THE *CHARTER* AND THE RAPE SHIELD PROVISIONS OF THE *CRIMINAL CODE*: MORE ABOUT RELEVANCE AND THE CONSTITUTIONAL EXEMPTIONS DOCTRINE

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I. INTRODUCTION

There has been an appreciable amount written about the constitutionality of sections 276[1] and 277[2] of the *Criminal Code of Canada*, the so-called "rape shield" provisions.[3] The issue has also received treatment by a variety of courts.[4] The amount of ink spilled and the

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[1] R.S.C. 1985, c. C-46, formerly s. 246.6, *as am.* S.C. 1987, c. 24, s. 12.

[2] R.S.C. 1985, c. C-46, formerly s. 246.7, *as am.* S.C. 1987, c. 24, s. 13.

[3] D. Doherty, *"Sparing" the Complainant "Spoils" the Trial* (1985), 40 C.R. (3d) 55; T. Brettel Dawson, *Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance* (1987-88) 2 C.J.W.L. 310; C. Boyle *et al.*, A FEMINIST REVIEW OF CRIMINAL LAW (Ottawa: Minister of Supply and Services, 1985) at 111-13; D.M. Paciocco, *The Constitutional Right to Present Evidence in Criminal Cases* (1985) 63 CAN. BAR REV. 519; and *more generally see* D.M. Paciocco, CHARTER PRINCIPLES AND PROOF IN CRIMINAL CASES (Toronto: Carswell, 1987) at 113-242 [hereinafter Paciocco, CHARTER PRINCIPLES].

[4] *Re Seaboyer and The Queen; Re Gayme and The Queen* (1987), 61 O.R. (2d) 290, 58 C.R. (3d) 289 (C.A.), leave to appeal to S.C.C. granted, [1988] 1 S.C.R. xiii [hereinafter *Re Seaboyer* cited to O.R.]; *R.* v. *Wald* (1989), 94 A.R. 125, [1989] 3 W.W.R. 324 (C.A.) [hereinafter *Wald* cited to A.R.]; *R.* v. *LeGallant* (1985), 47 C.R. (3d) 170 (B.C.S.C.), overruled [1986] 6 W.W.R. 372, 54 C.R. (3d) 46 (B.C.C.A.) [hereinafter *LeGallant* cited to W.W.R.]; *R.* v. *Bird and Pebbles* (1984), 40 C.R. (3d) 41 (Man.Q.B.), application to quash on other grounds granted (1984), 27 Man. R. 241, 12 C.C.C. (3d) 523 (C.A.); *R.* v. *Brun* (1986), 71 N.B.R. (2d) 295, 28 C.C.C. (3d) 396 (Q.B.T.D.) [hereinafter *Brun* cited to N.B.R.]; *R.* v. *Coombs* (1985), 56 Nfld & P.E.I.R. 152, 23 C.C.C. (3d) 356 (Nfld S.C.T.D.) [hereinafter *Coombs* cited to Nfld & P.E.I.R.]; *R.* v. *Oquataq* (1985) 18 C.C.C. (3d) 440 (N.W.T.S.C.) [hereinafter *Oquataq* cited to C.C.C.]; *R.* v. *Mickunas*, [1985] B.C.W.L.R. 4309 (S.C.); *R.* v. *Wiseman* (1985), 22 C.C.C. (3d) 12 (Ont. Dist. Ct) [hereinafter *Wiseman* cited to C.C.C.].

disparate conclusions arrived at by appellate level courts[5] in this country mask the fact, however, that the issues related to the constitutional integrity of the provisions are fairly straightforward. Do the provisions deprive accused persons of evidence that could raise a reasonable doubt about their guilt, and, if so, does the *Charter* do anything about it?

I am satisfied, as are the overwhelming majority of courts and commentators, that the *Charter* does indeed have something to say about rules which allow accused persons to be convicted despite the existence of a reasonable doubt,[6] and I am perfectly prepared to concede that I have arrived at that conclusion by applying "the methodological assumptions of the liberal legal paradigm".[7] After all, the legal rights provisions of the *Charter* unequivocally constitutionalize that paradigm. The accusatorial system which gave genesis to, and provides the specific definition for,[8] these *Charter* provisions takes its very essence from concerns about the liberty of individuals to be as free as possible from state intrusion in the form of prosecution, conviction and punishment.[9] While there are problems of definition related to the constitutional rights in question which I will attempt to address, there is virtually no doubt about their existence.

The primary ground of controversy concerns whether the impugned sections, 276 and 277, do in fact deprive accused persons of the opportunity to present a full answer and defence. This turns on the question of whether the provisions deprive accused persons of evidence which might, in a particular case, be probative. A secondary controversy relates to the appropriate constitutional remedy, if this proves to

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[5] *Wald, ibid.*, held that section 246.6 (now 276) was unconstitutional and was of no force or effect. *Re Seaboyer, ibid.*, also found that the provision was unconstitutional but held that it could stand. In certain cases, however, the *Charter* would require that accused persons be allowed to call evidence that the section would otherwise prohibit. In *LeGallant, ibid.*, the Court held that the provision represented a fair balance of competing interests and was therefore constitutional as applied in all cases.

[6] *See* Paciocco, CHARTER PRINCIPLES, *supra*, note 3.

[7] T. Brettel Dawson, in her thoughtful article, *supra*, note 3 at 316-17, described my work in the area as exemplifying the liberal legalist approach, and criticized it on the basis that it represents a perspective within a faulty paradigm which has been constructed without reference to women or in a way that excludes them.

[8] *See Reference Re Section 94(2) of the Motor Vehicles Act (B.C)*, [1985] 1 S.C.R. 486, 24 D.L.R. (4th) 536 [hereinafter *Re Section 94(2)* cited to S.C.R.]. For a general discussion of the origins and nature of the legal rights provisions, *see* Paciocco, CHARTER PRINCIPLES, *supra*, note 3 at 50-76 and 107-18.

[9] For an interesting discussion of the nature and origins of the adversary or accusatorial system, *see* E. Ratushny, SELF-INCRIMINATION IN THE CANADIAN CRIMINAL PROCESS (Toronto: Carswell, 1979) at 10-24.

be true. In the course of examining these general issues I will come to the following conclusions. First, the concept of relevance that is applied in determining questions of admissibility provides for the admission of evidence where it has the potential to cause a reasonable person to find the proposition advanced by the party tendering the evidence more appealing in the presence of that evidence than in its absence. Second, I will conclude that in at least some circumstances, which in my view will be relatively uncommon, section 276 and possibly section 277, depending on how the latter provision is interpreted, would require the exclusion of evidence which satisfies that definition and which might well be probative enough to raise a reasonable doubt. Third, I will suggest that the constitutional regime for addressing this problem should be found to rest in section 7 of the *Charter* and not in subsection 11(d) nor in a combination of the two provisions. Fourth, I will conclude that section 1 cannot be used to save the provisions because the deleterious effect to particular accused persons caused by the *Charter* violation is too extreme to justify, even in light of the policy considerations which inspired the sections. Finally, I will examine the constitutional exemptions doctrine pursuant to which a statutory provision which may produce unconstitutional results in some but not all of its applications is saved from becoming inoperative, and I will conclude that sections 276 and 277 are not appropriate candidates for its application. Before engaging in the substantive discussion, however, it is necessary, in my view, to address a number of preliminary questions which have served on occasion to cloud the issues.

A. *Do Sections 276 and 277 Remove a Special Regime, or Create One?*

There is no doubt that indefensible beliefs about human conduct and female sexuality have inappropriately influenced both law and practice in the prosecution of sexual offences against women. This is a common theme in feminist literature.[10] It has been said that male lawmakers identified with persons accused of such crimes, rather than with the female complainant, and became absorbed with the spectre of false charges against innocent suspects, and that this fear has not been prevalent with respect to other kinds of offences. It is argued that this "distrust and suspicion" has led to a number of legal rules which provide specialized treatment for those accused of sexual off-

[10] *See, e.g.*, C. Boyle, SEXUAL ASSAULT (Toronto: Carswell, 1984) at 3-7; S. Brownmiller, AGAINST OUR WILL (New York: Simon & Shuster, 1975) at 16-30.

ences not enjoyed by those who are accused of other offences.[11] Two common illustrations are the former corroboration rule[12] and the historical rule requiring a female victim of a sexual assault to raise "hue and cry".[13]

The submission that persons accused of sexual offences against women have been given special, illegitimate treatment, has been called into aid in the context of the current debate. It has been said in favour of upholding the constitutionality of sections 276 and 277 that they represent legislative action designed to remove or modify special legal rules which illegitimately provided persons accused of sexual offences against women with protections not available to persons charged with other crimes.[14] In marked contrast Brooke J.A. challenged the legitimacy of sections 276 and 277 in *Re Seaboyer* on the basis that they "render the ordinary rules of evidence inapplicable in the cases to which they apply and create instead a special rule which puts the accused in a separate and worse position than persons charged with other serious crimes".[15]

I think that the resolution of this controversy is of some importance for it colours the approach to the entire question. In my opinion Brooke J.A. is correct. The rules of evidence which sections 276 and 277 override are rules of general application, or at least the particular variants of such rules, and are not confined in their application to victims of sexual offences. On the other hand, it is beyond controversy

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[11] Boyle, *ibid.* at 7.

[12] At common law, courts were required to warn jurors, and to direct themselves, of the dangers of convicting an accused upon the uncorroborated evidence of the victim of a sexual offence. *See* Sir R. Cross and C. Tapper, CROSS ON EVIDENCE, 6th ed. (London: Butterworths, 1985) at 222. The rule had the most substantial impact upon female victims because females are far more commonly the victims of sexual offences. The rule applied, however, even where the victim of the sexual offence was male. The corroboration requirement was abolished by statute. *See* s. 274 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[13] The historical rule required that a complainant make "hue and cry" at the first available opportunity or a rape prosecution could not proceed. Over time the rule evolved into one in which the complainant could establish that she complained at the first available opportunity and the fact of the early complaint could be considered as bolstering the strength of the complainant's testimony. Without this special rule such evidence would have contravened the rule against previous consistent statements, and would have been inadmissible. *See* the explanation of the rule offered in *Kribs* v. *R.*, [1960] S.C.R. 400, 127 C.C.C. 1; and *see* the discussion in REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM RULES OF EVIDENCE (Toronto: Carswell, 1982) at 299-304 [hereinafter REPORT ON UNIFORM RULES ON EVIDENCE].

