Court No. 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

BRADLEY DAVID BARTON

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, VANCOUVER RAPE RELIEF SOCIETY, LA CONCERTATION DES LUTTES CONTRE L'EXPLOITATION SEXUELLE (LA CLES), ASIAN WOMEN FOR EQUALITY SOCIETY, ABORIGINAL WOMEN'S ACTION NETWORK (AWAN), FORMERLY EXPLOITED VOICES NOW EDUCATING (EVE), CEASE: CENTRE TO END ALL SEXUAL EXPLOITATION (CEASE), ASSEMBLY OF FIRST NATIONS, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, THE WOMEN OF THE MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK, NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, CRIMINAL LAWYERS' ASSOCIATION ONTARIO, INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, ABORIGINAL LEGAL SERVICES, CRIMINAL TRIAL LAWYERS' ASSOCIATION (ALBERTA)

INTERVENERS

FACTUM OF THE INTERVENER,
ATTORNEY GENERAL OF ONTARIO
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

Christine Bartlett-Hughes
Benita Wassenaar

Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9
Telephone: (416) 326-4600
FAX: (416) 326-4656
E-mail: Benita.Wassenaar@ontario.ca
Christine.BartlettHughes@ontario.ca

Kate Forget

Indigenous Justice Division
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9
Telephone: (416) 212-7529
E-mail: Jessica.Wolfe@ontario.ca

Counsel for the Intervener,
The Attorney General of Ontario

Nadia Effendi

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, Ontario K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842
E-mail: neffendi@blg.com

Ottawa Agent for the Intervener,
The Attorney General of Ontario

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Dino Bottos
Peter Sankoff

Bottos Law Group
10226 - 104 Street NW, 4th Floor
Edmonton, Alberta T5J 1B8
Telephone: (780) 421-7001
FAX: (780) 421-7031
E-mail: dbottos@bottoslaw.ca

Counsel for the Appellant

Eugene Meehan, Q.C.

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, Ontario, K2P 0R3
Telephone: (613) 695-8855 Ext: 101
FAX: (613) 695-8580
E-mail: emeehan@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant

Joanne B. Dartana
Christine Rideout

Department of Justice
Crown Prosecution Service, Appeals Branch
9833 - 109 Street NW, 3rd Floor
Edmonton, Alberta T5K 2E8
Telephone: (780) 422-5402
FAX: (780) 422-1106
E-mail: joanne.dartana@gov.ab.ca

Counsel for the Respondent, Her Majesty the Queen

D. Lynne Watt

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-8695
FAX: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Ottawa Agent for the Respondent, Her Majesty the Queen

Renée Lagimodière
Jennifer Mann

Attorney General of Manitoba
510 - 405 Broadway
Winnipeg, Manitoba R3C 3L6
Telephone: (204) 945-5778
FAX: (204) 945-1260
E-mail: renee.lagimodiere2@gov.mb.ca

Counsel for the Intervener, Attorney General of Manitoba

D. Lynne Watt

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-8695
FAX: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Manitoba

Gwendoline Allison
Janine Benedet

Foy Allison Law Group
207 - 2438 Marine Drive
West Vancouver, British Columbia V7V 1L2
Telephone: (604) 922-9282
FAX: (604) 922-9283
E-mail: gwendoline.allison@foyallison.com

**Counsel for the Intervener,
Vancouver Rape Relief Society and
La Concertation des luttes contre
l'exploitation sexuelle (La CLES), AWCEP
Asian Women for Equality Society,
Aboriginal Women's Action Network
(AWAN), Formerly Exploited Voices Now
Educating (EVE) and CEASE: Centre to
End All Sexual Expploitation (CEASE)**

Albertos Polizogopoulos

Vincent Dagenais Gibson LLP
260 Dalhousie Street, Suite 400
Ottawa, Ontario K1N 7E4
Telephone: (613) 241-2701
FAX: (613) 241-2599
E-mail: albertos@vdg.ca

**Ottawa Agent for the Intervener,
Vancouver Rape Relief Society and
La Concertation des luttes contre
l'exploitation sexuelle (La CLES), AWCEP
Asian Women for Equality Society,
Aboriginal Women's Action Network
(AWAN), Formerly Exploited Voices Now
Educating (EVE) and CEASE: Centre to
End All Sexual Expploitation (CEASE)**

Stuart Wuttke
Julie McGregor

55 Metcalfe Street, Suite 1600
Ottawa, Ontario K1P 6L5
Telephone: (613) 241-6789 Ext: 228
FAX: (613) 241-5808
E-mail: swuttke@afn.ca

**Counsel for the Intervener,
Assembly of First Nations**

Moira Dillon

Supreme Law Group
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9
Telephone: (613) 691-1224
FAX: (613) 691-1338
E-mail: mdillon@supremelawgroup.ca

**Ottawa Agent for the Intervener,
Assembly of First Nations**

Christopher Rupar

Department of Justice
50 O'Connor Street, Suite 500
Ottawa, Ontario K1A 0H8
Telephone: (613) 670-6290
FAX: (613) 954-1920
E-mail: chirstopher.rupar@justice.gc.ca

**Counsel for the Intervener,
Attorney General of Canada**

Robert J. Frater Q.C.

