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 CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, VANCOUVER RAPE RELIEF SOCIETY, LA CONCERTATION DES LUTTES CONTRE LÈXPLOITATION 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 EXPLOITATION (CEASE), ASSEMBLY OF FIRST NATIONS, AD IDEM / CANADIAN MEDIA LAWYERS ASSOCIATION, THE WOMEN OF THE MÉTIS NATION / LES FEMMES MICHIF OTIPEMISIWAK, THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, THE INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN AND THE WOMEN`S LEGAL EDUCATION AND ACTION FUND INC., DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS AND CRIMINAL TRIAL LAWYERS`ASSOCIATION (ALBERTA)

Interveners

FACTUM OF THE INTERVENER,
INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY
(Rule 42 of the *Rules of the Supreme Court of Canada*)

SPRAKE SONG & KONYE
Criminal Trials and Appeals
355 Burrard Street, Suite 1720
Vancouver, BC V6C 2G8
Telephone: (604) 669-7447
Facsimile: (604) 687-7089
Email: djsong@sprakesongkonye.com

Matthew A. Nathanson
Daniel J. Song

Counsel for the Intervener, Independent Criminal Defence Advocacy Society

SUPREME LAW GROUP
Barristers and Solicitors
275 Slater Street, Suite 900
Ottawa, Ontario K1P 5H9
Telephone: (613) 691-1224
Facsimile: (613) 613-691-1338
Email: mdillon@supremelawgroup.ca

Moira Dillon

Ottawa Agent for the Intervener, Independent Criminal Defence Advocacy Society

TO: THE REGISTRAR

AND TO:

BOTTOS LAW GROUP
10226 104 Street, NW, 4th Floor
Edmonton, AB T5J 1B8
Telephone: (780) 421-7001
Facsimile: (780) 421-7031
Email: dbottos@bottoslaw.ca
psankoff@bottoslaw.ca

Dino Bottos
Peter Sankoff

Counsel for the Appellant, Bradley David Barton

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite100
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855
Facsimile: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Eugene Meehan, QC
Marie-France Major

Ottawa Agents for Counsel for the Appellant

ALBERTA JUSTICE
Crown Prosecutions Service
Appeals Branch
9833 - 109 Street NW, 3rd Floor
Edmonton, AB T5K 2E8
Telephone: (780) 422-5402
Facsimile: (780) 422-1106
Email: joanne.dartana@gov.ab.ca

Joanne B. Dartana

Counsel for the Respondent, Her Majesty the Queen

GOWLING WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Telephone: (613) 786-8695
Facsimile: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

D. Lynne Watt

Ottawa Agent for the Counsel for the Respondent

DEPARTMENT OF JUSTICE
50 O'Connor Street, Suite 500
Ottawa, ON K1P 6L2
Telephone: (613) 670-6290
Facsimile: (613) 954-1920
Email: christopher.rupar@justic.gc.ca

Christopher Rupar

Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500, Room 556
Ottawa, ON K1P 6L2
Telephone: (613) 670-6289
Facsimile: (613) 954-1920
Email: robert.frater@justice.gc.ca

Robert J. Frater, Q.C.

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

ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9
Telephone: (416) 326-2351
Facsimile: (416) 326-4656
Email:
christine.bartletthughes@ontario.ca

Christine Bartlett-Hughes
Benita Wassenaar
Jessica Wolfe

Counsel for the Intervener, Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Telephone: (613) 237-5160
Facsimile: (613) 230-8842
Email: neffendi@blg.com

Nadia Effendi

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

ATTORNEY GENERAL OF MANITOBA
510 - 405 Broadway
Winnipeg, MB R3C 3L6
Telephone: (204) 945-5778
Facsimile: (204) 945-1260
Email: renee.lagimodiere2@gov.mb.ca

Renée Lagimodière
Jennifer Mann

Counsel for the Intervener, Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 786-8695
Facsimile: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

