

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

**A N D:**

**HER MAJESTY THE QUEEN**

Respondent

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(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. Women are overwhelmingly the victims of sexual assault. They are also the subject of myths and stereotypes concerning the validity of their consent to sexual activity. Section 276 of the *Criminal Code* aims to eradicate these myths and stereotypes, to promote fairness and to facilitate the truth-seeking function at trial by prohibiting the admission of irrelevant and prejudicial evidence.
2. The majority of those who are paid for sexual activity are also women. This group is especially vulnerable to sexual exploitation and abuse. Marginalized groups, and Indigenous women in particular, are disproportionately represented and are even more vulnerable. Indigenous women who are paid for sexual activity are also the subject of additional myths and stereotypes surrounding consent based on their race and gender. For s. 276 to achieve its objectives, it must bar the admission of evidence based on these myths and stereotypes unique to Indigenous women.
3. Section 276 applies to the admissibility of evidence of prior sexual activity in *any* case in which an enumerated sexual offence is connected to the offence charged. This connection is established in any proceeding where consent to sexual activity is at issue. Any interpretation of s. 276 that would restrict its application to cases in which one of the enumerated sexual offences is charged is contrary to Parliament's intent and would result in a two-tiered system of justice that would treat victims of sexual assault differently depending upon the charges laid in a given case.
4. The limitations on the admissibility of sexual history evidence apply to the entire court process. This evidence is presumptively inadmissible and its admissibility must always be determined through a *voir dire*. While s. 276 only specifies a procedure for when *an accused* seeks to adduce evidence of prior sexual activity, a special process governing the admissibility of this evidence is mandatory, whenever the issue arises. To the extent that there may be a procedural gap in s. 276 where the Crown or the trial judge are concerned, the common law can fill this gap.
5. The law has long recognized limits on consent to bodily harm. Under s. 273.1(3), consent to commercialized sexual activity should be vitiated where the activity results in serious bodily harm or death and a risk of bodily harm was objectively foreseeable. Otherwise, vulnerable persons would have an incentive to agree to be paid for sexual activity with those who seek sexual gratification through dangerous or risky sexual acts that pose a risk of bodily harm. The law should not tolerate such perverse incentives as they are incompatible with the proper functioning of society. The adoption of a subjective standard would also fail to adequately protect those who are paid for sexual activity.



## **B. Facts**

6. The Attorney General of Canada accepts the facts as stated by the parties to this appeal and takes no position with respect to any factual disputes between them.

### **PART II – RESPONSE TO THE QUESTIONS IN ISSUE**

7. Section 276 of the *Criminal Code* applies to the admission of evidence of prior sexual activity in all proceedings where consent to sexual activity is at issue. The limitations on the admissibility of prior sexual activity evidence should apply equally to the accused, the Crown and the trial judge.

8. Under s. 273.1(3) of the *Code*, consent to commercialized sexual activity that results in serious bodily harm or death should be vitiated where a risk of bodily harm was objectively foreseeable as a consequence of the activity.

### **PART III – ARGUMENT**

#### **A. Legislative Intent and Principles of Statutory Interpretation Support the Broad Application of Section 276 of the *Criminal Code***

9. Section 276 contains rules “that prevent evidence of a complainant’s past sexual activity from being used for improper purposes and procedural sections that enforce this rule.”<sup>1</sup> The provision is intended to protect the dignity, equality, security and privacy of sexual assault victims.<sup>2</sup>

10. Section 276(1) makes evidence of a complainant’s sexual history inadmissible when it is used to support one of two illegitimate inferences: the “twin myths” that a complainant is more likely to have consented to an alleged sexual assault or that she is less worthy of belief by virtue of her prior sexual experience.<sup>3</sup>

11. The detrimental impact of these myths is compounded when they intersect with other improper assumptions based on gender, race and class, including the false stereotypes that Indigenous women are more likely to consent to high risk sexual activity, including in a commercialized context, are less worthy of belief as victims of sexual assault because of their gender and race, and are not deserving of the law’s protection.<sup>4</sup>

12. These types of harmful stereotypes distort the truth-seeking function of the trial process, regardless of whether they are perpetuated by an accused, the Crown or the trial judge, and evidence that is the source of these stereotypes is always inadmissible under s. 276 as irrelevant or prejudicial irrespective of who raises it.<sup>5</sup>

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<sup>1</sup> *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46 (“*Darrach*”) at para. 20.

