File No. 37769

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

BETWEEN:

BRADLEY 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, ABORIGINAL LEGAL SERVICES, ASSEMBLY OF FIRST NATIONS, THE WOMEN OF THE MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, THE CRIMINAL TRIAL LAWYERS`ASSOCIATION (ALBERTA), CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, THE INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN and THE WOMEN`S LEGAL EDUCATION AND ACTION FUND INC. (JOINTLY), THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, 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 CENTRE TO END ALL SEXUAL EXPLOITATION (CEASE) (JOINTLY)

Interveners

FACTUM OF THE INTERVENER
WOMEN OF THE MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I OVERVIEW AND FACTS

Overview

1. The Women of the Métis Nation/Les Femmes Michif Otipemisiwak ("WMN/LFMO") is the national body that advocates on behalf of the women of the Métis Nation. When we use the term "Métis" in this factum, we refer to the historic Métis Nation of the Canadian North-West, one of the "aboriginal peoples of Canada" within the meaning of s. 35 of the *Constitution Act, 1982*. This court has specifically recognized the Métis people of the Canadian North-West as a culturally distinct people.[1] We do not use the term "Métis" to refer to any individual with mixed Canadian/Indigenous heritage. We emphasize this distinction because the Métis Nation has its own distinct culture, language, laws and practices.

2. Cindy Gladue was a Métis woman. Her Métis culture, history, laws and values were ignored in this case. They should not have been ignored. This Intervener cannot and does not seek to enter evidence about the Métis Nation culture and values with respect to the dignity we afford the dead and our laws with respect to crimes against women, but we can alert the court to the absence of any consideration of such culture, laws and values. There is a move to reconcile Indigenous peoples with Canada's institutions and laws. But if Indigenous values, customs and laws are not considered relevant by the court in a trial that seeks justice for the murder of an Indigenous woman, reconciliation between Indigenous and non-Indigenous will never be achieved.

3. Cindy Gladue died as a result of gender-based violence. The WMN/LFMO defines gender-based violence as any act that results in, or is likely to result in harm to women whether occurring in public or private. This definition is consistent with the definitions of violence against women in international law.

4. The WMN/LFMO works on the assumption, supported by voluminous evidence accumulated over decades by government institutions, academics and royal commissions of inquiry, that Indigenous women in Canada are at risk of death and victimization at rates that are

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[1] *Daniels v. Canada (Indian Affairs and Northern Development),* [2016] 1 SCR 99, para 42; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670; and *Manitoba Métis Federation v. Canada (Attorney General),* [2013] 1 SCR 623.

many times higher than those experienced by non-Indigenous women. We also work on the assumption, again supported by decades of evidence, that being a visibly Indigenous woman in Canada is in and of itself a risk factor for gender-based violence.

5. The WMN/LFMO has a mission to ensure that Métis women can enjoy the equal protection of all human rights and freedoms including the right not to be subjected to cruel, inhuman or degrading treatment. Our mission includes ensuring that the re-victimization of Métis women does not occur as a result of Canadian institutions, systems, laws, policies and enforcement practices that are insensitive to gender and Indigenous considerations.

6. We believe that while gender-based violence against Indigenous women manifests itself in individual acts of violence, it is a broad social problem that requires civil society to respond. Gender-based violence against the women of an identifiable community – the Indigenous peoples of Canada – requires comprehensive institutional and systemic responses beyond specific events and individual cases. The Canadian state takes the position that all violence is a crime against the state, yet the state plays a role in enabling gender-based violence against Indigenous women to continue.

7. Gender-based violence against Indigenous women requires each state institution to use its power and influence in four ways. First, to recognize that disproportionally high gender-based violence against Indigenous women is a fact in Canada. Second, to admit that this is a systemic problem and that state institutions are part of the problem. Third, to identify the rules and foundational assumptions that both contribute to and enable gender-based violence against Indigenous women. Finally, to take steps to change their systems to eliminate anything that enables the violence and the victimization or re-victimization of Indigenous women.[2] Nowhere is this four-step process more urgent than in the criminal justice system of Canada.

8. This court has repeatedly addressed what it has correctly identified as the "tragic" problem of Indigenous *offenders* and their overrepresentation in our prisons and jails.[3] This case

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[2] *R. v. Barton*, 2017 ABCA 216, Reasons for Judgment Reserved ("RJR") at para. 126, noted that "Canadian courts … could *and should,* take proactive steps to prevent racism from compromising trials." [emphasis in the original]

[3] *R. v. Gladue*, [1999] 1 SCR 688, para. 87

brings before this court the issue of a trial process that re-victimized an Indigenous woman who was already the *victim* of gender-based violence. We say that the over-representation of Indigenous offenders and the over-representation of Indigenous women victims are the opposite sides of the same coin. Indigenous women and their families who are the victims of gender-based violence should never be re-victimized by being subjected to cruel, inhuman or degrading treatment by the courts. This case provides an opportunity for this court to advise trial judges and lawyers on how to treat, with dignity, Indigenous women who, as victims of gender-based violence, are caught up in the criminal justice system.