D. Lynne Watt

Ottawa Agent for Counsel for the Intervener, Attorney General of Manitoba

ATTORNEY GENERAL OF BRITISH COLUMBIA
940 Blanshard Street, 3rd Floor
Victoria, BC V8W3E6
Telephone: (250) 387-4218
Facsimile: (250) 387-4262
Email: lesley.ruzicka@gov.bc.ca

Lesley A. Ruzicka

Counsel for the Intervener, Attorney General of British Columbia

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 783-8817
Facsimile: (613) 788-3500
Email: robert.hoston@gowlingwlg.com

Robert E. Houston, Q.C.

Ottawa Agent for Counsel for the Intervener, Attorney General of British Columbia

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS
Complexe Jules-Dallaire
2828, boulevard Laurier
Tour 1, bureau 500
Québec, PQ G1V 0B9
Telephone: (418) 643-9059 Ext. 21404
Facsimile: (418) 644-3428
Email: andrej.soko@dpcp.gouv.gc.ca

Andrej Soko

Counsel for the Intervener, Director of Criminal and Penal Prosecutions

DIRECTEUR DES POURSUITES CRIMINELLE ET PÉNALES DU QUÉBEC
17, rue Laurier
bureau 1.230
Gatineau, PQ J8X 4C1
Telephone: (819) 776-8111 Ext. 60446
Facsimile: (819) 772-3986
Email: Sandra.bonanno@dpcp.gouv.qc.ca

Sandra Bonanno

Ottawa Agent for Counsel for the Intervener, Director of Criminal and Penal Prosecutions

FOY ALLISON LAW GROUP
207 - 2438 Marine Drive
West Vancouver, BC V7V 1L2
Telephone: (604) 922 9282
Facsimilie: (604) 922-9283
Email:
gwendoline.allison@foyallison.com

Gwendoline Allison

Counsel for the Intervener, Vancouver Rape Society

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N7E4
Telephone: (613) 241-2701
Facsimile: (613) 241-2599
Email: albertos@vdg.ca

Alberto Polizogopoulos

Ottawa Agent for Counsel for the Intervener, Vancouver Rape Society

FOY ALLISON LAW GROUP
207 - 2438 Marine Drive
West Vancouver, BC V7V 1L2
Telephone: (604) 922 9282
Facsimilie: (604) 922-9283
Email:
gwendoline.allison@foyallison.com

Gwendoline Allison

Counsel for the Intervener, La Concertation des lutes 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 Exploitation

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N7E4
Telephone: (613) 241-2701
Facsimile: (613) 241-2599
Email: albertos@vdg.ca

Alberto Polizogopoulos

Ottawa Agent for Counsel for the Intervener, La Concertation des lutes 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 Exploitation

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Telephone: (613) 241-6789 Ext. 228
Facsimile: (613) 241-5808
Email: swuttke@afn.ca

Stuart Wuttke
Julie McGregor

Counsel for the Intervener Assembly of First Nations

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, ON K1P 5H9
Telephone: (613) 691-1224
Facsimile: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Moira Dillon

Ottawa Agent for Counsel for the Intervener Assembly of First Nations

FASKEN MARTINEAU DUMOULIN LLP
Bureau 3700, C.P. 242
800, Place Victoria
Montréal, PQ H4Z 1E9
Telephone: (514) 397-7545
Facsimile: (514) 397-7600
Email: cleblanc@fasken.com

Christian LeBlanc
Tess Layton

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

FASKEN MARTINEAU DUMOULIN LLP
55 rue Metcalfe, Bureau
1300 Ottawa, ON K1P 6L5
Telephone: (613) 236-3882
Facsimile: (613) 230-6423
Email: sarsenault@fasken.com

Sophie Arsenault

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

THE WOMEN OF THE MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK
Jean Teillet Personal Law Corporation
861 East 11th Avenue
Vancouver, BC V5T 2E7
Telephone: (604) 787-3978
Facsimile: (416) 916-3726
Email: jteillet@pstlaw.ca

