Court File No. 37769

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

B E T W E E N:

BRADLEY DAVID BARTON

APPELLANT
(Appellant)

– and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT, BRADLEY DAVID BARTON

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

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

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

Counsel for the Appellant

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agents for Counsel for the Appellant

ALBERTA JUSTICE
Appeals Branch
3rd Floor, 9833-109 St. N.W.
Edmonton, AB T5K 2E8

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

Counsel for the Respondent

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent

TABLE OF CONTENTS

PAGE

PART I: OVERVIEW AND STATEMENT OF FACTS

1. This case has received enormous public attention, partly because of its unusual facts and evidence, partly because it involves the unfortunate death of Cindy Gladue, an Indigenous woman, and partly because of the approach taken by the Court of Appeal of Alberta (ABCA) to the crime of sexual assault, at a time in history when concerns about this type of offending have perhaps never been more pronounced. Lost in the public discourse of this case, however, is what can go wrong when appellate courts ignore critical due process norms. As this Court noted in *R v Mian*,[1] "[a] departure from the usual conduct of an appeal could lead the court to be seen to be intervening on behalf of one of the parties, thus impugning the impartiality of the court."

2. In the third paragraph of its factum before the ABCA, the Crown summed up its view of the case by opining that "it is difficult to fathom how the jury acquitted". The ABCA appears to have taken this message to heart in hearing this appeal. The Court's distaste for the jury decision is evident from its treatment of the legal and procedural issues and disregard for the difficult task faced by a well-respected trial judge who worked tirelessly with the parties to prepare a fair and balanced jury charge at the end of a complex four week trial. Amongst other concerns, the ABCA: (1) ignored instructions from this Court about how an appellate court can raise issues of its own motion; (2) allowed an intervener to raise new grounds of appeal; (3) ignored the fact that most of the Crown's grounds of appeal contradicted positions taken at trial, even though this was a central theme of the Appellant's factum; (4) reversed a number of discretionary decisions made by the trial judge; and (5) dissected the jury charge rather than looking at it as a whole, picking out every problematic word or phrase. In short, the ABCA's treatment of this appeal reveals a flawed process and an improper result, both of which stem from a troubling disregard of well-established restrictions upon an appellate court's review function.

3. The Appellant, Mr. Bradley Barton, met the deceased, Ms. Gladue, a 36 year-old sex trade worker,[2] at the Yellowhead Inn hotel in Edmonton. The Appellant testified that late on June 20, 2011, Ms. Gladue agreed to a range of sexual activity for $60.00.[3] They met in his hotel room, where she took off her clothes and began to fellate him for about 2-3 minutes. He then inserted

---

[1] *R v Mian*, 2014 SCC 54 at para 39.
[2] Trial Transcript, Vol 1, 14/15 **[Tab 22 Appellant's Record (A.R.)];** Vol 4, 1102/6 - 1103/18 **[Tab 39 A.R.]**; Vol 5, 1568/21 **[Tab 48 A.R.]**.
[3] Trial Transcript, Vol 4, 1103/20-33 **[Tab 39 A.R.]**.

his hand in a conical shape into her vagina up to the ridge of his knuckles for a period of five to ten minutes. They subsequently engaged in vaginal intercourse for ten minutes.[4]

4. The next evening, Ms. Gladue met the Appellant and a co-worker in the hotel bar.[5] The co-worker testified that upon speaking with and observing Ms. Gladue he concluded that she was not particularly drunk and placed her as a "2 or 3" on a scale of 1 to 10, with 1 being sober and 10 being "totally inebriated" or "falling out, passing out drunk".[6] The Appellant testified to his belief that Ms. Gladue was around a 5 to 5.5 on this scale. He had no difficulties conversing with her; nor did he perceive any difficulties on her part in answering questions, keeping up a conversation, or staying awake.[7] Similarly, the bartender at the hotel bar, Ms. Tanya Dunster, noticed nothing unusual about Ms. Gladue and had no concerns about serving her alcohol. On the 0-10 scale, she placed Ms. Gladue at a "2".[8]

5. The Appellant testified that on this second night Ms. Gladue again agreed to the same price for the same sexual activity. The chronology of the sexual activity was essentially the same on both nights. They each took off their clothes and Ms. Gladue then began to fellate the Appellant while sitting on his bed. While she did so, the Appellant placed his hand in a conical shape inside her, first one finger, then two, then three, then four fingers, and he began to move his hand in and out.[9] The Appellant testified that the only difference between the two nights was that on the first night he inserted his hand up to the crest of his knuckles, while on the second night he inserted his hand approximately one to two centimeters past his knuckles, thrusting "a little harder than the night before. And maybe... a little farther."[10]

6. The Appellant then removed his hand from her vagina to have intercourse, at which time he saw blood on his hands. This prompted him to ask Ms. Gladue if she was menstruating, to which she responded "maybe I am". He then decided not to have sexual intercourse, and asked

---

[4] Trial Transcript, Vol 4, 1106/10-30 **[Tab 39 A.R.]**.
[5] Trial Transcript, Vol 1, 142/18-38 **[Tab 26 A.R.]**; Vol 4, 1117/2-11 **[Tab 39 A.R.]**.
[6] Trial Transcript, Vol 1, 173/27- 174/38 **[Tab 26 A.R.]**.
[7] Trial Transcript, Vol 4, 1119/15- 1120/13 **[Tab 39 A.R.]**.
[8] Trial Transcript, Vol 4, 1308/1-24 **[Tab 41 A.R.]**.
[9] Trial Transcript, Vol 4, 1103/23-33; 1104/27-41; 1121/9-19; 1122/19-1124/25 **[Tab 39 A.R.]**.
[10] Trial Transcript, Vol 4, 1124/25-28 **[Tab 39 A.R.]**; 1267/28-39 **[Tab 40 A.R.]**.

Ms. Gladue to wash up and leave. He went to the washroom to wash his hands and she did the same thereafter. While Ms. Gladue was in the bathroom, the Appellant fell asleep in his bed.[11]

7. The Appellant testified that he never noted any disagreement on Ms. Gladue's part to the sexual activity on either night. He said of the second occasion that "[c]ommunication was good. There was moaning and groaning going on, all good signs, working it really good, thrusting. It was good. All signs were go."[12] The Appellant had no criminal record and was *never challenged or in any way cross-examined* on his testimony that he engaged in consensual sexual activity with Ms. Gladue on the two consecutive nights.[13] He was cross-examined only about whether he had used a knife to cut Ms. Gladue's vaginal wall open to cause her death and that she was too intoxicated by alcohol to consent to the sexual activity. He denied both allegations.[14]

8. The Appellant awoke the next morning, got out of bed and observed Ms. Gladue bloodied and naked in the bathtub. He believed she was dead. In a panic, he used a wet towel to clean the blood from his feet and floor. He got dressed, packed his bag and placed the bloodied towel in the garbage outside the hotel.[15] He then checked out of the hotel and proceeded to the hotel coffee shop before eventually meeting a second co-worker at his van.[16] The Appellant falsely told his co-worker that a woman he didn't know had appeared at his hotel room the prior night and asked to use his shower. He told the co-worker that he let her do so and then fell asleep, but when he woke up he found her dead in the bathtub.[17] The co-worker advised him to call the police.

9. The Appellant then returned to the hotel and asked the hotel clerk to provide him with a key for the room so that he could retrieve some papers. Once back in the room, he immediately

---

[11] Trial Transcript, Vol 4, 1128/27-1129/13; 1129/31-1130/8 **[Tab 39 A.R.];** 1210/4-24; 1270/41-1271/15; 1271/26-1272/28; 1275/32-1276/19; 1280/34-1281/14 **[Tab 40 A.R.]**.
[12] Trial Transcript, Vol 4, 1105/4-7; 1124/4-19 **[Tab 39 A.R.]**.
[13] Trial Transcript, Vol 4, 1088/2 **[Tab 39 A.R.]**;1207/23- 1210/40 **[Tab 40 A.R]**.
[14] Trial Transcript, Vol 4, 1285/24-39 **[Tab 40 A.R.]**.
[15] Trial Transcript, Vol 4, 1078/17-19 **[Tab 37 A.R.]**; 1131/4-20; 1132/9-10 **[Tab 39 A.R.]**; 1206/25-1207/21; 1219/16-41; 1221/28-1222/1; 1224/38 - 1225/4; 1235/25-36; 1238/30- 1239/26 **[Tab 40 A.R.]**.
[16] Trial Transcript, Vol 1, 25/17-26 **[Tab 23 A.R.]**; Vol 4, 1132/14-25; 1149/36-1150/31 **[Tab 39 A.R.]**.
[17] Trial Transcript, Vol 4, 1150/34-1151/3 **[Tab 39 A.R.]**; 1199/25-1200/31; 1223/40-1224/32 **[Tab 40 A.R.]**.

phoned 911 and told the operator the same false version of events he had told his co-worker.[18] The police arrived and took the Appellant away from the scene for questioning. The police then secured the area and shortly thereafter commenced a comprehensive search of the hotel property.[19] All garbage inside and outside the hotel was seized for subsequent investigation.

10. The homicide investigation began on June 23, 2011, when the medical pathologist, Dr. Dowling, concluded that Ms. Gladue had died from an injury to her vaginal wall, which he opined was likely caused by a knife or other sharp object.[20] Shortly thereafter, the Edmonton Police Service organized a comprehensive search for a sharp edged weapon at the hotel and surrounding areas including all previously seized garbage receptacles. No weapon was found.[21]

11. After his arrest, the Appellant told a false story to an undercover police officer posing as a prisoner: that Ms. Gladue's death was due to someone else whom he had rented the room for.[22]

12. At trial, Dr. Dowling opined that the cause of death was an 11 centimeter cut to the Ms. Gladue's vaginal wall. He believed it had been caused by a sharp edged instrument, but conceded it was possible that it had been caused by blunt force injury. He opined that if it had been a blunt force injury then a "considerable" or "excessive force" would have been required.[23] The Crown also called Dr. Catherine Carter-Snell, who was not a medical doctor but had a Ph.D. in nursing, to support the theory that the vaginal wall had been cut with a sharp object. However, it became clear from her testimony that she did not understand the wound from the photographs that she had been provided, had not been provided all of the photographs from the autopsy, and had not been shown the autopsy report by the Crown.[24]

13. The Appellant called Dr. Janice Ophoven, an expert in the area of forensic pathology. She opined that the wound was caused by blunt force trauma, as nothing about the wound suggested a

---

[18] Trial Transcript, Vol 1, 299/1-40 **[Tab 27 A.R.]**; Vol 4, 1151/9-41; 1152/24-36 **[Tab 39 A.R.]**; 1205/28- 1206/7 **[Tab 40 A.R.]**.
[19] Trial Transcript, Vol 1, 321/5- 336/41 **[Tab 28 A.R.]**; Vol 2, 419/28 to 423/36 **[Tab 30 A.R.]**.
[20] Trial Transcript, Vol 2, 419/36-41 **[Tab 28 A.R.]**.
[21] Trial Transcript, Vol 2, 399/40- 401/26 **[Tab 29 A.R.]**; Vol 2, 419/28-420/6; 420/24- 423/8 **[Tab 28 A.R.]**; Vol 3, 1050/3- 1051/41 **[Tab 32 A.R.]**.
[22] Trial Transcript, Vol 4, 1157/36-1159/15 **[Tab 39 A.R.]**; 1241/12-1256/35 **[Tab 40 A.R.]**.
[23] Trial Transcript, Vol 3, 771/14-772/5; 779/35-40; 780/33-781/3; 784/18-21 **[Tab 34 A.R.]**; 842/15-20 **[Tab 35 A.R.]**.
[24] Trial Transcript, Vol 3, 982/3-1003/13 **[Tab 36 A.R.]**.

sharp force injury.[25] Defence counsel posed a hypothetical question involving a fisting scenario similar to that described in the Appellant's testimony and Dr. Ophoven agreed that the injury could have been caused in that way. She opined further that the sexual activity the night before could have impacted Ms. Gladue's vaginal wall strength on the second night.[26] She gave evidence about how vaginal wall strength can vary with age and presence or absence of chronic disease, including chronic use of alcohol, prior obstetrical events and nutritional problems.[27] The trial judge advised the jury that all three experts had little, if any, experience with the practice of fisting, and the force it would take for fingers to penetrate the vaginal wall.[28]

14. The jury acquitted the Appellant of first degree murder as well as manslaughter.

PART II: STATEMENT OF ISSUES

GROUND I: Did the ABCA's approach compromise the fundamental fairness of the appeal?