It has been suggested that the modern rule had the effect of perpetuating the historical rule. While a complaint would bolster credibility, the absence of one could be considered as evidence against the complainant. In effect, even under the modern rule the complainant was expected to make hue and cry. For this reason the rule was removed by statute. *See* section 275 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[14] *See, e.g.*, Appellant's Factum in *Re Seaboyer*, *supra*, note 4, in the Supreme Court of Ontario (C.A.), Ministry of the Attorney-General, at para. 59.

[15] *Supra*, note 4 at 310-11, dissenting in part.

that these rules have been illegitimately applied in the context of sexual offence prosecutions; the problem, however, is not with the rules but rather with the way in which they have been applied historically.

Prior to the development of the so-called "rape shield" provisions an accused person could cross-examine a complainant about her past sexual conduct. The trial judge had a discretion to spare the complainant from having to answer.[16] If answers were received they could be considered in deciding both the issue of consent and the credibility of the complainant as a witness.[17] Yet, the accused could not contradict the answers provided by the complainant unless they related to prior sexual involvement by the complainant with the accused,[18] or unless the contradictory evidence was proof of general character relating to the complainant's occupation as a prostitute,[19] or to her flagrant sexual misconduct.[20] Evidence of specific acts establishing prostitution or flagrant sexual misconduct could not be called.[21]

All of these rules of evidence are particular applications of general rules. Any witness other than the accused may be asked questions about his or her acts of misconduct on the footing that a witness who is disreputable is a less credible person than one who is not.[22] The inability of the accused to challenge the witness on the answers provided relates to the collateral facts rule, a rule of evidence designed to avoid the creation of side issues and the undue consumption of time. Subject to exceptions, it prevents counsel from contradicting any witness on answers to questions not pertaining to the primary issue of what happened.[23] The rule allowing proof of the general character of

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[16] *Laliberté* v. *R.* (1877), 1 S.C.R. 117.

[17] *R.* v. *Finnessey* (1906), 11 O.R. 338 at 341, 10 C.C.C. 347 at 351 (C.A.); *R.* v. *Krausz* (1973), 57 Cr. App. R. 466 at 472 (C.A.) [hereinafter *Krausz*].

[18] In which case specific proof of this fact could be offered, *R.* v. *Martin* (1834), 6 C. & P. 589.

[19] *R.* v. *Clay*, 5 Cox C.C. 146.

[20] *Krausz*, *supra*, note 17.

[21] *R.* v. *Holmes* (1871), L.R. 1 C.C.R. 334.

[22] As McWilliams explains:

> Although a scoundrel may on occasion tell the truth, there is no assurance that he will do so. On the other hand, a witness of integrity or character can be expected to tell the truth out of regard for the truth itself, his oath, honour, self-respect and habit.

P. K. McWilliams, CANDIAN CRIMINAL EVIDENCE, 2d ed. (Toronto, Canada Law Book, 1984) at 1063. For this reason questions about the witness' improper conduct, association with known criminals and prior criminal convictions may be asked on cross-examination. *See* A.F. Sheppard, EVIDENCE (Toronto: Carswell, 1988) at 336-37.

[23] *See R.* v. *Krause*, [1986] 2 S.C.R. 466, 29 C.C.C.(3d) 385. That the rule relating to the prosecution of sexual assaults is of the same genus is made clear in the discussion of these rules in STARKIE ON EVIDENCE, 4th ed. (London: Stevens and Norton, 1850) at 237 and PHILLIPS ON EVIDENCE (New York: Gould and Banks, 1823) at 489, both summarized as to this point in *R.* v. *Laliberté*, *supra*, note 16 at 125-26.

the complainant is also of general application. According to prevailing assumptions about the dynamics of human behaviour, the character of any alleged participant or particular aspects of a participant's character may assist the court in determining what happened on the occasion in question.[24] Yet, it was felt that if courts allowed the issue of character of every alleged participant to be explored in detail whenever it appeared to have some relevance the trier of fact would be endlessly diverted from its task. For this reason the compendious method of establishing the reputation or general character of a participant was developed.[25] General proof in the form of reputation evidence, without details of specific incidents, therefore came to be an accepted method of establishing the relevant character of non-accused persons.[26] Reputation evidence also came to be available to demonstrate the low credence that a witness of poor character should be given, again because this mode of proof was considered to provide an expedient way of getting the information before the court.[27]

I expect that few people could read the foregoing paragraph without becoming inflamed, for while it illustrates that the relevant rules were of general application and not specially designed with the defence of sexual offences in mind, it also betrays the inappropriate assumptions which supported the free-ranging application of those rules in the context of sexual offence cases. Those rules can be applied systematically in sexual offence cases, as they apparently were prior to the passage of the rape shield provisions, only if one accepts that

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[24] *See* the discussion of the relevance of character evidence by Martin J.A. in *R.* v. *Scopelliti* (1981), 34 O.R. 524 at 536, 63 C.C.C. (2d) 481 at 493-94 (C.A.) [hereinafter *Scopelliti* cited to O.R.]. *See further* the comments of Lamer J. in *R.* v. *Clermont*, [1986] 2 S.C.R. 131, 29 C.C.C. (3d) 105; and those of Lord Hailsham in *D.P.P.* v. *Boardman* (1974), [1975] A.C. 421, [1974] 3 All E.R. 887 (H.L.) [hereinafter cited to A.C.]. It has been held that defence counsel can adduce evidence to show that the personality of an accused makes it unlikely that the accused committed the crime with which he or she is charged. *See R.* v. *Lupien* (1969), [1970] S.C.R. 263, [1970] 2 C.C.C. 193, for example. If propensity reasoning was considered to be irrelevant such evidence would be inadmissible.

[25] Evidence of the character or disposition of a complainant or victim is, as a result of the nature of most offences, irrelevant, since what the complainant or victim does typically has nothing to do with the guilt of the accused. In other cases the conduct of the victim may be relevant, such as where consent is in issue, or where the accused pleads self-defence. In the latter class of case, defence may call evidence of the reputation of the victim for violence or dangerousness. *See* J.H. Wigmore, EVIDENCE, 3d ed., vol. 1 (Toronto: Little Brown and Co., 1939) at para. 63; P.K. McWilliams CANADIAN CRIMINAL EVIDENCE, 2d ed. (Toronto: Canada Law Book, 1984) at 298; *Scopelliti*, *ibid.* at 535; *R.* v. *Drouin* (1909), 15 C.C.C. 205 (Que. K.B.); *R.* v. *Scott* (1910), 15 C.C.C. 442 (Ont. H.C.J.).

[26] Exceptionally, where the accused in a self-defence case claimed to know about specific past acts of violence by the victim, those specific acts could be testified to by the accused. *See Scopelliti*, *ibid.* at 534-35.

[27] *See*, *e.g.*, *R.* v. *Rowton* (1865), L.& C. 520, 169 E.R. 1497; *R.* v. *Taylor* (1986), 57 O.R. (2d) 737, 31 C.C.C. (2d) 1 (C.A.).

sexual permissiveness by women is a form of misconduct which reveals something about the character and therefore the credibility of the complainant, or that past sexual conduct is always of probative value on the issue of consent. I would defend neither of those assumptions, but I would suggest that neither is needed to sustain the probity of some evidence revealing the sexual conduct of the complainant on other occasions. The point which I think Brooke J.A. was making, and which I wish to make in this paper, is that sections 276, and possibly even section 277, have thrown the baby out with the bath water. In an effort to respond to abuse of the concepts of relevance the framers of the sections have deprived persons accused of sexual offences of access to rules of evidence which are generally available and which, when properly applied, allow the defence to present essential and legitimate exculpatory evidence.

B. Do the Exceptions in Section 276 Increase the Access to Evidence Enjoyed by Persons Accused of Sexual Offences?

The observation has been made that the exceptions provided for in section 276 actually allow accused persons to call evidence which they could not adduce at common law because those exceptions allow proof of specific incidents.[28] This is true. As the foregoing discussion illustrates, it was once the case that proof relating to the acts of third parties on other occasions when adduced as evidence of what happened on the occasion in question could be established only by questioning the complainant (the line of questioning being discretionary) or, in exceptional cases, by proof of reputation. The common law, however, is capable of growth and development and this area of the law has witnessed a liberalization in the ways in which proof relating to the character of participants other than the accused may be established. Recently Canadian courts have realized that evidence revealing the character of persons other than the accused may be essential to the presentation of a full answer and defence by an accused person, and the case law has progressed to the point where specific acts or facts revealing the character of third parties may be proved in evidence.[29] What this development means is that while persons accused of other offences can establish relevant information revealing the private or embarrassing activities of other participants, sections 276 and 277 prevent this from happening with respect to the complainant in sexual offence matters. Where such evidence is relevant to help establish what happened, it should be available.[30]

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[28] *See* T. Brettel Dawson, *supra*, note 3 at 318; *Wiseman*, *supra*, note 4; *LeGallant*, *supra*, note 4.

[29] *Scopelliti*, *supra*, note 24; *R.* v. *Valley* (1986), 26 C.C.C. (3d) 207, 13 O.A.C. 89 (C.A.) [hereinafter *Valley*, cited to C.C.C.].

[30] Even if the common law had not developed to allow for such proof, the *Charter* may well have required it to move in this direction.

C. What is the Relationship Between the Similar Fact Evidence Rule Applied to Accused Persons and the Proof of Character of Other Participants?

