

2001

Legal Rights in the Supreme Court of Canada in 2000: Seeing the Big Picture

Janine Benedet

Allard School of Law at the University of British Columbia, benedet@allard.ubc.ca

Follow this and additional works at: http://commons.allard.ubc.ca/fac_pubs

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), and the [Criminal Law Commons](#)

Citation Details

Janine Benedet, "Legal Rights in the Supreme Court of Canada in 2000: Seeing the Big Picture" (2001) 14 Sup Ct L Rev (2d) 97.

This Article is brought to you for free and open access by the Faculty Scholarship at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

LEGAL RIGHTS IN THE SUPREME COURT OF CANADA IN 2000: SEEING THE “BIG PICTURE”

Janine Benedet*

I. INTRODUCTION

The legal rights in sections 7-14 of the Charter¹ were among the first to be developed by the Supreme Court of Canada after the adoption of the Charter in 1982, and were the vehicle for some of the most important judicial changes to Canadian law, and in particular Canadian criminal law.² The year 2000 did not offer the Supreme Court of Canada many opportunities to apply or expand this jurisprudence. It did, however, provide the Court with four cases which raised claims under sections 7, 11(c), 11(d) and 12 of the Charter: two criminal cases, one human rights investigation and one child protection proceeding.³ This comment focuses on the Court's decisions in two cases which raised claims under section 7 of the Charter in the context of proceedings important to women's equality. Both of these cases demonstrate a commitment on the part of the Court to contextualize the interpretation of legal rights to take into account interests beyond those of the immediate parties to the case. In this paper, I argue that

* Assistant Professor, Osgoode Hall Law School, Toronto, Ontario. This paper was originally presented at the April 6, 2001 conference entitled “2000 Constitutional Cases: Fourth Annual Analysis of the Constitutional Decisions of the S.C.C.” sponsored by the Professional Development Program at Osgoode Hall Law School.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² See, e.g., *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

³ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519; *R. v. Darrach*, [2000] 2 S.C.R. 443; *R. v. Morrisey*, [2000] 2 S.C.R. 90.

this trend is justifiable in both the human rights and the criminal contexts at issue in the past year's appeals.

II. SECTION 7 AND ADMINISTRATIVE DELAY: BLENCOE

The promise of the human rights system to provide quick, informal and meaningful remedies where there has been unlawful discrimination continues to be unfulfilled. In fact, the human rights process is best described as slow, cumbersome and meagre in its outcome for most complainants. In Ontario, for example, the effective response to the growing backlog of cases has been to shrink the caseload by dismissing complaints at the outset and by shunting claimants to alternate forums such as grievance arbitration and mediation, thus undermining the public interest role of the human rights framework.⁴ In *Blencoe*, the Supreme Court of Canada examined this problem in the form of a section 7 challenge by a human rights claim respondent on the ground of unreasonable delay to proceedings before the B.C. Human Rights Commission.

Robin Blencoe was a cabinet minister in the British Columbia NDP government. In March 1995, Blencoe's assistant asserted that he had sexually harassed her. The allegation led to an inquiry and to Blencoe's dismissal from Cabinet and from the NDP caucus. These events were covered widely in the press. Blencoe's assistant did not file a human rights complaint. Several months later, two other women who had professional dealings with Blencoe did file human rights complaints against him, stating that he had sexually harassed them as well.

Blencoe fought the complaints with full force. He objected to the timeliness of the complaints when the women sought relief from the statute's miserly six-month limitation period. He demanded to see documents forwarded by the complainants in reply to his response, and to make additional submissions, despite the fact that this was a departure from the Commission's normal procedures. Both his counsel and the complainants' counsel did file their various documents efficiently. The Commission, however, was responsible for a number of periods of mostly unexplained delay; the longest amounted to five months. The hearing was scheduled to take place 32 months from the date of the filing of the complaints.

⁴ Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000), 26 *Queen's L.J.* 43, at 51-62.

Blencoe commenced an application for judicial review, seeking a stay of proceedings on the ground that the unreasonable delay was an abuse of process and violated section 7 of the Charter. This application was dismissed by the Supreme Court of British Columbia, but allowed by a majority of the B.C. Court of Appeal, Lambert J.A. dissenting. On further appeal to the Supreme Court of Canada, the Court unanimously held that the hearing should proceed. However, four members of the Court would have found a violation of administrative law principles of fairness that merited some remedy short of a stay.