<sup>2</sup> *Ibid.* at paras. 3, 19 & 31; and *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577 (“*Seaboyer*”) at pp. 605-606.

<sup>3</sup> *Ibid. Darrach* at paras. 2 & 32.

<sup>4</sup> Court of Appeal at para. 128.

<sup>5</sup> *Darrach* at para. 24.

13. Section 276 applies to “proceedings in respect of” an enumerated sexual offence. The inclusion of this wording by Parliament is presumed to be deliberate and it must be given meaning.<sup>6</sup>

14. The phrase “in respect of” are words of the “widest possible scope” and import such meanings as “in relation to”, “with reference to” or “in connection with.” This phrase has been characterized as “probably the widest of any expression intended to convey some connection between two related subject matters.”<sup>7</sup> “Proceedings” similarly has “a very wide meaning.”<sup>8</sup> This language supports a “wide rather than narrow view” of what will constitute “proceedings in respect of” a listed offence.<sup>9</sup>

15. Section 276 clearly applies to cases where an accused is charged with a listed offence. However, had Parliament intended to restrict s. 276 to such cases, “it could easily have done so.”<sup>10</sup> It chose not to. This provides a full answer to the contention that s. 276 should be limited to cases involving charges for listed offences.<sup>11</sup>

16. While the French version of s. 276 is capable of a broad or a narrow interpretation depending on the meaning assigned to “poursuites”, if this potential ambiguity renders the common meaning of the English and French versions unclear, construing both versions harmoniously and consistent with the context of the legislation and the intent of Parliament supports the interpretation that their shared meaning should be that s. 276 applies to *all* proceedings where consent to sexual activity is at issue.<sup>12</sup>

17. Broad language is used throughout the sexual assault provisions to afford victims the widest possible protections. When the legislative amendments were being debated, it was explained that the definition of “consent” in s. 273.1(1) employed the language “sexual activity in question” as opposed to “sexual activity which forms the subject matter of the charge” to ensure that the definition of consent applied to *any* situation where there is a dispute about consent to sexual activity, and not just where sexual activity is the subject matter of the charges.<sup>13</sup> This same reasoning applies to s. 276.

18. In the context of s. 276, “proceedings in respect of an offence” requires only that the “proceedings” in question have “some connection” to one of the enumerated offences.<sup>14</sup>

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<sup>6</sup> *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30 at para. 87.

<sup>7</sup> *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 39. See also *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9 (“*Markevich*”) at para. 26.

<sup>8</sup> *Ibid. Markévich* at para. 24.

<sup>9</sup> *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430 at pp. 445-446.

<sup>10</sup> *British Columbia Human Rights Tribunal v. Schrenk*, [2017] 2 S.C.R. 795, 2017 SCC 62 at para. 34.

<sup>11</sup> *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305, 2008 SCC 12 at para. 42.

<sup>12</sup> *Markevich* at paras. 29-32; and *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62 at paras. 52-57.

<sup>13</sup> House of Commons, Issue No. 7, June 4, 1992, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, An Act to amend the *Criminal Code* (sexual assault), p. 7:13.

<sup>14</sup> *Markevich* at para. 26.

19. This connection is established in any proceeding where consent to sexual activity is at issue. It would be incongruous if s. 276 applied to prosecutions for listed offences, but not to prosecutions for non-listed offences where consent to sexual activity is at issue in both types of cases. Such an interpretation would exclude from the ambit of s. 276 a prosecution for murder under s. 231(5)(b) of the *Code* where it is alleged that death was caused while committing or attempting a sexual assault.<sup>15</sup>

20. Section 276 protects complainants. A complainant means the victim of an alleged offence.<sup>16</sup> A complainant does not cease to be a victim if a sexual assault results in their death. A restrictive reading of the section would deny sexual assault victims its protections. This outcome would be antithetical to the law's commitment to a society "in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."<sup>17</sup> It would mean that sexual assault survivors would be afforded the statutory protections, while victims of sexual assault who died would be denied these safeguards. A construction of a statute that would produce absurd results like this "makes no sense"<sup>18</sup> and should be avoided.<sup>19</sup>

21. Sections 276 identifies the procedure to be followed where an accused seeks to adduce evidence of a complainant's prior sexual activity but is silent on how admissibility should be determined in the rare event that the Crown or the trial judge raise evidence of this nature.