Efforts have been made to equate proof about the sexual conduct of sexual assault complainants with proof of the character of an accused.[31] Just as it is said that proof of the accused's character is generally disallowed[32] because it might prejudice the accused, so too should proof about the sexual conduct of the complainant be disallowed, for it might prejudice him or her as well. This has caused some courts and commentators to suggest that evidence of the character of the complainant must pass the rigours of the similar fact evidence test, even if the *Charter* manages to cast aside the rape shield. This submission proceeds, in my submission, on a misunderstanding of the concept of prejudice which sustains the exclusionary rule as applied to accused persons. The "prejudice" which the similar fact evidence rule responds to is the prospect of "prejudgment", the risk that a trier of fact will apply the criminal sanction against the accused without fully considering the particular merit of the Crown's case.[33] Exclusion under

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[31] *See Wald, supra*, note 4; B. Daisley, *Sexual Conduct Evidence Ban Violates Charter*, THE LAWYERS WEEKLY (31 March 1989) 1; and *see* T. Brettel Dawson, *supra*, note 3 at 324, where the common but inaccurate assumption that similar fact evidence must be "bizarre" to be relevant and admissible is repeated. Evidence of the acts of accused persons on other occasions can be used to establish a variety of things, and the relevance of such evidence is not always contingent upon its bizarre quality. Where the evidence is being used to identify the accused, its bizarre quality may assist in establishing that the accused is the culprit. For example, in *R.* v. *Straffen*, [1952] 2 Q.B. 911, 2 All E.R. 657, the accused was identified as the strangler because of the unusual nature of the crime, and because of Straffen's past similar acts. Or, the victim of an offence may attest to something bizarre about the way the perpetrator acted or dressed. Evidence that the accused had acted or dressed in that manner on other occasions might make the prospect of concoction by the complainant extremely unlikely. *See, e.g., D.P.P.* v. *Boardman, supra*, note 24. In other cases, however, the evidence need not be bizarre at all. To take but one example, in *R.* v. *Bond*, [1906] 2 K.B. 389, the accused claimed that he did not know that the drug he was administering to a woman would induce a miscarriage. Evidence that he had used the drug before to induce miscarriages established his knowledge despite the fact that there was nothing bizarre about the case.

> [32] It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

Makin v. *A-G for N.S.W.*, [1894] A.C. 57 at 64 (P.C.). The evidence will be admissible where it is tendered for some purpose other than establishing that the accused is the kind of person to do the act in question and where its probative value outweighs the risk of prejudice that it presents.

[33] In the language of Lord Hailsham, such evidence may have a tendency to add more heat than light. *See D.P.P.* v. *Boardman, supra*, note 31 at 454.

the similar fact evidence rule is premised upon the presumption of innocence and the threat to the liberty of the accused which a conviction represents.[34] While a sexual assault complainant may be embarrassed, even humiliated, by the evidence, and while it could cause wrong-minded triers of fact to draw inappropriate or even outrageous conclusions about her and about the case,[35] the fact is that she is not being "prejudged" in any way that is in derogation of the presumption of innocence, which of course applies to the accused alone. She cannot be incriminated as a result of the trier's finding. The potential for prejudice to an accused is of a whole different order. For this reason Mr Justice Martin said in *Scopelliti*, when faced with an effort to equate proof of the character of victims with proof of the character of the accused:

> [T]he admission of similar fact evidence against an accused is exceptional, being allowed only if it has substantial probative value on some issue, otherwise than as proof of propensity . . . . No such policy rule operates to exclude evidence of propensity with respect to a person other than the accused where that person's propensity to act in a particular way is relevant to an issue in the case.[36]

Thus the accused is not subject to the restrictions that the Crown is with respect to the proof of the character of a co-accused, and the accused is free to establish the discreditable and personal acts of a victim or of another third party.[37] Moreover, the Crown cannot call the prejudicial impact of information into aid in an effort to have a court exercise its exclusionary discretion.[38] Only the defence can benefit from this discretion. The revelation of information in cases to date pursuant to these rules has resulted in the publication of extremely embarrassing and private material about participants involved in the event in question but in each such case the accused's right to have

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[34] *D.P.P.* v. *Boardman*, *ibid.* at 451.

[35] Thereby justifying some limits on access to such evidence even under a *Charter* regime.

[36] *Supra*, note 24 at 538.

[37] As to a co-accused, *see Lowery* v. *R.* (1973), [1974] A.C. 85, [1973] 3 All E.R. 662 (P.C.). As to the crime victim, *see Valley*, *supra*, note 29. As to a third party who had an opportunity to commit the crime, *see R.* v. *McMillan* (1975), 7 O.R. (2d) 750, 23 C.C.C. (2d) 140 (C.A.)., *aff'd* [1977] 2 S.C.R. 824, 33 C.C.C. (2d) 360 [hereinafter *McMillan*, cited to O.R.].

[38] The exclusionary discretion which exists at common law to refuse tenuously admissible evidence that is of trifling probative value but gravely prejudicial cannot be used to exclude evidence tendered by the accused. *See Valley*, *supra*, note 29, as well as the comments of Dubin J.A. in *R.* v. *Hawke*, (1975), 7 O.R. (2d) 145 at 181, 22 C.C.C. (2d) 19 at 54-55, and those of O'Sullivan J.A. in *R.* v. *Lucier* (1979), 1 Man. R. (2d) 182 at 202, 50 C.C.C. (2d) 535 at 552 (C.A.), dissenting on another point, overruled [1982] 1 S.C.R. 28, 65 C.C.C. (2d) 150.

access to the information has prevailed.[39] This is not to say that no checks can be developed to minimize the unfortunate consequences of adducing such proof. It is to say, however, that no equation to the similar fact evidence rule can justifiably be made.

II. Relevance and Proof Prohibited by Sections 276 and 277

A. *Concepts of Relevance*

Mr Justice La Forest had occasion to explain the concept of relevance in the case of *Corbett* v. *R.*:

> [A]t the stage of the threshold inquiry into relevancy, basic principles of the law of evidence embody an inclusionary policy, namely, that any item of evidence which, as a matter of common sense, logic and human experience, has *any* tendency to prove a fact in issue, ought, *prima facie*, to be admitted to assist in the discovery of truth because the cumulative effect of such evidence may be sufficient to prove a fact in issue. McCormick, in proposing a similar test for relevancy which asks whether the item of evidence renders the desired inference "more probable than it would be" without that item, aptly observed that "[a] brick is not a wall".[40]

Periodically, higher standards of relevance have been expressed. For example, Pratte J. said in *Cloutier* v. *R.*, "[f]or one fact to be relevant to another, there must be some connection or nexus between the two which makes it possible to infer the existence of one from the other",[41] in other words, if Fact "A" (the fact proved in evidence) exists, then it must be possible to infer that Fact "B" (the fact desired to be

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[39] In *Valley*, *supra*, note 29, for example, the world learned that the victim was a homosexual with interests in sado-masochistic literature. In *McMillan*, *supra*, note 37, the world learned that Mrs. McMillan was psychotic. In *Scopelliti*, *supra*, note 24, it was revealed that the deceased boys were mean and violent.

Where the embarrassing evidence relates directly to the scenario in question, it is revealed and there is never even any discussion about "prejudice". In *R.* v. *Rabey*, [1980] 2 S.C.R. 513, 54 C.C.C. 1, it was published that the victim had written a letter about a young man whose sexual experience had impressed her, since this was pertinent to the onset of the accused's automatism, and in *R.* v. *Biggin* (1919), [1920] 1 K.B. 213 it was revealed that the victim had made homosexual advances toward the accused charged with his murder.

[40] [1988] 1 S.C.R. 670 at 720, 41 C.C.C. (3d) at 421, dissenting on other grounds, [hereinafter *Corbett* cited to S.C.R.] citing C.T. McCormick, Evidence, 2d ed., ed. by E.W. Cleary (St. Paul, Minn.: West Pub. Co., 1972) at 436-37.

[41] [1979] 2 S.C.R. 709 at 731, 48 C.C.C. (2d) 1 at 28. The Federal/Provincial Task Force quoted this passage as authority for the "prevailing view" on questions of relevance, but in its discussion describes the prevailing view as requiring only that evidence have a tendency to increase or diminish the probability of the existence of a fact in issue, an elaboration more in keeping with the standard of relevance described by LaForest J. in *Corbett*, *ibid.* *See* the Report on The Uniform Rules of Evidence, *supra*, note 13 at 61.

established) also exists.[42] As stated, this test of relevance cannot be correct for it would result in the exclusion of most circumstantial evidence. For example, in endeavouring to prove in an arson trial that the accused owner intentionally burned her own building it is surely relevant to prove that she was having financial problems. Yet, it is not possible, without more, to infer the existence of the fact that she intentionally burned her building (Fact B) from the fact that she was having financial difficulties (Fact A). Proof of the financial difficulties is admissible because, along with proof of insurance, it provides, as a matter of human experience, the foundation for a motive, and we know that people are more likely to act when they have a motive for doing something than when they do not. Proof of a potential motive merely makes it easier to accept the prosecution theory. It follows that one need not find it possible to infer the existence of the desired fact from the tendered evidence for that evidence to be relevant; one need merely find that, as a matter of human experience, the existence of the fact sought to be proved appears to be more likely than it would seem in the absence of that evidence.

The fact that relevance is to be assessed as a matter of human experience presents grave problems for the resolution of the controversy concerning evidence of the sexual conduct of complainants on other occasions. This is because there is, in truth, no homogeneous human experience nor any universal understanding of the dynamics of events or of human conduct. People draw conclusions based upon a whole panoply of generalizations which others find wrong-headed or even obtuse or offensive. This could not be truer than in the case of evidence of sexual conduct. The authors of the FEMINIST REVIEW OF CRIMINAL LAW noted that:

> [T]he notion of relevance is open to interpretation and may give rise to controversy. For example, what is considered relevant to the issue in a given case [by a judge] may be clearly discriminatory in the eyes of a woman.[43]

It is asserted that the tendency to accept the relevance of such evidence represents an insensitivity to the feminist perspective or world view, which largely if not completely[44] denies the relevance of such proof.