GROUND II: Did the ABCA err in its treatment of motive?

GROUND III: Did the ABCA correctly address the trial judge's charge with respect to post-offence conduct?

GROUND IV: Did the ABCA err in its treatment of the evidence of prior sexual activity?

GROUND V: Was the offence of unlawful act manslaughter properly explained to the jury?

PART III: STATEMENT OF ARGUMENT

GROUND I: Did the ABCA's approach compromise the fundamental fairness of the appeal?

15. One of the touchstones of the Canadian justice system is that judicial decision-makers remain independent and impartial and be *seen* to act that way.[29] In this case, the ABCA disregarded a number of critical rules about appellate decision-making, making errors that compromised every one of the reasons for ordering a new trial, with the exception of the finding

---

[25] Trial Transcript, Vol 4, 1347/41-1348/2; 1363/3-6; 1377/1-3; 1380/10-19; 1389/32-35; 1403/12-13; 1408/36-1409/**7 [Tab 42 A.R.]**.
[26] Trial Transcript, Vol 4, 1389/2-5 - 1391/13-29 **[Tab 42 A.R.]**.
[27] Trial Transcript, Vol 4, 1388/28-1389/30; Vol 4, 1401/18-19; 1409/19-25; 1412/23-40 **[Tab 42 A.R.]**.
[28] Trial Transcript, Vol 5, 1757/6-12 **[Tab 7 A.R.]**.
[29] *R v Mian*, 2014 SCC 54 at para 39.

with respect to motive – a matter that the Appellant instead contests exclusively on its substantive merits, as set out Ground II. This Court should correspondingly set aside the ABCA's decision to order a new trial because of alleged errors with respect to the trial judge's treatment of: (1) after the fact conduct; (2) the prior sexual history evidence; and (3) unlawful act manslaughter.

(a) Did the ABCA err in allowing the Crown to use its right of appeal to secure a re-trial based on theories and legal arguments that were contrary to positions taken at trial?

(i) Overview and Legal Context

16. Of the four grounds raised by the Crown in its notice of appeal, three amounted to reversals of positions taken by the Crown at trial. In addition, the ABCA added a ground of appeal on its own motion without notice, and allowed intervenors to raise new issues that also conflicted with the Crown's stance at trial. Notwithstanding strenuous objection by the Appellant,[30] the ABCA largely ignored the fact that these alleged "errors of law" expressly contradicted positions taken by the Crown at trial, recognizing this only once, and completely dismissing its significance.[31] In allowing the Crown's appeal, the ABCA ignored pronouncements from this Court stressing the importance of protecting the "fundamental right of an accused not to be placed for a second time in jeopardy."[32] Having failed to obtain a conviction on the basis of its trial strategy, the Crown was essentially permitted free rein to secure a retrial based on entirely new strategies adopted on appeal.

17. Although section 676(1)(a) of the *Criminal Code* provides the Crown with a right to appeal on questions of law, the provision does not give the Crown *carte blanche* to change tactics on appeal. As the Ontario Court of Appeal noted in *R v Suarez-Noa*,[33] referring specifically to the Crown's attempt to change its position on appeal, s 676 "does not leave an appellate court powerless in the face of a Crown appeal that constitutes an abuse of the appellate process."

18. In *Wexler v The King*,[34] this Court unanimously held that the Crown cannot secure a retrial by advancing a new basis for liability on appeal, noting that to do so would constitute a "manifest injustice" and compromise the double jeopardy principle. *Wexler* has been re-affirmed

---

[30] Respondent's Factum, Court of Appeal, paras 1-5, 46, 67, 79 **[Tab 15 A.R.]**.
[31] ABCA Decision, para 111 (failure to request a s 276 hearing) **[Tab 2 A.R.]**.
[32] *Savard and Lizotte v The King*, [1946] SCR 20 at 37.
[33] *R v Suarez-Noa*, 2017 ONCA 627 at para 28.
[34] *Wexler v The King*, [1939] SCR 350 at 357-358.

by this Court on multiple occasions. As Rand J held in *Savard and Lizotte v The King*,[35] "the Crown having failed on an hypothesis which was fairly and unexceptionably to itself tried out, is not on the same set of facts and on a view open to it but rejected on the first trial to be permitted a second opportunity to try to fasten guilt upon an accused." The "paramount public interest" in such circumstances is the fair treatment of the accused.

19. Courts have consistently applied this principle to prohibit the Crown from raising new factual or legal theories of liability on an appeal from acquittal.[36] As the Ontario Court of Appeal held in *R v Varga*,[37] "[i]t offends double jeopardy principles... to subject an accused, who has been acquitted, to a second trial based on arguments raised by the Crown for the first time on appeal. Double jeopardy principles suffer even greater harm where the arguments... contradict positions taken by the Crown at trial." Using this logic, courts have also held that the Crown cannot raise new or contradictory arguments on appeal to argue against the presence of an evidentiary foundation for a defence[38] or the admissibility of evidence.[39]

20. The only existing exception to the *Wexler* principle is limited and difficult to satisfy. In *Cullen v The King*,[40] this Court held that a mere failure to object to a jury charge does not necessarily bar the Crown from appealing on grounds of misdirection. However, where there is any indication that the failure to object was the result of a *deliberate tactical choice*, the *Wexler* principle applies.[41] The Crown is similarly prohibited from altering its position on appeal if there

---

[35] *Savard and Lizotte v The King*, [1946] SCR 20 at 37. See also *R v Penno*, [1990] 2 SCR 865 at 895; *R v Egger*, [1993] 2 SCR 451 at 481.
[36] See, eg, *R v Patel*, 2017 ONCA 702 at para 58; *R v Nguyen*, 2008 SKCA 160 at para 38; *R v Tran*, 2016 ONCA 48 at para 4; *R v Elms* (2006), 217 CCC (3d) 217 at 223-24 (Ont CA); *R v Vaillancourt* (1995), 105 CCC (3d) 552 at 561-564 (Que CA); *R v Merson* (1983), 4 CCC (3d) 251 at 272-273 (BC CA); *R v Campeau*, 2009 SKCA 4 at para 28; *R v Armstrong* (1971), 3 CCC (2d) 424 at 427-428 (BC CA); *R v McIlwaine* (1996), 111 CCC (3d) 426 at 444 (Que CA).
[37] *R v Varga* (1994), 90 CCC (3d) 484 at 494 (Ont CA). See also *R v Suarez-Noa*, 2017 ONCA 627 at para 29.
[38] See *R v Suarez-Noa*, 2017 ONCA 627 at paras 26-39; *R v Knight*, 2015 ABCA 24 at para 22.
[39] See eg *R v Varga* (1994), 90 CCC (3d) 484 at 497 (Ont CA); *R v Alves*, 2014 SKCA 82 at paras 53-57; *R v Hiscoe*, 2013 NSCA 48 at paras 16-17.
[40] *Cullen v The King*, [1949] SCR 658 at 644. See also *R v Dunham* (1949), [1950] 1 DLR 498 at 502 (NB SC(AD)); *R v Pinske* (1988), 30 BCLR (2d) 114 at 123 (CA).
[41] See eg *R v Varga*, (1994), 90 CCC (3d) 484 at 496 (Ont CA).

was an opportunity to participate actively in developing the charge and/or a specific endorsement of it.[42] As will be discussed below, both prohibitions apply in the case at bar.

(ii) Application of the Principles

21. After lengthy discussions between counsel and the trial judge, and consultation with the Crown Appeals branch, Crown counsel at trial agreed on multiple occasions that the proposed charge on manslaughter, including the three routes to liability for sexual assault[43] and the manner in which dangerousness of a proven unlawful act would be explained to the jury,[44] was appropriate. For example, the Crown agreed that liability by way of objective foresight of bodily harm could *only* occur if the Crown first proved that Ms. Gladue was incapacitated or had not consented to the sexual activity in question. At no point did the Crown suggest that objective foreseeability was a mandatory factor to consider in assessing Ms. Gladue's consent.[45]

22. On appeal, the Crown changed its position. It criticized the directions on dangerousness and also raised a fourth route to liability, arguing that an assessment of sexual assault causing bodily harm (and, by implication, manslaughter) *required* the jury to assess Ms. Gladue's consent to the sexual activity in light of the fact that she had suffered objectively foreseeable bodily harm.[46] This latter point amounted to the Crown deliberately advancing a new theory of liability, whereby the Appellant could be found guilty of manslaughter despite the Crown's having failed to prove Ms. Gladue's lack of consent, and even though he had no intention to cause her bodily harm. In addition to being legally incorrect,[47] the Crown should not have been permitted to alter its position on appeal in this manner. After all, "[o]n a Crown appeal from an acquittal, a trial judge should not be found to have committed an error of law for having failed to consider a means of convicting the accused, *which was effectively taken off the trial judge's plate by Crown*

---

[42] See eg *R v Pickton*, 2009 BCCA 300 at paras 190-91; *R v Patel*, 2017 ONCA 702 at para 82; *R v Chahal*, 2018 ABCA 132 at para 13.
[43] Trial Transcript, Vol 5, 1522/29-1523/36; 1560/4-19 **[Tab 48 A.R.]**; 1600/11-37; 1607/16-1609/39 **[Tab 52 A.R.]**; 1708/15-1711/16 **[Tab 54 A.R.]**; 1764/40 - 1766/5 **[Tab 55 A.R.]**.
[44] Trial Transcript, Vol 5, 1712/17 - 1713/24 **[Tab 54 A.R.]**
[45] Nor was the jury instructed to this effect: Trial Transcript, Vol 5, 1753/5-21; 1758/3-20; 1760/20-25 **[Tab 7 A.R.]**; 1770/2-12 **[Tab 55 A.R.]**.
[46] Crown Factum, Court of Appeal, paras 58-61 **[Tab 13 A.R.]**. See also ABCA Transcript, p 10/36-11/6 **[Tab 17 A.R]**.
[47] See this Factum at paras 93-110.

counsel."[48] As the Ontario Court of Appeal put it in *R v Varga*, [49] "[t]he Crown must live with that decision both at trial and on appeal."

23. The Crown's explicit acceptance of the manslaughter instructions should not be viewed as "mere oversight". After all, "[w]hen the trial judge's instructions are consistent with the instructions worked out by counsel and the trial judge in the pre-charge conference, and counsel has no objections after the charge is delivered, it is an understatement to describe counsel's silence as merely 'a failure to object.'"[50] In addition, the Crown's consent to the charge conformed with its overall tactical approach to the case, which was focused on obtaining a murder conviction, as well as by the fact that there was no evidence to support the suggestion that Ms. Gladue had not consented to the sexual activity in question, and direct evidence from the Appellant to refute it.

