Court File No. 37769

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

B E T W E E N:

BRADLEY DAVID BARTON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, ABORIGINAL LEGAL SERVICES, ASSEMBLY OF FIRST NATIONS, THE WOMEN OF THE MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, 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 CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO
(Rule 42 of the *Rules of the Supreme Court of Canada*)

ADDARIO LAW GROUP LLP
171 John Street, Suite 101
Toronto, ON M5T 1X3

Megan Savard
Samara Secter
Tel: (416) 979-6446
Fax: 1-866-714-1196
Email: Msavard@addario.ca

Counsel for the Intervener
Criminal Lawyers' Association (Ontario)

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Agent for the Intervener
Criminal Lawyers' Association (Ontario)

ORIGINAL TO: THE REGISTRAR
SUPREME COURT OF CANADA

BOTTOS LAW GROUP
10226 – 104 Street NW
4th Floor
Edmonton, AB T5J 1B8

Dino Bottos
Peter Sankoff
Tel: (780) 421-7001
Fax: (780) 421-7031
Email: dbottos@bottoslaw.ca

Counsel for the Appellant

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Agent for the Appellant

ATTORNEY GENERAL OF ALBERTA
Department of Justice
Crown Prosecution Service, Appeal Branch
9833 – 109 St NW, 3rd Floor
Edmonton, AB T5K 2E8

Joanne B. Dartana
Christine Rideout
Tel: (780) 422-5402
Fax: (780) 422-1106
Email: joanne.dartana@gov.ab.ca

Counsel for the Respondent

GOWLING WLG (CANADA) INC.
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Respondent

ATTORNEY GENERAL OF CANADA
Department of Justice
50 O'Connor Street
Suite 500
Ottawa, ON K1A 0H8

Christopher Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Counsel for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice
50 O'Connor Street
Suite 500, Room 556
Ottawa, ON K1P 6L3

Robert J. Frater, Q.C.
Tel: (613) 670-6289
Fax: (613) 954-1920
Email: robert.frater@justice.gc.ca

Agent for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Criminal
10th Floor – 720 Bay Street
Toronto, ON M7A 2S9

Christine Barlett-Hughes
Benita Wassenaar
Jessica Wolfe
Tel: (416) 326-2351
Fax: (416) 326-4656
Email: christine.bartletthughes@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K2P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for the Intervener,
Attorney General of Ontario

ATTORNEY GENERAL OF MANITOBA
510 – 405 Broadway
Winnipeg, MB R3C 3L6

Renée Lagimodière
Jennifer Mann
Tel: (204) 945-5778
Fax: (204) 945-1260
Email: renee.lagimodiere2@gov.mb.ca

Counsel for the Intervener,
Attorney General of Manitoba

GOWLING WLG (CANADA) INC.
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Manitoba

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS
Complexe Jules-Dallaire
2828, boulevard Laurier
Tour 1, bureau 500
Québec, QC G1V 0B9

Andrej Skoko
Tel: (418) 643-9059 ext: 21404
Fax: (418) 644-3428
Email: andrej.skoko@dpcp.gouv.qc.ca

Counsel for the Intervener,
Director of Criminal and Penal Prosecutions

DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC
17, rue Laurier
Bureau 1.230
Gatineau, QC J8Z 4C1

Sandra Bonanno
Tel: (819) 776-8111
Fax: (819) 772-3986
Email: sandra.bonanno@dpcp.gouv.qc.ca

Agent for the Intervener,
Director of Criminal and Penal Prosecutions

ABORIGINAL LEGAL SERVICES
211 Yonge Street, Suite 500
Toronto, ON M5B 1M4

Emily Hill
Jonathan Rudin
Tel: (416) 408-4041 Ext: 224
Fax: (416) 408-1568
Email: e_hill@lao.onca

Counsel for the Intervener,
Aboriginal Legal Services

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K2P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for the Intervener,
Aboriginal Legal Services

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

Stuart Wuttke
Julie McGregor
Tel: (613) 241-6789 Ext: 228
Fax: (613) 241-5808
Email: swuttke@afn.ca

Counsel for the Intervener,
The Assembly of First Nations

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K2P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for the Intervener,
The Assembly of First Nations