Jean Teillet

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

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8
Telephone: (613) 282-1712
Facsimile: (613) 288-2896
Email: msobkin@sympatico.ca

Michael J. Sobkin

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

NATIONAL INQUIRY MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS
500-1138 Melville Street
Vancouver, BC V6E 4S3
Telephone: (416) 268-4133
Facsimile: (604) 775-5009
Email: c.bigcanoe@mmiwg-ffada.ca
fwylde@mmiwg-ffada.ca

Christa Big Canoe
Fanny Wylde

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

NATIONAL INQUIRY MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS
300-222 Queen Street,
Ottawa, ON K1P 5V9
Telephone: (613) 222-5951
Facsimile: (613) 943-5760
Email: m.porter@mmiwg-ffada.ca

Meredith Porter

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

ADDARIO LAW GROUP
171 John Street, Suite 101
Toronto, ON M5T 1X3
Telephone: (416) 979-6446
Facsimile: (866) 714-1196
Email: msavard@addario.ca

Megan Savard
Samara Secter

Counsel for the Intervener, Criminal Lawyers' Association of Ontario

GOLDBLATT PARTNERS LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Telephone: (613) 482-2463
Facsimile: (613) 235-3041
Email: cbauman@goldblattpartners.com

Colleen Bauman

Ottawa Agent for Counsel for the Intervener Criminal Lawyers' Association Ontario

THE INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN and THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (Jointly)
Weber Law
10209-97 Street
Edmonton, AB T5J 0L6
Telephone: (780) 758-6365
Facsimile: (780) 429-2615
Email: lisa@weberlaw.ca

Lisa Weber
Shaun O'Brien

Counsel for the Interveners The Institute for the Advancement of Aboriginal Women and the Women's Legal Education and Action Fund Inc. (Jointly)

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Telephone: (613) 237-5160
Facsimile; (613) 230-8842
Email: neffendi@blg.com

Nadia Effendi

Ottawa Agent for Counsel for the Interveners The Institute for the Advancement of Aboriginal Women and the Women's Legal Education and Action Fund Inc. (Jointly)

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
University of Toronto
39 Queen's Park Cresent
East Toronto, ON M5S 2C3
Telephone: (416) 978-0092
Facsimile: (416) 978-8894
Email: cheryl.milne@utoronto.ca

Cheryl Milne

Counsel for the Intervener David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Telephone: (613) 780-8654
Facsimile: (613) 230-5459
Email: matthew.halpin@nortonrosefulbright.com

Matthew J. Halpin

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

ABORIGINAL LEGAL SERVICES
211 Yonge Street, Suite 500
Toronto, ON M5B 1M4
Telephone: (416) 408-4041 Ext. 224
Facsimile: (416) 408-1568
Email: e_hill@loa.onca

Emily Hill
Jonathan Rudin

Counsel for the Intervener, Aboriginal Legal Services

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Telephone: (613) 237-5160
Facsimile: (613) 230-8842
Email: neffendi@blg.com

Nadia Effendi

Ottawa Agent for Counsel for the Intervener, Aboriginal Legal Services

CRIMINAL TRIAL LAWYERS' ASSOCIATION (ALBERTA)
Hurley O'Keeffe Millsap
300 MacLean Block
10110-107 Street
Edmonton, AB T5J 1J4
Telephone: (780) 421-4766
Facsimile: (780) 429-0346
Email: whitling@libertylaw.ca

Nathan J. Whiting
Aloneissi O'Neill

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

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Telephone: (613) 695-8855 Ext. 102
Facsimile: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Marie-France Major

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

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PART I: OVERVIEW AND STATEMENT OF FACTS

I. OVERVIEW

1. Sometimes the criminal process achieves balance by being lopsided. The Crown—the most experienced and financed litigant in criminal courts—has, for sound reasons, limited avenues of appeal against acquittals. This includes the rule against relying on different theories or arguments on appeal to secure a new trial after an accused is acquitted. This rule, now entrenched by ***Wexler v. The King***,[1] is for the sole benefit of the accused but is firmly tethered to the principle against double jeopardy.