Attorney General of Canada
50 O'Connor Street, Suite 500, Room 556
Ottawa, Ontario K1P 6L2
Telephone: (613) 670-6289
FAX: (613) 954-1920
E-mail: robert.frater@justice.gc.ca

**Ottawa Agent for the Intervener,
Attorney General of Canada**

Christian Leblanc
Tess Layton

Fasken Martineau DuMoulin LLP
Bureau 3700, C.P. 242
800, Place Victoria
Montréal, Quebec H4Z 1E9
Telephone: (514) 397-7545
FAX: (514) 397-7600
E-mail: cleblanc@fasken.com

Counsel for the Intervener,
Ad Idem / Canadian Media Lawyers Association

Sophie Arseneault

Fasken Martineau DuMoulin LLP
55 rue Metcalfe, Bureau 1300
Ottawa, Ontario K1P 6L5
Telephone: (613) 236-3882
FAX: (613) 230-6423
E-mail: sarseneault@fasken.com

Ottawa Agent for the Intervener,
Ad Idem / Canadian Media Lawyers Association

Jean Teillet

Jean Teillet Personal Law Corporation
861 East 11th Avenue
Vancouver, British Columbia V5T 3E7
Telephone: (604) 787-3978
FAX: (416) 916-3726
E-mail: jteillet@pstlaw.ca

Counsel for the Intervener,
The Women of the Métis Nation / Les Femmes Michif Otipemisiwak

Michael J. Sobkin

331 Somerset Street West
Ottawa, Ontario K2P 0J8
Telephone: (613) 282-1712
FAX: (613) 288-2896
E-mail: msobkin@sympatico.ca

Ottawa Agent for the Intervener,
The Women of the Métis Nation / Les Femmes Michif Otipemisiwak

Christa BigCanoe

National Inquiry Missing and Murdered Indigenous Women and Girls
500 - 1138 Melville Street
Vancouver, British Columbia V6E 4S3
Telephone: (416) 268-4133
FAX: (604) 775-5009
E-mail: c.bigcanoe@mmiwg-ffada.ca

Counsel for the Intervener,
National Inquiry into Missing and Murdered Indigenous Women and Girls

Meredith Porter

National Inquiry Missing and Murdered Indigenous Women and Girls
300 - 222 Queen Street
Ottawa, Ontario K1P 5V9
Telephone: (613) 222-5951
FAX: (613) 943-5760
E-mail: m.porter@mmiwg-ffada.ca

Ottawa Agent for the Intervener,
National Inquiry into Missing and Murdered Indigenous Women and Girls

Daniel J. Song
Matthew A. Nathanson

Sprake Song & Konye
1720 - 355 Burrard Street
Vancouver, British Columbia V6C 2G8
Telephone: (604) 669-7447
FAX: (604) 687-7089
E-mail: djsong@sprakesongkonye.com

Counsel for the Intervener,
Independent Criminal Defence Advocacy Society

Moira Dillon

Supreme Law Group
900 - 275 Slater Street
Telephone: (613) 691-1224
FAX: (613) 691-1338
E-mail: mdillon@supremelawgroup.ca

Ottawa Agent for the Intervener,
Independent Criminal Defence Advocacy Society

Andrej Skoko

Directeur des poursuites criminelles et pénales du Québec
Complexe Jules-Dallaire
2828, boulevard Laurier, Tour 1, bureau 500
Québec, Quebec G1V 0B9
Telephone: (418) 643-9059 Ext: 21404
FAX: (418) 644-3428
E-mail: andrej.skoko@dpcp.gouv.qc.ca

Counsel for the Intervener,
Director of criminal and penal prosecutions

Sandra Bonanno

Directeur des poursuites criminelles et pénales du Québec
17, rue Laurier bureau 1.230
Gatineau, Quebec J8X 4C1
Telephone: (819) 776-8111 Ext: 60446
FAX: (819) 772-3986
E-mail: sandra.bonanno@dpcp.gouv.qc.ca

Ottawa Agent for the Intervener,
Director of criminal and penal prosecutions

Megan Savard
Samara Secter

Addario Law Group
171 John Street, Suite 101
Toronto, Ontario M5T 1X3
Telephone: (416) 979-6446
FAX: (866) 714-1196
E-mail: msavard@addario.ca

Counsel for the Intervener, Criminal Lawyers' Association of Ontario

Colleen Bauman

Goldblatt Partners LLP
500-30 Metcalfe St.
Ottawa, Ontario K1P 5L4
Telephone: (613) 482-2463
FAX: (613) 235-3041
E-mail: cbauman@goldblattpartners.com

Ottawa Agent for the Intervener, Criminal Lawyers' Association of Ontario

Lisa Weber
Shaun O'Brien

Weber Law
10209 - 97 Street, Suite 300
Edmonton, Alberta T5J 0L6
Telephone: (780) 758-6365
FAX: (780) 429-2615
E-mail: lisa@weberlaw.ca

Counsel for the Intervener, Institute for the Advancement of Aboriginal Women and Women's Legal Education and Action Fund Inc.