24. The ABCA's treatment of the charge on after the fact conduct was even more egregious, as this ground was raised entirely by the Court of its own motion. While appellate courts do have the jurisdiction to raise new issues in rare circumstances, they are bound by legal limitations on the right to appeal.[51] Given the principles enunciated by this Court in *Wexler* and *Mian*, it would significantly undermine the protection against double jeopardy to allow appellate courts to "remedy" decisions made by the Crown at trial and on appeal.

25. Moreover, the trial Crown essentially *proposed* the wording of the allegedly problematic charge on after the fact conduct, noting that "I am intending to use [the after the fact conduct evidence] in the sense that that it's the Crown's position, it wasn't an accident he knew he committed an unlawful act, and that's why I'm using it."[52] Again, the charge was the product of detailed consultations and agreed to by all parties at trial.[53]

26. In relation to the absence of a s 276 hearing, the Crown was the first party to raise Ms. Gladue's sexual history as a sex trade worker, and never objected to any discussion by the of this

---

[48] *R v Nguyen*, 2008 SKCA 160 at para 39 [Emphasis Added].
[49] *R v Varga* (1994), 90 CCC (3d) 484 at 496 (Ont CA).
[50] *R v Bouchard*, 2013 ONCA 791 at para 38.
[51] *R v Mian*, 2014 SCC 54 at para 50.
[52] Trial Transcript, Vol 5, 1586/2-14 **[Tab 48 A.R.]**.
[53] See further the discussion in this Factum at para 59.

point by the defence or suggested at trial that a hearing was required. While the ABCA held that the procedures under s 276 are mandatory irrespective of the position taken by the parties at trial,[54] it reached this conclusion by relying upon *R v AJB*,[55] an appeal from *conviction*. Clearly, different considerations should apply when the Crown attempts to raise a new argument for the first time on an appeal from an acquittal.

27. The situation here is comparable to *R v Varga*,[56] where the Crown raised a new theory for the admissibility of evidence for the first time on appeal, arguing that the defence should have been required to demonstrate the materiality of certain records before being permitted to access them. The Ontario Court of Appeal 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."

(b) Did the ABCA err in raising new grounds of appeal and expanding upon positions taken by the Crown without giving appropriate notice to the defence?

28. In *R v Mian*,[57] this Court established guidelines to govern the manner in which appellate courts can raise new grounds of appeal. The Court stressed the need to provide parties with appropriate notice before new issues were raised, holding that "[t]he overriding consideration is that natural justice and the rule of *audi alteram partem* will have to be preserved."

29. In the case at bar, the ABCA indicated an interest in raising an undefined number of new issues at the very beginning of the oral hearing.[58] The judges ultimately raised four new issues in the following order, all of which favoured the Crown: (1) whether the jury should have been instructed on wilful blindness with respect to murder;[59] (2) whether a person can ever consent to bodily harm in the context of a sexual assault;[60] (3) whether the directions on after the fact conduct had been improper;[61] and (4) whether the jury should have been instructed with respect

---

[54] ABCA Decision, paras 111-112 **[Tab 2 A.R.]**.
[55] *R v AJB*, 2007 MBCA 95.
[56] *R v Varga* (1994), 90 CCC (3d) 484 at 497 (Ont CA).
[57] *R v Mian*, 2014 SCC 54 at para 59.
[58] ABCA Transcript, p 2/40 **[Tab 17 A.R.]**.
[59] ABCA Transcript, p 29/6-8 **[Tab 17 A.R.]**.
[60] ABCA Transcript, p 35/15- 37/20 **[Tab 17 A.R.]**.
[61] ABCA Transcript, p 42/23 - 49/34 **[Tab 17 A.R.]**.

to criminal negligence as a route to conviction.[62] None were specifically identified as new issues, though each was subsequently raised in some detail with both parties. The Court ended the hearing's first day by providing a list of questions for defence counsel to consider overnight.

30. Throughout the hearing, the Court was equivocal about whether additional written submissions could be provided or were even desirable. At the beginning of the hearing, Chief Justice Fraser noted that it might be possible for the parties to file additional submissions if the Court felt there was a need.[63] On two later occasions, Justice Watson suggested that the Appellant "will... have the opportunity to write [a] supplemental factum too", but Chief Justice Fraser expressed hesitation, indicating that this was conditional on need.[64] The matter was left to the end of the hearing, when counsel were ultimately dissuaded from providing further written material.[65]

31. The conduct of the ABCA in this case conflicts with the requirements established by *Mian*. To begin with, appellate courts interested in raising a new issue must do so "... *as soon as is practically possible* after the issue crystallizes" in order to allow the parties "to request an adjournment of the hearing and an extension of the filing deadlines for further written argument.[66]" In this case, the Court did *not* provide notice prior to the hearing, choosing instead to announce its concerns at the very outset of the hearing, before oral submissions had begun.[67]

32. In addition, the ABCA failed to address the new issues in a manner that allowed the parties to address them coherently. *Mian* requires that when raising a new issue an appellate court must "provide enough information to allow the parties to respond to [it]."[68] But here the multitude of new issues made it impossible for counsel to gauge their importance and respond effectively. Counsel were simply expected to answer questions about these complex new matters without preparation, and without being cautioned that the new issues could be a reason for reversing the acquittal. Curiously, the ABCA held that in deference to *Mian*, it would not overturn the jury acquittal on the basis of the other concerns it raised, but failed to follow this approach with

---

[62] ABCA Transcript, p 68/2 - 69/25 **[Tab 17 A.R.]**.
[63] ABCA Transcript, p 2/40 - 3/4 **[Tab 17 A.R.]**.
[64] ABCA Transcript, p 70/12-20 (ability to file supplemental factum conditional "on what it is we want to hear from both of you on, if anything."); p 164/22-32 **[Tab 17 A.R.]**.
[65] ABCA Transcript, p 196/21-40 **[Tab 17 A.R.]**.
[66] *R v Mian*, 2014 SCC 54 at para 59 [Emphasis added].
[67] In contrast, see *R c Clarke*, 2015 QCCA 1995 at para 48 **[Book of Authorities (BOA) Tab 3]**.
[68] *R v Mian*, 2014 SCC 54 at para 58.

respect to ATFC.[69] It is submitted that where an appellate court raises new issues, there is a responsibility to identify: (a) what the issues are; and (b) whether these issues are significant enough to warrant further submissions. This is especially true where the matters arise during the course of a complex hearing that is already evaluating multiple grounds of appeal.

33. The ABCA's approach contrasts noticeably with that of other appellate courts. Consider, for example, the exemplary handling of a new issue by the Nova Scotia Court of Appeal in *R v Borden*.[70] In that case, once it became clear during the hearing that a significant new matter had to be addressed, the hearing was immediately adjourned. The Court then wrote to the parties specifying precisely the issues it wanted more detail on. Further written materials were filed and a second oral hearing held two months later.

34. The inappropriateness of the ABCA's general disregard for due process norms is also exemplified by the remedy granted for the alleged error of failing to hold a section 276 hearing. During the appeal hearing, the Crown clearly indicated – without dispute from the Court – that the *only* route to a new trial for murder was if the Court found an error with respect to the charge on motive. The Appellant's counsel agreed, and there was no follow-up questioning from the Court.[71] In its reasons however, the Court concluded that "the errors identified [with respect to section 276] are sufficient to justify a new trial on the original charge" of first-degree murder.[72]

35. This amounts to an unannounced alteration of the Crown's position on appeal and one that failed to give the Appellant *any* chance to address why it was inappropriate. In a letter to counsel after the hearing, the Court explained that the "Court is not bound by positions taken by either counsel as to remedy on a point of law. The Court is obliged to state the law correctly."[73] As a matter of due process, this is unacceptable.[74] Where the parties agree on a matter of law in an appellate hearing, with the apparent agreement of the Court, the appellate court must be under an

---

[69] ABCA Decision, para 47 **[Tab 2 A.R.]**
[70] *R v Borden*, 2017 NSCA 45 at paras 85-87. See also *R v Phinn*, 2015 NSCA 27 at paras 23-25; *R c Laliberte*, 2015 QCCA 1633 at para 115; *R c Clarke*, 2015 QCCA 1995 at para 48 **[BOA Tab 3]**.
[71] ABCA Transcript, p 4/9-33; 70/28-39 **[Tab 17 A.R.]**.
[72] ABCA Decision, para 153 **[Tab 2 A.R.]**.
[73] Letter from Bobbi Jo McDevitt, Clerk of the ABCA (August 17, 2017) **[Tab 19 A.R.]**.
[74] See *Rubens v Sansome*, 2017 NLCA 32 at para 108.

obligation to notify the parties that this position is of concern. It offends due process principles for a party's first notice of a change to come in the judgment on appeal.[75]

(c) Did the ABCA err in refusing to provide a complete transcript from the appellate hearing in this case?

36. Prior to seeking leave to appeal to this Court, the Appellant requested a transcript of the appeal hearing. The ABCA declined to issue a complete transcript,[76] citing earlier precedent holding that parties in litigation have no right to such access.[77] After obtaining leave to appeal to this Court, the request was renewed, and this time it was granted. As a consequence, it is conceded that the prejudice arising from the absence of a complete record has been obviated.

37. Nonetheless, this Court should still address the importance of being able to access appellate transcripts. In order to allow for a proper review of *Mian* issues, it is essential to have such access to resolve what new issues arose and how they were addressed. Furthermore, it accords with the open court principle and concern for transparency in the administration of justice for appellate courts to provide reasonable access to such transcripts. At the moment, parties to a criminal proceeding can acquire a transcript from courts at every level, with the exception of the ABCA. The Alberta practice also departs from that of other Canadian appellate courts.[78] There is no principled reason for this anomaly and strong reasons to change the practice.

(d) Did the ABCA err in letting the Joint Interveners raise new grounds of appeal and effectively operate as a "second prosecutor" against the Appellant?

38. The Canadian criminal justice system operates through an adversarial process, "a fundamental tenet of our legal system [that] helps guarantee that issues are well and fully argued by parties who have a stake in the outcome."[79] While appellate courts have the jurisdiction to permit interveners to join the proceedings for the purpose of "present[ing] the court with

---

[75] See, eg, *R v Burback*, 2012 ABCA 30 at para 13 (court duty to hear submissions before departing from agreed position on sentence).
[76] Letter from Dino Bottos (July 6, 2017) **[Tab 18 A.R.]**; Letter from Bobbi Jo McDevitt (August 17, 2017) **[Tab 19 A.R.]**.
[77] *McDonald v Brookfield Asset Management Inc*, 2016 ABCA 419.
[78] See for example *Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario*, March 1, 2017, s 14.
[79] *Borowski v Canada (Attorney General),* [1989] 1 SCR 342 at 358-359. See also *R v Swain*, [1991] 1 SCR 933 at para 34.

submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal,"[80] the jurisprudence imposes restrictions to ensure that the adversarial process is not compromised and that parties are not prejudiced by arguments tendered by a third party.

39. At least three of these restrictions are directly relevant here. First, an intervener is never entitled to "widen or add to the points in issue,"[81] "thereby commandeering the proceedings and placing an undue burden on the parties."[82] Second, the presumption against permitting interveners is especially critical in criminal proceedings, for "... a person charged with an offence should not have to face a phalanx of prosecution representatives arguing in the alternative."[83] Finally, interveners are granted access to the courts for the purpose of making principled submissions on legal points pertinent to the appeal. They should not advocate for a particular result.[84]

40. These limits cannot just be restricted to the decision whether to grant leave to intervene. Where intervener status *is* authorized, it effectively comes with caveats: the intervener must not expand or widen the points in issue or act as a second prosecutor. Moreover, to preserve the fundamental nature of the adversarial process and the fairness that this construct provides to the parties, these restrictions *must* be enforced by the tribunal that grants leave to intervene. To put it bluntly, a grant of limited standing does not give an intervener unlimited scope to make submissions relating to an appeal or authorize an appellate court to adopt such submissions.