2. To the extent that the resolution of this appeal may engage the principles in that case, the Independent Criminal Defence Advocacy Society ("CDAS") submits that the historical development of the Crown's right of appeal, the recent appellate decisions on this issue, and the policy considerations that buoy the rule against double jeopardy all support the continued integrity of ***Wexler***. Although it appears that this Court has not revisited the reasoning in ***Wexler*** since 1960,[2] CDAS contends there is no principled basis to depart from or alter the *ratio decidendi* in that case. Indeed, there are sound reasons now to affirm this important rule in criminal cases.

3. The focus of the inquiry should be whether the Crown's position on an appeal is *materially different* from the arguments or theory presented at trial. Where the Crown's arguments on appeal involve a material change in position, a court of appeal should not interfere with the verdict even if they establish an error of law. Indeed, given that s. 11(h) of the *Charter* prevents an individual from being tried again for the same offence, any conflict or tension between an appellate court's role to correct errors and the duty to ensure procedural fairness should be resolved in favour of the accused in this context. In short, correctness must yield to the *Charter*-protected interests of the accused.

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[1] ***Wexler v. The King***, [1939] S.C.R. 350, 1939 CanLII 41.

[2] See ***The Queen v. George***, [1960] S.C.R. 871, 1960 CanLII 45.

II. POSITIONS OF THE PARTIES

4. The Court of Appeal did not directly address Mr. Barton's complaint that the Crown, as the appellant in the court below, was relying on a theory of liability that it did not present at trial. In the first paragraph of his factum in the Court of Appeal, Mr. Barton (as the respondent) referred to the "well-established principle that an accused should not be tried twice,"[3] citing ***Wexler*** and other authorities in support of his argument that the Crown cannot change its theory of liability on appeal. However, the Court of Appeal's lengthy judgment did not include any legal analysis of the principles in ***Wexler*** or related cases.

A. Position of Mr. Barton

5. Nevertheless, Mr. Barton now argues in this Court that the Court of Appeal erred by allowing the Crown to rely on theories and arguments that were contrary to the positions it took at trial. He again relies on ***Wexler*** and its progeny to submit that the Crown cannot advance a new basis of liability on appeal as doing so would constitute a "manifest injustice" and offend the principle against double jeopardy.[4]

6. Mr. Barton also submits that the only apparent exception to the principle in ***Wexler*** appears in ***Cullen v. The King***,[5] where this Court held that the Crown may appeal on grounds of misdirection of the jury even if it fails to object to the jury charge, only where the objection was not a deliberate tactical choice, and only when the Crown did not have an opportunity to participate actively in developing the charge.[6]

B. Position of the Crown

7. The Crown does not appear to quarrel with the principles in ***Wexler*** and agrees that "[t]he Crown is, generally, not entitled to present a new/alternate theory of liability on appeal" to avoid double jeopardy.[7] However, the Crown submits that the failure to object to

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[3] See "Respondent's Factum, Court of Appeal" – Appellant's Record, TAB 15.
[4] Appellant's Factum at para. 18.
[5] ***Cullen v. The King***, [1949] SCR 658, 1949 CanLII 7.
[6] *Ibid*. at para. 20.
[7] Respondent's Factum at para. 25.

a misdirection in a jury charge and its position at trial does not bar an appellate court from ordering a new trial based on an erroneous instruction.[8]

8. The Crown argues that "[c]ounsel's position at trial will not be determinative when misdirection or non-direction is raised as a ground of appeal," and that a "legal error remains a legal error even if counsel does not object to, or supports, the erroneous instruction."[9] The Crown seems to suggest that even if a change in its theory of liability on appeal is unfair to the accused, a legal error in a jury charge *that the Crown supported* should nevertheless demand a new trial.

