a legislative judgement as to whether evidence is relevant for certain purposes. In *Corbett*, La Forest J. held that in the absence of cogent evidence that Parliament was wrong in exercising its judgement, the fact that there is disagreement about the relevance of a particular kind of evidence is not fatal to the constitutionality of a legislative provision.

R. v. *Corbett*, [1988] 1 S.C.R. *per* La Forest J. (diss.) at 720.

22. Only those facts which are material to the determination of whether a sexual assault occurred are admissible. In order to ensure that the trial process is not distorted by the introduction of irrelevant and prejudicial evidence, *Bill C-49* includes evidentiary and procedural provisions to promote the truth seeking purpose of the trial.

i. Elements of Sexual Assault

23. In its unanimous decision in *R.* v. *Ewanchuk*, this Court identified the protection of personal autonomy, dignity and integrity as the rationale for criminalizing sexual assault.

> Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force.

10 *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 *per* Major J. at 348

24. With respect to the *actus reus*, three key elements were identified: touching; contact which is sexual in nature; and the absence of consent. This Court unanimously affirmed that consent is determined by reference to the complainant alone, either by direct evidence (her testimony) or other evidence of her verbal or non-verbal conduct.

25. In *Ewanchuk,* this Court also rejected the notion of "implied consent" and held that once the *actus reus* - non-consensual sexual touching - is established, the question of consent is no 20 longer in issue:

> [The] trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.

30

R. v. *Ewanchuk*, [1999] 1 S.C.R. 330 *per* Major J. at 349-50

26. The *mens rea* of sexual assault is proved by evidence beyond a reasonable doubt that the accused intended to touch the complainant and either (a) knew she was not communicating consent or (b) was reckless or wilfully blind to the absence of the expression of consent. This Court affirmed the availability of the defence of honest but mistaken belief in consent, provided that the belief is not excluded by the operation of law, or does not itself rest upon a mistake of law:

> In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant *communicated consent to engage in the sexual activity in question*. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence... [emphasis in original]
>
> [A] belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R.* v. *M.(M.L.)*, [1994] 2 S.C.R. 3. Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say he thought "no meant yes".
>
> *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 *per* Major J. at 354-55, 356

27. This Court's finding in *Ewanchuk* that consent, in order to be effective, must be communicated, and its explicit rejection of defences which are rooted in myths and stereotypes, interprets substantive sexual assault law in a manner consistent with sex equality. The Interveners submit that the constitutional review of the legislation in the case at bar should follow from the foundation laid in *Ewanchuk*.

ii. Scheme of the Evidentiary and Procedural Provisions

28. In his challenge to the constitutionality of sections 276(1), 276(2)(c), 276.1(2)(a) and 276.2(2) , the appellant argues for a narrow construction of sections 7, 11(c) and 11(d), which appears to equate the interests of the accused with the principles of fundamental justice and a fair trial. However, this Court has held that the rights protected by s. 7 and 11 of the *Charter* reflect societal interests which include those of the accused, but are not defined by them.

> It is true that s. 11 of the *Charter* constitutionalizes the right of an accused and not that of the state to a fair trial before an impartial tribunal. But fairness implies, and in my view, demands considerations also of the interests of the state in representing the public. Likewise, the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.
>
> *R.* v. *Corbett*, [1988] 1 S.C.R 670 *per* La Forest J. (diss.) at 745
> *R.* v. *Levogiannis*, [1993] 1 S.C.R. 475 *per* L'Heureux-Dubé J. at 475
> *R.* v. *L.(D.O.)*, [1993] 4 S.C.R. 419 *per* L'Heureux-Dubé at 453

29. In *R. v. Corbett*, La Forest J. concluded that one of the principles of fundamental justice in a criminal trial is the inclusion of relevant evidence - in the absence of a valid reason for excluding it - and the exclusion of irrelevant evidence. In *Corbett*, the accused's right to a fair trial was not infringed by the admission of relevant evidence, even though the evidence might have operated to the accused's disadvantage. In considering the content of fairness, this Court focused not only on the accused's interests, but also on the impact of the admission of the evidence on the trial as a whole. The Court concluded that exclusion of the evidence, while perhaps beneficial to the accused, would distort the fact finding process.

> *R.* v. *Corbett*, [1988] 1 S.C.R. 670 *per* Lamer C.J. at 698

30. Consistent with the approach in *Corbett*, in the context of sexual assault trials, fairness and principles of fundamental justice require the admission of only relevant past sexual history evidence. This is so despite the fact that irrelevant sexual history evidence may operate to the advantage of the accused.