JEAN TEILLET PERSONAL LAW CORPORATION
861 East 11th Avenue
Vancouver, BC V5T 3E7

Jean Teillet
Tel: (604) 787-3978
Fax: (416) 916-3726
Email: jteillet@pstlaw.ca

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

MICHAEL J. SOBKIN
331 Somerset Street W.
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Agent for the Intervener,
the Women of the Métis Nation / Les femmes Michif Otipemisiwak

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
University of Toronto
39 Queen's Park Cres. East
Toronto, ON M5S 2C3

Cheryl Milne
Tel: (416) 978-0092
Fax: (416) 978-8894
Email: cheryl.milne@utoronto.ca

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

Matthew J. Halpin
Tel: 613-780-8654
Fax: 613-230-5459
Email: matthew.halpin@nortonrosefulbright.com

Agent for the Intervener,
David Asper Centre for Constitutional Rights

HURLEY O'KEEFFE MILLSAP
300 MacLean Block
10110 – 107 Street
Edmonton, AB T5J 1J4

Nathan J. Whitling
Aloneissi O'Neill
Tel: (780) 421-4766
Fax: (780) 429-0346
Email: whitling@libertylaw.ca

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

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 x 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

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

SPRAKE SONG & KONYE
1720 – 355 Burrard Street
Vancouver, BC V6C 2G8

Daniel J. Song
Matthew A. Nathanson
Tel: (604) 669-7447
Fax: (604) 687-7089
Email: djsong@sprakesongkonye.com

Counsel for the Intervener,
Independent Criminal Defence Advocacy Society

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Intervener,
Independent Criminal Defence Advocacy Society

FASKEN MARTINEAU DUMOULIN LLP
Bureau 3700, C.P. 242
800, Place Victoria
Montréal, QC H4Z 1E9

Christian Leblanc
Tess Layton
Tel: (514) 397-7545
Fax: (514) 397-7600
Email: cleblanc@fasken.com

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

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa ON K1P 6L5

Sophie Arsenault
Tel: (613) 696-6860
Fax: (613) 230-6423
Email: sarsenault@fasken.com

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

WEBER LAW
10209 – 97 Street
Edmonton, AB T5J 0L6

Lisa Weber
Shaun O'Brien
Tel: (780) 758-6365
Fax: (780) 429-2615
Email: lisa@weberlaw.ca

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K2P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

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

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

NATIONAL INQUIRY MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS
500 – 1138 Melville Street
Vancouver, BC V6E 4S3

Christa Big Canoe
Tel: (416) 268-4133
Fax: (604) 775-5009
Email: cbigcanoe@mmiwg-ffada.ca

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

NATIONAL INQUIRY MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS
300 – 222 Queen Street
Ottawa, ON K1P 5V9

Meredith Porter
Tel : (613) 222-5951
Fax : (613) 943-5760
Email : m.porter@mmiwg-ffada.ca

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

FOY ALLISON LAW GROUP
207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison
Janine Benedet
Tel: (604) 922-9282
Fax: (604) 922-9283
Email: gwendoline.allison@foyallison.com

Counsel for the Intervener,
Vancouver Rape Relief Society

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street
Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
Tel: (613) 241-2701
Fax: (613) 241-2599
Email: albertos@vdg.ca

Agent for the Intervener,
Vancouver Rape Relief Society

FOY ALLISON LAW GROUP
207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison
Janine Benedet
Tel: (604) 922-9282
Fax: (604) 922-9283
Email: gwendoline.allison@foyallison.com

Counsel for the Intervener,
La Concertation des luttes contre l'exploitation sexuelle (LaCLES), AWCEP Asian Women for Equality Society, Aboriginal Women's Action Network (AWAN), formerly Exploited Voice now Educating (EVE); and CEASE: Centre to End All Sexual Exploitation (CEASE) (Jointly)

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street
Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
Tel: (613) 241-2701
Fax: (613) 241-2599
Email: albertos@vdg.ca

Agent for the Intervener,
La Concertation des luttes contre l'exploitation sexuelle (LaCLES), AWCEP Asian Women for Equality Society, Aboriginal Women's Action Network (AWAN), formerly Exploited Voice now Educating (EVE); and CEASE: Centre to End All Sexual Exploitation (CEASE) (Jointly)