PART II: INTERVENER'S POSITION ON APPEAL

9. CDAS is an incorporated British Columbia non-profit society with over 300 members (primarily defence counsel) engaged in advocacy, law reform and education relating to criminal defence work and the administration of justice.

10. CDAS does not take a position on whether the Court of Appeal, in fact, offended the rule in ***Wexler*** in allowing the Crown's appeal. In addition, CDAS takes no position on whether the Crown in this case simply failed to object to aspects of the jury charge or whether it made a considered decision not to pursue alternate routes to liability. Instead, CDAS argues this Court should reaffirm the principles in ***Wexler*** and refrain from broadening or expanding the Crown's right of appeal to allow appeals from acquittals where the Crown advances new or different arguments that were not marshalled at trial.

11. CDAS also submits that the Crown cannot circumvent the principle against double jeopardy by arguing that a "legal error is a legal error." Where the Crown's deliberate position at trial contributed to an error in a jury charge, and the Crown advances a new or different theory of liability on appeal in order to establish this error, the principle against double jeopardy should bar the Crown's appeal.

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[8] *Ibid*. at para. 26.
[9] *Ibid*.

12. In support of its position, CDAS will (1) provide some historical legislative context of the Crown's right to appeal acquittals in Canada; (2) review ***Wexler*** and recent related jurisprudence; (3) discuss the rule against double jeopardy and its limiting effect on the Crown's right of appeal; and (4) reflect on the policy considerations that support the asymmetrical rights of appeal between the Crown and accused.

PART III: STATEMENT OF ARGUMENT

I. THE CROWN CANNOT MATERIALLY CHANGE ITS POSITION ON APPEAL

A. Statutory Evolution of the Crown's Right of Appeal

13. In England, the Crown had no right to appeal an acquittal until 2005 (when the Crown was granted a limited right to appeal acquittals stemming from a trial judge's rulings). For this reason, where there was an acquittal in a criminal prosecution "the scene [was] closed and the curtain [dropped]."[10] This was the legal tradition and framework that Canada adopted prior to 1892.

14. The enactment of the *Criminal Code of Canada* in 1892 codified and reformed criminal law in Canada, with arguably the most important change being that it established "a somewhat primitive" system of appeals in criminal cases.[11] More specifically, after initially adopting the English laws that precluded Crown appeals from acquittals, Parliament legislated a limited right of appeal for the Attorney General in 1892.[12]

15. Curiously, at the time the 1892 *Criminal Code* was first introduced in the House of Commons, the Minister of Justice, Sir John Thompson, stated that there was no intention to depart from the long-standing English common law rule that prohibited the Crown from

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[10] David S. Rudstein, "Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges' Rulings 'No Case to Answer'," 13 San Diego Int'l L.J. 5 2011-2012, at p. 10 (footnote 24). **[CDAS Book of Authorities ("BOA") – TAB 4]**

[11] Alan W. Mewett, "The Canadian Criminal Code, 1892-1992", 72 Can. B. Rev. 1 1993, at p. 3. **[BOA – TAB 2]**

[12] *Criminal Code, 1892*, S.C. 1892, c. 29, ss. 742-753. **[BOA – TAB 5]**

appealing acquittals.[13] However, the legislation as enacted, "[w]hether through inadvertence or by design, gave the Crown a right unprecedented in English jurisprudence, *e.g.* the right to appeal an acquittal on any question of law which was requested to be reserved at trial."[14] All other questions that the trial judge declined to reserve would still require leave of both the Attorney General and the court of appeal.[15] Additionally, on a Crown appeal, the court of appeal did not have the power to substitute a conviction for an acquittal and could only order a new trial.[16]