22. The common law and the inherent jurisdiction of the courts can fill legislative gaps, particularly where the gaps relate to procedural matters<sup>20</sup> or are necessary for the effective operation of the legislative scheme.<sup>21</sup> Interpreting s. 276 as also applying to the Crown and the trial judge meets both of these exceptions. The common law evidentiary principles set out in *Seaboyer*, which inform the procedure under s. 276, can also fill this gap.<sup>22</sup>

## **B. Section 273.1 Must Protect Those Who Are Paid For Sexual Activity from Harm**

23. This case is not about "keeping the state out of the bedrooms of the nation."<sup>23</sup> Rather, it concerns the application of s. 273.1 in the specific context of where a person has consented to paid sexual activity that has caused that person serious bodily harm or death. This appeal does not require a consideration of this issue outside of the commercialized sex context.

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<sup>15</sup> *Ibid.* at para. 34.

<sup>16</sup> *Criminal Code*, s. 2.

<sup>17</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171.

<sup>18</sup> Court of Appeal at paras. 106-107.

<sup>19</sup> *Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] 2 S.C.R. 289, 2017 SCC 50 at para. 32.

<sup>20</sup> *Gell v. Canadian Pacific Ltd.*, [1988] 2 S.C.R. 271.

<sup>21</sup> *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626.

<sup>22</sup> *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592, 2010 SCC 41 at para. 45.

<sup>23</sup> *R. v. J.A.*, [2011] 2 S.C.R. 440, 2011 SCC 28 ("J.A.") at para. 116.

24. In the non-commercialized context, the prevailing view is that consent to sexual activity involving bodily harm is vitiated under s. 273.1 where an accused subjectively intended to inflict bodily harm through this activity and such harm resulted from the activity.<sup>24</sup> The Crown, defence and trial judge approached the issue of whether consent was vitiated in this case on this basis.<sup>25</sup> The Court of Appeal questioned the correctness of this approach and in particular its application to sexual activity resulting in death.<sup>26</sup>

25. The vitiation of consent to sexual activity resulting in bodily harm or death in the commercialized context should be approached differently. The analysis should take into account the unique features in which the harm occurs, including the risk of harm to disempowered groups<sup>27</sup>, who are among the most vulnerable to non-consensual sexual activity.<sup>28</sup>

26. Those who are paid for sexual activity are a “particularly vulnerable” group.<sup>29</sup> The majority are women and girls. Indigenous women and girls are disproportionately represented. Engaging in paid sexual activity is influenced by a variety of socio-economic factors, including poverty, youth, lack of education, child sexual abuse and other forms of child abuse, drug and alcohol addiction and mental health issues.<sup>30</sup> Racism and colonization have contributed to the entry of Indigenous women and girls into commercialized sexual activity and to their remaining involved in this activity.<sup>31</sup>

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<sup>24</sup> *R. v. Zhao* (2013), 297 C.C.C. (3d) 533 (Ont. C.A.), 2013 ONCA 293 (“*Zhao*”) at paras. 85, 95, 107 & 110. Other provincial appellate courts have applied the subjective standard articulated in *Zhao*. See for example *R. v. Lozano Lopez*, 2015 BCCA 311 at para. 2; and *R. v. Threefingers*, 2016 ABCA 225 at para. 91

<sup>25</sup> Court of Appeal at para. 301.

<sup>26</sup> Court of Appeal at para. 304.

<sup>27</sup> Elaine Craig, “Capacity to Consent to Sexual Risk”, 17 *New Crim. L. Rev.* 103 (2014) at p. 120.

<sup>28</sup> Lucinda Vandervort, “Sexual Consent as Voluntary Agreement: Tales of Seduction or Questions of Law”, 16 *New Crim. L. Review* 143 (2013) at p. 177.