Cheryl Milne

University of Toronto
39 Queen's Park Cres. East
Toronto, Ontario M5S 2C3
Telephone: (416) 978-0092
FAX: (416) 978-8894
E-mail: cheryl.milne@utoronto.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

Emily Hill
Jonathan Rudin

Aboriginal Legal Services
211 Yonge Street, Suite 500
Toronto, Ontario M5B 1M4
Telephone: (416) 408-4041 Ext: 224
FAX: (416) 408-1568
E-mail: e_hill@lao.on.ca

Counsel for the Intervener, Aboriginal Legal Services

Nadia Effendi

Borden Ladner Gervais LLP
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842
E-mail: neffendi@blg.com

Ottawa Agent for the Intervener, Institute for the Advancement of Aboriginal Women and Women's Legal Education and Action Fund Inc.

Matthew J. Halpin

Norton Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 1A4
Telephone: (613) 780-8654
FAX: (613) 230-5459
E-mail:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for the Intervener, David Asper Centre for Constitutional Rights

Nadia Effendi

Borden Ladner Gervais LLP
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842
E-mail: neffendi@blg.com

Ottawa Agent for the Intervener, Aboriginal Legal Services

Nathan J. Whitling
Aloneissi O'Neill

Hurley O'Keeffe Millsap
300 MacLean Block
10110 - 107 Street
Edmonton, Alberta T5J 1J4
Telephone: (780) 421-4766
FAX: (780) 429-0346
E-mail: whitling@libertylaw.ca

Counsel for the Intervener, Criminal Trial Lawyers' Association (Alberta)

Marie-France Major

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener, Criminal Trial Lawyers' Association (Alberta)

Court File No. 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

BRADLEY DAVID BARTON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

ATTORNEY GENERAL OF ONTARIO

Intervener

FACTUM OF THE INTERVENER
ATTORNEY GENERAL OF ONTARIO

TABLE OF CONTENTS

PAGE

PART I - OVERVIEW AND STATEMENT OF FACTS

1. This case engages fundamental concerns about fairness to accused persons, the relationship between Indigenous people and the criminal justice system, and the prosecution of sexual assault related offences. The case invites scrutiny of the way the criminal justice system addresses the intersectionality of gender and race. The Attorney General of Ontario will advocate a framework for the admissibility of prior sexual history that acknowledges the unique circumstances of Indigenous women in Canadian society. AG Ontario will also provide an approach to vitiating consent to sexual activity where injury is caused that is animated by harm reduction objectives and the need to protect vulnerable complainants.

PART II - QUESTIONS IN ISSUE

2. AG Ontario will make submissions in relation to the Appellant's grounds (iv) and (v):

iv. Did the ABCA err in its treatment of the evidence of prior sexual activity?
v. Was the offence of unlawful act manslaughter properly explained to the jury?

In relation to the issue of prior sexual activity evidence, AG Ontario takes the position that:

- an admissibility ruling is required for Crown led evidence of prior sexual activity;
- prior sexual activity rarely has any probative value in establishing the defence of consent or mistaken belief in consent; and
- the reasonable steps component in s. 273.2 (b) will almost always demand that an accused take some active step to ascertain that the complainant is consenting.

AG Ontario takes the position that consent to sexual activity is vitiated when:

- bodily harm was caused and subjectively intended; or
- an accused "wounds, maims, disfigures or endangers the life of the complainant" and that degree of harm was objectively foreseeable.

AG Ontario takes no position on the outcome of the appeal.

PART III - ARGUMENT

A. Procedure when the Crown Seeks to Lead Prior Sexual History Evidence

3. Where an accused is charged with a sexual offence or a sexual offence underlies the offence charged, an admissibility hearing should be held prior to the introduction of evidence of other sexual activity that does not form the subject matter underlying the offence charged. Introduction of this evidence whether by the defence or Crown can potentially lead to prejudicial inferences based on discriminatory reasoning regarding the complainant's credibility or the likelihood of consent, and may activate racial and gender stereotypes regarding her worthiness. When weighing the probative value against the prejudicial effect of the evidence of other sexual activity, the court

should consider whether anti-Indigenous stereotypes, race or other factors are being relied upon to compound discriminatory myths regarding sexual activity that may undermine credibility or foster an inference regarding the likelihood of consent.

4. The plain language of s. 276 encompasses only evidence of other sexual activity on the part of the complainant when the defence seeks its introduction. In *R. v. Darrach* this Court recognized that s. 276 is in essence a codification of the substantive guidelines of the Court in *Seaboyer*.[1] The substantive sections prevent evidence of a complainant's past sexual activity from being used for improper purposes; procedural sections enforce this rule.[2] Legislation must be interpreted harmoniously with *Charter* norms.[3] Likewise, the common law must develop in accordance with *Charter* values.[4] Whether introduced by the defence or by the Crown, evidence of a complainant's other sexual activity has the potential to mislead the trier of fact.[5]

5. As this Court noted in *R. v. Osolin*, relevance and probative value must be determined taking into account the purpose for which the evidence is tendered.[6] This Court has repeatedly held when giving scope to evidentiary procedures, courts must take into account the privacy interests of a complainant and the fair trial interests of an accused and balance those in a manner that facilitates the truth seeking function of the court.[7] In *R. v. Mills*[8] and *R. v. Darrach*[9] this Court explicitly added that the equality rights of complainants must be taken into account.