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[42] This is the test of relevance cited in the factum of the appellants in *Re Seaboyer, supra*, note 4, and which was relied upon to sustain the general submission that the exceptions contained in s. 276 completely, or all but completely, define the class of relevant evidence. *See* Appellant's Factum at paras 55 and 58.

[43] Boyle *et al.*, *supra*, note 3 at 95.

[44] In the FEMINIST REVIEW it is said that "the main reason why there should be no questions about sexual activity is . . . that such activity is not relevant". The authors concede that "[i]f the victim's sexual history had any probative value questions about it would be justified, and the issue of harassment would not even arise". *Ibid.* at 112.

By contrast a noted criminal defence lawyer, commenting on the rape shield provisions and on other reforms inspired by feminist lobbying, said:

> While continually charging others with "insensitivity" to their concerns, these feminists have demonstrated an astounding insensitivity to just about any human concern from justice to common sense. Indeed, they seem unable to conceive of such concepts outside their own terms of reference.[45]

Herein lies the primary weakness in having resort to feminist perspectives in identifying whether proof is relevant; it asks us to resolve questions of fact based on a particular network of beliefs about how women tend to behave, despite that there is controversy about such matters and despite that some of those charged with making factual determinations do not share feminist generalizations about how the world turns. It may be that the world would be a better place if the generalizations about human dynamics that feminists subscribe to were indisputably accurate but that is not the point. A trier of fact can render a decision of fact only if he or she is drawing conclusions about what he or she really believes has happened. That task simply cannot be performed if a trier who does not share the feminist perspective is asked to disregard his or her own perceptions about reality. To impose limitations on the inferences of fact that a trier can draw is, in essence, to ask the trier to render a conclusion not on the basis of what the evidence tells him or her, but rather to speculate as to what would have occurred given the evidence if certain approved values and conclusions about human conduct gave order to the universe. In other words, the invalidation of beliefs, even unattractive beliefs or beliefs which presume an unattractive world, has nothing to do with relevance.[46] It has to do with policy.

So, how are questions of relevance to be resolved given that those having different experiences and perspectives would answer questions of fact differently? The answer, in my opinion, lies in gender neutral principles of criminal law which combine to produce the result that evidence will be relevant where, assuming it is true, a reasonable trier of fact could find that the evidence makes one of the competing versions offered by the parties appear more likely than it would seem in the absence of such evidence.

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[45] E.L. Greenspan and G. Jonas, GREENSPAN: THE CASE FOR THE DEFENCE (Toronto: McMillan of Canada, 1987) at 229.

[46] It is incontestable that values can influence beliefs about how people behave. There is nonetheless a distinction to be drawn between beliefs about how people behave, and matters of moral judgment. For example, it is suggested that evidence revealing a lack of chastity on the part of the plaintiff may cause the trier of fact to conclude that "she got what she deserved" and that the accused should therefore be acquitted. *See R.* v. *Gunn, Ex Parte Stephenson*, [1977] 17 S.A.S.R. 165 at 167-68. This is not an inference about fact and therefore has nothing whatsoever to do with relevance.

In the resolution of questions of fact the criminal law draws the line only where the inferences needed to sustain a finding of fact are "unreasonable". In deciding whether to grant a directed verdict of acquittal it is asked whether, assuming that the evidence adduced is believed, a reasonable trier of fact, properly instructed, could find the accused guilty.[47] The same test is used in determining whether an accused should be committed for trial after a preliminary inquiry.[48] In deciding whether to leave a defence to the jury it is asked whether there is an evidential foundation that could raise a reasonable doubt in the mind of a reasonable trier of fact as to the existence of the defence.[49] Perverse verdicts which can be challenged by persons convicted of crimes are verdicts at which no reasonable trier of fact could have arrived.[50] In sum, any reasonable finding of fact is acceptable in criminal law while only unreasonable findings are not. Since a finding of fact is the accumulation of specific inferences it follows that the only invalidated inferences are those which no reasonable person could hold and the only inferences that no reasonable person could hold are those which are indisputably incorrect. This sets a low threshold for determinations of relevance, and this is as it should be. As La Forest J. said in another context in *Corbett* v. *R.*:

> In the absence of cogent evidence establishing that evidence . . . is irrelevant . . . the fact that reasonable people may disagree about its relevance merely attests to the fact that unanimity in matters of common sense and human experience is unattainable.[51]

I would go so far as to suggest that this approach is constitutionally required by subsection 11(d) of the *Charter*. The presumption of innocence entrenched in subsection 11(d) includes the corollary that the Crown must establish guilt beyond a reasonable doubt. If it is evidence that a reasonable trier of fact could act upon, it can form the basis for a reasonable doubt. The question then, is whether a reasonable trier of fact could ever find that evidence revealing the past sexual conduct of a complainant makes the accused's version appear more likely than it would seem in the absence of such evidence, and whether such evidence would be excluded by sections 276 and 277.

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[47] *R.* v. *Mezzo*, [1986] 2 S.C.R. 802, 52 C.R. (3d) 113 [hereinafter *Mezzo* cited to S.C.R.].

[48] *U.S.A.* v. *Sheppard*, [1977] 2 S.C.R. 1067, 70 D.L.R. (3d) 136, as explained in *Mezzo*, *ibid.* at 836.

[49] *Laybourn* v. *R.*, [1987] 1 S.C.R. 782, 58 C.R. (3d) 48. The test is not stated in these terms but I would suggest that an analysis of the decision leads to this conclusion.

[50] *Yebes* v. *R.*, [1987] 2 S.C.R. 168, 36 C.C.C. (3d) 417.

[51] *Supra*, note 40 at 720.

B. Relevance and Section 276

Section 276 has to do primarily with evidence revealing the sexual history of a complainant that is tendered, not as proof of the credibility of the complainant, but rather as proof of what happened.[52] I think it is beyond argument that this kind of evidence will be relevant in at least some cases. Section 276 itself reflects recognition that evidence revealing the sexual conduct of complainants will, from time to time, be useful in attempting to arrive at a correct factual conclusion. The section allows for the admission of such evidence in three exceptional situations by creating three categories of exception.[53] In other words, it does not deny the relevance of such proof absolutely, but it purports to settle questions of relevance in advance by predetermining categories of relevant proof.

Speaking of the similar fact evidence rule and of unsuccessful efforts to develop categories of relevant proof in that context, Sopinka J. cautioned in *Morin* v. *R.*:

> It is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in a case. Attempts in the past to define the criteria for the admission of similar facts have not met with much success. The test must be sufficiently flexible to accommodate the varying circumstances in which it must be applied.[54]

So, too, with sexual conduct evidence. The variety and complexity of circumstances make it impossible to develop a closed list of categories

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[52] Although it can have an impact on evidence adduced to establish the falsity of the complainant's testimony. *See* the discussion in note 61, *infra.*

[53] These exceptions were described and explained by Grange J.A. in *Re Seaboyer*, *supra*, note 4 at 300 as follows:

> Where the prosecution has given evidence of the complainant's sexual activity, or more likely inactivity, it will clearly be in the interest of the defence to refute it, else a misapprehension may well arise in the trier of fact, to the prejudice of the accused [ss. 276(1)(a)]. Where there is any dispute as to the identity of the assaulter or as to the source of injuries alleged to arise from the assault, the accused must be permitted to lead evidence to show the true source [ss. 276(1)(b)]. The complainant's sexual conduct with others at the time of the alleged offence may be relevant to the accused's belief in her consent to relations with the accused [ss. 276(1)(c)].

See supra, note 1 for the text of the section.

[54] [1988] 2 S.C.R. 345 at 370-71, 44 C.C.C. (3d) 193 at 218.

of relevant evidence. Not surprisingly then, appellate level and superior court judges in this country have provided a number of illustrations of relevant proof excluded by section 276. These include:

a) some cases where there has been a specific pattern of sexual permissiveness, into which pattern the case in question falls.[55]

b) some cases where the defence is the honest but mistaken belief of an accused that the complainant consented.[56]

c) cases where there is a common belief which threatens to present an unreceptive environment for the defence theory and where the evidence

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[55] In *Re Seaboyer*, *supra*, note 4 at 300 Grange J.A. offered a related example:

> If. . .the defence was that the complainant was a prostitute who sought after the act to obtain a larger fee on threat of exposure or false accusations of assault, evidence of similar acts of that nature in the past would be relevant.

Hetherington J.A. in *Wald*, *supra*, note 4 at 134, would confine such proof to evidence satisfying the similar fact evidence rule that is applied to accused persons. Her Ladyship referred to "evidence establishing the disposition of the complainant to engage in sexual activity bearing very distinctive characteristics or in very distinctive circumstances", thereby "indicating a disposition to consent to sexual activity of that very distinctive kind or in those very distinctive circumstances". This would seem to rule out resort to general propensity reasoning, and also suggests the need for bizarre facts to sustain relevance but the basis for these conclusions is questionable.

Vivian Berger, on the other hand, provides the following specific example and commentary illustrative of evidence that is relevant on a pure propensity reasoning basis: "[T]he victim habitually goes to bars on Saturday nights, picks up strangers and takes them home to bed with her . . ." She explains that "one cannot cavalierly assume that a woman's behaviour on one occasion has no relationship at all to her conduct and state of mind on another. On the contrary, her actions tend 'to prove that consent to intercourse for her has lost its unique . . .non-transferable character' when these conditions obtain". *See* V. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Court Room* (1977) 77 COL. L.R. 1 at 60.