<sup>29</sup> *R. v. Downey*, [1992] 2 S.C.R. 10 at (“*Downey*”) p. 39; and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, 2012 SCC 45 at para. 12.

<sup>30</sup> Bill C-36, *Protection of Communities and Exploited Persons Act*, An Act to Amend the *Criminal Code* in response to the Supreme Court of Canada decision in *Attorney General of Canada v. Bedford* and to make consequential amendments to other *Acts*, Technical Paper at pp. 3-4, tabled in House of Commons, Standing Committee on Justice and Human Rights, Evidence, 41-2, No. 32 (July 7, 2014) at p. 2 (Hon. Peter MacKay) and Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 15 - Evidence (September 9, 2014) at p. 4 (Hon. Peter MacKay).

<sup>31</sup> Court of Appeal FN 50 citing Janine Benedet, “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution” (2014) 52:1 *Alta L Rev* 127 at pp. 182-183. See also Renissa Mawani, “The Iniquitous Practice of Women”: Prostitution and the Making of White Spaces in British Columbia, 1898-1905” in Cynthia Levine-Rasky, Ed. *Working Through Whiteness: International Perspectives* (New York, 2002: State University of New York Press).

27. Persons paid for sexual activity are inherently at risk of numerous harms, including disease, violence, death<sup>32</sup> and sexual exploitation.<sup>33</sup> They are potentially doubly vulnerable because sexual assault is a gender-based crime predominantly committed by males against females; those who are paid for sexual activity tend to be women and those who pay for this activity tend to be men.<sup>34</sup>

28. The vulnerability of these individuals may be magnified by factors beyond gender and race. Those paid for sexual activity may be in need of financial support or be addicted to drugs or alcohol.<sup>35</sup> They may be financially responsible for supporting others, whether a disabled parent or a dependent child.<sup>36</sup> Any of these factors, standing alone or in combination, may induce a person to agree to be paid for sexual activity that poses a risk of bodily harm.

29. Sexual offences “are disproportionately committed against vulnerable populations.”<sup>37</sup> The criminal law must protect vulnerable groups from these crimes.<sup>38</sup> In *J.A.*, it was “the total vulnerability of the unconscious partner and the need to protect this person from exploitation”<sup>39</sup> that compelled this Court’s decision on the issue of advanced consent to unconscious sexual activity. In *Downey*, this Court similarly held that the *Charter* should not be used to deprive a particularly vulnerable segment of society – those who are paid for sexual activity - of a measure of protection.<sup>40</sup>

30. The risk of harm to a vulnerable group should also inform the analysis of consent to commercialized sexual activity resulting in bodily harm or death. Section 273.1 should be interpreted in a way that diminishes rather than aggravates the risks associated with commercialized sexual activity.<sup>41</sup> For this to happen, it cannot set the threshold for vitiating consent too high.

31. One of the chief objectives of s. 273.1 is “[t]he protection of the vulnerable and the weak and the preservation of the right to freely choose to consent to sexual activity.”<sup>42</sup> The provisions have been interpreted to take into account the vulnerabilities of sexual assault victims, which can engender relationships of imbalance that could be exploited by the person in power to obtain consent to sexual activity.<sup>43</sup> Relationships of imbalance are also not uncommon in the commercialized sex context.<sup>44</sup>

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<sup>32</sup> *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, 2013 SCC 72 (“*Bedford*”) at paras. 88-89.

<sup>33</sup> *R. v. Barabash*, [2015] 2 S.C.R. 522, 2015 SCC 29 at para. 55.

<sup>34</sup> Court of Appeal at para. 8.

<sup>35</sup> See for example *R. v. Sharma*, 2015 BCSC 735 at paras. 7-13.

<sup>36</sup> *Downey* at p. 45 citing *R. v. Grilo* (1991), 64 C.C.C. (3d) 53 (Ont. C.A.) at p. 61.

<sup>37</sup> *R. v. George*, [2017] 1 S.C.R. 1021, 2017 SCC 38 at para. 2.

<sup>38</sup> *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 at para. 76.

<sup>39</sup> *J.A.* at para. 60.

<sup>40</sup> *Downey* at p. 39.

<sup>41</sup> *Bedford* at paras. 60 & 87-88.