6. The requirement of an admissibility ruling, irrespective of whether it is the Crown or the defence who seeks to introduce the evidence, focuses all parties on the legitimate use of such evidence and ensures that trial judges adequately understand the context. This facilitates careful, nuanced rulings that respect the privacy, dignity and equality rights of the complainant, as well as the accused's right to a fair trial and full answer and defence. Evidence introduced by the Crown that has limited probative value but which has the potential to invoke discriminatory reasoning, including racial and gender stereotyping, may cause more damage to the truth seeking process than if the same evidence were introduced by the defence, as the discriminatory inferences may be

---

[1] *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 19
[2] *R. v. Darrach*, *supra* at para. 19
[3] *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584 at paras. 45-48; *R. v. Mills*, [1999] 3 S.C.R. 668, 139 C.C.C. (3d) 321 at paras. 59-68
[4] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 20 O.R. (3d) 816; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, 143 D.L.R. (4th) 1; *R. v. Salituro*, [1991] 3 S.C.R. 654, 68 C.C.C. (3d) 289
[5] *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321at para. 91
[6] *R. v. Osolin*, [1993] 4 S.C.R. 595 at p. 666, 86 C.C.C. (3d) 481
[7] *R. v. Seaboyer*, *supra* at 634; *R. v. Osolin supra* at 673; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33 at paras.134-151
[8] *R. v. Mills*, *supra* at paras. 21, 54, 61-68
[9] *R. v. Darrach*, *supra* at paras. 28-31

imbued with an added air of legitimacy when proffered by the state. The clarity provided by the trial judge in his or her gatekeeping function regarding permissible and impermissible evidence and lines of questioning promotes fairness and reduces the potential for unforeseen inferences and subconscious stereotypes to be exploited in a manner that does not facilitate the truth seeking function of the trial.

7. AG Ontario proposes a procedure whereby the Crown should be required to provide notice to the defence (and where possible the complainant[10]) as to the contents of the proposed evidence of other sexual activity and the basis for a claim that the evidence is relevant and of probative value. It would then fall to the trial judge to determine whether the probative value of this evidence is not substantially outweighed by the prejudicial effect, taking into account the factors set out in s. 276(3). Where the Crown tenders the evidence, the factors to be considered by the trial judge should parallel those in s. 276(3). In particular, subsection 276(3)(d) requires the trial judge to consider the need to remove from the fact-finding process any discriminatory belief. Subsection (e) requires the trial judge to consider the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; and subsection (h) requires a consideration of any other factor that the judge considers relevant. In addition subsection (g) requires taking into account the right of the complainant and every individual to personal security and to the full protection and benefit of the law.

8. The language of s. 276(3) reflects Parliament's intention to remove from the fact finding process any discriminatory beliefs or bias surrounding the use of evidence of other sexual activity. The section requires identifying discriminatory beliefs or bias against Indigenous or racialized people where those beliefs may, combined with evidence of other sexual activity, influence the jury's assessment of credibility, consent and worthiness. An approach that protects equality rights would ensure inferences drawn from stereotyping, including anti-Indigenous stereotyping, are removed from the reasoning process.[11]

9. Where the complainant is Indigenous, the direction of this Court in *R. v. Ipeelee* must inform the context in which any ruling in respect of s. 276(3) is made:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society . . .To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential

[10] Where the complainant is unavailable, the possibility of a substitute/alternative procedure would require further consideration and submissions from interested parties.

[11] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at paras. 23-25

> schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[12]

10. This Court in *R. v. Williams* recognized widespread anti-Indigenous racism in Canada, including myths and stereotypes that Indigenous people are less credible, less worthy, and prone to criminality.[13] This Court concluded that "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system" which establishes "a realistic potential that some of the jurors might not have been indifferent between the Crown and the accused." In *Williams* this Court noted that these stereotypes "are as invasive and elusive as they are corrosive" and held that such prejudices "may be deeply ingrained in the subconscious psyches of jurors." This partiality has been found to exist against Indigenous victims as well; in *R. v. Rogers* the Ontario Superior Court found that "racism will be at work on the jury panel as soon as the victim is described as an Aboriginal."[14]

11. Where there is an evidentiary basis to conclude that myths and stereotypes may lead to the complainant being viewed as less worthy or credible, as in cases involving Indigenous complainants in sexual offences, the prejudice arising from prior sexual conduct evidence may be aggravated. In exercising the gatekeeping function under s. 276(2) of the *Criminal Code,* or under the common law, the trial judge must consider the corrosive nature of racial stereotypes in combination with the use of the evidence of other sexual activity when assessing admissibility. In particular, the trial judge must assess whether the proposed evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. The circumstances experienced by Indigenous people identified in *Ipeelee* reflect the ongoing legacy of colonialism, displacement and residential schools. In order for Indigenous complainants and potentially other racialized complainants to receive the full protection and benefit of law, racial prejudice needs to be addressed.[15] The prevalence of the sexual victimization of Indigenous women and girls underscores the necessity of this analysis.