TABLE OF CONTENTS

I. OVERVIEW AND POSITION ON QUESTIONS ON APPEAL

1. This appeal asks the Court to consider significant changes to Canadian sexual assault law. The Criminal Lawyers' Association (Ontario) ("CLA") submits that the current law, properly applied, protects complainants and witnesses from illegal, myth-based conduct. It is tempting in high-profile cases, particularly those with unsettling facts, to react to an acquittal with calls for reform. The risk, realized in the Alberta Court of Appeal's decision, is that the courts will go beyond curing the perceived unfairness and set down new, unnecessary and unworkable rules. The CLA asks the Court to reject the Court of Appeal's proposed changes and resolve the legal issues as it always has: with restraint and certainty.[1]

2. The CLA takes no position on the facts. With respect to the questions on appeal, the CLA submits: (A) Sections 276 to 276.5 of the *Criminal Code* should be interpreted in light of its purpose and the practical realities of trial; (B) the law of subjective consent should reflect the importance of individual autonomy; and (C) the courts should not *categorically* limit valid consent to sexual activity. Courts should only set aside adults' freely given consent to sexual activity in extreme, fact-specific cases.

II. STATEMENT OF ARGUMENT

A. Sections 276 to 276.5 of the *Criminal Code* Should be Interpreted in Light of their Purpose and Practical Realities

3. Sexual assault prosecutions are procedurally different from other cases. Sections 276 to 276.5 require the defence to share with the prosecutor and the court, well before trial, what would normally be litigation-privileged information about its case theory and strategy. No other violent crimes require the accused to so extensively 'vet' its proposed line of defence. Unsurprisingly, the rape shield laws have always walked a fine line between constitutionality and unconstitutionality. They should not be lightly expanded.

4. This appeal, and the appeal in *Goldfinch*, will be the Court's first opportunity since *Darrach* to consider the purpose and practical application of the s. 276 regime. This case raises several discrete questions, including whether the section applies to non-enumerated offences,

[1] *R v. Hutchison*, 2014 SCC 19, [2014] 1 SCR 346 at para. 42 [*Hutchinson*].

Crown-led evidence and narrative evidence.[2] The Court below took a formalistic approach to s. 276 and presumed that the failure to apply it was a substantive error.[3] The CLA asks this Court to take a different approach: one that recognizes s. 276's role as a procedural screening mechanism to enhance trial fairness, not a substantive rule that excludes otherwise relevant evidence.[4]

1. Section 276 does not apply to prosecutions for non-enumerated offences.

5. The Court should limit the application of s. 276 to those prosecutions in which the defendant may be convicted of an enumerated offence. This approach accomplishes the regime's protective purpose and puts the parties on notice. In unlawful act homicide cases, for example, s. 276 will apply *if* the indictment particularizes the underlying s. 276 offence, thereby making it an included offence.[5] The application of the regime should not depend on the Crown theory of the case, which need not be disclosed and which can change at any time. The accused should not have the responsibility of anticipating or responding to changes in Crown strategy of which he has no notice.

6. There is no need to endorse the Court of Appeal's application of the section to any prosecution that is "in reference to or in connection with" an enumerated offence.[6] This overbroad reading of the provision's language could result in the application of s. 276 in cases where the enumerated offence is truly collateral. In a *Lavallée* murder prosecution, for example, the defendant may wish to introduce evidence of her past sexual abuse at the hands of her spouse. She should not have to bring a pre-trial application to do so.

2. Section 276 should not apply to Crown-led evidence.

7. The CLA agrees with the Appellant that s. 276 does not apply to Crown-led evidence because the provision's language does not support this interpretation. The CLA further submits that in cases of Crown-led evidence, the risk of misuse that s. 276 was designed to combat is low. Crown counsel exercise "a public duty" and are "trained to question witnesses within the context

---

[2] *R v. Barton*, 2017 ABCA 216 [*Barton*].
[3] *Ibid* at paras. 96-110.
[4] *R v. L.S.*, 2017 ONCA 685 at para. 45 [*L.S.*].
[5] *Criminal Code*, RSC 1985, c. C-46, s. 662; *R v. G.R.*, 2005 SCC 45, [2005] 2 SCR 371.
[6] *Barton*, *supra* at paras. 102-103.

of judicial rulings on relevance, fairness, privilege, and procedure."[7] The Crown also has a duty to consult with complainants and to represent and advance third-party interests to the extent compatible with the fair trial right.[8]

8. Nor should s. 276 apply to defence testing of Crown-led evidence. Unlike the typical s. 276 scenario, there is no need for an evidentiary record: the fact that the Crown led the evidence is a sufficient basis to argue for the admissibility of a responsive cross-examination. Applying s. 276 would also create practical problems, as the accused may not learn about the Crown's intention to elicit a piece of evidence until the Crown introduces it at trial.[9] Permitting counsel to test the Crown's case without resort to a cumbersome s. 276 application would be fair to the defendant and minimize the risk that trials will be delayed and derailed.