<sup>42</sup> *R. v. Hogg* (2000), 148 C.C.C. (3d) 86 (Ont. C.A.) at para. 17.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at pp. 1193-1194.

**C. Section 273.1 Extends to Circumstances Beyond Those Specifically Enumerated**

32. Parliament has explicitly legislated in s. 273.1(3) that consent may be vitiated in situations beyond those enumerated in s. 273.1(2). Section 273.1 is therefore non-exhaustive and enables courts to identify additional cases in which no consent is obtained.<sup>45</sup>

**D. Section 273.1 Should Be Interpreted to Advance Gender Equality and Human Dignity**

33. Section 273.1 should be interpreted in a manner that advances the objectives of gender equality and human dignity. Sexual assault denies the victim's dignity as a human being.<sup>46</sup> It is also largely a gender-based offence that deprives women of equality.<sup>47</sup>

34. Section 273.1 should also be interpreted in a way that does not perpetuate myths and stereotypes<sup>48</sup>, particularly the myth that those who are paid for sexual activity are walking around in a state of constant consent to all activity, including that involving bodily harm, and related stereotypes surrounding consent based on gender, race and class.<sup>49</sup> These myths and stereotypes have no place in a system of justice that treats all witnesses equally.<sup>50</sup>

**E. Section 273.1(3) Should Vitate Consent to Commercialized Sexual Activity Resulting in Serious Bodily Harm or Death Where a Risk of Bodily Harm Was Objectively Foreseeable**

35. The common law has set limits “on the types of harmful actions to which one can validly consent.”<sup>51</sup> Delineating these limits is context-driven and policy-based. The overarching consideration must be to strike an appropriate balance between individual autonomy and some larger societal interest.<sup>52</sup> This balance is best achieved by vitiating consent to commercialized sexual activity resulting in serious bodily harm or death where a risk of bodily harm was objectively foreseeable.

36. In *J.A.*, this Court left open the question of the point at which consent should be vitiated to sexual activity that causes bodily harm.<sup>53</sup> Yet the Court has clearly signalled that there *are limits*:

Sexual activity is a positive source of human expression, fulfilment and pleasure. But some kinds of sexual activity may harm those involved. Women may be forced into prostitution or other aspects of the sex trade. They may be the objects of physical and psychological assault. Sometimes they may be seriously hurt or even killed....Sexual conduct that risks

<sup>45</sup> *J.A.* at para. 29; and Court of Appeal at para. 305.

<sup>46</sup> *R. v. Mabior*, [2012] 2 S.C.R. 584, 2012 SCC 47 (“*Mabior*”) at paras. 44-48.

<sup>47</sup> *R. v. Osolin*, [1993] 4 S.C.R. 595 at p. 669; and *R. v. Ewanuchuk*, [1999] 1 S.C.R. 30 (“*Ewanuchuk*”) at para. 69.

<sup>48</sup> *Willick v. Willick*, [1994] 3 S.C.R. 670 at paras. 20 & 23.

<sup>49</sup> *Seaboyer* at pp. 604 & 690. See also *R. v. Esau*, [1997] 2 S.C.R. 777 at para. 84; *Mabior* at paras. 46-47; and *Ewanuchuk* at para. 87.

<sup>50</sup> *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 16.

<sup>51</sup> *R. v. Jobidon*, [1991] 2 S.C.R. 714 (“*Jobidon*”) at p. 735.

<sup>52</sup> *Ibid.* at pp. 735, 740-744 & 766.

<sup>53</sup> *J.A.* at paras. 21 & 75.

this sort of harm may violate society's declared norms in a way that is incompatible with the proper functioning of society. [Emphasis added.]<sup>54</sup>

37. In his dissent in *J.A.*, Fish J. stated that even if a person can consent in advance to unconscious sexual activity, consent will be vitiated at common law or on public policy grounds where the contemplated sexual activity involves a degree of bodily harm or risk of fatal injury that cannot be condoned by society.<sup>55</sup>