41. In this appeal, an examination of the process reveals that this delicate balance was ignored. After the Appellant's acquittal, the Crown filed a notice to appeal, contending that the trial judge had erred in: (1) directing the jury on manslaughter; (2) failing to hold a hearing under s 276 of the Code; (3) instructing the jury that prior sexual activity evidence could support the defence of honest mistaken belief in consent; and (4) instructing the jury about motive. The first ground of appeal suggested the trial judge had erred in failing to charge the jury that it "could also

---

[80] *R v Morgentaler*, [1993] 1 SCR 462 at para 2.
[81] *Ibid*.
[82] *MacGarvie v Friedmann*, 2012 BCCA 109 at para 11. See also *International Fund for Animal Welfare Inc v R*, [1988] 3 FC 590 at para 8 (CA) **[BOA Tab 1]**.
[83] *R v A(SC)*, 2013 ABCA 80 at para 17. See similarly *R v Ahenakew*, 2007 SKCA 54; *R v JLA*, 2009 ABCA 324 at para 2; *R v Munyaneza*, 2012 QCCA 1829 at para 8; *R v Finta* (1990), 1 OR (3d) 183 at para 11 (CA).
[84] *Carter v Canada (Attorney General)*, 2012 BCCA 502 at para 15.

convict of manslaughter if the [Appellant] ought to have known there was a risk of bodily harm.[85]" The second and third ground of appeal alleged that the evidence of prior sexual activity had not been vetted properly through a s 276 hearing, and the jury was then incorrectly charged about its potential use.[86] Under all three grounds, no objection was raised about *any* substantive aspect of the charge regarding consent, honest but mistaken belief in consent, or the obligation to take reasonable steps.

42. On November 10, 2015, the Joint Interveners applied to intervene on two points. First, they focused on consent. Echoing the Crown's line of argument in its first ground of appeal, the Joint Interveners submitted that "if her sex partner uses force such that he inflicts foreseeable bodily harm in the performance of the sexual activity to which the complainant agreed, he is performing a sexual activity that is different in character from the activity to which the complainant agreed and thereby acting without her consent." The Joint Interveners also proposed to make submissions on whether s 276 "requires a trial judge to receive and decide an application and admit sexual history evidence before any evidence regarding a sexual assault complainant's sexual history is admitted at trial."[87] This included submissions on the particular importance of a hearing where the victim was an Indigenous woman involved in the sex trade.

43. On March 8, 2016, over the Appellant's objection, Berger JA granted leave to intervene. In a short judgment, he noted that the Joint Interveners could make submissions on "the definition of "sexual activity" in s 273.1(1) of the *Criminal Code* [by] provid[ing] a substantive equality analysis of the meaning of consent". Submissions were also permitted "on the procedure required by s 276 of the *Criminal Code*". Berger JA noted that "I see no prejudice to the [Appellant], provided that the submissions of the interveners are confined to the proposed joint factum."[88]

44. Notwithstanding Berger JA's prediction, there is ample evidence to conclude that the Appellant suffered considerable prejudice from the actions of the Joint Interveners and the treatment of their submissions by the ABCA. To begin with, the Joint Interveners acted akin to a second prosecutor in this appeal. Rather than stressing how the law should be interpreted or

---

[85] Crown Factum, Court of Appeal, para 3 **[Tab 13 A.R.]**.
[86] Crown Factum, Court of Appeal, para 4 **[Tab 13 A.R.]**.
[87] Joint Interveners, Application to Intervene, p 4 **[Tab 16 A.R.]**.
[88] *R v Barton*, 2016 ABCA 68 at paras 12-13 **[Tab 1 A.R.]**.

applied, the Joint Interveners focused heavily upon the facts of the case and reiterated repeatedly how the conduct of the Crown, defence and trial judge had impacted the trial in a negative way, using language akin to a Crown prosecutor. For example, at para 2, the Joint Interveners submitted that "[t]he trial Court's uncritical admission of irrelevant and prejudicial information, coupled with the inadequacy of its jury charge regarding the Canadian law of consent to sexual activity, constituted errors of law." At para 33, they suggested that "[t]he complainant's consent cannot be implied from the circumstances of the sexual activity... The [Appellant] is not entitled to rely on the false logic that because Ms. Gladue was engaged in sex in exchange for money she must thereby have consented to all sexual touching performed by the [Appellant]." The Joint Interveners' factum is littered with similar examples of this type.[89]

45. This approach does not conform to the types of submissions interveners are permitted to make during a criminal proceeding. In *R v Middleton*,[90] the Ontario Court of Appeal refused to grant leave to a proposed intervener simply because its argument would inevitably have to focus too heavily on factual matters specific to the case. The Court concluded by noting:

> It is difficult to conceive how meaningful submissions could be made on this point without reference to factual scenarios that would, implicitly if not explicitly, touch on the particular facts of the case. If so, the appellant would be faced with two, possibly divergent, sets of arguments dealing with the fitness of sentence. That is not, in my view, the function of an intervener in a criminal proceeding.

46. Highlighting specific factual matters was a key objective of the Joint Interveners. The submissions as a whole were not restricted to providing assistance in the orderly development of the law, or ensuring that the interests of women and Indigenous women more generally were respected in considering the impact of a ruling in future. They were ultimately about obtaining a positive result for the prosecution.

47. The Joint Interveners also improperly widened the issues at stake through their submissions, and the ABCA wrongly adopted these in resolving the appeal. Considering the combination of the Crown's notice of appeal and the Joint Interveners' submissions in seeking leave to intervene, argument by the Joint Interveners should have been restricted to a discussion of two points: (1) the relationship between consent, the definition of "sexual activity" under s

---

[89] See Joint Interveners' Factum, ABCA, paras 12, 21, 23, 26, 29, 43, 49 and 51-53 **[Tab 14 A.R.]**.
[90] *R v Middleton*, 2010 ONCA 610 at paras 9-10 **[BOA Tab 6]**.

273.1, and the possibility of objectively foreseeable bodily harm caused by sexual contact; and (2) the importance of holding a hearing under s 276, especially where the victim/complainant was an Indigenous person in the sex trade.

48. Many other submissions were made, however, and the ABCA engaged with them all. First, the Court accepted the suggestion – one that conflicted with the positions of the Crown and defence on appeal – that the references to Ms. Gladue as a "prostitute" and "Native girl" caused significant prejudice.[91] Second, the ABCA adopted submissions raised by the Joint Interveners about errors in the jury charge with respect to: (a) whether the touching exceeded the limit of any consent given;[92] (b) the failure to charge about the fact that receiving sex for money did not provide consent to all forms of sexual activity;[93] (c) the treatment of honest but mistaken belief in consent;[94] (d) the relevance of Ms. Gladue's moaning during the sexual activity;[95] (e) the duty to take reasonable steps;[96] (f) the failure to include recklessness as a culpable form of *mens rea*;[97] and (g) the irrelevance of certain factual matters surrounding the commercial nature of the sexual transaction to proof of consent.[98] Correct or not, these arguments provide no insight upon how the presence of objectively foreseeable bodily harm helps establish whether an absence of consent has been proven – the only substantive issue the Joint Interveners were permitted to address.[99]

49. The following part of the appeal transcript is also revealing of the ABCA's approach:

---

[91] ABCA Decision, paras 128, 196 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, paras 21-26 **[Tab 14 A.R.]** .
[92] ABCA Decision, para 195 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, paras 45, 50 **[Tab 14 A.R.]**.
[93] ABCA Decision, paras 212-214 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, paras 33, 37 **[Tab 13 A.R.]**.
[94] ABCA Decision, para 256 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, para 35, 49 **[Tab 14 A.R.]**.
[95] ABCA Decision, para 229 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, para 35 **[Tab 14 A.R.]**.
[96] ABCA Decision, para 258-264 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, para 52 **[Tab 14 A.R.]**.
[97] ABCA Decision, para 227 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, para 52 **[Tab 14 A.R.]**.
[98] ABCA Decision, paras 211-212 **[Tab 2 A.R.]**; Joint Interveners' Factum, ABCA, para 49 **[Tab 14 A.R.]**.
[99] See *R v Murdock*, 1996 NSCA 6 at paras 9-15; *International Fund for Animal Welfare Inc v R*, [1988] 3 FC 590 at para 4 (CA) **[BOA Tab 1]**; *Ward v Clark*, 2001 BCCA 264 at paras 3-4; *R v Morgentaler* (1985), 19 CCC (3d) 573 at para 11 (Ont CA) **[BOA Tab 7]**.

> CHIEF JUSTICE FRASER: You've mentioned at some stage -- and I believe this is raised by you about myths and stereotypes as they relate to this particular person in the context both of prostitution and persons of aboriginal origin.
>
> MS. DARTANA: I think that's the intervener that raised that point.
>
> CHIEF JUSTICE FRASER: Well, it's been raised before us.[100]

The Crown went on to reply that the jury should have been instructed on myths relating to prostitution, but that it was not clear that there was enough evidence to instruct on myths about aboriginal status, indicating that "this is not something that we're arguing."[101] Despite this concession, the ABCA concluded in its reasons that the jury instruction was "inadequate" and "implicitly invited the jury to bring to the fact finding process discriminatory beliefs or biases about the sexual availability of Indigenous women."[102]

50. In their totality, the Joint Interveners' submissions went well beyond the boundary of proper intervention, raising a host of new issues and advocating forcefully for a particular result. As a consequence, the Appellant was placed in the unfair position of defending against two adversaries.[103] More alarmingly, the ABCA treated the Joint Interveners as a full party and accepted their arguments without assessing if they had been properly raised, notwithstanding the Appellant's objections.[104] For this reason, the numerous questions of law decided by the ABCA adversely to the Appellant that went beyond the grounds of appeal raised by the Crown *cannot* be the reason for ordering a new trial in this case.

GROUND II: Did the ABCA err in its treatment of motive?

51. After hearing arguments from both parties, the trial judge exercised his discretion to charge the jury about the Appellant's absence of motive to commit an offence. In deciding to order a new trial for first-degree murder, the ABCA concluded that the instruction should not have been provided. At para 79, the ABCA noted that "the fact of charging on motive signalled to the jury that it was relevant to their deliberations; otherwise, why charge on this issue at all", implying that motive was *not* relevant. In para 80, the ABCA was clearer, noting that "this jury

---

[100] ABCA Transcript, p 65/34-41 **[Tab 17 A.R.]**.
[101] ABCA Transcript, p 66/1-28 **[Tab 17 A.R.]**.
[102] ABCA Decision, para 128 **[Tab 2 A.R.]**.
[103] See *R v Alfred*, [1994] 3 CNLR 88 at 96 (BCSC); *R v Kapp*, 2004 BCSC 1143 at paras 23-37.
[104] Respondent's Factum, ABCA, paras 4-6 **[Tab 15 A.R.]**.

did not need assistance on motive... to arrive at a just conclusion". Finally, in para 81, the ABCA declared that it had not been appropriate to charge on motive in the circumstances.

52. The ABCA's approach is replete with error. To begin with, the Court failed to properly consider or apply the appropriate standard of review. In discussing how charges on motive should be treated on appeal the ABCA merely stated that "whether to refer to motive in the jury charge falls within the general discretion of the trial judge".[105] This does not correspond to the statement of this Court in *R v Lewis*[106] holding that the trial judge is in the very *best* position to decide whether a charge to the jury on absence of motive should be provided:

> The necessity of charging a jury on motive may be looked upon as a continuum, at one end of which are cases where the evidence as to identify of the murderer is purely circumstantial and proof of motive on the part of the Crown so essential that reference must be made to motive in charging the jury.... At the other end of the continuum, and requiring a charge on motive, is the case where there is proved absence of motive, and this may become of great significance as a matter in favour of the accused. Between these two end points in the continuum there are cases where the necessity to charge on motive depends upon the course of the trial and the nature and probative value of the evidence adduced. *In these cases, a substantial discretion must be left to the trial judge*.