[56] *Wald*, *ibid.* *See also* Grange J.A. in *Re Seaboyer*, *ibid.* at 300 where His Lordship provided the specific example of a complainant who notoriously attended a certain place and regularly offered herself to anyone there without charge. That could, Grange J.A. felt, go to help establish an honest belief in consent. The exception in s. 276(1)(c) is applicable only where the evidence relates to sexual conduct of the complainant on the same occasion as the subject matter of the charge. The exception in s. 276(1)(c) betrays the fact that section 276 excludes relevant evidence for it recognizes that evidence of acts of sexual conduct with others *on the same occasion* can give rise to rational inferences about the accused's belief in consent. If the accused's knowledge of such acts can induce a belief when they occur on the same occasion, why not when they occur the day before or at some earlier point in time? What is it about the passage of time that so resolutely deprives such knowledge by the accused of its capacity to influence his beliefs about consent?

> in question serves to challenge the appropriateness of calling that belief into aid in resolving the instant case.[57]
>
> d) cases where the evidence suggests that injuries to the complainant, being attributed to the accused, may have been caused by her sexual activity with another *on another occasion*.[58]

It is unsafe to assume that there are not other kinds of cases and for that reason these categories can be taken as illustrative only. Some of the illustrations will no doubt be controversial. Perhaps they will all be. But, can it be said uncategorically that no reasonable person could be moved closer to accepting the accused's version in the face of evidence of this kind? In my view, it cannot. Section 276 excludes at least some relevant evidence.

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[57] In *LeGallant*, *supra*, note 4, McLachlin J. (as she then was) accepted as relevant, evidence stipulated by the accused to the effect that the 13 year old male complainant had previously engaged in homosexual activities. The allegation against the accused was that he had applied physical contact of a sexual nature to the person of the boy. The accused claimed that the sexual act was performed by the boy, not by him, and that his passive enjoyment of the act could not amount in law to an assault. Her Ladyship felt that in determining who performed the act of sexual physical contact upon whom, the trier would be inclined to believe that, as an older man, the accused was most likely to have been the perpetrator since young boys in such situations usually respond rather than act. She inferred that evidence about the sexual experiences of a boy might rebut this "common sense inference" and should therefore be heard. The British Columbia Court of Appeal overturned the judgement, upholding section 276 (then 246.6), but did not suggest that this evidence would be irrelevant. Instead, Hinkson J.A., for the Court, simply held that McLachlin J.'s judgment failed to consider adequately the interests of sexual assault victims.

A similar example is given by D.W. Elliot, *Rape Complainants' Sexual Experience With Third Parties* [1984] CRIM. L.R. 4. In his hypothetical a female professor is found by a janitor having intercourse in her office with a student. The student claims that she consented while she claims that she did not. A trier of fact might well be disinclined to believe that a female professor would engage in this form of relationship with a male student. To counter this possible inference Elliot suggests that the student should be entitled to prove a prior act of consensual intercourse by the professor with another student and to thereby show that this professor is prepared to disregard the code of conduct which would normally be thought to present an additional barrier to consensual intercourse in this situation.

[58] In *Oquataq*, *supra*, note 4, Marshall J. accepted as relevant evidence stipulated by the accused that the complainant may have suffered vaginal bruising as a result of aggressive sexual intercourse with a second man which she allegedly had after having left the accused. The accused, to whom the bruising was being attributed, alleged that his intercourse with the woman was consensual. In the end, Marshall J. was unsatisfied that the evidence actually profferred by the accused was capable of sustaining his contention as to what occurred and he disallowed the proof.

In *Re Seaboyer*, *supra*, note 4, Grange J.A. seems to suggests that where the allegation is that injuries were caused by the accused on the occasion in question, evidence can be led under s. 276(1)(b) to establish that they occurred on another occasion. It is difficult to reconcile this conclusion with the language of s. 276(1)(b), which seems to require that the evidence establish the identity of the person involved with the complainant on the occasion in issue. In *Oquataq* the identity of the accused was not in issue. The only question was as to consent.

C. *Section 277 and Relevance*

Section 277 of the *Criminal Code* is designed to prevent the use of "sexual misconduct" evidence to challenge the credibility of a complainant as a witness. It prevents defence counsel from cross-examining sexual offence complainants about their sexual history or habits where this is done solely to test the credibility of the complainant as a witness, and it prevents defence counsel from adducing sexual reputation evidence. Depending upon how it is interpreted, the section should be upheld in the face of constitutional attack. If the exclusionary rule under section 277 applies only where the evidence is adduced for the purpose of showing that the complainant is the type of person that should not be believed, then it is constitutionally inoffensive. This is because those rules which allow proof of the sexual character of the complainant to be adduced on the secondary issue of the credibility of the complainant as a witness apply only if the view is taken that sexual promiscuity by women is a form of "misconduct", and that a promiscuous woman should not, therefore, be readily believed. Whereas it is indisputable that liberal sexual practices by women were once regarded as "misconduct", this is no longer the case. "Gradually it became the view of almost all social observers that, not only were sexual relations outside marriage more common, but they were losing public opprobrium."[59] Even among those who might persist in that view, it is unlikely that they would equate sexual promiscuity with dishonesty. It would be fair to dismiss any contrary views on the matter as unreasonable and therefore as incapable of founding relevant inferences.

On the other hand, there will be occasions when evidence revealing the sexual history of a complainant is adduced solely to illustrate that the complainant has concocted the allegation against the accused and where it does not depend on the general inference that unchaste women are inherently incredible. An example is provided by the American case of *State* v. *DeLawder*.[60] There the accused was given constitutional relief after being prevented by the judge from proving that the complainant became impregnated by another and then, out of fear of her mother's reaction to her consensual intercourse, concocted the story of enforced "carnal knowledge" by the accused.[61]

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[59] *Re Seaboyer*, *ibid.* at 298, *per* Grange J.A.

[60] 28 Md. App. 212, 344 S.2d 446 (1975), cited in V. Berger, *supra* note 55 at 62, n. 365.

[61] Altogether apart from section 277, this evidence would not be admissible in Canada in the face of section 276 unless the allegation against the accused related to the same occasion as when the girl actually became pregnant yet it is equally relevant whether her story alleged intercourse with the accused on that occasion or another. The present point is that even if the *Charter* is used to reform section 276, if section 277 is construed to catch evidence such as this, it too has the potential to work an unconstitutional result.

Another example is provided by the case of *Commonwealth of Pennsylvania* v. *Black*[62] where evidence was adduced to establish that the complainant made a totally false complaint against her father out of malice because he had put an end to the affair that she was having with her brother. If section 277 is interpreted as excluding such proof, it too, has the potential to contravene the pertinent constitutional right. On balance, however, the section should be understood as preventing only proof that is intended to raise an inference from reputation or general character to credibility, in which case its constitutionality is secured.[63]

III. The Nature of The Constitutional Challenge

It is safely beyond controversy that persons charged with crimes have a constitutional right to make full answer and defence and to thereby raise a reasonable doubt, and that this can give accused persons the constitutional right to present evidence. It is also broadly accepted that both section 7 and subsection 11(d) of the *Charter* ground such rights.[64] What has not yet been fully explored by any court is the relationship between these provisions, and their precise contribution to the issue in question.

Courts that have dealt with constitutional challenges to section 276 have invariably relied on the constitutional right of accused persons to present full answer and defence. In referring to the constitutional basis for this right courts typically cite both section 7 and subsection 11(d) of the *Charter* in tandem. This is unfortunate because the provisions differ in a material respect. The subsection 11(d) right to a fair trial is contravened where something occurs which, in all of the circumstances, renders the entire trial unfair. Concern is not exclusively with the interests of the accused; there will be a *prima facie Charter* violation only where the interests of the accused are not outweighed by competing interests related to the overall fairness of the trial

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[62] 487 A.2d 396 (1985), cited in *Re Seaboyer*, *supra*, note 4 at 306.

[63] All of the appellate level courts that have considered the matter have refused to strike section 277. *See Re Seaboyer*, *ibid.*; *LeGallant*, *supra*, note 4; *Wald*, *supra*, note 4. In *Oquataq*, *supra*, note 4, however, section 277 (then s. 246.7) was said to be unconstitutional although the issue was not directly before the court. The Court in *Brun*, *supra*, note 4, agreed.

[64] None of the courts dealing with constitutional challenges to these provisions deny that sections 7 and 11(d) of the *Charter* ground such rights. *See* other cases referred to in Paciocco, CHARTER PRINCIPLES, *supra*, note 3 at 219-30.

process.[65] In other words, the subsection 11(d) right has internal limitations; before a *prima facie Charter* violation even arises considerations which are hostile to the accused's interest can be considered.

Section 7, on the other hand, does not have internal limitations; the sole issue relates to whether the accused's interests, as embodied in the principles of fundamental justice, have been respected. Principles of fundamental justice do not lie in the realm of general public policy. Rather they are discovered by examining the "basic tenets of our legal system"[66] in an effort to determine which elements of that system are essential to it, bearing in mind that the system is founded upon belief in the dignity and worth of the human person and the rule of law.[67] Competing considerations of policy and principle are to be considered only in the context of section 1 of the *Charter*.[68]

This difference can, of course, have implications for the resolution of the constitutional question. In *R.* v. *LeGallant* the British Columbia Court of Appeal cited both section 7 and subsection 11(d) but took a subsection 11(d) approach. In overturning the decision of McLachlin J. the Court ruled that Her Ladyship had "lost sight of other considerations . . . namely, that the common law did not afford sufficient protection to complainants and that because of this, many rape cases were not being reported and prosecuted".[69] "In my opinion", said Hinkson J.A., "s. 246.6 [now section 276] achieves a balance of

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[65] For example, in the case of *Corbett, supra*, note 40, the accused presented his constitutional attack under s. 11(d). He alleged that to allow the Crown to cross-examine him as to his prior conviction for manslaughter at his murder trial, ostensibly to impugn his credibility as a witness, raised the real prospect that he would be prejudiced. The trier of fact might be attracted to the inference that having caused death before, he might well be the type to have done it again. The Court held that the risk of prejudice did not render the trial unfair because Corbett had cross-examined Crown witnesses as to their criminal records, and to prevent the Crown from revealing Corbett's record might leave the jury with the impression that Corbett was without convictions. Considering this fact, it was fair to have tried Corbett in this fashion despite the risk of prejudice, especially given that a proper jury direction as to the limited permissible use of his conviction was provided.