38. In identifying at what point commercialized sexual activity resulting in bodily harm should be criminalized, the focus is not only on whether the conduct causes harm, but on whether that harm is of a degree that is acceptable to society.<sup>56</sup> In making this determination, the lack of social utility of objectively dangerous sexual activity, the integrity of the human body, the law's concern that people treat each other humanely and with respect, the need to deter and discourage conduct that is an affront to these principles, and the protection of the vulnerable, all militate in favour of setting limits on consent to bodily harm resulting from sexual activity to protect those who are paid for this activity.<sup>57</sup>

39. The approach to consent to commercialized sexual activity causing bodily harm must be distinguished from situations such as consenting to medical treatment or surgical interventions and other risky but socially valuable activities.<sup>58</sup> *Jobidon* did not include sexual violence in this list.<sup>59</sup>

40. The argument that consent should be a defence to any degree of sexually violent activity that is performed in private has been rejected.<sup>60</sup> In the non-commercialized sex context, courts have held that the personal interests of individuals must yield to more compelling societal interests.<sup>61</sup> While sexual autonomy is also a valid consideration, it is not the only value that our law seeks to protect.<sup>62</sup> The right to choose is not absolute<sup>63</sup> where it risks undermining more pressing societal interests. As this Court recognized in *Ewanchuk*, “[h]aving control over who touches one’s body, and how, lies at the core of human dignity and autonomy.” [Emphasis added.]<sup>64</sup>

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<sup>54</sup> *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80 (“*Labaye*”) at para. 48.

<sup>55</sup> *J.A.* at para. 75.

<sup>56</sup> David A. Tanovich, “Criminalizing Sex at the Margins” (2010), 74 C.R. (6<sup>th</sup>) 86 (“*Tanovich*”) at p. 93.

<sup>57</sup> *Jobidon* at pp. 762-766.

<sup>58</sup> *Ibid.* at p. 767.

<sup>59</sup> *R. v. Welch* (1995), 101 C.C.C. (3d) 216 (Ont. C.A.) (“*Welch*”) at p. 238.

<sup>60</sup> *Ibid.* at p. 225.

<sup>61</sup> *Ibid.* at p. 239. The United Kingdom and the United States have reached similar conclusions on this issue: *R. v. Brown* (1994) 1 A.C. 212 (H.L.); and *Commonwealth v. Appleby*, 402 N.E.2d 1051 (Mass. S.J.C., 1980); *State v. Collier*, 372 N.W.2d 303 (Iowa App., 1985); and *People v. Jovanovic*, 700 N.Y.S.2d 156 n. 5 (App. Div., 1999), as canvassed in *Welch* at pp. 230-234.

<sup>62</sup> *Jobidon* at p. 765.

<sup>63</sup> *J.A.* at para. 115.

<sup>64</sup> *Ewanchuk* at para. 28.

41. Limiting what types of paid sexual activity can be lawfully consented to is necessary to shield a vulnerable group from sexual exploitation and abuse.<sup>65</sup> This limit on consent is justified to countervail the power imbalance created by the fact that payment could induce those who are paid for sexual activity to agree to activity that causes serious bodily harm or death.

42. It would be perverse if the *Jobidon* limits on bodily harm in the consensual fist fight context were more restrictive than those that apply to consent to sexual activity causing bodily harm in the commercialized context. Those who cause *serious* bodily harm or death to a person as a result of paid sexual activity should not avoid conviction by relying on the person's consent to the activity.<sup>66</sup> The English and Canadian Law Reform Commissions have recommended a comparable threshold.<sup>67</sup>

43. This tailored approach would not result in criminal liability in circumstances in which sexual activity did not result in serious bodily harm or death. Nor would consent be vitiated in situations where unforeseeable serious bodily harm or death accidentally resulted from sexual activity.<sup>68</sup>

44. The threshold of serious bodily harm also accords with the vitiation of consent to sexual activity by non-disclosure of HIV positive status.<sup>69</sup> As in that context, consent to sexual activity would not be vitiated based on any trivial harm but only where reprehensible conduct merits conviction.<sup>70</sup> There is also academic support for this threshold.<sup>71</sup>

45. The remaining question is whether the risk of bodily harm should be evaluated objectively or subjectively. The identification of the appropriate standard should be responsive to the context. In *Jobidon*, this Court was careful to point out that the vitiation of consent to activities resulting in bodily harm may be subject to different limits depending on the circumstances.<sup>72</sup> Applying *Jobidon*, courts have found that the social utility of intimate sexual relationships is significantly different from that of consensual fist fights.<sup>73</sup> Commercialized sexual activity is also markedly different than sexual activity occurring in an intimate, non-commercialized context, such as in relationships of mutual trust.