16. In 1923, the *Criminal Code* was amended to effectively mirror the *Criminal Appeal Act* in England in 1907.[17] Prior to 1907, "there was no right of appeal in the modern sense" in English criminal cases.[18] Moreover, given that the English did not permit appeals from acquittals, the 1923 amendments to the *Criminal Code* (mistakenly) abolished the Attorney General's right to appeal acquittals in Canada (which, as noted, had previously been in place by virtue of the 1892 enactment).[19]

17. It was not until 1930 that the *Code* was amended[20] to provide the Crown an unqualified right to appeal an acquittal on a question of law.[21] However, in ***Wexler***, Crocket J. described this as a "drastic amendment to the *Criminal Code*"—one that Parliament did not intend to permit the Crown to use to retry an accused with a different route to liability.[22] In other words, the absence of limiting words in the text of s. 1013(4) (now s. 676(1)(a)) did not mean that the Crown's right to appeal acquittals was unfettered.

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[13] Vincent M. Del Buono, "The Right to Appeal in Indictable Cases: A Legislative History," Alta. L. Rev. 16 1978 at p. 453. **[BOA – TAB 1]**
[14] *Ibid*.
[15] *Ibid*.
[16] Mewett, *supra* note 11 at p. 22.
[17] *Ibid*. at p. 23.
[18] C.H. O'Halloran, "Development of the Right of Appeal in England in Criminal Cases: with the Canadian Aspect of Directing New Trials in Murder Cases," 27 Can. B. Rev. 153 1949, at p. 154. **[BOA – TAB 3]**
[19] Mewett, *supra* note 11 at p. 23; Del Buono, *supra* note 13 at 454.
[20] *Criminal Code Amendment Act* (1930) 20-21, Geo. 5, c. 11. **[BOA – TAB 6]**
[21] Mewett, *supra* note 11 at p. 24. Del Buono, *supra* note 13 at 461.
[22] ***Wexler***, *supra* note 1, at 357-58.

18. The Crown's right of appeal against acquittals has largely remained unchanged by statute since 1930. More significantly, CDAS submits that the limits as articulated in ***Wexler*** have also endured—untouched at common law. Indeed, as set out below, more recent appellate decisions have endorsed and robustly applied the rule in ***Wexler***.

B. *Wexler v. The King* and Subsequent Cases

19. While the Crown in this case does not contend that it can advance arguments on appeal that contradict its positions at trial, it appears to submit that a court of appeal must rectify an acquittal tainted by legal error—regardless of whether the Crown's appeal offends the principle against double jeopardy. In other words, an appellate court must remedy a legal error *even where the Crown's shifting position results in unfairness to the accused*.[23] CDAS submits that this Court should not accede to this argument and that appellate decisions since ***Wexler*** do not support it.

20. CDAS accepts that ***Cullen v. The King***[24] held that the failure to object to an aspect of a jury charge may not prevent the Crown from appealing on the basis of misdirection or non-direction. However, CDAS submits that a Crown's considered or calculated decision to refrain from objecting to a jury charge cannot gild a contradictory ground of appeal with the lustre of legitimacy. ***Cullen*** does not extend such generosity.

21. Indeed, it appears that the concern about trial fairness "will be greater when the [jury] instruction relates to a theory of liability that has not been advanced by the Crown."[25] This is especially so when modern criminal trial procedure in Canada ordinarily involves an in-depth pre-charge conference with the trial judge and all counsel, such that an unexpected or surprising instruction is the exception not the norm.

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[23] Respondent's Factum at para. 26.
[24] ***Cullen***, *supra* note 5.
[25] ***R. v. Ranger*** (2003), 67 O.R. (3d) 1, 2003 CanLII 32900 (C.A.) at para. 136.