53. The message of this Court in *Lewis* was crystal clear and it has been universally followed until this decision: "... motive is always a matter of fact and evidence, and therefore *primarily for the judge and jury rather than the appellate tribunal*."[107] The importance of leaving this decision to the trial judge was summarized in *R v Vokurka*,[108] where the Court held that "[i]n finding that the matter of motive in *Lewis* was "squarely in the middle of the continuum", that is to say that neither motive nor absence of motive was proved, *Justice Dickson concluded there was no duty on the trial judge to charge on it, although it was open to him to have done so*."

---

[105] ABCA Decision, para 76 **[Tab 2 A.R.]**.
[106] *R v Lewis*, [1979] 2 SCR 821 at para 43 [Emphasis added].
[107] *R v Lewis*, [1979] 2 SCR 821 at para 64. See eg. *R v Cloutier*, (1988), 43 CCC (3d) 35 (Ont CA); *R v Kennedy* (1991), 1 OR (3d) 464 at paras 13-15 (CA); *R v Manoukian* (1996), 91 OAC 213 at paras 8-9; *R v Guyatt* (1997), 119 CCC (3d) 304 at paras 98-100 (BCCA); *R v Cook*, 1997 CarswellQue 7 at para 45 (CA) **[BOA Tab 4]**; *R v McMaster* (1998), 122 CCC (3d) 371 (Ont CA); *R v O'Grady*, 1999 BCCA 189 at paras 15-22; *R v Edgar* (2000), 142 CCC (3d) 401 at paras 57-58; *R v Ilina*, 2003 MBCA 20 at paras 42-63; *R v White*, 2009 ABCA 115 at paras 49-52; *R v Teerhuis-Moar*, 2010 MBCA 102; *R v MacNeil*, 2013 QCCA 562 at para 30.
[108] *R v Vokurka*, 2013 NLCA 51 at para 29, affirmed 2014 SCC 22 [Emphasis added].

54. In addition to improperly interfering with the trial judge's discretion, the ABCA failed to indicate *why* the trial judge had been wrong to charge on motive. The Court never reviewed the evidence or assessed how an absence of motive could have affected the defence case. The Appellant was charged with murder, and the Crown's theory was that he deliberately inserted a sharp object into Ms. Gladue's vagina intending to kill her.[109] It remained relevant for the jury to consider the Appellant's absence of motive as circumstantial evidence that could assist in resolving whether he had the requisite intention to harm or kill Ms. Gladue.

55. Moreover, there was ample evidence for jurors to conclude that the Appellant had no motive to commit a crime in the circumstances, and acted in a manner that was at odds with someone who intended to harm a guest in his suite. The Appellant had visited the hotel on many occasions and was known to staff of the hotel.[110] He registered for his room in his own name, providing correct personal and employment information.[111] He engaged in a satisfactory commercial transaction for sexual activity with Ms. Gladue on the first night. Footage from a hallway surveillance camera showed Ms. Gladue and Appellant walking hand-in-hand from his suite towards the lobby less than an hour after they engaged in sexual activity.[112] On the second night Ms. Gladue was seen by two witnesses arriving of her own volition and drinking at the bar with the Appellant, and she was acting amorously with him, as evidenced by testimony that she had her leg over the top of his lap while the Appellant touched and stroked it.[113] At the end of the evening, the Appellant and Ms. Gladue were walking back to the Appellant's suite with Kevin Atkins, and the Appellant invited Atkins to engage in sexual activity with Ms. Gladue.[114]

56. The ABCA also expressed concern about the wording used in the charge, suggesting it indicated to jurors that the Crown was obligated to prove a motive because instructions on this point were delivered in a "one-sided manner",[115] a description that is highly inaccurate. The

---

[109] Trial Transcript, Vol 5, 1683/32-37 **[Tab 44 A.R.]**.
[110] Trial Transcript, Vol 1, 79/31-36; 92/4-28 (Evidence of Veronica Chysyk) **[Tab 24 A.R.]**.
[111] Trial Transcript, Vol 1, 76/2- 77/7; 92/30-41 (Evidence of Veronica Chysyk) **[Tab 24 A.R.]**.
[112] Visible in Exhibit 7, Yellowhead Inn Hallway DVD, admitted in Trial Transcript, Vol 1, 118/37 **[Tab 25 A.R.]**; Trial Transcript, Vol 4, 1106/41 **[Tab 39 A.R.]**.
[113] Trial Transcript, Vol 1, 175/30-40 (Evidence of Kevin Atkins) **[Tab 26 A.R.]**; Trial Transcript, Vol 4, 1303/26-40 (Evidence of Tanya Dunster) **[Tab 41 A.R.]**.
[114] Trial Transcript, Vol 1, 145/19-40 (Evidence of Kevin Atkins) **[Tab 26 A.R.]**.
[115] ABCA Decision, paras 79-83 **[Tab 2 A.R.]**.

instruction began with a clear declaration that "the Crown is not required to prove motive, and in this case it introduced no evidence of motive". The potential absence of motive was described as something that "*may* be of assistance in some cases". Evidence that could have shown an absence of motive was not outlined or emphasized in the charge and the jury was effectively told *twice* that it was for jurors "to decide how much or how little you will rely on lack of motive to help you decide this case."[116] Even if the decision to charge was in error, it is impossible to see how it could have had a "material bearing" on the acquittal,[117] as the ABCA suggests.

57. Finally, the ABCA criticized the charge because the jury was "not told how a more generalized purpose or attitude could qualify as motive. It suggested that this could include an *animus* against a person or persons and could capture the desire to use a sex trade worker in an objectifying or dehumanizing manner for personal gratification."[118] This suggestion is flawed in two respects. First, there is no mandatory form of instruction for absence of motive. As the Ontario Court of Appeal noted in *R v McMaster*,[119] "[a] trial judge has a discretion as to how to deal with an issue such as this one and there is no formula that must be followed." Second, the jury should not be encouraged to speculate about matters that are not in evidence. There was no evidence to suggest that the Appellant possessed a "generalized purpose or motive" that led him to commit a criminal act, and it would have been irresponsible to suggest otherwise to the jury.[120]

GROUND III: Did the ABCA correctly address the trial judge's charge with respect to post-offence conduct?

58. Notwithstanding the Crown having chosen not to raise this as a ground of appeal, the ABCA identified four purported errors in the trial judge's charge on after-the-fact conduct (ATFC). First, the Court criticized the wording of the charge, suggesting that it removed the jury's ability to infer guilt from the ATFC. Second, the trial judge was said to have usurped the jury's role by failing to instruct the jury that they could consider whether the ATFC "was out of all proportion to [the Appellant's] stated rationale for a cover-up". Third, the charge was found to

---

[116] Trial Transcript, Vol 5, 1740/27-28 - 1741/2-13 **[Tab 7 A.R.]**.
[117] *R v Graveline*, 2006 SCC 16 at para 14.
[118] Court of Appeal Decision, para 81 **[Tab 2 A.R.]**.
[119] *R v McMaster* (1998), 122 CCC (3d) 371 at para 16 (Ont CA). See generally *R v Araya*, 2015 SCC 11 at para 39.
[120] See, eg *Lee Chun-Chuen v The Queen* [1962] 3 WLR 1461 at 1469-70 (PC).**[BOA Tab 2]**

be contradictory about whether ATFC could be used to infer guilt, and finally, the trial judge failed to point out that ATFC could be used to measure the Appellant's credibility.[121]

59. It is critical to begin by noting that the charge on ATFC was the product of lengthy discussions between both counsel and the trial judge, and the Crown *twice* argued that this evidence should be used to assess the Appellant's claim of accident, *using the same language the ABCA ultimately found problematic*. On Friday, March 13, 2015, the Crown noted that "I want to make sure... that after-the-fact conduct goes to his... position that this is an accident, not intention for murder or manslaughter."[122] Later that day, the Crown reiterated that "how I'm intending to use it is in the sense that it's the Crown's position that it wasn't an accident. He knew he had committed an unlawful act."[123] The trial judge and counsel worked diligently on the draft over the weekend, exchanging emails in which counsel provided detailed feedback on every aspect of the charge.[124] The trial judge delivered the charge agreed upon by the parties on Tuesday, March 17, 2015, without any objection regarding ATFC.

60. Notwithstanding these facts, the ABCA found the charge to be lacking. The first three alleged errors all stem from the same source: a failure to consider the jury charge in its entirety. This Court has repeatedly indicated that appellate courts must approach jury charges cautiously, noting that "it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge."[125] Furthermore, an "appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole."[126] Finally, "appellate courts should not examine minute details of a jury instruction in isolation. 'It is the overall effect of the charge that matters.'"[127]

61. The ABCA ignored all of these rules. The Court focused intently on one passage, which indicated to jurors that "you cannot infer that Barton is guilty of any offence as a result of his after-the-fact conduct, but it may be used to assess his claim that Cindy Gladue's injury was an

---

[121] ABCA Decision, paras 65-73 **[Tab 2 A.R.]**.
[122] Trial Transcript, Vol 5, 1494/34-35 **[Tab 48 A.R.]**.
[123] Trial Transcript, Vol 5, 1586/6-7 **[Tab 48 A.R.]**.
[124] Drafts 1-5 of Charge to the Jury and Accompanying Emails between Counsel and Graesser J, March 13-17, 2015 **[Tab 46-55, 57-58 A.R.]**.
[125] *R v Daley*, 2007 SCC 53 at para 30.
[126] *R v Jaw*, 2009 SCC 42 at para 32.
[127] *R v Araya*, 2015 SCC 11 at para 39.

accident."[128] From this language, the Court concluded that the jury was told that it could not use evidence of ATFC to find that the Appellant was guilty of a crime, usurping the jury's role. Other "accurate portions of the charge" were deemed to "further confuse the jury".[129]

62. In reality, the charge was more than adequate in the circumstances. Considerable time was spent discussing this part of the charge before it was delivered, as all parties were concerned about the risk of erroneously inviting the jury to infer that the Appellant was guilty of murder, as opposed to manslaughter, because of how he acted after discovering that Ms. Gladue had died.[130] It is with this in mind that the trial judge instructed the jurors that they could not use ATFC to infer that the Appellant was guilty of "any offence", meaning that it would be improper to use the evidence to infer that the Appellant was guilty of any *specific* offence. This would have been clear to the jury from the repeated instructions before and after this part of the charge that it *could* use ATFC "along with all the other evidence [if] you are satisfied that it is consistent with his guilt."[131] Moreover, any ambiguity was clarified later in the charge, where the trial judge noted that "this evidence might only be used to draw an inference relating to Ms. Gladue's injuries being accidental. You cannot use this evidence to draw any conclusion about -- *as to which of the available offences Mr. Barton may be guilty of*."[132]

63. The ABCA was also incorrect to suggest that a repeated direction to jurors that they could use the ATFC to "assess his claim that Cindy Gladue's injury was an accident" prevented the jury from drawing an inference of guilt. There were only two possible versions of events here for the jury to accept. Either the Appellant was culpable in some way for Ms. Gladue's death, or it was the product of an accident. In effect, the claim of "accident" was a shorthand way of describing an

---

[128] At para 63 of the ABCA Decision **[Tab 2 A.R.]**, the ABCA suggests that the Crown and defence agreed during the hearing that the trial judge erred in giving the jury this instruction. The Appellant disputes this contention. Although counsel on appeal acknowledged that the charge to the jury did not match the standard jury instruction, he never conceded that the direction amounted to an error of law. See ABCA Transcript, p 179/4 - 181/41 **[Tab 17 A.R.]**.