46. In the commercialized sex context, the fault requirement to vitiate consent should be assessed on an objective basis. If an accused has paid for sexual activity that causes serious bodily harm or

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<sup>65</sup> *J.A.* at para. 72.

<sup>66</sup> *Jobidon* at p. 766; and *R. v. Paice*, [2005] 1 S.C.R. 339, 2005 SCC 22 (“*Paice*”) at para. 18.

<sup>67</sup> Law Reform Commission of Canada, *Working Paper 38 (Assault)* (Ottawa: Ministry of Supply and Services, 1984); and The Law Commission, Consultation Paper No. 134, *Criminal Law-Consent and Offences against the Person* (London: H.M.S.O., 1994), as discussed in *Welch* at pp. 234-236.

<sup>68</sup> *Paice* at para. 12.

<sup>69</sup> *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (“*Cuerrier*”); and *Mabior*.

<sup>70</sup> *Ibid. Cuerrier* at paras. 128 & 133.

<sup>71</sup> Tanovich at p. 94.

<sup>72</sup> *Jobidon* at p. 766.

<sup>73</sup> *Zhao* at para. 79.



death to the person paid for the activity, *any* consent should be vitiated where a risk of bodily harm was objectively foreseeable as a consequence of the activity.

47. For consent to be vitiated under s. 273.1(3), an accused must have intentionally applied force to the victim that, viewed objectively, would likely cause harm.<sup>74</sup> This objective standard is not unlike the mental element applied to the offence of unlawfully causing bodily harm, contrary to s. 269 of the *Code*, which requires that the underlying act be objectively dangerous in that a reasonable person would inevitably realize that the act would subject another person to the risk of bodily harm or injury.<sup>75</sup>

48. Under a subjective standard, it would be extremely onerous to vitiate consent once an accused testified that they did not intend to cause bodily harm, particularly where the victim is not alive or otherwise available to testify.<sup>76</sup> An accused may also testify that they viewed the activity as pleasurable, not dangerous.<sup>77</sup> There is no right to pleasure that results in harm to others, nor should the law provide an incentive to engage in risky conduct that causes seriously bodily harm or death.

49. A person who is paid to be choked as part of commercialized sexual activity illustrates why an objective standard should be preferred. If an accused chokes a victim to the point of unconsciousness resulting in serious bodily harm or death, consent should be vitiated if a risk of bodily harm was objectively foreseeable as a consequence of the accused's conduct. Legitimizing consent to paid sexual activity that causes serious bodily harm or death in circumstances where an accused has simply testified that they did not intend to cause bodily harm but a risk of bodily harm was reasonably likely is not something that society should condone.

#### **PART IV – COSTS**

50. The Attorney General of Canada does not seek costs and submits that the ordinary rule that costs are not awarded against interveners should apply.

#### **PART V – ORDER SOUGHT**

51. The Attorney General of Canada asks that the appeal be disposed of in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 11<sup>th</sup> day of September, 2018.

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Jeffrey G. Johnston,  
of Counsel for the Intervener, Attorney General of Canada

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<sup>74</sup> *Welch* at pp. 221-222.

<sup>75</sup> *R. v. Desousa*, [1992] 2 S.C.R. 944 at pp. 961-962.

<sup>76</sup> Court of Appeal at para. 304.

<sup>77</sup> See for example *R. v. S.R.W.*, 2015 ONSC 8130 at para. 97.

## PART VI – LIST OF AUTHORITIES

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## PART VII – STATUTES AND REGULATIONS

### Criminal Code, s. 2

#### Definitions

*complainant* means the victim of an alleged offence

### Criminal Code, s. 231(5)(b)

**231 (5)** Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(b) section 271 (sexual assault)

### Criminal Code, s. 269

#### Unlawfully causing bodily harm

**269** Every one who unlawfully causes bodily harm to any person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

### Criminal Code, s. 273.1

#### Meaning of consent

**273.1 (1)** Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

#### Where no consent obtained

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;

### Code criminel, art. 2

#### Définitions

*plaignant* La victime de l'infraction présumée.