The majority reasons were written by Justice Bastarache, who began by noting the existence of some disagreement in the lower courts as to the application of section 7 to non-criminal proceedings, at least in the context of pre-hearing delay. Bastarache J. confirmed that section 7 is not restricted to the criminal law. So long as there is state action that directly engages the justice system, section 7 can be invoked. Delay in human rights proceedings could provide a basis for the claim.

However, he cautioned that the recognition that section 7 can apply in this context should not be conflated with an assessment of whether Blencoe's rights to life, liberty or security of the person had been infringed. This is an independent consideration that must be satisfied before proceeding to consider the principles of fundamental justice.

The majority considered and rejected Blencoe's contention that the effects of the delay, and in particular the ongoing psychological stress and stigma from the unresolved complaints, infringed his liberty interest. Bastarache J. noted that while the liberty interest extends beyond direct physical restraint to protect the right to make fundamental personal decisions about one's own life free from state interference, no such fundamental personal choices were at issue in this case.

Turning to security of the person, Bastarache J. described the reach of this interest to include not only interferences with bodily integrity but also serious state-imposed psychological stress. On the facts, he found that neither component of this definition was satisfied; the harm was neither state-imposed nor sufficiently serious. Blencoe had suffered most of his considerable stress and stigmatization on his dismissal from Cabinet, well before the filing of the human rights complaint or any delays in the proceedings. Bastarache J. disagreed that the delay in the human rights process had significantly exacerbated the prejudice. Any infringement of psychological security was not state-imposed.

In the alternative, Bastarache J. also found that the interference with Blencoe's psychological integrity was not sufficiently serious. He cautioned that while "dignity" is an underlying value in Charter

analysis, it is not a freestanding constitutional right, whose deprivation triggers section 7. The real interest asserted by Blencoe was damage to reputation and social stigma. But these interests were also not Charter rights. What was required was a state interference with an individual interest of fundamental importance that had a serious and profound effect on Blencoe's psychological integrity. It is clear from the majority's reasons that the Court envisions this to be a narrow category:

It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.⁵

While the Court is correct not to trivialize the definition of "security of the person" to encompass every annoyance or prejudice occasioned by the operation of state action, the alternate definition imposed by the Court does not entirely make sense. In particular, it is unclear how courts could ever find delay in the human rights process that "interferes in profoundly intimate and personal choices". Bastarache J.'s definition of security of the person seems in fact to exclude human rights delay entirely from its ambit, contrary to his earlier claim.

Even if the start of the media attention in this case had been coincident with the human rights complaints — if Blencoe's assistant had also filed a complaint, and done so at the time her allegations were made public — and even if the delay had been longer than 32 months, how could it ever operate so as to affect an "intimate personal choice" of Blencoe? It is hard to imagine a situation in which the result of an unresolved human rights proceeding is the inability of the person affected to regain custody of their children or to control what happens to their own body. It might have been clearer to simply exclude this claim from the ambit of the security of the person interest altogether, than to reserve some space for a Kafkaesque delay.

In any event, the Court rejected Blencoe's characterization of the delay as an assault on his dignity or his privacy interests. The public scrutiny of Blencoe was largely the result of his decision to inject himself into the public realm. Any invasion of his privacy was not the

⁵ *Blencoe, supra*, note 3, at para. 83.

result of the Commission's actions, nor was it appropriate for Blencoe to compare himself to complainants in sexual assault trials facing disclosure of their therapeutic records:

Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with the human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being.⁶

This passage is as reassuring for its recognition of women's rights to abortion and to equality in sexual assault trials as it is for its perspective on the degree of harm to Blencoe attributable to the delay.

Perhaps the most important aspect of the majority reasons in *Blencoe* is the rejection of the analogy to section 11(b) of the Charter as applied in criminal cases. The Court makes clear that while section 7 can apply to proceedings outside the penal context, this does not mean that the section 11(b) right to be tried within a reasonable time can be imported into section 7 in the human rights context. The Court rejects in strong language the tendency of some courts to equate human rights complaints, and in particular sexual harassment complaints, with criminal charges:

In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the Commission "prosecutes" the respondent.⁷

This distinction bears repeating. When the first comprehensive anti-discrimination laws were passed in the United States and Canada in the 1960s, it was easy to understand that they were remedial rather than punitive, since overt or explicit discrimination was the norm, and in many cases state-supported. It was therefore clear, at least to

⁶ *Id.*, at para. 86.