Facts

9. The WMN/LFMO adopts the facts set out by the Respondent in paragraphs 5 to 20 of its factum and adds the following facts.

10. Witnesses, Defence counsel and the Crown referred to Ms. Gladue as "Native" approximately 26 times during the trial. One witness was directly asked to describe the victim's ethnicity and the Crown used the term while questioning the witness.[4]

11. Courts in Canada have long recognized the potential for racial prejudice against visible minorities in the justice system.[5]

12. During the trial, the judge did not admonish counsel for their references to Ms. Gladue as "Native." The trial judge gave no corrective instruction to the jury about the risks of prejudice that might arise from the repeated references to her as "Native".

13. The trial judge permitted Ms. Gladue's dismembered body to be brought into court as evidence to demonstrate to the jury the injury the Crown alleges caused her death. He gave no corrective instruction to the jury about the prejudice that might arise from the admission of her body as evidence.

PART II STATEMENT OF ISSUES

14. The WMN/LFMO will address the following issues which are before this court:

a. The role of interveners in a criminal appeal;

[4] RJR, para. 124.
[5] RJR, para. 126.

b. The purpose, scope and mandatory nature of s. 276 of the *Criminal Code*; and

c. Section 276 and the re-victimization of Cindy Gladue.

PART III ARGUMENT

a. The Role of Interveners in a Criminal Appeal

15. The Appellant asks this court to examine the role Interveners play in a criminal appeal. The Appellant asserts that the Joint Interveners at the Court of Appeal compromised the fundamental fairness of the appeal by raising new grounds of appeal and operating as a "second prosecutor". The Appellant claims this happened when the Joint Interveners raised the issue of s. 276 of the *Criminal Code*.[6] The Appellant submits that this was an improper widening of the issues on appeal and that the Alberta Court of Appeal erred in adopting the Intervener's submissions. In addition to raising the issue of the role of Interveners in a criminal appeal, the Appellant raises the issue of the purpose, scope and mandatory nature of s. 276.

16. On the issue of Interveners, we propose to address two points, the role of Interveners in a criminal appeal and whether the Court of Appeal erred in adopting the Intervener's submissions.

17. We submit that it is appropriate and necessary for Interveners to make submissions with respect to the broader considerations that arise from the issues raised by the Appellant. In the case at bar those broader implications include the re-victimization of women during the trial process, the impact on Indigenous women who are the victims of gender-based violence and the reputation of the justice system. Interveners, such as the Indigenous Interveners in this case, are often the *only* way such matters, or the failure to consider such matters, can come before the court. This is not an "improper widening of the issues on appeal". The Court of Appeal did not err in permitting the Joint Interveners to raise these broad implications.

18. In the case at bar, the WMN/LFMO submits that the Court of Appeal did not err when it adopted the submissions of the Joint Interveners, even though those submissions differed from the positions taken by the parties at trial. The WMN/LFMO submits that an appeal court can adopt submissions from Interveners that differ from the submissions made by the parties. In *Manitoba Métis Federation*, this court has done just that. In that case this court took the

[6] Appellant's Factum, para. 42.

opportunity to create a new development in the law of the Honour of the Crown – the duty to diligently implement constitutional promises. This court noted that the Interveners submissions went beyond the arguments made by the parties, raised a broader issue and that it was relying, at least in part, on the implicit arguments of the Interveners.[7]

b. The Purpose, Scope and Mandatory Nature of s. 276 of the *Criminal Code*

19. Section 276(1) of the *Criminal Code* is as follows:

> 276(1) … 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.[8]

20. The Appellant argues that the Crown first raised evidence with respect to the Indigeneity of Ms. Gladue; that s. 276 has no application to evidence raised by the Crown; and that s. 276 is strictly about past sexual activity and does not encompass references to her Indigeneity.[9] The Appellant argues that s. 276(2) restricts the general prohibition to evidence adduced by or on behalf of the accused.

21. With respect, this cannot be correct. Section 276(1) is a general prohibition. It makes no reference to who introduces such evidence and such an inference cannot be read into it. Section 276(2) is not a restriction on the general prohibition in s. 276(1). It limits and clarifies the circumstances under which such evidence can be adduced by or on behalf of the accused.