22. In addition, the Ontario Court of Appeal in ***R. v. Varga***[26] and ***R. v. Suarez-Noa***[27] appears to have accepted "the substantial body of case law" that bars the Crown not only from changing its theory of liability on appeal but also from raising brand-new arguments that it did not advance at trial. In ***Varga***, Doherty J.A. distinguished a failure to object within the ambit of ***Cullen*** from a considered decision not to advance an argument. An "affirmative decision not to litigate an issue at trial" could not warrant raising that issue for the first time on appeal. Doherty J.A. further held that, "[j]ust as the Crown cannot challenge an acquittal by advancing a theory of liability for the first time on appeal, it cannot secure a new trial by advancing a new test for admissibility that contradicts the one advanced at trial."

23. This is significant because the admissibility of evidence is an issue for the trier-of-law, and a trial judge errs in law if he or she admits inadmissible evidence—despite the consent of the parties. In other words, even if the Crown in ***Varga*** was correct that the trial judge had to make an additional finding of materiality of the documents at issue, that "legal error" would not displace the "abuse of the appellate process" that would have resulted had Doherty J.A. acceded to the Crown's new argument.

24. Other decisions since ***Wexler*** have relied on the following principles or doctrines to disallow the Crown from changing its theory on an appeal: the risk of double jeopardy (***Patel***;[28] ***Elms***;[29] ***Varga***), the denial of full answer and defence under s. 7 of the *Charter* (***Penno***[30] per McLachin J. (as she then was); ***Patel***; ***Knight***[31]), and the abuse of the appellate process (***Varga***; ***Suarez-Noa***). All of these are different legal expressions of unfairness or, as Crocker J. put it in ***Wexler***, "a manifest injustice."[32] But none of these cases have elevated these principles to prerequisites that must be established before a court of appeal refuses to accede to a Crown appeal.

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[26] ***R. v. Varga*** (1994), 18 O.R. (3d) 784, 1994 CanLII 8727 (C.A.).
[27] ***R. v. Suarez-Noa***, 2017 ONCA 627 (CanLII) at para. 30.
[28] ***R. v. Patel***, 2017 ONCA 702 (CanLII).
[29] ***R. v. Elms*** (2006), 82 O.R. (3d) 415, 2006 CanLII 31446 (C.A.).
[30] ***R. v. Penno***, [1990] 2 S.C.R. 865, 1990 CanLII 88.
[31] ***R. v. Knight***, 2015 ABCA 24 (CanLII).
[32] ***Wexler***, *supra* note 1, at 357.

25. Collectively, they echo the language of fairness that marks the edges of the Crown's right of appeal under s. 676. In particular, the principle against double jeopardy enshrined under s. 11(h) of the *Charter* must, as a matter of constitutional authority, prevail over an appellate court's statutory imperative to correct errors of law—even where a "legal error remains a legal error."[33]

C. Double Jeopardy in Canada and Other Jurisdictions

26. The rule against double jeopardy embodies the *autrefois* pleas available to an accused in England and in Canada. The rule is constitutionalized in Canada, and indeed, similarly constitutionalized in other countries such as the United States (with its Fifth Amendment).[34] Of course, the rule does not, in and of itself, prevent appeals by the state:[35] Argentina, Israel, Mexico, South Africa, and many European countries recognize the rule against double jeopardy and simultaneously provide the prosecution with rights of appeal.[36]

27. However, it appears that the more deeply entrenched the rule is in a particular jurisdiction, the greater impact it may have on limiting a right of appeal by the state. For example, New Zealand and some states in Australia allow appeals from acquittals while recognizing double jeopardy by way of legal mechanisms such as the *autrefois* pleas.[37] More starkly, the United States prohibits prosecution appeals from acquittals in virtually all circumstances, because the Fifth Amendment accords "absolute finality" to an acquittal.[38] The U.S. Supreme Court has stated that granting broad appeal rights in government appeals against acquittals would allow the prosecutor to "re-examine the weaknesses in his first presentation in order to strengthen the second."[39] Indeed, the "finality of an acquittal applies even if it were 'based upon an egregiously erroneous foundation.'"[40]

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[33] Respondent's Factum at para. 26.
[34] Rudstein, *supra* note 10 at pp. 27-28.
[35] *Ibid*. at p. 51.
[36] *Ibid*. at pp. 40-41.
[37] *Ibid*. at pp. 44-45.
[38] *Ibid*. at p. 48.
[39] *Ibid*. at pp. 52-53.
[40] *Ibid*. at p. 50 (emphasis added).