⁷ *Id.*, at para. 94.

those who supported the laws, that they were designed to correct an injustice rather than to stigmatize individuals as evil. As discrimination becomes less overtly acceptable, however, complaints of discrimination, especially when directed at individual respondents, have at times taken on an accusatory flavour, especially in the media. Of course, this is also in part because they are increasingly so hard-fought by respondents like Blencoe.

Treating sex discrimination claims as criminal charges is both not true to the spirit of human rights legislation and a factor that encourages legalization of human rights proceedings, which in turn spawns delay. To avoid the *de facto* criminalization of sexual harassment and other discrimination claims, members of equality-seeking groups will also have to refrain from viewing every successful discrimination claim as proof of personal fault, and be content with a process that provides a speedy and meaningful remedy to the complainant.⁸

The dissent in *Blencoe* does not undertake a section 7 analysis. Rather, the dissenting judges disagree with the majority's conclusion that Blencoe was not entitled to any remedy for the effects of the delay based on administrative law principles of fairness. While the majority and the dissent disagreed on the effects of the delay in this case, and whether it could be described as "unfair" in this sense, they agreed that the stay of proceedings granted by the Court of Appeal was inappropriate in the circumstances. Both majority and dissent note that the interests of the complainants must also be considered in assessing the appropriate remedy, and that the case is not a "pure conflict between the respondent and the state."⁹ A stay was not to be the preferred form of redress where other remedies, such as an order for an expedited hearing or for costs, were available.¹⁰

⁸ The trend to viewing these proceedings as adversarial and punitive is probably exacerbated by the increasing use of grievance arbitration as a forum for addressing sexual harassment complaints, as human rights commissions try to decrease their backlog by shifting as many cases as possible into that forum. Arbitrations are often explicitly punitive, in that they determine whether disciplinary sanctions imposed on an employee for his or her actions are just, and can pit members of the same bargaining unit against one another. The increasing reliance on wrongful dismissal actions by persons fired from non-union positions for sexual harassment has also added to this atmosphere: *Bannister v. General Motors of Canada Ltd.* (1998), 40 O.R. (3d) 577 (C.A.); *Gonsalves v. Catholic Church Extension Society of Canada* (1998), 164 D.L.R. (4th) 339 (Ont. C.A.).

⁹ *Blencoe*, *supra*, note 3, at para. 139, *per* LeBel J., dissenting.

¹⁰ *Blencoe* is consistent with the Court's reasoning in *Winnipeg Child and Family Services v. K.L.W.*, *supra*, note 3, released one week later. The Court, by a 5:2 majority, dismissed a section 7 challenge to section 21(1) of the Manitoba *Child and Family Services Act*, which permitted child welfare authorities to apprehend children in need of protection

III. SECTION 7 AND EVIDENCE IN CRIMINAL TRIALS: DARRACH

The Supreme Court of Canada in 2000 considered legal rights in the criminal context in *R. v. Darrach*.¹¹ The accused in this case challenged the constitutionality of a number of amendments to the *Criminal Code*¹² provisions on sexual assault following the Court's decision in *R. v. Seaboyer*.¹³ In particular, Darrach argued that the sexual history provisions enacted to replace those struck down in *Seaboyer* violated his rights to silence and to a fair trial under sections 7 and 11(d) of the Charter, and his section 11(c) right not to testify against himself.

Although this decision was billed as an important one by both defence lawyers and women's groups,¹⁴ they both overstate its significance. Before the Ontario Court of Appeal, Darrach had also challenged the constitutionality of the "reasonable steps" provision under section 273.2(b) of the *Criminal Code*. This issue, had it been raised before the Supreme Court of Canada, could have required the Court to confront the continuing validity of its "stigma" jurisprudence and might, if the provisions were upheld, have encouraged judges to stop ignoring the section.