22. Section 276 cannot be presumed to be inapplicable to references to Indigeneity where both the Crown and Defence counsel proceeded on the assumption that there was an intersection between the victim's sexual activity and her Indigeneity. Intersectionality is a theoretical framework that allows us to understand how disadvantage and prejudice multiply where there is more than one source of bias. In this case, understanding intersectionality is essential to combatting the interwoven prejudices at play in this trial. Casual references to Cindy Gladue's Indigeneity combined with references to her as a prostitute should have been prohibited because

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[7] *Manitoba Métis Federation v. Canada (Attorney General),* [2013] 1 SCR 623, paras. 84-90
[8] *Criminal Code,* RSC 1985, c C-46, s. 276(1).
[9] Appellant's Factum, paras. 73 and 77.

they may have led a jury to assume she was more likely to have consented to the sexual activity that formed the subject matter of the charge.

23. The Court of Appeal correctly noted that s. 276 was intended to replace the false logic and discriminatory thinking about who consents, who tells the truth and what is relevant with a process that excludes evidence that would support illegitimate inferences.[10] The goal of s. 276 can be further understood by an examination of the factors a trial judge must consider under s. 276(3) including:

> d. the need to remove from the fact-finding process *any* discriminatory belief or bias; [emphasis added]
> 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; and
> g. the right of the complainant and of every individual to personal security and to the full protection and benefit of the law.

24. The purpose of s. 276 is to put procedures in place to counter the risk that evidence going to the victim's sexual activity will raise inferences "based on groundless myths and fantasized stereotypes."[11] Courts have spoken about the need to prohibit such inferences for many reasons, including social policy and "false logic."[12]

25. The social policy reason for s. 276 is to protect the substantive equality of women. But the protection of substantive equality for Indigenous women cannot be achieved if s. 276 is interpreted narrowly ignoring intersectionality and only seeking to protect against adducing evidence about her sexual activity. Section 276 is also about the character of the complainant and that character includes her visible identity. Groundless myths, fantasized stereotypes and false logic also arise from irrelevant evidence about a woman's Indigeneity. Where sexual activity and Indigeneity intersect, as they do in this case, the propensity for these myths, stereotypes and false logic multiplies.

26. The WMN/LFMO submit that the only way evidence of sexual activity that intersects with the victim's Indigenous identity can be admitted is by following the application process set

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[10] RJR, para. 120.
[11] *R. v. Osolin*, [1993] SCJ No. 135, at para. 168.
[12] *R v Seaboyer; R. v. Gayme*, [1991] 2 SCR 577, at 605.

out in s. 276.1. We note that in furtherance of the goal of protecting the victim's personal dignity the jury and the public are to be excluded from a s. 276 hearing. We submit that s. 276.1 clarifies the mandatory nature of the hearing.

27. In the case at bar both the Crown and Defence counsel ignored s. 276. The result is precisely what the provision was meant to avoid. Instead of removing from the fact-finding process discriminatory sentiments, beliefs or bias, both Crown and Defence counsel instigated such beliefs and bias when they labeled Ms. Gladue as Native and a prostitute. Both Crown and Defence counsel relied on those sentiments. The potential prejudice to Cindy Gladue's personal dignity was never considered and she was provided with no protection or benefit of the law specifically set out in s. 276.

28. One of the central purposes of s. 276 is to ensure that women are not re-victimized during the trial because of insensitive laws and processes. In order to achieve that purpose, s. 276 must, throughout the trial, respect the victim's bodily integrity, her personal dignity and the dignity of her family and her Indigenous culture. If these are not respected they will contribute to the "twin myths". Of the utmost importance in any trial is that a victim of gender-based violence is entitled to be treated with dignity during the trial process *whether she survives the violence or not*. Victims of violence, even in death, should not be re-victimized by the state during the process of the trial.

29. Crown counsel, as the state representative, has a duty to be fair and is obliged to ensure that any comments made during jury addresses are not inflammatory. Inflammatory conduct or comments could render a trial unfair. We submit that the many casual references Crown counsel made during the trial to Ms. Gladue as "Native" and a prostitute constitute inflammatory comments. We further submit that when the Crown sought leave of the court to adduce Ms. Gladue's dismembered body as evidence, that act was inflammatory conduct.

30. In *R. v. Mallory*[13] the Ontario Court of Appeal dealt with the Crown counsel's opening and closing addresses, which the Defendants argued were improper and inflammatory and that they rendered the trial unfair. The Appellants objected during the trial but the trial judge refused

[13] *R. v. Mallory*, 2007 ONCA 46 (CanLII), paras. 330-345.

to grant a mistrial or provide the jury with a corrective instruction. The Court of Appeal held that the opening comments were "plainly inappropriate and set an unfortunate tone for the balance of the trial." The Court of Appeal declined to find judicial error in failing to declare a mistrial. But they found that some corrective action was called for. The trial judge should, at a minimum, have admonished the Crown and instructed the jury to ignore the objectionable passages of the Crown's opening address.