[66] *Re Section 94(2), supra*, note 8 at 513.

[67] *Ibid.* at 503.

[68] For example, in *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636 at 654, 39 C.C.C. (3d) 118 at 134 [hereinafter *Vaillancourt* cited to S.C.R.] it was held that a principle of fundamental justice requires at a minimum, that "absent proof beyond a reasonable doubt of at least objective foreseeability, there surely cannot be a murder conviction". Considerations supporting the perpetration of s. 213(d), the section under *Charter* challenge, were considered only in the context of s. 1. *See also Re Section 94(2), supra*, note 8.

[69] *Supra*, note 4 at 384.

fairness between the complainant and the accused."[70] It was therefore held that there was not even a *prima facie Charter* violation and there was no need to examine section 1.

By contrast, the Ontario Court of Appeal examined the question under section 7.[71] It held that the provision was *prima facie* unconstitutional because "there may be instances where evidence of past sexual conduct not encompassed by the paragraphs might further a legitimate defence".[72] Considerations related to the protection of the victim from embarrassment and the encouragement of the reporting of sexual assaults were considered under section 1 where they failed to justify the *prima facie* contravention.

What, then, is the appropriate approach? When an accused person challenges an evidentiary rule or ruling are his or her section 7 rights somehow merged with the subsection 11(d) "fair hearing" claim thereby allowing for internal limitations upon that right, or is he or she entitled to claim that his or her *Charter* rights have been *prima facie* infringed because the exclusionary rule or ruling contravenes a principle of fundamental justice? In favour of the former position is the pragmatic consideration that it will be much easier to confine constitutional challenges related to the conduct of a trial if it is possible to consider internal limitations upon the interests raised by the accused. Moreover, as a matter of construction it is arguable that, since subsection 11(d) expressly provides a constitutional right to a fair trial, it is under that provision and not the more general section 7 provision that trial procedures should be litigated. Such an approach, however, would be inconsistent with established principles of *Charter* interpretation. First, the *Charter* is to be given a large and liberal interpretation (and application) in order to better protect the rights and freedoms which it

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[70] *Ibid.* In *Wald*, *supra*, note 4, the Court also cited both sections 7 and 11(d) yet applied a process of reasoning consistent with section 11(d). Despite this the Court disagreed with the British Columbia Court of Appeal, saying at 135:

> Surely no balancing of the interests of the complainant and the accused can be fair if it may prevent an accused from introducing relevant and otherwise admissible evidence, the probative value of which exceeds its prejudicial effect.

[71] *Re Seaboyer*, *supra*, note 4 at 301. Both provisions had been argued.

[72] *Ibid.* at 300. While Grange J.A. did not articulate in precise terms the principle of fundamental justice that would be contravened, it is apparent that the Court considered it to be a principle of fundamental justice that an accused person be entitled to adduce evidence which might raise a reasonable doubt. In *R.* v. *Jones*, [1986] 2 S.C.R. 284 at 322, 28 C.C.C. (3d) 513 at 528-29 [hereinafter *Jones* cited to S.C.R.], Wilson J. found that a rule which in her view prevented an accused person from adducing relevant evidence violates the principles of fundamental justice. For a complete examination of the origins and nature of this principle of fundamental justice *see* Paciocco, CHARTER PRINCIPLES, *supra*, note 3 at Chapter 3, and especially 185-219.

enshrines.[73] Second, there is a preference for the avoidance of internal limitations because they tend to cut down the vitality of constitutional principles and impose, in some cases, an unrealistic burden of persuasion on the private litigant.[74] Finally, it would be more than a little ironic if subsection 11(d) is interpreted as housing all of the challenges to the trial process, thereby leaving section 7 for the review only of substantive as opposed to procedural *Charter* claims. After all, to the extent that we know anything about legislative intention we know that section 7 was intended by its framers to have only procedural scope,[75] and for the first few years of the *Charter*'s existence speculation concerned whether it could even sustain substantive challenge.[76] It will be more than a little ironic if it is ultimately determined that, with respect to the prosecution of offences, section 7 has no content independent of subsection 11(d) in matters of trial procedure.

On any reasonable interpretation, section 7 houses a principle of fundamental justice that is contravened where an accused is deprived of the admission into evidence of relevant proof that has the potential to raise a reasonable doubt. That being so, accused persons should have access to that provision of the *Charter* without its scope being cut back simply because there happens to be a further related *Charter* protection included in subsection 11(d).[77]

IV. SECTION 1

A section 1 justification requires that the purpose behind legislation which *prima facie* contravenes the *Charter* must be pressing and substantial and that the means taken to accomplish that purpose are proportional. Determining proportionality, in turn, involves assessing whether the means taken to effect the purpose constitute a rational way of doing so, deciding whether less intrusive means are available, and considering whether the deleterious effect that the legislative scheme has on the consitutional interest is too substantial to tolerate.[78]

There is no dispute that protecting complainants in sexual offence prosecutions from the embarrassment and invasion of privacy that the use of such evidence represents is a pressing and substantial concern. So, too, is the general policy pursued by section 276 of encouraging the reporting and prosecution of sexual offences by making the process

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[73] *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 344, 18 C.C.C. (3d) 385 at 423-24.

[74] *See R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 134, 50 C.R. (3d) 1 at 26-27 [hereinafter *Oakes* cited to S.C.R.].

[75] In *Re Section 94(2)*, *supra*, note 8 the Court received statements including those of the Assistant Deputy Minister of Public Law, the Deputy Minister of Justice and the Minister of Justice, all to this effect.

[76] The issue was finally settled affirmatively in *Re Section 94(2)*, *ibid.*

[77] For a further discussion of this issue, *see* Paciocco, CHARTER PRINCIPLES, *supra*, note 3 at 185-86.

[78] *Oakes*, *supra*, note 74 at 138-39.

as painless as possible for complainants.[79] Where the section 1 analysis breaks down is with respect to the proportionality inquiry. While there is a rational connection between those pressing and substantial objectives and the prohibition of such evidence,[80] section 276 may not provide the least intrusive means of reasonably accomplishing the objective in question, although this is a matter for debate. The primary concern, however, is that the deleterious effect of the provisions on the constitutional rights of accused persons is too great.[81]

A. The Least Intrusive Means

The second leg of the proportionality test which requires that the legal rule that constitutes the limitation on a constitutional interest must represent the least intrusive means available of accomplishing the pressing and substantial objective has been modified in subsequent cases. We now understand that a valid consideration is whether the least intrusive means available can reasonably accomplish the pressing and substantial concern. If it cannot, a more intrusive measure may be justified.[82]

On its face, providing a judicial discretion to disallow proof of the sexual conduct of a complainant on other occasions would constitute a less intrusive means of accomplishing the pressing and substantial objectives of section 276. Where the evidence is thoroughly unpersuasive or is of dubious relevance in the context of other evidence in

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[79] *See, Wald, supra,* note 4.

[80] It can be expected that saving complainants from encounters where they are required to discuss their sexual history might make them more ready to report sexual offences.

[81] Courts addressing the section 1 question are so confident in that conclusion that no extensive examination of the various limbs of the *Oakes* test is undertaken. *See Wald, supra* note 4 at 135-36; *Re Seaboyer, supra,* note 4 at 302-03. In *Oquataq, supra,* note 4, perhaps because of the inevitability of the outcome, the section 1 question is not even addressed by the Court. In *Coombs, supra,* note 4 at 158, the Court openly took the position that section 1 need not be analyzed:

> It is plain that any provision that obstructs a fair trial by excluding the opportunity for full answer and defence can never be a reasonable limitation within a free and democratic society. That is so by definition.

[82] *See, e.g., Jones, supra,* note 72 at 299, where it was held acceptable to require persons who were educating their children at home for religious reasons to apply for certificates of efficient instruction despite that a less intrusive interference with the freedom of religion of such persons would be to have the state take the initiative of determining whether children were receiving effective home study. The majority considered that this less intrusive regime would undermine the effectiveness of the process of protecting the educational interests of children. Similarly, in *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 772-73, 30 C.C.C. (3d) 385 at 428-29 [hereinafter *Edwards Books* cited to S.C.R.], a number of alternative schemes were rejected because of the extent to which they would reduce the effectiveness of the legislation in fulfilling its purpose.

the case a judge could be given the authority to refuse this line of proof.[83]

It can be argued that this approach would not accomplish the pressing and substantial objectives of the section. The most familiar argument is that a judicial discretion to refuse the evidence would be ineffective because the judiciary manifests those inappropriate attitudes which caused the problem in the first place, namely, of finding relevance in evidence that is in fact of no probative value.[84] This submission will be justifiably repudiated, if anyone has the indiscretion to present it in argument. It would be incredible if a regime which depends upon the discretion of the judiciary, the very guardians of our Constitution, cannot constitute an acceptable alternative to section 276 because the judiciary cannot be trusted to make appropriate determinations.

Another far more compelling submission relates to the extent to which a judicial discretion begs the question of admissibility. Without hearing some evidence or allowing some cross-examination there is no way to exercise a discretion to admit or refuse the evidence and by the time that this is done the purposes behind the exclusionary rule in section 276 are largely defeated. The complainant is embarrassed, prosecutions are discouraged, and the precise enterprise that is sought to be prohibited has occurred, although perhaps not to the same extent. It follows that absolute exclusion represents the only reasonable way to accomplish the pressing and substantial objectives supporting the provision. On the other hand, Deschenes J. came to the opposite conclusion in *R.* v. *Brun*, holding that the precise reason why then section 246.6 could not be upheld under section 1 is that it "[has] the effect of predetermining, without the benefit of a judicial assessment, the admissibility of evidence irrespective of the potential probative force thereof or its prejudicial effect".[85] In other words, the scheme provided for in the section cannot be the least intrusive reasonable means of accomplishing the pressing and substantial objective because the scheme itself is not a reasonable one.