> It is non-controversial to state that an accused does not have a constitutional right to adduce irrelevant evidence. To the extent that much, if not all, of the evidence excluded by the provision at issue here is irrelevant, there is no constitutional issue. Nor, in my view, does an accused have the right under the Charter, whether under the rubric of a right to a fair trial or the right to make full answer and defence, to adduce evidence that prejudices and distorts the fact-finding process at trial. As a corollary, neither do notions of a "fair trial" or "full answer and defence" recognize a right in the accused to adduce any evidence that may lead to an acquittal. Such propositions cast ss. 7 and 11(d) in an extremely narrow fashion and deny meaningful content to notions of "fairness" and "principles of fundamental justice".
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* L'Heureux-Dubé, J. (diss.) at 696

31. The evidentiary and procedural provisions of *Bill C-49* regulate the use of the complainant's past sexual history in a manner fully consistent with evidence rules of general application. In addition, they recognize and give effect to the complainants' rights not to be abused and denigrated in sexual assault trials. As Cory J. commented with respect to the new provisions in *R.* v. *Osolin*:

> These statutory provisions mirror the concern for the appropriate protection for the interest of complainants in sexual assault cases that were set forth in *Seaboyer*. Both the reasons of McLachlin J. and the new provisions of the *Code* suggest the factors which should be considered in limiting the scope of cross-examination of a complainant in a sexual assault trial. It cannot be forgotten that a sexual assault is very different from other assaults.
>
> *R.* v. *Osolin*, [1993] 4 S.C.R. 595 *per* Cory J. at 669

Section. 276(1)

32. Section 276(1) limits the purpose for which past sexual history evidence may be introduced. In restricting the use of past sexual history, Parliament has reflected the finding by this Court in *Seaboyer* that such evidence is irrelevant to the issues of credibility and consent. As McLachlin J. stated in her summary of the applicable principles:

> 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.
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* McLachlin J. at 633-4
> *R.* v. *Darrach* (1998), 38 O.R. 3d 1 (C.A.) at 12

33. Given that consent to any particular incident of sexual activity is the result of a discrete decision, no logical inference may be drawn between a woman's past consensual activity and her consent to activity on the occasion in question.

> These inferences were not based on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar.
>
> *Seaboyer*, [1991] 2 S.C.R. 577 *per* McLachlin J. at 604

34. Section 276(1) does not suffer from the constitutional deficiency in the predecessor section identified by the Court in *Seaboyer*. It does not bar all evidence of past sexual history, nor does it preclude cross-examination of the complainant on issues of consent and credibility.

Rather, it prohibits the use of past sexual history evidence which is not probative of any fact in issue. The fairness of a trial is not infringed by a prohibition on the admission of irrelevant evidence.

35. As this Court has held, when the defence of honest but mistaken belief in consent is not in issue, evidence of past sexual history will only rarely be relevant. In both *Dickson*, and *Crosby*, evidence that the complainant had a recent prior consensual relationship with the accused was not admissible on the issue of consent, although in *Crosby* it was admissible for another purpose.

10 *R.* v. *Crosby*, [1995] 2 S.C.R. 912 *per* L'Heureux-Dubé J. at 922-23
R. v. *Dickson,* [1994] 1 SCR 153
R. v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* McLachlin J. at 613
R. v. *Harris* (1997), 10 C.R. (5th) 287 (Ont. CA) at 299-300
R. v. *Santocono* (1996), 28 O.R. (3d) 630 (CA) at 637

Section 276(2)(c)

36. On the rare occasions when past sexual history of the complainant is relevant, s.276(2)(c) provides that the evidence is admissible only if it is of significant probative value and its use will not be substantially outweighed by prejudice to the administration of justice.

20

37. This provision is entirely consistent with evidence rules of general application which exclude relevant evidence on the ground that its admission would do more harm than good to the trial process. As Cory J. pointed out in *Osolin*:

> Despite its importance, the right to cross-examine has never been unlimited. It must conform to the basic principle that all evidence must be relevant in order to

> be admissible. In addition, the evidence must be weighed against its prejudicial effect.
>
> *R.* v. *Osolin*, [1988] 1 S.C.R. *per* Cory J. at 663-65, 667
> *R.* v. *Corbett*, [1988] 1 S.C.R. 670 *per* La Forest (diss.) at 714,715
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577, *per* L'Heureux-Dubé J. (diss.) at 206

38. In order to address the abuses of past sexual history evidence, Parliament enacted an explicit statutory provision requiring a balancing of the probative value and potential prejudice of this evidence. This provision was clearly contemplated by *Seaboyer*, in which this Court concluded that defence evidence which substantially prejudices the trial process may be excluded.