31. We submit that, in the case at bar, the trial judge should not have permitted the Crown in its opening address to refer to Ms. Gladue as a prostitute, should not have permitted evidence with respect to Ms. Gladue's Indigeneity to be adduced and should have removed such evidence from the fact-finding process. At minimum, as in *Mallory*, the trial judge should have cautioned the jury about discriminatory beliefs or bias that might arise with respect to evidence that referred to the victim's Indigeneity and to her as a prostitute. To the extent that he failed in this, he was in error. These failures in the trial process were sufficient to undermine the appearance of justice.

c. Section 276 and the re-victimization of Cindy Gladue

32. The WMN/LFMO submits that Cindy Gladue was re-victimized during the trial process. In raising the way the trial process re-victimized Cindy Gladue we note that the Appellant raised the issue of the scope of s. 276 and the issue of whether Interveners can speak to the broader consequences of failing to apply s. 276 to the evidence adduced at trial. The re-victimization of Cindy Gladue during the trial process is one of those broader consequences.

33. This court has previously recognized "women's fear of further victimization at the hands of the criminal justice system" and that "with good reason, women have come to believe … that the trial process itself will be yet another experience of trauma."[14] This is exactly what happened in this trial. Cindy Gladue was re-victimized in a shocking manner that brings the justice system into disrepute.

34. We have already raised the issue of prejudice and bias that arose as a result of the casual use of the term "Native", its intersection with the victim's sexual activity, and how the errors at trial in that respect violated s. 276 of the *Criminal Code*. But there was a further and more

[14] *Osolin*, *supra* note 8, at p. 628.

egregious breach of s. 276 when the trial judge admitted Ms. Gladue's dismembered body as evidence.

35. Section 276 expressly prohibits evidence that the victim "has engaged in sexual activity, whether with the accused or with any other person." It does not limit that evidence to *past* sexual activity. The evidence is prohibited if it supports an inference that the complainant was more likely to have consented to the sexual activity that forms the subject matter of the charge.

36. We submit that adducing Ms. Gladue's dismembering body as evidence at trial was the objectification of her as a woman. She was called the "specimen" and the "tissue" and treated as an object. That objectification was an act of dehumanization. When she was dehumanized to this extent, it has the potential to, and perhaps did send a message to the jury that the sexual violence did not happen to a woman. It happened only to an object. Objects have no dignity. Objects can be used at will. Objects can be violated. Objects cannot object. The very idea that an object would have the capacity to say no has been removed. This is the ultimate prohibited evidence that s. 276 was enacted to prevent.

37. In admitting Ms. Gladue's dismembered body as evidence in the trial, the judge gave no consideration to the potential prejudice this might invoke in the jury with respect to the issue of consent and s. 276. He gave no consideration to Cindy Gladue's personal dignity or her right to the full protection and benefit of s. 276.[15] Again we stress that the protection of s. 276 cannot apply only to victims of gender-based violence that survive the violence.

38. The dismemberment of an Indigenous woman's body and the use of it as evidence in a trial was a shocking assault by the state on Indigenous women. This is a matter of great importance to the Indigenous women of Canada. It should be a matter of great concern to this court because it has brought the justice system into disrepute. This horrific act is the part of the trial that has overshadowed all other considerations in the minds and hearts of Indigenous women in Canada. We are horrified by what happened. Now in Canada, quite justifiably, Indigenous women fear gender-based violence *by the state* in the name of "justice". The state cannot be permitted to re-victimize women in this manner. No justice was served by this

[15] *R v Barton*, 2015 ABQB 159

barbaric, cruel and violent indignity to an Indigenous woman. It was a secondary assault by the trial process itself on a family already traumatized by the crime. It was also an assault all Indigenous women.

39. If we are to reconcile the rift in society between Indigenous and non-Indigenous, all state actors must acknowledge their role in creating and maintaining that rift. The criminal justice system in this trial ripped a hole in the fabric of our society with this one shocking act. There is evidence that Indigenous women were fearful of the justice system before this trial. Now their fears have been proven true and they have lost what little confidence they had in the justice system.

40. We ask this court to raise its voice on this issue, which is of such overriding concern to Indigenous women in this country. We ask this court say that it was wrong. We ask you to do everything in your power to ensure that no other Indigenous woman is dismembered, dehumanized, her body used as evidence and violated by the courts of this country. Please say that this horror must never take place again. We beg this court, in its reasons for judgment to send a resounding affirmation of the need to protect Indigenous women from state violence during every trial in this country. Justice demands it.

PART IV COSTS

41. The WMN/LFMO does not seek costs and asks that no costs be awarded against it.

PART V NATURE OF RELIEF REQUESTED

42. The WMN/LFMO takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated at Vancouver, British Columbia, this 11th day of September, 2018

Jean Teillet, IPC, OMN, MSC
Counsel for the Intervener, WMN/LFMO

PART VI TABLE OF AUTHORITIES AND LEGISLATION

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