[129] ABCA Decision, para 68 **[Tab 2 A.R.]**.

[130] See the pre-charge discussion on this point: Trial Transcript, Vol 5, 1493/20 - 1495/16; 1586/2 - 1587/9 **[Tab 48 A.R.]**. See also *R v White*, 2011 SCC 13.

[131] Trial Transcript, Vol 5, 1494/33-35 **[Tab 48 A.R.]**.

[132] Trial Transcript, Vol 5, 1743/18-20 **[Tab 7 A.R.]**.

absence of guilt. Telling jurors they could use the after-the-fact evidence to assess the Appellant's claim of accident was, in effect, inviting them to use the evidence to infer the opposite – *guilt* – the very inference the ABCA suggests was taken away from the jury.

64. In addition to concluding that the jury had been incorrectly instructed on ATFC, the ABCA found that the trial judge erred in failing to inform jurors that they could use ATFC to assess the Appellant's credibility as a whole. The ABCA's conclusion on this point suffers from four shortcomings. First, it misunderstands the actual role that ATFC plays in allowing for the assessment of an accused person's credibility. *R v Jaw*,[133] which is cited as an authority by the ABCA, is instructive. In that case, this Court held that:

> While post-offence conduct cannot usually serve on its own as a basis for inferring the specific degree of culpability of an accused person who has admitted committing an offence... it can be used, more generally to impugn the accused person's credibility.

This statement does not suggest that ATFC has some sort of "free-standing" impact on credibility. Instead, it recognizes that ATFC can weaken the force of a non-culpable narrative offered by an accused person. In *Jaw*, for example, the accused's ATFC "revealed a lack of sincerity and credibility that the jury could take into account when assessing the veracity of the appellant's claim to have been so badly affected by the pepper spray that he could not remember the events leading up to the shooting."[134]

65. In other words, evidence of post-offence conduct can affect credibility where it casts doubt, *as a matter of logic*, on the accused's version of events. But this is *exactly* how the jury was tasked with using the evidence in the case. Again, the charge effectively asked jurors to consider whether the Appellant's ATFC rendered his claim of accident at trial less believable.

66. Second, even if the ABCA is correct, there is no authority holding that a distinct direction on credibility tied to ATFC is mandatory. At best, the authorities relied upon by the ABCA hold that juries *can* use this evidence to assess credibility. None clearly requires, as the ABCA

---

[133] *R v Jaw*, 2009 SCC 42 at para 39.
[134] *Ibid*.

demands, that jurors be instructed that "after the fact conduct could bear on [an accused's] credibility, whether or not they also found it showed a consciousness of guilt."[135]

67. Third, in assessing whether the failure to direct the jury on credibility caused prejudice the ABCA neglected to consider whether any shortcoming was effectively rectified by the trial judge's general charge, wherein jurors were instructed that they must "assess the credibility of all the witnesses... as to credibility or truthfulness in light of your own experience with people." The instruction also asked jurors to assess whether:[136]

> Any inconsistencies in the witness' evidence make the main point of his or her testimony more or less believable and reliable? Was the inconsistency about something important or a minor detail? Did it seem like an honest mistake? Was it a deliberate lie? Was the inconsistency because the witness said something different or because he or she failed to mention something on an earlier occasion? Was there any explanation for it? Did the explanation make sense?

68. Fourth, in assessing whether an error of this sort was significant enough to warrant a new trial, it is important to note that at no point during the lengthy discussions on ATFC prior to the charge did the Crown suggest that a direction along these lines was necessary. At the very least, the failure to request a direction shows the lack of significance this matter held for the Crown.

GROUND IV: Did the ABCA err in its treatment of the evidence of prior sexual activity?

69. The ABCA concluded that evidence of prior sexual activity, including repeated references to Ms. Gladue's work as a prostitute, had been wrongly admitted. The Court then held that the instructions to the jury about how to address this evidence were flawed enough to warrant a new trial for first degree murder.

70. The ABCA's approach to this issue suffers from three main shortcomings. First, the Court erred in concluding that the prior sexual history evidence adduced by the Crown was captured by section 276 of the *Criminal Code*, as this section applies exclusively to evidence "adduced by or on behalf of the accused". Second, assuming a hearing was nonetheless mandatory, the ABCA erred in not properly considering whether the evidence would inevitably have been admitted anyway. Finally, even assuming the trial judge erred in a manner that warranted a new trial, the order should have been for a new trial on manslaughter only, and not one for murder.

---

[135] ABCA Decision, para 73.
[136] Trial Transcript, Vol 5 1735/32-33, 1736/39- 1737/3 **[Tab 7 A.R.]**.

(a) Section 276 Does Not Apply to Evidence Led by the Crown or Use of the Term "Native"

71. The ABCA took a very strict and unambiguous position on the scope of section 276, concluding that "[t]rial judges must not allow evidence of prior sexual conduct to enter the trial without compliance with the Code requirements."[137] The Court held that the trial judge had an obligation to exclude evidence of this sort where it did not comply with the Code, holding that "the vital interests served by s 276 in protecting the equality and privacy rights of complainants are not... to be sacrificed or waived by any of the participants in the trial."[138]

72. What the ABCA failed to do, however, was recognize that the evidence *had been introduced by the Crown, rather than the Appellant*. Early in its opening statement, the Crown declared that "Ms. Gladue was a prostitute... and [she and Mr. Barton] struck a working relationship." Implicitly referring to the prior sexual conduct between the two, the Crown added that the pair spent time together in this capacity on June 20, and again on June 21.[139] Moreover, questions about Ms. Gladue's professional relationship with the Appellant were then posed in direct examination to one witness,[140] while testimony about the sexual nature of the relationship, and Ms. Gladue's "availability" to have sex with a witness, were elicited – again, in direct examination by the Crown – from another.[141] While the Appellant acknowledges that Crown Counsel's opening remarks are not evidence per se, the opening previewed the evidence that the jury "would hear over the next number of weeks" and it would have made an early impression on the jury as to the context of the case.[142]

73. Section 276 has no application to evidence raised by the Crown. This is clear from the wording of s 276(2), which restricts the general prohibition of a complainant's prior sexual activity to proof "adduced by or on behalf of *the accused*". Section 276.1 similarly provides that a hearing to admit evidence of prior sexual contact under s 276.2 is restricted to evidence "by or on behalf of the accused". Finally, a mandatory direction of the inferences that a jury may and may not draw from prior sexual history evidence is restricted to evidence admitted pursuant to s 276.2.

---

[137] ABCA Decision, para 154.
[138] ABCA Decision, para 111.
[139] Trial Transcript, Vol 1, 14/13-18 (Crown Opening Statement) **[Tab 22 A.R.]**.
[140] Trial Transcript, Vol 1, 29/33-40 (Evidence of John Sullivan) **[Tab 23 A.R.]**.
[141] Trial Transcript, Vol 1, 145/28- 146/8 (Evidence of Kevin Atkins) **[Tab 26 A.R.]**.
[142] Trial Transcript, Vol 1, 14/8-18 **[Tab 22 A.R.]**.

In short, since proof of Ms. Gladue's work history as a prostitute along with her having engaged with sexual relations with the Appellant the night before she died were raised in submissions and questioning by the Crown as part of its case-in-chief, section 276 had no application whatsoever.

74. The ABCA correspondingly erred in holding that the evidence's admissibility was conditional on satisfying the demands of s 276. At several junctures, it nonetheless applied the s 276(2) admissibility standard to the evidence, noting that "since [calling someone a prostitute] is not evidence of a specific instance of sexual activity as required under s 276(2)(a), it is, by itself, inadmissible."[143] On another instance, the Court held that the trial judge had erred in failing to consider "whether the evidence had significant probative value that was not substantially outweighed by its prejudicial effect," referring specifically to the test set out in s 276, and the need for a mandatory jury caution, as required by section 276.4.[144]

75. The ABCA also suggested, possibly as an alternative, that the Crown's use of the evidence might have contravened this Court's decision in *R v Seaboyer*,[145] holding that the evidence was "caught by s 276 if advanced by the defence, and governed by *Seaboyer* if advanced by the Crown."[146] But *R v Seaboyer* does not provide grounds for ordering a new trial if prior sexual activity evidence is adduced by the Crown. In contrast to the legislative scheme, *Seaboyer* never purported to create mandatory obligations for hearings and jury instructions. Instead, it provided guidelines, which "... should be seen for what they are – an attempt to describe the consequences of the application of the general rules of evidence... and not as judicial legislation cast in stone."[147] Moreover, while the wording of these guidelines *could* be viewed as applying to both the Crown and the defence equally, a deeper examination shows that the focus was upon evidence tendered by the accused. In the very first paragraph discussing the trial judge's role in admitting evidence, McLachlin J noted that "the judge must assess with a high degree of sensitivity whether the evidence *proffered by the defence* meets the test of demonstrating a degree of relevance which outweighs the damages... presented by the admission of such evidence."[148]

---

[143] ABCA Decision, para 122 **[Tab 2 A.R.]**.
[144] ABCA Decision, para 131 **[Tab 2 A.R.]**.
[145] *R v Seaboyer*, [1991] 2 SCR 577.
[146] ABCA Decision, para 122 **[Tab 2 A.R.]**.
[147] *R v Seaboyer*, [1991] 2 SCR 577 at 633-634.
[148] *Ibid* at 634 [Emphasis added].

76. The need to hold a hearing before admitting evidence of this type *only* where it is adduced by the defence squares with the basic demands of the adversarial process in criminal proceedings. In effect, the ABCA is suggesting that if the Crown raises evidence that both parties believe is relevant to the trial and admissible, the defence should nonetheless object to avoid the risk of a new trial if the accused is acquitted.

77. The ABCA's concerns about referencing Ms. Gladue as a "native" are similarly flawed. Whether or not this term somehow invited the jury to discriminate "about the sexual availability of Indigenous women,"[149] it has nothing to do with section 276. Aside from being a term first utilized by the Crown, it does not qualify as "evidence that the complainant has engaged in sexual activity", and is not covered by section 276.

(b) The Failure to Hold a Hearing Caused No Prejudice

78. Even if this Court decided that a s 276 hearing was mandatory for some of the evidence, the failure to hold such a hearing is not a sufficient reason, on its own, to order a new trial. In *R v Wierzbicki*,[150] the Ontario Court of Appeal correctly dismissed a Crown appeal from an acquittal for sexual assault notwithstanding a failure to hold a s 276 hearing with respect to certain points raised by the accused in cross-examination of the complainant. Three of the Court's reasons for dismissing the appeal are directly applicable here:[151] (1) the cross-examination, even if it fell within s 276, did not invoke either of the “twin myths” against which the section is intended to protect; (2) had the s 276 procedure been followed, "the questions put to the complainant... would inevitably have been permitted"; and (3) no objection had been raised by the Crown to the questions. In summary, the Ontario Court of Appeal concluded that "[i]f the failure to comply with s. 276 was an error in law, it did not result in the kind of prejudice to the Crown needed to justify an order quashing the acquittal and granting a new trial."[152]

---

[149] ABCA Decision, para 128 **[Tab 2 A.R.]**.
[150] *R v Wierzbicki*, 2012 ONCA 794.
[151] The fourth reason does not detract from the position taken here. The Court simply concluded that the complainant's story was not shaken by the cross-examination on this point. Obviously, this factor is even stronger in this case, where the evidence was not put to a complainant at all.
[152] *R v Wierzbicki*, 2012 ONCA 794 at para 3.