With this aspect of the Darrach case not before the Supreme Court, the appeal became a challenge to provisions that were nearly identical to those judicially legislated by McLachlin J. in her decision in *Seaboyer*. This can be contrasted with the *Criminal Code* records provisions at issue in *R. v. Mills*,¹⁵ which represented a substantial and

without prior judicial authorization even in non-emergency situations. The Court characterized the apprehension of a child from a parent as an interference with the security of the person of both the parent and the child. However, the majority found the legislative scheme to accord with the principles of fundamental justice when taking into account the child's right to life and health, the state's *parens patriae* duty to protect children, and the difficulty and risk inherent in either taking the time to seek judicial authorization or in waiting until the situation can clearly be classified as an emergency. Section 7 of the Charter was satisfied by a prompt post-apprehension hearing. Once again, in this case, the Court preferred a "delicate and contextual balancing" (at para. 48) that turned on the characterization of child protection legislation as "a child welfare statute and not a parents' rights statute" (at para 80, quoting *T. v. Alberta (Director of Child Welfare)* (2000), 188 D.L.R. (4th) 603, at para. 14 (Alta. C.A.)).

¹¹ *Supra*, note 3.

¹² R.S.C. 1985, c. C-46.

¹³ [1991] 2 S.C.R. 577.

¹⁴ Bailey, "Top Court Rejects Rape-Shield Challenge" *Toronto Star* (13 October 2000) N3; Chwialkowska, "Rape Shield Law Upheld by High Court: Unanimous Decision" *National Post* (13 October 2000) A4.

¹⁵ [1999] 3 S.C.R. 668.

welcome departure by Parliament from the inadequate common law regime laid down in *R. v. O'Connor*.¹⁶ Not surprisingly, the Court relied heavily on its reasoning in *Mills* to support the result in *Darrach*. If the “dialogue” approach to the balance of constitutional power between courts and legislatures favoured by the court in *Mills* was sufficient in that case to uphold statutory provisions quite different from those created in *O'Connor*, it is hardly surprising that the Court in *Darrach* upheld legislation that followed much more closely its directions in *Seaboyer*. Yet inasmuch as *Mills* can be read as a repudiation of the Court’s own majority reasons in *O'Connor* in favour of the dissenting reasons of L’Heureux-Dubé J. in that case, so too does the reasoning in *Darrach* adopt at least some of the understanding of sexual assault found in her *Seaboyer* dissent.

The accused in *Darrach* raised four main objections to the Code scheme, two of which were described as substantive and two procedural. First, the accused objected to the rule in section 276(1) that prohibits introduction of sexual history evidence to attack the complainant’s credibility or to prove her consent, on the ground that this violated his right to make full answer and defence. The Court rejected the defence’s characterization of this rule as a blanket exclusion, noting that evidence was only excluded when tendered in support of the “twin myths” of credibility and consent, myths that are not relevant and distort the trial process.

Sexual history evidence that is not excluded by the operation of section 276(1) is subject to a balancing process under section 276(2)(c) to determine admissibility. Such evidence is admissible where it has significant probative value that is not substantially outweighed by prejudice to the proper administration of justice. The defence unsuccessfully challenged the requirement that the probative value of the evidence be “significant”. Gonthier J. noted that the balance under section 276(2)(c) could be said to be heightened on both sides of the equation. This is appropriate, given the Court’s recognition in both its majority and dissenting reasons in *Seaboyer* that the introduction of sexual history evidence carries with it inherent damages and disadvantages to overall trial fairness.

On the procedural side, *Darrach* challenged the statutory requirement to produce an affidavit by or on behalf of the accused and to establish admissibility on a *voir dire* in which the accused could be cross-examined on his affidavit. The Court held that this procedure did

¹⁶ [1995] 4 S.C.R. 411.

not violate an accused's section 11(c) right not to be compelled to testify against himself. Gonthier J. noted that this procedure was consistent with the law of evidence in requiring a person who seeks to adduce restricted evidence to show that it is admissible to support some relevant inference. Section 11(c) prohibits *legal* compulsion of the accused. The accused who seeks to introduce sexual history evidence faces a tactical burden, not a legal one. The accused is under no obligation to call evidence; the tactical burden necessarily arises where the Crown makes out a *prima facie* case and the accused wishes to avoid being convicted.

The Court also rejected the argument that this procedure violated the accused's right to silence by forcing him to reveal his defence. As the Court correctly points out, while the accused has a right to silence before trial and while there is no obligation on the accused to disclose evidence to the Crown, at trial it will be necessary for the accused to identify his defences. The right to make full answer and defence, Gonthier J. confirms, "does not include the right to defend by ambush."¹⁷ In this case, the accused's refusal to be cross-examined on his affidavit made it worthless as evidence and prevented the trial judge from establishing whether the evidence sought to be admitted was relevant to a defence the accused sought to advance at trial.¹⁸

Finally, the Court confirmed the constitutional validity of section 276.2(2) of the Code, which states that the complainant is not a compellable witness on the *voir dire* to determine admissibility. The Court recognizes that without such a rule, the purpose of the sexual history provisions would be defeated and the *voir dire* opened up to a fishing expedition by the accused. In the first Code provisions on sexual history evidence, the complainant was considered a compellable witness at the *voir dire*.¹⁹ This proved to be a significant limitation on achieving the goals of the legislation, since the end result was that complainants could always be cross-examined at least once on their sexual history, even if the prospective evidence was grossly unreliable.