9. The common law already has the tools required to protect witness dignity and privacy. In cases where counsel seek to make improper use of Crown-led evidence, the court can apply the *Seaboyer/Osolin* test to exclude it. This test requires courts to conduct a similar balancing act and consider virtually the same factors as a judge considering admissibility under s. 276.[10] In cases where the evidence is admissible but prejudicial, the judge can give a limiting instruction, which juries are presumed to understand and follow.[11]

3. Section 276 permits the introduction of relevant narrative evidence.

10. Provincial courts of appeal disagree about when s. 276 permits the introduction of the accused and complainant's sexual relationship for context.[12] The Court will explore this issue fully in *Goldfinch*, in which the Alberta Court of Appeal relied on *Barton (ABCA)*'s conclusion

---

[7] *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 SCR 248 at para. 95; *Boucher v. The Queen*, [1955] SCR 16 at 24.
[8] For duty to consult see *R v. Darrach*, 2000 SCC 46; [2000] 2 SCR 443 at para. 55 [*Darrach*].
[9] If the accused wants to significantly expand on the evidence (*e.g.*, by calling a responsive witness) a s. 276 application may still be required.
[10] *R. v. Seaboyer*, [1991] 2 SCR 577 at 611-612 [*Seaboyer*]; *R. v. Osolin*, [1993] 4 SCR 595 at 667-672 [*Osolin*].
[11] *R v. Corbett*, [1988] 1 SCR 670 at 692-693, 695; *Osolin, supra* at 671-672.
[12] *L.S., supra* at paras 75-99; and *R. v. Strickland*, (2007) 45 CR (6th) 183, 2007 CanLII 3679 at para 32 in Ontario; *R. v. Goldfinch*, 2018 ABCA 240 at paras. 43, 46-47 in Alberta (SCC Case No. 38270) [*Goldfinch*].

that narrative evidence is not "ordinarily" admissible under s. 276.[13] The CLA asks the Court to reject the Alberta Court of Appeal's conclusion.

11. Section 276 should permit admission of narrative evidence *whenever it would advance the truth-seeking function of the trial*.[14] It runs contrary to common sense to ask a trier of fact to assess a witness' account of a sexual interaction without knowing if it occurred between strangers, acquaintances or long-time partners. In cases where the parties dispute the sufficiency of the steps the accused took to ensure consent to a unique activity, the fact that, and method by which, the complainant consented to that activity in the past undoubtedly helps explain what was in the defendant's mind, and advances the search for truth.[15]

B. The Law of Subjective Consent Should Reflect the Importance of Individual Autonomy

12. The CLA asks the Court to affirm the importance of subjective consent in the sexual assault context. The Court should reject the Court of Appeal's attempt to introduce an "objective foreseeability of harm" or "degree of force" component into the subjective consent analysis.[16] The Court of Appeal's approach is contrary to both *Hutchison* and *Ewanchuk*.[17]

1. Expanding s. 273.1 of the Criminal Code to include "degree of force" creates uncertainty and risks over-criminalization

13. The Court of Appeal said the jury ought to have considered whether Gladue subjectively consented to "sexual activity that *involved the degree of force* required" to cause her injuries.[18] This reasoning is inconsistent with *Hutchinson*. Consent to the "sexual activity in question" under s. 273.1 only requires agreement to the basic physical act, *not* the precise manner in which the act is carried out.[19] The Court of Appeal reintroduced the uncertainty that the *Hutchinson* Court tried

---

[13] *Goldfinch*, *supra* at paras. 31-32; *Barton*, *supra* at para. 136.
[14] *Darrach*, *supra* at para. 37.
[15] *Seaboyer*, *supra* at 622-623.
[16] *Barton*, *supra* at para. 195.
[17] *R v. Ewanchuck*, [1999] 1 SCR 330 at para. 27.
[18] *Barton*, *supra* at para. 195.
[19] Other components include the sexual nature of the touching and the identity of the partner. *Hutchinson*, *supra* at paras. 5, 22, 54-57 (the majority provided the following examples of physical acts: kissing, petting, oral sex, intercourse or the use of sex toys).