12. Where a trial judge decides to admit evidence of other sexual activity on the part of the complainant, he or she is obliged to ensure that the jury is aware of the permissible and impermissible uses of the evidence. Section 276.4 mandates that the trial judge provide such instruction to the jury. In *Seaboyer* this Court held that "in the exceptional case where

---

[12] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 at para. 60; See also para.61; *R. v. Sharma*, 2018 ONSC 1141, 145 W.C.B. (2d) 644 at paras. 56-60

[13] *R. v. Williams*, [1998] 1 S.C.R. 1128, 124 C.C.C. (3d) 481 at paras. 58 -59; and paras. 21-22

[14] *R. v. Rogers* (2000), 47 W.C.B. (2d) 233, 38 C.R. (5th) 331 (Ont. Sup Ct) at para. 6

[15] Section 276(3)(e) and (g)

circumstances demand that such evidence be permitted," trial judges must take "special care" to ensure that "the jury is fully and properly instructed as to its appropriate use."[16] Where invasive and corrosive racial stereotypes aggravate and reinforce the potential for prejudicial use of the evidence of other sexual activity, the trial judge must provide mitigating instructions. An instruction that alerts jurors to the pervasiveness and elusiveness of racial prejudice and ensures respect for the dignity and worthiness of the complainant is required.

B. Evidence of Other Sexual Activity and Consent / Honest but Mistaken Belief in Consent

13. Prior sexual activity between a complainant and an accused and any accompanying discussion regarding the parameters of prior sexual activity rarely has any probative value in establishing the defence of consent or mistaken belief in consent. Section 273.1 is clear that consent means "voluntary agreement of the complainant to engage in the sexual activity in question." This is specific activity on a specific occasion. The concept of implied consent has no place in Canadian law.[17] Therefore, an accused cannot found his expectations as to what sexual activity the complainant will consent to on a specific occasion on the basis of a prior interaction. Evidence of the complainant's prior sexual activity may have probative value in relation to the question of consent in situations where the fact of the prior sexual activity contradicts the contents of the complainant's evidence or a prior statement; for example, when a complainant states that she did not consent because of the nature of the sexual activity; that she would not consent to sexual activity with the accused; or that the relationship was only platonic.[18]

14. However, where the alleged sexual activity is unusual, and there is a concern that a juror might draw the inference that it is unlikely that the complainant would consent to the activity in question, an instruction to the jury could be given to the effect that they cannot rely on the unusual nature of the sexual activity in question to conclude either that the complainant consented or did not consent.[19] This prevents the possibility that the jury may rely on impermissible inferences that consent to the sexual activity underlying the charge is more likely because of the prior sexual conduct. An instruction is also fair to the accused as it prevents the jury from assuming that due to the unusual nature of the activity the complainant would not consent. An instruction focuses the

---

[16] *R. v. Seaboyer*, *supra* at para. 100.
[17] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 131 C.C.C. (3d) 481 at paras. 25-26, 31
[18] See for example *R. v. Harris* (1997), 102 O.A.C. 374, 118 C.C.C. (3d) 498 (CA); *R. v. Butts*, 2012 ONCA 24, 285 C.C.C. (3d) 569; *R. v. Zachariou*, 2015 ONCA 527, 123 W.C.B. (2d) 403, aff'g 2013 ONSC 6694. See also: *R. v. Crosby*, [1995] 2 S.C.R. 912, 141 N.S.R. (2d) 101
[19] *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275

jury on the evidence of consent at the time of the sexual activity in question.[20] A complainant can give or withdraw consent at the time of the activity.[21]

15. When the act in question changes from what was specifically agreed to, an accused is obliged to make sure he has unequivocal consent to the new act.[22] Similarly, an agreement to sexual touching should not be considered an agreement to sexual touching accompanied by any amount of force. This would violate the rationale for criminalizing assault as asserted in *Ewanchuk*: "Having control over who touches one's body, *and how*, lies at the core of human dignity and autonomy [emphasis added]."[23] The amount of force being applied is an essential quality of the act distinguishable from consequences such as pregnancy or disease.[24]

Reasonable Steps to Ascertain that the Complainant was Consenting

16. The reasonable steps component in section 273.2(b) will almost always demand that an accused take some active step to ascertain that the complainant is consenting. In *Ewanchuk* this Court held that for an accused to successfully raise the defence of honest but mistaken belief in consent, "the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question."[25] Practically, the defence will only apply where there is some ambiguity in the complainant's conduct in the circumstances that the accused relies upon to ground his belief in consent. As McLachlin, J. (as she then was) noted in *R. v. Esau* "[t]here must be evidence of not only non-consent and belief in consent, but in addition evidence capable of explaining how the accused could honestly have mistaken the complainant's lack of consent as consent."[26] However, this Court in *Ewanchuk* was also clear that the complainant's silence, passivity or ambiguous conduct cannot amount to consent.[27] Therefore, a reasonable person faced with ambiguous conduct would take some step to clarify the ambiguity conveyed.