B. The Extent of the Deleterious Effects of the Constitutional Compromise

Even if it is accepted that section 276 is the only reasonable way of accomplishing the pressing and substantial objectives behind the provision it, and others like it, are destined to fail the last leg of the

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[83] *See* the discussion below.

[84] *See, e.g.*, Z. Adler, *The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation* [1985] CRIM. L. REV. 769 at 769-70; J. Tempkin, *Regulating Sexual History Evidence — The Limits of Discretionary Legislation* (1984) 33 INT. AND COMP. L.Q. 942; T. Brettel Dawson, *supra*, note 3 at 329-30.

[85] *Supra*, note 4 at 319.

section 1 test. This aspect of the test requires that the deleterious effects of compromising the constitutional right or freedom in question must not be too great to tolerate. "The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."[86] The deleterious effect that section 276 threatens to have is the conviction of legally innocent individuals. If, *ex hypothesi*, the section prohibits the adduction of evidence that could raise a reasonable doubt then it tolerates the conviction of those who may be innocent in the eyes of the law. It is almost inconceivable that any system committed to the presumption of innocence would abide such a consequence, whether it is meant to save a complainant from embarrassment, or to protect privacy, or to encourage the prosecution of offences.[87] Our system of criminal justice could be made much more efficient if we were to accept at a formal level the conviction of some morally innocent persons yet this consequence is anathema to our entire accusatorial process. If the pressing and substantial state interest cannot be accomplished entirely without producing that consequence, then perhaps it cannot be accomplished entirely.[88]

For the foregoing reasons, it is submitted that section 276, which is in *prima facie* violation of the *Charter*, cannot be saved by section 1.

V. Remedying the Constitutional Defect — the Constitutional Exemptions Doctrine

Where a law is held to infringe or deny the *Charter* rights of some persons the conventional approach under the Canadian *Charter of Rights and Freedoms* has been to invalidate the entire law, even

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[86] *Oakes*, *supra*, note 74 at 140.

[87] In *LeGallant*, *supra*, note 4, at the Supreme Court level Madam Justice McLachlin stated at 180:

> The right to make a full answer and defence to criminal charges and the importance of the jury rendering a true verdict are fundamental to our society. Only very important considerations can limit that right; only for the gravest of reasons, if ever, is it conceivable that these principles should be compromised. The potential embarrassment of the complainant, however distasteful that may be, is not such a reason, in my view.

[88] At the very least, before agreeing to this horrendous compromise it is hoped that our courts will satisfy themselves that the existence of section 276 does, in fact, have a substantial effect on the prosecution rates relating to sexual offences. If that result remains speculative or questionable, as it has been suggested to be (*see* T. Brettel Dawson, *supra*, note 3 at 326-27), it is not worth pursuing at the cost of potentially imprisoning innocent individuals.

where it can be applied constitutionally to others.[89] This use of a declaration of complete or facial invalidity has been justifiably described, however, as a "crude remedial device".[90] It lacks precision in addressing the constitutional mischief that a statute creates by rendering legislation to be of no force or effect even as applied to those cases where it creates no constitutional difficulties. Moreover, it allows individuals to present constitutional challenges even where the law in question produces no unconstitutional effects when applied to them, and it causes our courts to determine questions of constitutionality based upon hypothetical cases. By contrast the usual remedy in the United States is a declaration that the law in question is invalid as applied to the particular individual who is before the court.[91]

In *Re Seaboyer*[92] the majority of the Ontario Court of Appeal elected to deal with the infirmities of section 276 by using an approach, sometimes called the constitutional exemptions doctrine, which is more in keeping with that applied in the United States. Rather than declaring it of no force and effect the Court held that the provision would be inoperative only in those cases where it might cause a trial to become unfair by depriving the accused of evidence of real probative force. The crucial factors in that decision were that evidence excluded by section 276 would be of real probative force with respect to a legitimate defence in only rare cases, that the provision did not have an unconstitutional purpose, and that it was not unconstitutional on its face.

The Alberta Court of Appeal refused to follow suit in *R.* v. *Wald*.[93] Echoing the reasons for dissent given by Brooke J.A. in *Re Seaboyer*,[94] Madam Justice Hetherington was not persuaded that cases where relevant evidence would be excluded by the provisions would be rare,[95] and she expressed grave reservations about the operation of the constitutional exemptions doctrine in this context.[96]

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[89] *See, e.g., Smith* v. *R.*, [1987] 1 S.C.R. 1045, 58 C.R.(3d) 193, where the hypothetical case of a person possessing only one marijuana cigarette was used to illustrate the constitutional frailty of a minimum sentence provision for importing, despite that the accused had appreciably more narcotics in his possession; *Vaillancourt, supra*, note 68, where the Court considers extreme hypotheticals to justify striking a constructive murder provision. These are only two of several illustrations emerging out of Supreme Court of Canada authority.

[90] C. Rogerson, *The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness*, in R.J. Sharpe, ed., CHARTER LITIGATION (Toronto: Butterworths, 1987) 233 at 239.

[91] *Ibid.* at 269.

[92] *Supra*, note 4.

[93] *Supra*, note 4.

[94] Dubin J.A. concurring.

[95] I am prepared to assume for the purposes of the following analysis that cases where the evidence could raise a reasonable doubt and where the evidence is excluded by section 276 will indeed be rare. That is almost certainly the case and I think this is demonstrated by the fact that in no case to date has a court that has struck down section 276 subsequently found the evidence before it to warrant admission.

[96] *See* the discussion accompanying note 110, *infra*.

The first issue is whether it is legitimate to apply a constitutional exemptions doctrine at all. Although the Supreme Court of Canada has gone a long way towards apparently committing itself to a regime of facial invalidity, there is reason to believe that it is legitimate. A number of courts have rendered what amount to declarations of partial invalidity.[97] Moreover, in *R.* v. *Edwards Books & Art Ltd* Dickson C.J.C. left the door open for the development of such a doctrine.[98] The legitimacy of its application is argued for by Professor Carol Rogerson in a seminal article on the subject.[99]

Professor Rogerson explains that the Canadian preference for declarations of facial invalidity is attributable to our constitutional history, which traditionally engaged questions of federalism. Division of powers questions tend to deal with broad spheres of governmental authority, creating little need for fine delineations. More importantly, declarations of complete unconstitutionality were not understood as interferences with the wisdom of legislation but rather as the patrolling of the boundaries of jurisdiction, "one of the primary judicial functions in a society governed by the rule of law".[100] Remedies that would seek to distinguish valid from invalid applications of the law, on the other hand, were seen to thrust the court too far into questions of legislative competence:

> Thus, our constitutional history has created an understanding of the judicial role which sees a complete invalidation of a law as more deferential to the legislature and more appropriate to the judiciary than a judicial attempt to save the law in some of its applications.[101]

She goes on to argue that this model is inappropriate in matters of *Charter* review. American courts consider their mandate to be the settlement of real controversies; courts "are not roving commissions assigned to pass judgment on the validity of the Nation's laws".[102] According to this view, providing relief on a case by case basis, despite that it is not in keeping with the language of the relevant statute, is more deferential to legislative autonomy than declarations of facial invalidity would be. It is not at all clear, therefore, that the usual Canadian approach is the least intrusive one. Moreover, Professor Rogerson suggests that it is not necessary to think of constitutional

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[97] *See, e.g., Edmonton Journal* v. *A.-G. Alta.*, [1987] 5 W.W.R. 385, 78 A.R. 375 (C.A.); *R.* v. *Rao* (1984), 46 O.R. (2d) 80, 9 D.L.R. (4th) 542 (C.A.); *Re Reynolds and A.-G. B.C.* (1982), 143 D.L.R. (3d) 365, 41 B.C.L.R. 258 (S.C.), *aff'd* (1984), 11 D.L.R. (4th) 380, 53 B.C.L.R. 394 (C.A.).

[98] *Supra*, note 83 at 784.

[99] Rogerson, *supra*, note 90.

[100] *Ibid.* at 250.

[101] *Ibid.*

[102] *Broadrick* v. *Oklahoma*, 413 U.S. 601, 37 L. Ed.2d 830 (1973), cited in Rogerson, *ibid.* at 254.

claims in terms of issues of *vires*; the Constitution can be conceived of as a text containing the supreme law such that the duty of judges should be understood as ensuring that ordinary laws conform to it. This makes judicial modification of laws possible. "The source of the modification is the Constitution. . . ."[103] The case in favour of the doctrine is therefore a strong one.

The question then is whether the use of a partial declaration of invalidity in the form of granting certain accused persons a constitutional exemption is appropriate in this context. Professor Rogerson suggests, as a starting point, that courts should remind themselves that what is at stake with respect to a rights violation is a claim by an individual, and that the appropriate remedy will at least *prima facie* be an individual one.[104] Moreover, it should be appreciated that "legislation which serves desirable social purposes may give rise to entitlements which themselves deserve protection".[105] These starting positions point away from a declaration of facial invalidity in the case of section 276. What should be sought, then, is a remedy which provides relief to those accused persons who are truly aggrieved, while preserving the social utility of the legislation wherever this is possible.

Professor Rogerson cautions, however, that declarations of facial invalidity may be required where it is necessary to render the entire law inoperative in order to protect against future violations. "This is based upon the recognition that individual vindication of rights after-the-fact is less desirable than preventing the violation from ever taking place. . . ."[106] This concession exists in recognition of one of the major failings of the use of declarations of partial invalidity, the risk that insufficient guidance will be provided for future cases. For this reason, where there is a clear line between the constitutional and unconstitutional reach of a provision which the decision in question will illustrate, a declaration of partial invalidity is easier to obtain.