to eliminate: exposing sexual partners to criminal liability unless they obtain consent to "potentially infinite collateral conditions," such as the type of kissing, the pace of intercourse or the positioning of the participants' bodies.[20]

2. Risk and harm are not proxies for subjective non-consent

14. The Court of Appeal said the jury should have considered the sexual activity's objective foreseeability of harm (the "degree of force" required to cause injury) in deciding whether the complainant subjectively consented to it.[21] The underlying assumption is that 'objective risk' is a piece of circumstantial evidence capable of proving non-consent. This reasoning is flawed as a matter of law, logic and social policy. In assessing a complainant's state of mind, juries should consider *only* whether the complainant subjectively gave her voluntary agreement – not whether, in its opinion, the average person would have appreciated and consented to the risk of harm.

15. The choice to engage in sexual activity is intensely personal. Just as the objective beliefs of others cannot create subjective consent when there is none, the objective beliefs of others cannot negate subjective consent. Both equally diminish autonomy. Asking juries to consider objective foreseeability of harm in evaluating the Crown's claim of non-consent is an invitation to consider whether the activity's risk is something to which the 'average person' would consent and, if not, to infer that *this* complainant did not consent. Without point-of-comparison evidence about a particular complainant's state of mind, preferences or practices, the inference does not follow.

16. Introducing objectivity and 'normalcy' into the consent analysis encourages triers of fact to criminalize non-normative sex. The problematic nature of the Court of Appeal's reasoning is reflected in one passage of its reasons relating to subjective consent. The Court took issue with the trial judge's reference to the sexual activity as "fisting" because, in its view, the reference "normalized" the activity.[22] At this point in the analysis, the normalcy of the activity was irrelevant. Using normalcy as circumstantial evidence that consent is inherently less likely presupposes a base-line for sex, from which a departure would be abnormal and unlawful.

---

[20] *Ibid* at para. 27.
[21] *Barton*, *supra* at paras. 193-195, 198.
[22] *Ibid* at para. 199

17. The Court of Appeal attempted to carve out an exception for sado-masochistic sex.[23] Presumably, its reasoning was that an objective risk of harm does not make consent less likely in sado-masochism cases because the participants are known to have a subjective interest in harm. The difficulty with the Court of Appeal's solution is that there is no bright line dividing normative sexual activity from sado-masochism.[24] Drawing a bright line would penalize consensual sex that does not meet the sado-masochism 'test' but involves rough elements that could cause harm.

C. Consensual Sexual Behavior Cannot be Categorically Vitiated: the *Jobidon* Approach is Not Appropriate

18. Individuals have the right to sexual self-determination. The law should not criminalize private, consensual sexual behaviour unless there is a compelling policy reason to do so.[25] In the context of sexual interactions, where personal autonomy is prioritized, those policy reasons should be limited to extreme cases. The purpose of criminalizing sexual assault is to protect people – not to paternalize or make choices for them.[26]

19. The Respondent and certain interveners, relying on *Jobidon*, ask the Court to categorically criminalize certain consensual sex that results in bodily harm.[27] The Court should not do so. A categorical rule vitiating consent is unworkable in the context of sexual contact, where the line between valuable and harmful conduct differs from case to case. In any event, the standard proposed is too low and would capture innocent, socially valuable behaviour. It is for Parliament to make that call and balance the competing interests of clarity and over-criminalization.

1. Jobidon does not apply in the sexual assault context

20. The Court is appropriately cautious about addressing policy issues by expanding criminal liability beyond Parliament's statutes.[28] For this reason, it should resist the invitation to apply

---

[23] *Ibid* at para 196.
[24] See, for instance, Monica Pa, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex" (2002) 11 Tex J Women & L 51 at 58 [Pa]; David M Tanovich, "Criminalizing Sex at the Margins" (2010) 74 CR-Art 86, fn. 10 (WL) [Tanovich].
[25] *R v. J.A.*, 2011 SCC 28, [2011] 2 SCR 440 at para. 115 (Fish J. dissenting) [*J.A.*].
[26] *Ibid* at para. 72 (Fish J. dissenting).
[27] Respondent Factum at para. 120; AG Ontario Factum at para. 21; AG Canada Factum at paras. 35-49.
[28] *R. v. D.L.W.*, [2016] 1 SCR 402, 2016 SCC 22 at paras. 3, 18. See also: *Frey v. Fedoruk*, [1950] SCR 517; *R v. McDonnell*, [1997] 1 SCR 948.