17. A trial judge is required to consider whether there is an air of reality in relation to each component of the defence.[28] The British Columbia, Ontario and Alberta Courts of Appeal[29] have concluded that:

---

[20] *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440 at para. 47 and 53
[21] *R. v. J.A., supra* at para. 47
[22] *R. v. J.A., supra* at para. 34
[23] *R. v Ewanchuk, supra* at para. 28
[24] *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346 at paras. 5, 14, 21-22
[25] *R. v. Ewanchuk, supra* at paras. 45-46; See also *R. v. J.A. supra* at para. 48
[26] *R. v. Esau*, [1997] 2 S.C.R. 777, 116 C.C.C. (3d) 289 at para. 63; See also *R. v. Despins*, 2007 SKCA 119, 228 C.C.C. (3d) 475 at para. 4, citing *R. v. Davis*, [1999] 3 S.C.R. 759, 182 Nfld. & P.E.I.R. 78 at paras. 80-81
[27] *R. v. Ewanchuk, supra* at para. 51
[28] *R. v. Esau, supra* at para. 15; *R. v. Cornejo* (2003), 68 O.R. (3d) 117, 181 C.C.C. (3d) 206 (CA) at paras. 12-24, leave to appeal to SCC refused, [2004] 3 S.C.R. vii (C.A.); *R. v. Despins, supra* at paras. 9, 11

> [Section 273.2(b)] clearly contemplates that there may be cases in which [the circumstances known to the accused] are such that nothing short of an unequivocal indication of consent from the complainant, at the time of the alleged offence, will suffice to meet the threshold test which it establishes as a prerequisite to a defence of honest but mistaken belief.

18. Where contextual factors exist that might reasonably affect the ability of the complainant to spontaneously express her lack of consent to sexual activity, an accused should be required to meet the more onerous standard of taking the active step of a verbal inquiry. For example, where a power imbalance exists between the accused and the complainant the onus on an accused to make verbal inquires and receive confirmation before proceeding should be greater. Such a power imbalance may arise from an employment context; a context where sexual services are commodified; or where the complainant is observably intoxicated but may retain the capacity to consent. The active step of a verbal inquiry should also be required in the context where the infliction of bodily harm or pain is intended or reasonably foreseeable.

C. Unlawful Act Manslaughter: Vitiation of Consent

19. In *R. v. Jobidon* this Honourable Court held that there are common law limits on the legal effectiveness of consent.[30] That case addressed consensual fist fights between adults. The analysis in *Jobidon* guides the assessment of the appropriate limitations on consent in the context of injury caused during sexual activity.[31] Before engaging in that analysis, it is necessary to address the interplay between harm-based vitiation of consent and *de facto* consent.

20. Where both are at issue, the trier of fact should consider *de facto* consent *before* harm-based vitiation.[32] Benefits of this approach include:

- It will affirm the ability of complainants to make autonomous choices about their bodies.
- It avoids confusing the *mens rea* analysis for sexual assault offences.[33] They are general intent offences.[34] Sexual assault causing bodily harm and aggravated sexual assault require objective foresight of the risk of bodily harm.[35] Vitiation is a distinct issue.[36]

---

[29] *R. v. G. (R.)* (1994), 53 B.C.A.C. 254, 26 W.C.B. (2d) 23 (CA) at para. 29; *R. v. Crangle*, 2010 ONCA 451, 256 C.C.C. (3d) 234 at para. 29. See also *R. v. Cornejo*, *supra* at para. 32; *R. v. Dippel*, 2011 ABCA 129, 281 C.C.C. (3d) 33 at paras. 21-25

[30] *R. v. Jobidon*, [1991] 2 S.C.R. 714 at p. 766, 66 C.C.C. (3d) 454; *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339 at para. 10

[31] *R. v. Jobidon*, *supra* at p. 127; *R. v. J.A.*, *supra* at paras. 21, 55; *R. v. Welch* (1995), 25 O.R. (3d) 665, 101 C.C.C. (3d) 216 (CA) at para. 39

[32] See for example, *R. v. Sullivan*, 2011 NLCA 6, 270 CCC (3d) 93 at para. 43; *R. v. McDonald*, 2015 ONCA 791, 126 W.C.B. (2d) 520 at para. 13; *R. v. Nguyen*, 2016 BCCA 32, 331 C.C.C. (3d) 74 at para. 31; and in contrast *R. v. Doherty* (2000), 227 N.B.R. (2d) 348, 146 C.C.C. (3d) 336 (CA) at para. 19-20; *R. v. Zhao*, 2013 ONCA 293, 297 C.C.C. (3d) 533 at para. 107; *State v. Collier* (1985), 372 N.W.2d 303

[33] See for example: *R. v. B.W.*, 2016 ONCA 96, 128 W.C.B. (2d) 2 at para. 15; *R. v. Nelson*, 2014 ONCA 853 at para. 37, 318 C.C.C. (3d) 476; *R. v. McDonald*, 2012 ONCA 379, 284 C.C.C. (3d) 470 at para. 19; *R. v. Sullivan*, *supra* at paras. 7, 13