### Code criminel, art. 231(5)(b)

**231 (5)** Indépendamment de toute préméditation, le meurtre que commet une personne est assimilé à un meurtre au premier degré lorsque la mort est causée par cette personne, en commettant ou tentant de commettre une infraction prévue à l'un des articles suivants :

b) l'article 271 (agression sexuelle)

### Code criminel, art. 269

#### Lésions corporelles

**269** Quiconque cause illégalement des lésions corporelles à une personne est coupable :

a) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.

### Code criminel, art. 273.1

#### Définition de consentement

**273.1 (1)** Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.

#### Restriction de la notion de consentement

(2) Le consentement du plaignant ne se déduit pas, pour l'application des articles 271, 272 et 273, des cas où :

- a) l'accord est manifesté par des paroles ou par le comportement d'un tiers;
- b) il est incapable de le former;

- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
  - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
  - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- c) l'accusé l'incite à l'activité par abus de confiance ou de pouvoir;
  - d) il manifeste, par ses paroles ou son comportement, l'absence d'accord à l'activité;
  - e) après avoir consenti à l'activité, il manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci.

**Subsection (2) not limiting**

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[Criminal Code, s. 276](#)

**Evidence of complainant's sexual activity**

**276 (1)** In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

**Précision**

(3) Le paragraphe (2) n'a pas pour effet de limiter les circonstances dans lesquelles le consentement ne peut se déduire.

[Code criminel, art. 276](#)

**Preuve concernant le comportement sexuel du plaignant**

**276 (1)** Dans les poursuites pour une infraction prévue aux articles 151, 152, 153, 153.1, 155 ou 159, aux paragraphes 160(2) ou (3) ou aux articles 170, 171, 172, 173, 271, 272 ou 273, la preuve de ce que le plaignant a eu une activité sexuelle avec l'accusé ou un tiers est inadmissible pour permettre de déduire du caractère sexuel de cette activité qu'il est :

- a) soit plus susceptible d'avoir consenti à l'activité à l'origine de l'accusation;
- b) soit moins digne de foi.

(2) Dans les poursuites visées au paragraphe (1), l'accusé ou son représentant ne peut présenter de preuve de ce que le plaignant a eu une activité sexuelle autre que celle à l'origine de l'accusation sauf si le juge, le juge de la cour provinciale ou le juge de paix décide, conformément aux articles 276.1 et 276.2, à la fois :

- a) que cette preuve porte sur des cas particuliers d'activité sexuelle;
- b) que cette preuve est en rapport avec un élément de la cause;
- c) que le risque d'effet préjudiciable à la bonne administration de la justice de cette preuve ne l'emporte pas sensiblement sur sa valeur probante.

(3) Pour décider si la preuve est admissible au titre du paragraphe (2), le juge, le juge de la

**(3)** In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

- (a)** the interests of justice, including the right of the accused to make a full answer and defence;
- (b)** society's interest in encouraging the reporting of sexual assault offences;
- (c)** whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d)** the need to remove from the fact-finding process any discriminatory belief or bias;
- (e)** the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f)** the potential prejudice to the complainant's personal dignity and right of privacy;
- (g)** the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h)** any other factor that the judge, provincial court judge or justice considers relevant.

cour provinciale ou le juge de paix prend en considération :

- a) l'intérêt de la justice, y compris le droit de l'accusé à une défense pleine et entière;
- b) l'intérêt de la société à encourager la dénonciation des agressions sexuelles;
- c) la possibilité, dans de bonnes conditions, de parvenir, grâce à elle, à une décision juste;
- d) le besoin d'écarter de la procédure de recherche des faits toute opinion ou préjugé discriminatoire;
- e) le risque de susciter abusivement, chez le jury, des préjugés, de la sympathie ou de l'hostilité;
- f) le risque d'atteinte à la dignité du plaignant et à son droit à la vie privée;
- g) le droit du plaignant et de chacun à la sécurité de leur personne, ainsi qu'à la plénitude de la protection et du bénéfice de la loi;
- h) tout autre facteur qu'il estime applicable en l'espèce.