Significantly, the Court in its analysis in *Darrach* considers the interests of sexual assault complainants in the analysis of the section 7 right itself, rather than leaving these concerns to section 1. The Court

¹⁷ *Darrach*, *supra*, note 3, at para 55.

¹⁸ The Court did confirm that the *voir dire* is a proceeding to which section 13 of the Charter applies, meaning that the accused's evidence at the *voir dire* cannot be used against him at trial except for the limited purpose of impeaching credibility through a prior inconsistent statement: *R. v. Kuldip*, [1990] 3 S.C.R. 618.

¹⁹ S.C. 1974-75-76, c. 93, s. 8.

does this by relating the rights in section 11(c) and (d) to the principles of fundamental justice in section 7, which also include interests other than the accused's. The Court concludes that the fair trial protected by section 11(d) is one that does justice to all the parties, including the complainant in a sexual assault trial. While the result may be the same, this analytical choice is significant and, I would argue, correct.

In the same way that *Blencoe* criticized some courts and tribunals for treating human rights proceedings like criminal trials, it can be argued that the Court's approach to section 7 and the other legal rights in *Darrach* treats criminal trials like administrative decisions. Considering the interests of complainants in the body of the right, so the argument goes, ignores the fact that it is the accused who is in jeopardy and facing the loss of his physical liberty.

Those who argue that the complainant's interests have no place in the section 7 or 11(d) analysis conceive the tension as one between the accused's right to make full answer and defence and the complainant's interest in her privacy and reputation. This was essentially the formulation relied on by the majority in both *Seaboyer* and in *O'Connor*. On this understanding of the interests at stake, the accused's rights will always take precedence. The criminal process is inherently invasive of personal privacy, although sexual assault complainants have clearly been subjected to a special hell in this regard. But where evidence is truly relevant, its admission cannot be avoided by characterizing it as private, absent an interest that rises to the level of privilege. This understanding of what is at issue, however, is based on two faulty assumptions.

The first fallacy is that the introduction of sexual history evidence is necessary for the accused to make full answer and defence. That contention is only true if the right to make full answer and defence is understood as a right to introduce any evidence that might lead a jury to acquit, even if that acquittal occurs by relying on myths and stereotypes. It is for this reason that the rule that sexual history evidence cannot be tendered to support an inference that the complainant was more likely to consent, or is less worthy of belief, is clearly not a violation of the accused's rights. Accused persons do not have a right to introduce evidence that is not probative of a matter in issue.

Second, characterizing the complainant's main interest as her right to privacy is also inaccurate. Any sexual assault complainant in the criminal process will experience an invasion of her privacy. She will be asked to recount the events of the assault in vivid detail in a public

forum in front of strangers, and will be vigorously cross-examined on any discrepancy that might demonstrate that she is either lying or unreliable. Details of any medical examination following the assault may also be publicly explored.

The use of sexual history evidence is wrong not because it invades the complainant's privacy but because it undermines the sex equality rights of complainants. Sexual assault is a practice by men against women, and sometimes against other men, that asserts and perpetuates the inequality of women to men as a class. One example of this inequality is that women are categorized and judged on the basis of their past sexual behaviour. While it is often argued that a relaxation of sexual mores has diluted the effect of this so-called madonna-whore dichotomy, the result of this social shift may simply be that more women are considered whores than before.

In any sexual assault trial where the issue is not identity, the defence is that the complainant is either lying as to her lack of consent or at least was equivocal in expressing her lack of interest. To use a woman's sexual history to encourage a trier of fact to reach such a conclusion locks the complainant, and all women, into a self-reinforcing system in which there is no societal response to the violations that contribute to inequality because of the sexist attitudes that inequality produces. This is sex discrimination.