28. In contrast, despite the constitutional status of the principle of double jeopardy in Canada, Parliament has endowed the Crown with avenues of appeal significantly broader than those found in other common law jurisdictions. Indeed, Cory J. noted in ***R. v. Evans***, "[i]n setting the standard for reversal, it is worth observing that, among the major English-speaking common-law jurisdictions, Canada appears to possess the most liberal provisions for Crown appeals."[41] The Crown can appeal as of right on questions of law,[42] an appellate court can substitute a conviction for an acquittal in a judge-alone trial,[43] and the Crown may appeal a stay of proceedings on questions of fact.[44]

29. Nevertheless, on the specific question of whether an error in a jury charge can warrant setting aside an acquittal where the Crown advances a position that contradicts its stance at trial, CDAS submits that the moment fairness is compromised (and effectively triggers s. 11(h) of the *Charter*), a legal error alone cannot justify a new trial. The Crown's modern appeal rights do not include flouting the *Charter*.

D. Policy Considerations Supporting Asymmetric Rights of Appeal

30. As this Court noted in ***R. v. Biniaris***,[45] "there is no principle of parity of appellate access in the criminal process."[46] Professor Rudstein attempts to explain this by identifying a number of policy considerations that inform the principle against double jeopardy: it supports finality in litigation; minimizes distress and trauma of the trial process; reduces the risk of wrongful convictions; protects the power of the jury; encourages efficient criminal investigations and prosecutions; conserves judicial and prosecutorial resources; prevents abuses of process; and maintains public confidence in the justice system.[47]

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[41] ***R. v. Evans*****,** [1993] 2 SCR 629, 1993 CanLII 102 (emphasis added).
[42] *Criminal Code*, R.S.C. 1985, c. C-46, s. 676(1).
[43] *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(4)(b)(ii).
[44] *Criminal Code*, R.S.C. 1985, c. C-46, s. 676(1)(c); ***R. v. Koruz***, 1992 ABCA 144 (CanLII) at para. 31; ***R. v. D.W.H.*****,** 1999 NSCA 126 (CanLII) at para. 41.
[45] ***R. v. Biniaris***, [2000] 1 S.C.R. 381, 2000 SCC 15 (CanLII).
[46] *Ibid*. at para. 33.
[47] Rudstein, *supra* note 10 at pp. 29-30.

31. There is also an important practical consideration that arises when the Crown raises a new theory of liability on appeal: the accused is deprived of the opportunity to build an appeal record to meet that new theory. The tactical decisions of the defence, the strategy in cross-examining witnesses, the decision to call witnesses or tender evidence, and the accused's critical choice whether to testify would have been a direct consequence of the Crown's theory at trial.

32. In sum, our jurisprudence embraces many of the policy concerns cited by Professor Rudstein, and the limits on Crown appeals certainly encourage finality and impede abuses of process that would negatively impact public confidence in the administration of justice. Those policy considerations support an asymmetry of appeal rights. But CDAS further submits that by applying ***Wexler*** with rigour, appellate courts will also enhance the Crown's role as stewards of fairness, shield the accused from a verdict that hangs like a question mark, and unapologetically affirm that justice can indeed thrive in places of unevenness.

PART IV: ORDER SOUGHT

33. CDAS takes no position on the orders of this Court.

PART V: ORAL ARGUMENT

34. As per Rowe J.'s order dated August 2, 2018, CDAS will present oral argument not exceeding five minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, A.D. 2018.

MATTHEW A. NATHANSON
DANIEL J. SONG
Counsel for the Intervener,
Independent Criminal Defence Advocacy Society

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