Jobidon to the complex question of whether and when the law should refuse to recognize valid sexual consent.

21. Parliament, not the courts, should make categorical decisions about when and how to vitiate sexual consent. The CLA acknowledges that in s. 273.1(3), Parliament gave courts the power to identify circumstances in which no consent is obtained. But this subsection, and s. 265(3), only permit the courts to identify and recognize criminal liability in situations where there is a deficiency in the complainant's *actual state of mind* (*e.g.*, capacity, fear or fraud). Section 273.1(3) does *not* permit the courts to ignore informed consent for policy reasons. To do so would be to create a new criminal offence: consensual sexual activity causing bodily harm. This result would be contrary to s. 9 of the *Criminal Code*, which prohibits prosecution for common law crimes, and the guiding principle in *Hutchinson* that the law should be interpreted with restraint.[29] It is for Parliament to draw bright lines and create proxies for non-consent.[30]

22. It is no answer to these concerns to say, "*Jobidon* permits it." *Jobidon* is a unique fact-specific decision, not a roadmap for this Court's future vitiated consent jurisprudence. In *Jobidon* itself, Gonthier J. cautioned that questions of vitiating consent should be developed on a case-by-case basis[31] and that "it must not be thought that by giving…a red light to fist fights, this Court is thereby negating the role of consent in all situations or activities."[32]

23. Moreover, fistfights and sexual freedom are incomparable. In *Jobidon*, the Court dealt with a discrete type of conduct universally recognized as having no social value.[33] Sexual interactions are different. Freedom of sexual pleasure is a socially valuable cultural product. There is no doubt: sexual *violence* is harmful. However, sexual violence is not the same as consensual sex that involves violence or the intentional infliction of harm. The character of sexual contact depends on the preferences of the participants. For some, sex involving pain is about pleasure, not violence.[34] Conversely, even minor sexual contact without pain is an act of violence

---

[29] *Hutchinson*, *supra* at para. 18.
[30] See for example: *Criminal Code*, s. 150.1 and s. 153.1.
[31] *R v. Jobidon*, [1991] 2 SCR 714 at 766.
[32] *Ibid.*
[33] *Ibid* at 762.
[34] Pa at 77; Tanovich at 86.

for the participant who does not want or consent to it. The existence of pain or harm is not the determinant of social worth in sexual encounters.

2. The Thresholds Proposed by the Respondent and Interveners Are Too Low

24. The CLA agrees, in theory, that there are certain sexual activities in which even consenting adults should not participate – but those are limited to the extreme and are not suited to a categorical judicial rule (*e.g.*, "bodily harm" or even "serious intended bodily harm"). A case-by-case, evidence-based assessment is required in which the focus is not just on harm, but whether, in all the circumstances, the conduct is of a type that is acceptable to society.[35] Consent is a defence to many harmful actions – even death – if the consent is valid and there is a sufficient basis on which to conclude the act has social utility.[36] Without setting a bright line rule, the Court can provide the following guidelines:

a) Serious bodily harm is not an appropriate cut-off point for consent

25. The Court should reject proposals to vitiate sexual consent based on the risk or reality of "bodily harm." Many kinds of normative sexual activity by their nature involve intimate, even forceful, physical contact. "Bodily harm" only means "something more than a *very short* time period and an injury of *very minor* degree, which results in a *very minor* degree of distress."[37] Unquestionably minor injuries have been held to constitute bodily harm.[38] This includes scratches and abrasions of less than one inch, bruising and swelling on face, thigh and hand;[39] long-lasting bruises, a sore hand and a sore throat; [40] a small anal tear, facial swelling and bruising, all of which was to resolve itself in a few days;[41] scrapes, bruises and lacerations.[42] This kind of bodily harm is an inherent risk of many sexual activities.