> The Canadian cases cited above all pertain to evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance found in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* McLachlin J. at 611

39. The incorporation into s. 276(2) of judicial discretion, which must be exercised in accordance with guidelines which reflect *Charter* values, prevents arbitrary exclusions of relevant past sexual history evidence and meets the constitutional requirement of fairness. These guidelines require consideration of the equality rights of women, fairness and the principles of fundamental justice when assessing the admissibility of evidence. Where a statutory provision

permits the exercise of judicial discretion in a manner consistent with the *Charter*, the provision is not unconstitutional.

> *R.* v. *L.(D.O.)*, [1993] 4 S.C.R. 419 *per* L'Heureux-Dubé at 419
> *R.* v. *Corbett*, [1988] 1 S.C.R. 670 *per* La Forest, J. (diss.) at 730, 744-46
> *R.* v. *Beare*, [1988] 2 S.C.R. 387 *per* LA Forest J. at 410
> *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 *per* Lamer C.J. at 875

10 40. The requirement that relevant evidence of past sexual history be of "significant" probative value does not impose an unfair burden on the accused. In *R.* v. *Scopelliti*, the Ontario Court of Appeal held that evidence which had the potential to arouse feelings of hostility against the victim, and thereby divert the trial process away from the guilt or innocence of the accused, must have significant probative value to be admissible. As Morden A.C.J.O. held in the present case:

> It [s. 276(2)(c)] 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.

20 *R.* v. *Darrach* (1998), 38 O.R. (3d) 1 (C.A.) at 16
R. v. *Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.) at 494-95
R. v. *Santocono* 28 O.R.(3d) 630 (C.A.) at 637

Section 276.1(2)(a)

41. Section 276.1(2)(a) addresses the s. 15 underpinnings of the legislation by providing a procedure to assess past sexual history evidence for relevance and potential prejudice. It meets the requirement in *Seaboyer* that the evidence must be evaluated to ensure its use for strictly legitimate purposes.

> ...the judge must assess with a high degree of sensitivity whether the evidence proffered
30 by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence. The examples

> presented earlier indicate that while cases where such evidence will carry sufficient probative value exist, they will be exceptional. The trial judge must ensure that evidence is tendered for a legitimate purpose and that it logically supports a defence. The fishing expeditions which unfortunately did occur in the past should not be permitted.
>
> *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 *per* McLachlin J. at 634

42. A requirement that the accused provide detailed particulars is designed to prevent both the fishing expeditions referred to in *Seaboyer* and the abuse of complainants through the improper use of past sexual history evidence. Furthermore, the assessment of relevance in accordance with the s.276(3) criteria cannot be made in a vacuum, but must occur with respect to specific evidence identified in a particular case. A requirement of particulars from an accused who seeks a ruling on the admissibility of proposed evidence is not unique to sexual assault law.

R. v. *Cleghorn*, [1995] 3 S.C.R. 175
R. v. *Kutynec* 24 C.R. (4th) 152 (Ont. C.A.)
R. v. *Chaplin*, [1995] 1 S.C.R. 727

Section 276.2(2)

43. Section 276.2(2) provides that, on a *voir dire* to determine the admissibility of past sexual history evidence, the complainant is not a compellable witness. The section does not infringe the accused's right against testimonial compulsion; this right protects an accused only against a legal requirement to give evidence. Section 276.2(2) does not compel the accused to give evidence, although it may require him to make a tactical choice as to which evidence to adduce. Furthermore, a s.276.2 application is made on a *voir dire* and the evidence given is not used to determine the guilt or innocence of the accused.

*R.*v. *Boss* (1988), 46 C.C.C. (3d) 523 (Ont. C.A.) at 542

44. As Morden A.C.J.O. held in the present case, the section does not infringe the accused's right to full answer and defence because the accused must know the evidence on which he relies:

> 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 that without the need to call the complainant - unless his real purpose is to conduct a "fishing expedition."

R. v. *Darrach* (1998), 38 O.R. (3d) 1 (C.A.) at 21

45. Furthermore, fairness and the principles of fundamental justice in a sexual assault trial include the complainant's right to equality, privacy and security of the person.

> The admission of evidence of the prior sexual history of the 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.

R. v. *Darrach* (1998), 38 O.R. (3d) 1 (C.A.) at 22

PART IV - ORDER REQUESTED

46. The Interveners therefore submit that the impugned provisions do not infringe sections 7, 11(c) and 11(d) of *the Charter* and respectfully request that the Appellant's appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS NOVEMBER 3, 1999.

Elizabeth Thomas per CRM

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PART V - AUTHORITIES

CASES

STATUTES

ARTICLES