79. This approach is consistent with the approach taken to evidentiary admissibility more generally. As a rule, the failure to hold a *voir dire* amounts to a procedural error that does not warrant a new trial in the absence of prejudice, even where a statute imposes specific and mandatory requirements that must be satisfied before any evidence is admitted at trial.[153] Ultimately, the real question on appeal is whether the evidence should have been admitted, and whether the jury was correctly instructed about its use.

80. It follows that the ABCA erred in failing to consider whether the evidence would inevitably have been admitted simply because "the proper application process was not followed and the specific evidentiary record that should underpin the s 276 analysis is lacking."[154] To overturn an acquittal, an appellate court must be satisfied "that the verdict would not necessarily have been the same had the errors not occurred... The onus is a heavy one and the Crown must satisfy the court with a reasonable degree of certainty."[155]

81. The evidence adduced in this case was unquestionably admissible, as it had significant probative value to at least three different issues in the case. First, the evidence was necessary to respond to the Crown's opening statement that Ms. Gladue "was a prostitute and struck up a working relationship" with the Appellant, as well as to questions posed by the Crown to its own witnesses.[156] Given that the sexual relationship between the parties and how they met was integral to the Crown's own theory, it would be unfair to the Appellant, and compromise the right to make full answer and defence, to prohibit an exploration of what in fact occurred during this "working relationship". The Appellant testified about performing an unusual sexual activity that to many observers would be regarded as aggressive or even dangerous. It would not be surprising for jurors to draw the inference that no reasonable woman would consent to this sort of activity, but for the Appellant's testimony that Ms. Gladue consented to very similar activity on the first night and returned of her own volition to meet with him a second night.[157]

---

[153] See *R v CCF*, [1997] 3 SCR 1183 at para 54; *R v Sylvain*, 2014 ABCA 153 at para 39; *R v Scott*, 2013 MBCA 7.
[154] ABCA Decision, para 134.
[155] *R v Sutton*, 2000 SCC 50 at para 2. See also *R v Graveline*, 2006 SCC 16 at para 14.
[156] Trial Transcript, Vol 1, 14/15-18 **[Tab 22 A.R.]**.
[157] Don Stuart, "*Barton*: Sexual Assault Trials Must be Fair: Not Fixed" (2017) 38 CR (7th) 438 **[BOA Tab 9]**.

82. Second, the nature of the existing relationship between Ms. Gladue and the Appellant, including the "unusual" sexual conduct that occurred between them, was an essential matter for the jury to consider in assessing the Appellant's state of mind during key moments of the second night encounter. The authors of McWilliams on *Canadian Criminal Evidence* describe this "category" of admission as follows:

> Perhaps the most succinct way of describing the relevance of prior sexual history on the issue of mistaken belief is stated by Dean Michelle Anderson:
>
> > ...prior negotiations between the complainant and the defendant regarding the specific act at issue or customs and practices about those acts should be admissible. Those negotiations, customs and practices between the parties reveal their legitimate expectations on the incident in question.
>
> Such evidence will be particularly compelling on the issue of mistaken belief if it revealed unique sexual practices between the parties.[158]

83. This excerpt appropriately describes the importance of the prior sexual activity in this case. It provided the contextual backdrop for both the negotiations and the particular sexual practices of the Appellant and Ms. Gladue, and was useful in revealing "their legitimate expectations on the incident in question."[159]

84. This point is strengthened by the fact that the prior sexual activity was virtually *identical* to the conduct that formed the subject matter of the charge at trial, and the incidents were separated by only one day, as these are strong indicia of probative value.[160] In this case, the close temporal relationship and similar nature of the prior sexual conduct, along with the negotiations and actions surrounding the agreement to engage in sexual activity, had the potential to help establish what the Appellant was thinking on the second evening when he proceeded to engage in sexual contact of a similar nature to the previous evening.

85. Finally, to the extent that referring to Ms. Gladue as a prostitute without having admissibility vetted constituted an error, it had no adverse impact on the trial, for this was clearly an admissible fact that played an important part in the sequence of events leading to her death.

---

[158] Casey Hill, David Tanovich & Louis Strezsos, *McWilliams' Canadian Criminal Evidence*, 5th ed. (Toronto: Canada Law Book, 2014-1 release) Vol. 2 at 16-18 **[BOA Tab 8]**.
[159] See eg *R v AP*, 2011 ONSC 2716 at para 14, reversed on other grounds 2013 ONCA 344.
[160] *R v Ross*, 2014 SKQB 50; *R v ENG*, 2015 MBQB 95; *R v A.M.P.* (1999), 27 CR (5th) 118 at paras 61-75 (NSCA) **[BOA Tab 5]**.

The ABCA suggests that the jury should not have been told about how the Appellant and Ms. Gladue met or the nature of their relationship,[161] as if blinding the jury to these facts would result in a better understanding of what occurred. In truth, removing this fact from the jury's attention would have been ill-advised, unrealistic and, quite frankly, impossible. There is no reason to believe that use of the term caused an unfair trial or perverted the jury's reasoning process.

86. The evidence correspondingly possessed considerable probative value in the circumstances. Additionally, some of the traditional aspects of prejudice listed in s 276(3) were of no concern in this case. For example, there was no *additional* prejudice to Ms. Gladue's personal dignity and right of privacy raised by this evidence considering the Crown's opening remarks and what was testified to by the Appellant in discussing the subject matter of the charge.

87. Since the evidence was admissible, it falls to assess whether the jury was properly charged about its use. The ABCA raised three main concerns in this regard: (1) the jury was not charged about one line from the Appellant's testimony, to the effect that "she knows what she was coming for";[162] (2) the trial judge failed to provide a mid-trial instruction about the use of prior sexual conduct;[163] and (3) the trial judge gave "internally inconsistent final instructions to the jury on the evidence of prior sexual conduct."[164]

88. None of these purported errors justify a new trial in the circumstances. First, there is simply no reason to believe that one isolated statement from the Appellant's testimony "led jurors deep into forbidden twin myths territory."[165] As noted below, the jury was carefully cautioned that it could not use any evidence from what transpired on the first night to find what Ms. Gladue consented to on the night when she died. Moreover, the emphasis on this one sentence is divorced from the context of what the Appellant was actually saying. He was merely testifying to his belief that Ms. Gladue knew she was coming to participate in sexual activity. An arrangement between the parties had clearly been reached, irrespective of what had happened on the first night, and his testimony was merely affirming that she knew she was attending to provide sexual services, the terms of which would be addressed - verbally or otherwise - once they got to his room.

---

[161] *R v LS*, 2017 ONCA 685 at paras 82-88.
[162] ABCA Decision, para 144 **[Tab 2 A.R.]**.
[163] ABCA Decision, paras 145, 152 ("necessary mid-trial instruction") **[Tab 2 A.R.]**.
[164] ABCA Decision, para 153 **[Tab 2 A.R.]**.
[165] ABCA Decision, para 144 **[Tab 2 A.R.]**.

89. Second, while a mid-trial instruction about the use of this evidence could have been given, it was not "necessary", as the ABCA suggested.[166] Section 276.4 requires a charge – it does not specify when it must be provided. Generally speaking, so long as the evidence in question is admissible, providing a mid-trial caution about the manner in which it can be used is a discretionary decision for the trial judge.[167]

90. Finally, the ABCA concluded that the trial judge "at one point... told the jury they could only consider that evidence with respect to Barton's defence of mistaken belief in consent and not as evidence that Gladue "actually" consented to what happened the night of her death. Nonetheless, in an earlier portion of the final charge on the issue of consent, the trial judge clearly implied the contrary."[168] This conclusion is perplexing, for the "clear" instruction did not take place during an "earlier portion of the final charge", as the ABCA suggests. All of these so-called "internally inconsistent" instructions occurred *in the same part of the charge*, minutes after one another. In effect, the trial judge provided an ambiguous statement indicating that "the chronology of events... is important to aspects on this issue of consent", referring to the sexual acts that had taken place on the first night. But moments later the trial judge clarified this point, making it clear that:

> [S]ince consent must be found at the time of the sexual activity itself, evidence of what transpired between them the night before is relevant only to the issue of Mr. Barton's belief in Ms. Gladue's consent on June 22nd. *You cannot use evidence of what transpired on June 20th as evidence of what... Ms. Gladue actually consented to on June 22nd*.[169]

It is difficult to imagine a clearer instruction on how the evidence could not be used. As Lamer CJC noted in similar circumstances in *R v Jacquard*,[170] "even if... the jury might initially have been left with the impression that the... evidence was not relevant to the topic of intention, the trial judge's subsequent comments resolved any alleged uncertainty. You must look at a jury charge in its entirety."

91. Finally, any possibility of prejudice arising from the failure to assess this evidence is further attenuated by the fact that, as the ABCA acknowledged at paragraph 99 of its reasons, it

---

[166] ABCA Decision, para 152 **[Tab 2 A.R.]**.
[167] *R v Howard*, 2017 BCCA 263 at para 30.
[168] ABCA Decision, para 151 **[Tab 2 A.R.]**.
[169] Trial Transcript, Vol 5, 1754/18-22 **[Tab 7 A.R.]**.
[170] *R v Jacquard*, [1997] 1 SCR 314 at para 20. See also *R v White*, [1998] 2 SCR 72 at para 16.

was not clear to any of the parties that a section 276 hearing was even required where the charge was for first degree murder. While this does not "cure" the error, it should be considered in assessing its magnitude and impact.[171]

(c) If any errors relating to section 276 warranted a new trial it should be for manslaughter, not murder

92. Despite agreement between the parties that any section 276 related errors only warranted a new trial for manslaughter,[172] the ABCA held that "the errors identified under this ground of appeal are sufficient to justify a new trial on the original charge."[173] This conclusion cannot be accepted, as the evidence of prior sexual conduct had absolutely no relevance to the charge of first-degree murder. The Crown's theory was that the Appellant used a sharp object to stab Ms. Gladue in the vagina and intentionally cause her death, and that conduct of this type could not have been consented to – a matter that was clearly explained to the jury.[174] The prior sexual conduct was admitted exclusively to provide an alternative version of events, one in which Ms. Gladue consented to conduct of a completely different type. Any errors involving the admission of this evidence could only have affected the jury's view of whether consent or honest but mistaken belief in consent was present. Since neither of these defences could have been raised in the context of murder, it is impossible to see how any errors about evidence of prior sexual conduct could have affected the jury's decision to acquit the Appellant of first-degree murder.

GROUND V: Was the offence of unlawful act manslaughter properly explained to the jury?

(a) Errors Relating to Sexual Assault: Consent

93. The ABCA expended considerable effort analyzing aspects of the charge relating to manslaughter. The Court purported to find no less than 30 errors surrounding the trial judge's treatment of sexual assault, the underlying offence for manslaughter. It then alleged a smaller number of errors relating to the way unlawful act manslaughter itself was presented to the jury. To understand the significance of these "errors", it is first necessary to assess how a manslaughter conviction against the Appellant could have been reached. The ABCA recognized that there were three possible ways of proving that a sexual assault had been committed: (1) by proving that Ms.

---

[171] See *R v Bell*, (1998) 126 CCC (3d) 94 at para 55 (NWTCA).
[172] ABCA Transcript, p 4/33 **[Tab 17 A.R.]**
[173] ABCA Decision, para 153 **[Tab 2 A.R.]**.
[174] Trial Transcript, Vol 5, 1748/9-12 **[Tab 7 A.R.]**.