Section 276 appears on its face to be a poor candidate for the application of the constitutional exemption doctrine if attention is paid to whether the use of the doctrine will provide guidance in future cases. The precise problem with the provision is that it attempts that which is impossible by purporting to predefine questions of relevance where no clear line can in fact be drawn. The ambit of the constitutional exception would therefore have to be determined on a case by case basis.[107] Moreover, resort to section 276 threatens to cloud the

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[103] *Ibid.* at 285.
[104] *Ibid.* at 287.
[105] *Ibid.* at 288.
[106] *Ibid.*
[107] It can be responded, however, that the problem of uncertainty in this context is intractable. Whether a constitutional exemption doctrine applies or not, determinations will still be made on a case by case basis such that striking down the entire law does no more for certainty in defining constitutional limits than would applying the doctrine and preserving the provision.

proper resolution of basic questions of relevance because of the artificially restricted scope of its stated exceptions. To allow the provision to continue to serve as the starting point when the appropriate inquiry is a general examination of the relevance and probative nature of evidence could well encourage unduly narrow determinations.

In my view the most substantial objection to the application of a constitutional exemptions doctrine in this context is that the constitutional limits of the present provision would render section 276 virtually useless. It would contribute nothing to the resolution of issues of admissibility. The constitutional limit would require that evidence excluded by the provision be admitted where it is relevant and potentially probative enough to cause a reasonable trier of fact to have a reasonable doubt in all of the circumstances of the case. Thus, the only evidence that section 276 would be allowed to exclude would be either irrelevant or non-probative information. According to the ordinary rules of evidence, information that is not relevant is already inadmissible. As far as excluding non-probative evidence is concerned, section 276 is of no assistance for it does not allow for the weighing of evidence.[108] For these reasons section 276 would add nothing to the way in which questions of admissibility would be resolved. The constitutional exemptions doctrine would not operate, therefore, to create exemptions at all; it would stand, in effect, as an independent standard for resolving questions of admissibility.

Another consideration militating against the application of the constitutional exemptions doctrine in this context relates to uncertainty about how Parliament might choose to resolve the constitutional problem. In discussing whether a declaration of partial invalidity is appropriate Professor Rogerson suggested that an important consideration would be whether the Court could anticipate what the legislative response would be and could duplicate it using the doctrine.[109] Despite that it seems inevitable that the only provisions that could avoid the constitutional mischief would be ones allowing for case by case considerations, there are still questions left to be answered. In the two appeal courts which have considered the prospect of applying the case by case constitutional exemptions doctrine, most attention was given to the modalities and feasibility of its application. The objection was raised in argument in both cases, and accepted in *Wald*,[110] that making case by case determinations would defeat the whole purpose of the legislation. The evidence would have to be led before the court could

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[108] By opting for a categories approach the framers of the provision eschewed any case by case appraisal of evidence. If relevant evidence fits into one of the categories it is admissible where the procedures provided for are complied with, regardless of its weight or importance to the case, and the assessment of the weight of the evidence is a function for the trier of fact to perform.

[109] Rogerson, *supra*, note 90 at 300-01.

[110] *Supra*, note 4.

determine its relevance. How could the section stand given that its very purpose is defeated by its constitutional failings?[111] In order to counter this, Grange J.A. was forced to construct a complete procedure for the adjudication of applications for constitutional exemption. There would be a *voir dire* at which the accused would stipulate the evidence. Occasionally the evidence would have to be heard, but in no case could the complainant be called during the *voir dire*. The procedure outlined by Grange J.A. was both controversial[112] and far from inevitable yet these questions of detail have substantial import. Because of this, it may be that the procedures attending the screening of such proof should be worked out by Parliament.

VI. Conclusion

Section 276 contravenes the principle of fundamental justice which is an essential corollary of the presumption of innocence that accused persons be given access to relevant evidence that has the potential to raise a reasonable doubt. This is because, according to the appropriate standard of relevance, section 276 has the potential to cause relevant evidence to be excluded. Moreover, the provision makes no allowance for the weighing of evidence and therefore could cause the exclusion of relevant evidence that is probative enough to undermine the Crown's efforts to meet its burden of proof. Section 1 cannot justify limiting the constitutional right in question because to allow the conviction of accused persons despite the existence of a reasonable doubt is too deleterious to the most basic of constitutional rights to tolerate; our system of justice simply cannot abide the conviction of particular individuals who may be innocent in the eyes of the law in order to further general societal goals like saving complainants from embarrassment and encouraging the reporting and prosecution of sexual offences. Despite that this unconstitutional mischief is unlikely to befall many accused persons, the entire provision must be declared invalid. This is because the section fails to meet the minimal criteria for the application of the constitutional exemptions doctrine.

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[111] In *Wald*, *ibid.* at 137, a more technical approach to the same argument was attempted. Hetherington J.A. argued that because it precludes proof of the past sexual conduct of the complainant other than in those cases specified, s. 246.6 (now s. 276) would prevent the accused from presenting the evidence needed to establish the exemption. Surely if it is accepted that the exclusion of some relevant evidence by the section is unconstitutional the section could not be relied upon to prevent the very establishment of that unconstitutionality in a particular case.

[112] In dissent, Brooke J.A. protested. In particular, he argued that if it was unconstitutional to deprive an accused of access to proof of past sexual conduct of the complainant where that proof is relevant, it is equally unconstitutional to deprive the accused of access to the most important witness on the subject while endeavouring to establish the constitutional violation. *See Re Seaboyer*, *supra*, note 4 at 315.

So, where does this leave Parliament in terms of its ability to minimize the reprehensible spectre of defence counsel embarrassing complainants with evidence that could not, on any reasonable view, raise a reasonable doubt? In my view there is nothing to prevent Parliament from developing a judicial discretion which would allow trial judges to prescreen relevant defence evidence and to reject it where it is clear that it is not probative enough to raise a reasonable doubt. It will no doubt be argued that a rule of evidence that allows trial judges to do a preliminary assessment of the probity of evidence would not satisfy the demands of the Constitution. Under our system of law, it is a matter of principle that the trier of fact determines whether a reasonable doubt exists.[113] This is because fact finding is a matter for human experience, and not an exercise requiring legal training. As Sopinka J. said in a recent decision, "[t]he reason we have juries is so that lay persons and not lawyers decide the facts".[114] This is also why it is a trite proposition of law that the weight to be ascribed to evidence, (a function of the extent to which evidence is believable and important) is for the trier of fact, not the trier of law.[115] To accommodate this, threshold questions of law related to determinations of fact are typically resolved on the assumption that the evidence will be believed by the trier of fact.[116] All of this seems to require that any relevant evidence must be given to the trier of fact so that he or she can decide whether each particular item of evidence does in fact contribute to a reasonable doubt. In this fashion the constitutional principle that an accused person must be given access to evidence that can raise a reasonable doubt appears to be translated into one that requires that all relevant defence evidence be admitted. Stated in this fashion the constitutional principle can tolerate no prior assessment of the exculpatory potential of the evidence.

The thing that prevents all of this from happening, in my view, is that questions of constitutional entitlement are questions of law, and the burden of establishing that there has been a constitutional violation is upon the accused. Where the judge has a discretion to admit evidence necessary to enable the accused to present a full answer and defence, the constitutional challenge must be to the exercise of that discretion

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[113] *See, Mezzo, supra,* note 47 at 836.
[114] *Morin, supra,* note 54 at 362.
[115] *Mezzo, supra,* note 47 at 844.
[116] *See* the illustrations accompanying notes 47-50.

and not to the provision or rule of law.[117] This is because there is nothing to prevent the judge from applying such a provision or rule in a constitutional fashion. Any constitutional claim relates, therefore, to the specific facts of the case and not to hypothetical situations.

The gravamen of a constitutional claim to the admission of evidence is that the evidence could make a difference in the outcome by revealing a reasonable doubt. If the judge determining the question of law of whether the *Charter* secures access to the evidence in the case at hand concludes that this is not so because the evidence is only tenuously relevant or, in the context of the case, is so flimsy or trivial that no reasonable trier of fact could act upon it, then no constitutional basis for its admission can be maintained.[118] Admittedly this usurps the role of the trier of fact to a degree; the trier is prevented from considering evidence which is, *ex hypothesi* relevant, and the trier may have thought the evidence to be more significant than the trial judge. It must be remembered, however, that the *Charter* would allow judges to refuse such evidence only where no reasonable trier of fact could act upon it. No accused person can claim a constitutional right to the consideration of evidence that does not even meet this minimal standard.

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[117] In *Corbett*, *supra*, note 40 it was recognized that, on its face, section 12 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, had the potential to allow evidence to be adduced which could jeopardize the accused's right to a fair trial. The thing that enabled the court to avoid striking the section was the determination that judges had a discretion to refuse to allow proof of the prior convictions of an accused where the revelation of those convictions would be so prejudicial as to compromise a fair trial. The constitutional complaint would therefore be to the exercise of the discretion and not to the provision itself. *See* Paciocco, CHARTER PRINCIPLES, *supra*, note 3 at 22.

[118] In each case where section 276 was declared unconstitutional the courts found a way to decide the issue before them by employing a judicial discretion to exclude evidence where its low probative value did not warrant its admission. In *Coombs*, *supra*, note 4, Steele J. simply exercised a broad judicial discretion, as did Marshall J. in *Oquataq*, *supra*, note 4, and this is the approach outlined by the Court in *Wald*, *supra*, note 4. In *Brun*, *supra*, note 4, the Court employed the questionable expedient of treating the former statutory regime as being revived by the constitutional ruling. A similar approach was apparently ultimately applied by McLachlin J. in *LeGallant*, *supra*, note 4. In my view this result must be accomplished by legislation for there is no common law discretion to deprive accused persons of evidence based on concerns about prejudice to other parties. *See* the discussion accompanying note 38, *supra*.