The right to sex equality, protected by sections 15 and 28 of the Charter, is a right with constitutional status and whose deprivation, unlike invasions of privacy, cannot be said to be either inherent in the criminal trial process or subordinate to defence interests. The Court implicitly recognizes the different status of these interests in *Mills*, in a passage quoted with approval in *Darrach*:

It is clear that the right to make full answer and defence is not engaged when the accused seeks information that will only serve to distort the truth-seeking purpose of the trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.²⁰

Note that equality rights have disappeared from the second sentence. Must the complainant's sex equality rights also "yield to the need to avoid convicting the innocent"?²¹ If an accused can only be acquitted

²⁰ *Mills, supra*, note 15, at para. 94, quoted in *Darrach, supra*, note 3, at para. 43.

²¹ *Darrach, supra*, note 3, at para. 43.

through an appeal to discriminatory attitudes, what possible meaning does the word “innocent” have in this sentence?

There are still some problems for women with the decision in *Darrach*, however. The Court continues to believe that sexual history evidence is often relevant to the defence of mistaken belief. This approach is inconsistent with both the reasonable steps provision in section 273.2(b) and the definition of consent endorsed by the Court in *R. v. M. (M.L.)*²² and in *R. v. Ewanchuk*,²³ all of which post-date *Seaboyer*.

In these cases, the Court makes clear that non-consent in law is not a behaviour manifested by the complainant in the form of resistance but rather a subjective state of mind of the complainant at the time of the sexual assault. There is no doctrine of implied consent in Canadian criminal law, such that the question is not whether the complainant said no, but rather whether she said yes. The Court has also made clear since *Seaboyer* that consent is to a person, an act and a circumstance, and that the belief that a complainant would consent on the basis of past behaviour is not the same as a belief that the complainant did in fact consent at the relevant time. The reasonable steps provision precludes the accused from relying on a belief in consent unless he takes reasonable steps, in the circumstances known to him at the time, to ascertain the complainant’s consent.

Unfortunately, the Court also endorses the “pattern of conduct” exception to the exclusion of sexual history evidence, noting that this may be an example of sexual history evidence being tendered for its non-sexual features. Past sexual conduct by the complainant with persons other than the accused is wholly irrelevant to the complainant’s consent to the accused on a subsequent occasion. This is true even if that conduct can somehow be described as showing a “pattern of behaviour.” No woman is in a state of perpetual consent, despite the concerted efforts of pornography to present all women in that way. Knowledge of this history also does not change what would be “reasonable” steps in the circumstances on the part of the accused.

Perhaps the Court means to confine this exception to situations where the “pattern” of past sexual conduct is with the accused himself, as was the case in *Darrach*. This might mean only that a pattern of past consensual contact between the complainant and the accused might form the basis for the accused’s assertion that a failure to take certain steps to ascertain consent was nonetheless “reasonable.” Yet the Court

²² [1994] 2 S.C.R. 3.

²³ [1999] 1 S.C.R. 330.

does not appear to be speaking so narrowly in declaring sexual history evidence often relevant to either a pattern of conduct generally or the mistaken belief defence, and even this narrower formulation has its concerns. Just because the Crown has the legal burden of proving non-consent does not mean that a man can presume consent in fact, even where there has been past consensual conduct. Under this approach, it is the man's view of what constitutes a "pattern" of behaviour that counts. This presents particular challenges for women who are in relationships that have been characterized by ongoing violence, such that the violence may be invoked as the normal pattern accompanying sexual contact.

IV. CONCLUSION

Sexual harassment in the workplace is an act of sex discrimination in employment; the legal remedy for this harm is attained through a human rights proceeding. Excessive delay in the human rights system harms both complainants and respondents, although the harm to respondents from ongoing stigma and publicity is not a state-imposed infringement of liberty or security of the person. Staying proceedings that have been subject to lengthy delay, however, serves only respondents. The result for complainants is no remedy at all.

Sexual assault is an act of sex discrimination that is also a crime. Where the state seeks to punish such crime through the mechanism of a criminal trial, a complainant will almost always be subject to attacks on her credibility through cross-examination, while the accused necessarily has no obligation to testify and face a direct challenge to his version of events. Acting to prevent further discrimination to complainants in the criminal process by requiring the accused to satisfy certain standards before attacking the complainant with her sexual history does not do much to alter these facts. Recognizing this is important in assessing constitutional objections to this procedure. In *Blencoe* and in *Darrach*, the Supreme Court of Canada saw the bigger picture, and got it right.