- It may avoid an analysis of vitiation which presupposes the possibility of *de facto* consent in circumstances clearly inconsistent with consent; for example, uncontested evidence of torn clothing, screaming, fleeing, bruising and bleeding.[37]
- It facilitates a proper assessment of evidence of injury as relevant to *de facto* consent and vitiation.[38] Where harm is caused, it may be appropriate to draw an inference about lack of consent – either *ab initio* or an exceeding of the scope of consent.[39]

In circumstances where there is evidence of consent to some sexual activity and injury is caused, it is vital to properly assess whether the accused exceeded the scope of the complainant's *de facto* consent.[40] As discussed above in para. 15, a complainant's consent must be specifically directed to "each and every sexual act."[41] Where sexual activity changes, either in nature or degree, the obligation to ensure consent remains. As noted at para. 18, where bodily harm is reasonably foreseeable, the reasonable steps requirement demands a verbal inquiry.

21. AG Ontario's approach to vitiation relies on harm as the primary justification for criminalization.[42] It aims to avoid the criminalization of minor injuries that were necessarily incidental to informed, consensual sexual activity pursued for the mutual pleasure of the parties. AG Ontario takes the position that consent is vitiated when:

i. bodily harm was caused and subjectively intended;[43] or
ii. an accused "wounds, maims, disfigures or endangers the life of the complainant" and that degree of harm was objectively foreseeable.[44]

Determining when consent should be vitiated requires an assessment of the social value of the activity and the harm caused,[45] analyzed in the context of broader societal interests. These include

---

[34] *R. v. Chase*, [1987] 2 S.C.R. 293 at p. 302-303, 82 N.B.R. (2d) 229; *R. v. Bernard*, [1998] 2 S.C.R. 833, 45 C.C.C. (3d) 1 at paras. 67, 82. AG Ontario suggests that harm-based vitiation could apply to sexual assault simpliciter, sexual assault causing bodily harm or aggravated sexual assault, in contrast to the approach in *R. v. J.A.*, 2010 ONCA 226, 100 O.R. (3d) 676 at para. 109 and *R. v. Zhao*, *supra* at paras. 37-38, 109

[35] *R. v. F.S.* (2006), 262 C.C.C. (3d) 472, 92 W.C.B. (2d) 640 (Ont. CA)

[36] *R. v. Djuraev*, 2016 ONCA 765, 133 W.C.B. (2d) 291 at para. 6; Hamish C. Stewart, *Sexual Offences in Canadian Law* (Toronto: Thomson Reuters Canada Ltd., 2018), Chapter 3 at 3:300.40

[37] *R. v. Zhao, supra*

[38] See for example, *R. v. Sullivan*, *supra* at para. 30; *R. v. Djuraev*, *supra* at paras. 3-6

[39] See for example, *R. v. Nelson*, *supra* at para. 28, 30; *R. v. Boyea*, [1992] Crim. L.R. 574, (1992) 156 J.P. 505 (EWCA)

[40] See for example, *R. v. M.H.B.*, 2016 NSSC 129, 374 N.S.R. (2d) 63 at para. 73; *R. v. Gairdner*, 2017 BCCA 425, 143 W.C.B. (2d) 495 at paras. 9-10, 25

[41] *R. v. J.A.*, (SCC) *supra* at paras. 31, 34, 37, 39-46, 60, 61, 65, 66; see also *R. v. Djuraev*, *supra*, at paras. 3-6; *R. v. J.A.C.*, 2017 ONCJ 580, 141 W.C.B. (2d) 695 at paras. 57, 71; *R. v. Ewanchuk supra* at para. 28

[42] *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 103

[43] *R. v. Quashie* (2005), 200 O.A.C. 65, 198 C.C.C. (3d) 337 (CA) at para. 57; *R. v. Zhao, supra*

[44] *R. v. Welch*, *supra* at para. 19;

[45] *R. v. Jobidon*, *supra* at p. 762-766; *Attorney General's Reference (No.6 of 1980)*, [1981] Q.B. 715, [1981] Crim. L.R. 553 (EWCA). See also Model Penal Code §2.11(2)(a), (b), (1962), which contains a threshold adopted by several states, being that consent is only a defence where the bodily harm consented to or threatened is "not serious"

autonomy, privacy, dignity, security, protection of vulnerable persons, and certainty and clarity in the criminal law.[46] Sexual activity has a high social value.[47] AG Ontario's approach to vitiation minimizes interference with autonomy and privacy by avoiding criminalization of minor injuries and unintended injuries that do not exceed a bodily harm standard. Violent sexual activity has a very limited or extremely negative social value; that is what AG Ontario seeks to criminalize.