---

[35] Tanovich at 93.
[36] *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 63 [*Carter*].
[37] *Bulldog et. al.*, 2015 ABCA 251 at para. 44 [*Bulldog*] (emphasis added).
[38] *Ibid* at para. 44.
[39] *R v. Rabieifar*, [2003] OJ No. 3833 (QL)(CA), affirming in part 2002 CarswellOnt 5591 at para. 7.
[40] *R v. Moquin*, 2010 MBCA 22 at paras. 32-33.
[41] *R v. C.K.*, 2001 BCCA 379 at para. 3.
[42] *R v. Dorscheild*, 1994 ABCA 18 at para. 11.

26. Augmenting the standard to "serious bodily harm" does not meaningfully reduce the problem of over-criminalization. The 'aggravated assault' standard suggested by the Attorney General of Ontario, for example, would capture normative sexual contact (which can have serious consequences, such as unwanted pregnancies or STIs). It is also inconsistent with the type of painful or 'harmful' activity to which individuals can legally consent in other contexts. A stuntman can consent to a life-threatening stunt, a patient can consent to a life-threatening medical procedure and average community members frequently consent to wounds with permanent consequences, such as tattooing or ear-piercing.[43] If life-threatening conduct and permanent or serious 'harm' are acceptable in other contexts, there should be no *categorical* prohibition on them in the sexual context.[44] Absent a rule created by Parliament, a case-by-case analysis that takes into account all the circumstances is required.

b) The accused must have intended the injury

27. Unintended consequences should rarely vitiate consent.[45] In an effort to ensure that only morally reprehensible conduct is caught by the criminal law, the Court should not vitiate consent unless the defendant had a specific intent to cause the injury. In the fistfight context, the Court acknowledged that a conviction based on causation alone would criminalize harmless activities like play fighting.[46] As noted above, even 'standard' sexual contact carries inherent risks of harm and bodily harm – and individuals accept these risks all the time. An objective bodily harm standard would have the perverse consequence of criminalizing some of this activity.

3. Categorical Vitiation of Consent Will Not Solve the Problem of Sexual Violence

28. Power imbalances are, and should be, of concern to the law of sexual assault. But Canadian law already has tools in place to protect against harmful exploitative relationships. Legal consent does not exist if the complainant is underage or incapable of making an informed

---

[43] In *R v. Wong*, (2006) 211 OAC 201, 2006 CanLII 18516 (ONCA) at para. 13, the Ontario Court of Appeal took no issue with a trial judge's definition of wounding: "to injure someone in a way that breaks or cuts or pierces or tears the skin or some part of the person's body."

[44] See generally, discussion in *Jobidon, supra* at para. 22 of CLA factum.

[45] This is particularly true if the harm threshold is low.

[46] *R v. Paice*, 2005 SCC 22, [2005] 1 SCR 339 at para. 12.

choice, or if the accused induces the complainant to engage in the activity through fear or by "abusing a position of trust, power, or authority."[47] Consent must be positively affirmed, ongoing, contemporaneous and informed.

29. Over-criminalization will not eliminate the problem of sexual exploitation. The criminal law is a blunt tool. A properly tailored vitiated consent rule will never capture all problematic sexually violent context. This Court recognizes that at a certain point, the importance of personal autonomy outweighs the risk of exploitation – particularly where there is an absence of evidence about the extent to which a particular activity is exploitative, or the extent to which prohibiting it will prevent exploitation.[48] That balancing act does not permit the criminalization of conduct on the basis that exploitation is *possible*. The courts must protect the power of choice even in "circumstances where [it] instinctively recoil[s] from the choice."[49] Distaste, in the absence of evidence, is not a basis for categorically criminalizing truly consensual behaviour.

III. SUBMISSIONS ON COSTS

30. The CLA seeks no costs and asks that no costs be awarded against it.

IV. NATURE OF THE ORDER REQUESTED

31. The CLA requests leave to present oral argument at the hearing of the appeal.

All of which is respectfully submitted this 13th day of September, 2018.

Megan Savard and Samara Secter
Counsel to the Intervener CLA

---

[47] *Criminal Code,* s. 150.1; s. 265(3)(a); s. 273.1(2)(d).
[48] See generally, *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 SCR 1101; *Carter*, *supra*.
[49] *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181, at para. 219.

TABLE OF AUTHORITIES

Paragraph Number

Case Law

Secondary Sources

Legislative Authorities