22. An analysis of the harm caused by violent sexual activity encompasses injury to the complainant as well as broader societal impacts.[48] Absent from the sexual assault context are the concerns articulated in *Jobidon* about breaches of the public peace,[49] since sexual activity usually takes place in private. However, the private nature of sexual activity exacerbates harm-based concerns as it results in situations of vulnerability. Another broader harm consideration is evidenced in the reference in *Jobidon* to the aggressor who "may too readily find their fists raised against a person whose consent they forgot to ascertain with full certitude".[50] That de-sensitization rationale resonates strongly in the context of sexual activity and has implications both in a domestic context, and over time with different sexual partners.[51]

23. Criminalizing injury to the consenting adult partner engages interests of personal autonomy. However, at some degree of injury the sanctity of the human body and the other broader societal interests noted above are engaged to a sufficient degree as to override personal autonomy interests.[52] An assessment of the requisite level of injury for vitiation takes place in the context of the social value of the activity in question.[53] AG Ontario proposes bodily harm and harm that constitutes aggravated assault as the relevant standards. These standards provide some certainty and clarity given their longstanding existence as a threshold in Canadian criminal law.[54] They also avoid criminalizing minor injuries incidental to consensual sexual activity.[55]

---

[46] *R. v. W. (G.)* (1994), 18 O.R. (3d) 321, 90 C.C.C. (3d) 139 (CA) at para. 12
[47] *R. v. Zhao*, *supra* at para. 79
[48] *R. v. Malmo-Levine, supra* at paras. 73-74, 77, 102-109
[49] *R. v. Jobidon, supra* at p. 763
[50] *R. v. Jobidon, supra* at p. 764
[51] *R. v. Jobidon, supra* at p. 763-764; see also *State v. Brown* (1976), 143 NJ Super 571, 364 A.2d 27, aff'd 154 NJ Super 511
[52] *R. v. Jobidon, supra* at p. 764-766; *R. v. Welch, supra* at para. 89; *R. v. B.M.*, [2018] EWCA Crim. 560, [2018] 2 Cr. App. R. 1; *R. v. Carriere* (1987), 56 C.R. (3d) 257, 35 C.C.C. (3d) 276 (Alta. C.A.)
[53] *R. v. B.M.*, *supra*
[54] See for example, *R. v. Moquin*, 2010 MBCA 22, 253 C.C.C (3d) 96 at paras. 32-33; *R. v. Marsman*, 2007 NSCA 65, 220 C.C.C. (3d) 254 at para. 5
[55] *R. v. Jobidon, supra* at para. 131

24. A subjective intent for vitiation where bodily harm is caused avoids overreach.[56] An objective test is appropriate for the higher degree of injury in order to promote a societal standard that seeks to prevent serious harm.[57] There is a need to protect vulnerable persons from injury during sexual activity.[58] That vulnerability may derive from the circumstances, such as the private nature of sexual activity. It may also be specific to the complainant, stemming from issues of race or gender. Acknowledging that reality mandates an objective test to fix a standard for human behaviour.[59] As this Court stated in *R. v. Creighton*:

> … we are all, rich and poor, wise and naive, held to the minimum standards of conduct prescribed by the criminal law. This conclusion is dictated by a fundamental proposition of social organization. As Justice Oliver Wendell Holmes wrote …: "when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare."[60]

Moreover, the serious consequences of violent sexual activity demand an objective test.[61]

PART IV - SUBMISSIONS RESPECTING COSTS

25. The intervener makes no submissions as to costs.

PART V - NATURE OF ORDER SOUGHT

26. The intervener makes no submissions as to the outcome in this appeal.

ALL of which is respectfully submitted

Christine Bartlett-Hughes	Benita Wassenaar	Kate Forget

Counsel for the Intervener, the Attorney General of Ontario
Dated this 11th day of September, 2018

---

[56] In *R. v. Amos*, (1998) 39 W.C.B. (2d) 285 (Ont. C.A.) the conviction was overturned and an acquittal entered where bodily harm was caused by anal sex, but there was no suggestion that the appellant deliberately inflicted injury or pain; *R. v. Robinson* (2001) 53 O.R. (3d) 448 (C.A.) at para. 62 suggests the jury be charged that consent was no defence only if the appellant deliberately inflicted pain upon the complainant causing bodily harm (an oozing sore caused by the appellant's goatee rubbing the complainant's chin during vigorous kissing). See also: *R. v. M.(S.)*, (1995) 22 O.R. (3d) 605 (Ont. C.A.) at paras. 3, 18; Law Reform Commission of Canada, *Assault, Working Paper 38, 1984* (Ottawa: Public Works and Government Services Canada) at pp. 29 (footnote 68) and 51

[57] *R. v. Hill*, [1986] 1 S.C.R. 313, 25 C.C.C. (3d) 322 at para. 18; *R. v. Welsh*, *supra* at para. 31
[58] *R. v. J.A*, *supra* at paras. 61
[59] *R. v. Hill*, *supra* at para. 19
[60] *R. v. Creighton*, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346 at para 58
[61] *R. v. Simon Slingsby*, [1995] Crim. L.R. 570 (complainant died after vigorous penetration by accused's hand; ring caused cuts that led to infection); *R. v. Meachen*, [2006] EWCA Crim. 2414 (considerable blood loss, extensive bruising, acute splitting of the anal canal area extending into the rectum, colostomy)

PART VI - TABLE OF AUTHORITIES

Secondary sources

Legislative Authorities