Gladue lacked the legal capacity to consent to the sexual activity in question given her level of intoxication; (2) by demonstrating that Ms. Gladue had not provided "autonomous consent" to the sexual activity in question; and, (3) by showing that any consent provided had been vitiated by the intentional bodily harm that resulted. The ABCA did not assess the jury instructions on Route #1, as the Crown never challenged them.[175] Though the ABCA criticized the way Route #3 had been addressed, this was expressly done in *obiter* only.[176]

94. But the ABCA addressed the question of Route #2, autonomous consent, in considerable depth, writing 95 paragraphs on the topic, uncovering one purported error after another. Reading the ABCA's judgment, one could reasonably conclude that the *key* focus of this four week murder trial was whether or not Ms. Gladue had consented to the force inflicted upon her by the Appellant's conduct, and whether the jury had the proper instructions to allow it to assess this fact. Without conceding the correctness of any of these errors, however, it is critical to recognize that Ms. Gladue's lack of consent to the sexual activity was *not a focus of the trial nor the Crown's appeal*. This is best exemplified by the Crown's closing argument, which runs for 27 pages in the transcript. The content of 26 of these pages concentrates almost *exclusively* on showing that the Appellant was guilty of murder by use of a knife.[177] The argument on the remaining one page asked the jury to find that the Appellant was guilty of manslaughter because he either intended to cause bodily harm (Route #3), or because Ms. Gladue was incapable of consenting (Route #1).[178] The Crown *never* once suggested that Ms. Gladue had failed to consent to the sexual activity, nor that she had failed to consent to the degree of force that was used. Nor was the Appellant *ever asked a single question* in cross-examination that focused upon Ms. Gladue's actual consent. Simply put, there was no evidentiary foundation to the ABCA's theory that Ms. Gladue failed to provide autonomous consent. Yet errors about the description of consent, and whether the Appellant had an honest, mistaken belief in consent, were treated by the Court of Appeal as vital reasons to order a new trial.

95. In reality, neither consent nor honest mistaken belief in consent were truly issues for the jury to consider, and the trial judge was entitled to give these matters less attention than they

---

[175] ABCA Decision, para 176 **[Tab 2 A.R.]**.
[176] ABCA Decision, paras 176, 301-310 **[Tab 2 A.R.]**.
[177] Trial Transcript, Vol 5, 1656/1 - 1683/41 **[Tab 44 A.R.]**
[178] Trial Transcript, Vol 5, 1684/1-26 **[Tab 44 A.R.]**.

might normally deserve. As this Court has held on many occasions, "the role of a trial judge in charging the jury is to decant and simplify."[179] As Moldaver J held in *R v Rodgerson*:[180]

> [T]he failure to isolate the critical issues in a case and tailor the charge to them... makes the instructions less helpful to the jury adds unnecessarily to their length and complexity...
> Trial judges must "separate the wheat from the chaff" when determining which defences may be applicable, and must engage in a "careful and considered culling... to avoid unnecessary, inappropriate and irrelevant legal instruction of a kind that might well divert the jury's attention from the primary disputed issues in the case.

96. Given the practical non-importance of autonomous consent as a route of liability, it stands to reason that any errors found by the ABCA were unlikely to have had a "material bearing" on the acquittal.[181] Though the Appellant takes serious issue with the substance of these alleged errors, it is not possible to address every one of these within the allotted page limits of this factum. Nonetheless, discussion of two issues may be useful as a means of demonstrating how flawed the ABCA's approach to the jury charge really was.

97. First, the ABCA concluded that the jury had not been properly instructed about whether Ms. Gladue's consent was tied to the amount of force that the Appellant used in the sexual activity. Though the ABCA accepted that the trial judge *had* addressed the jury on this issue, the Court concluded that it had been incorrectly explained, as "it was not clear to which pathway these instructions related". As such, "the jury would not have understood that they also applied to the *actus reus* of sexual assault on the standard pathway, and not simply to a situation when consent is "voided" under the *Jobidon* pathway."[182]

98. This is a gross mischaracterization of the trial judge's instructions, which were very clear on this issue. The discussion of the *Jobidon* pathway occurred several minutes before the instructions on consent began, and the judge made clear to jurors that "your consideration of consent *only* arises if you are not satisfied beyond a reasonable doubt that Mr. Barton intended to inflict serious hurt or nontrivial bodily harm on Ms. Gladue. If you are in doubt on this issue, then you will proceed to consider consent." The charge on force in no way references the *Jobidon* issue, as it indicated that "when a person consents to the application of force, including during

---

[179] *R v Jacquard*, [1997] 1 SCR 314 at para 13.
[180] *R v Rodgerson*, 2015 SCC 38 at paras 51-52.
[181] *R v Graveline*, 2006 SCC 16 at para 14.
[182] ABCA Decision, paras 193-194 **[Tab 2 A.R.]**, referring to *R v Jobidon*, [1991] 2 SCR 714.

sexual activity, that consent only covers a certain amount of force." The instruction continued, using the clearest possible language, stating that jurors must consider whether "if Cindy Gladue validly consented to being touched, to sexual activity, and to the touching described by Mr. Barton in his testimony, she consented to the amount of force that Mr. Barton used."[183] It is impossible to see how the jury would have been confused about which pathway this related to.

99. Second, the ABCA concluded that running through the instructions was an "unstated assumption", that "consent to 'intercourse, sex'... equaled consent to the risk of bodily harm, or actual bodily harm." With the exception of sado-masochistic sex, the ABCA "reject[ed] the proposition that when someone consents to engage in sexual activity, whether for payment or otherwise, that necessarily includes consent to bodily harm or even the risk of bodily harm." The Court went on to add that "it would undoubtedly come as a great surprise to Canadian women to discover that when they consent to engage in sexual activity, they are also consenting not only to the risk of bodily harm, but to actual bodily harm as an incident of that activity.[184]"

100. These statements are highly problematic, and demonstrate *both* a misunderstanding of how consent interacts with the risk of bodily harm and the use of a dangerous form of *ex post facto* reasoning, in which the presence or absence of consent is resolved by the result of the sexual activity in question. To begin with, it should not come as a surprise to *anyone* that consent to engage in sexual activity will, in some circumstances, involve consent to a risk of bodily harm, not to mention actual bodily harm. This is because one consents to *sexual activity*, and not to the risks arising from that activity. For example, any woman who consents to unprotected sexual intercourse with a new partner *by definition* consents to the risk of bodily harm, be it through an unwanted pregnancy, or by the transmission of disease. Consent is simply not measured by the *results* of the activity. Though the ABCA is correct in stating that consent to sexual activity does not grant licence to inflict bodily harm, it incorrectly takes this point too far by stating that consent *never* extends to the risks of bodily harm unless sado-masochistic activity is involved.[185] In reality, assuming that any harm arising from sexual activity is not caused intentionally,

---

[183] Trial Transcript, Vol 5, 1758/13-20 **[Tab 7 A.R.]**.
[184] ABCA Decision, paras 196-197 **[Tab 2 A.R.]**.
[185] Furthermore, the ABCA never explained why this activity should be treated differently.

whether such harm is covered by a consent given is determined *exclusively* by assessing whether the harm occurred as a result of activity for which consent was provided, and nothing more.

101. The reasoning here is particularly dangerous as it suggests a "back-door" means of supplanting this Court's approach to vitiating consent in *R v Jobidon*, as applied to sexual assault by the Ontario Court of Appeal in *R v Zhao*,[186] and applied at trial in this decision. While the ABCA noted later in its judgment that it was content to apply *Zhao* for the purposes of this appeal, its reasoning effectively amounts to an attack on the notion that consent will only be vitiated in these sorts of cases where bodily harm was *intended* by the person inflicting force.

102. A similar type of flawed reasoning arises at paragraph 198, where the ABCA suggests that in deciding whether consent had been provided, "the jury should have been instructed to take into account whether it was objectively foreseeable that Barton's actions would put Gladue at risk of bodily harm." This is simply an attempt to craft a new route to liability that is unsupported by the jurisprudence. Juries in these sorts of cases *should* be instructed to consider the nature of the sexual activity in question, the force used, and whether consent was provided for those things. All of these formed part of the trial judge's instruction. In particular, he told the jury "you will have to decide if Ms. Gladue consented to being touched by Mr. Barton, including... consenting to the type of sexual activity described and demonstrated by Mr. Barton in his testimony".[187] He later provided a more detailed description of this point, suggesting that "when a person consents to the application of force... it does not cover force that goes beyond the consent".[188] Finally, he reminded jurors that "if you make the determination that Ms. Gladue consented to the type of touching described by Mr. Barton in his testimony but did not consent to the amount of force used by him... you will have decided that ... Mr. Barton committed an unlawful act."[189]

103. It would be dangerous and contrary to existing law to instruct jurors that consent must be considered by assessing whether the force utilized was *objectively* likely to cause bodily harm. First, it conflicts with how consent is actually assessed. As this Court noted in *R v Ewanchuk*, "the absence of consent... is *subjective* and determined by reference to the complainant's

---

[186] *R v Zhao*, 2013 ONCA 293.
[187] Trial Transcript, Vol 5, 1753/28-31. See also Vol 5, 1755/27-29 **[Tab 7 A.R.]**.
[188] Trial Transcript, Vol 5, 1758/13-14 **[Tab 7 A.R.]**.
[189] Trial Transcript, Vol 5, 1758/28-31, 1758/27-31 **[Tab 7 A.R.]**.

subjective internal state of mind towards the touching, at the time it occurred."[190] Given this clear focus, mandating an evaluation of consent concentrating upon the objective foreseeability of bodily harm would be contrary to the notion that a person has the autonomy to choose the type of sexual conduct they wish to engage in. Ultimately, if the force was unwanted or went beyond the scope of the consent provided, it will not qualify as consensual – but this is *exactly* what the jury was told, and jurors clearly decided that there was, at least, a reasonable doubt on this point.

104. Attempting to insert a mandatory consideration of a completely untethered assessment involving the objective likelihood of bodily harm into the consent inquiry would determine criminal liability on an *ex post facto* analysis that looks not at whether a complainant consented, but whether she *should have* consented. Furthermore, it would make the accused a guarantor in case of accidental injury whenever a "reasonable person" would have foreseen the risk of injury.

105. The consent inquiry must ultimately focus upon whether a person agrees to the sexual activity that was performed. Taking any other approach unfairly limits a person's right to exercise their own personal choice, and makes it impossible for those performing the sexual activity to know the valid limits of consent, as their subjective intentions to cause harm would no longer be definitive. As this Court noted in *R v Hutchinson*,[191] "broad adjectival approaches to the “sexual activity in question” produce not only uncertainty, but also may criminalize conduct that lacks the necessary reprehensible character, casting the net of the criminal law too broadly."

(b) Errors Relating to Manslaughter

106. The ABCA also found "errors" involving the manslaughter charge. In particular, it held that the judge's failure to instruct about the dangerousness of the unlawful act and the need to prove that any risk of bodily harm was objectively foreseeable prejudiced the Crown, necessitating a new trial. The instructions were also said to be confusing, in that proof of dangerousness was alternatively implicit, omitted and required.[192]

107. While aspects of the jury charge on dangerousness could have been clearer, and the jury was not instructed to consider dangerousness or the need to prove that a reasonable person in the

---

[190] *R v Ewanchuk*, [1999] 1 SCR 330 at paras 26-27 [Emphasis added].
[191] *R v Hutchinson*, 2014 SCC 19 at para 54.
[192] ABCA Decision, paras 268, 274 **[Tab 2 A.R.]**.

Appellant's position would have foreseen the risk of bodily harm, it is difficult to fathom why these "shortcomings" merit a new trial. The requirements to prove that an unlawful act is dangerous and that the act is objectively likely to cause bodily harm both exist *as protection for the accused*. In *R v DeSousa*,[193] Sopinka J held that:

> [T]he most principled approach to the meaning of "unlawful"... is to require that the unlawful act be objectively dangerous. This conclusion... *is in accord with the emerging jurisprudence of this court in regard to personal fault*.
>
> Objective foresight of bodily harm should be required for both criminal and non-criminal unlawful acts which underlie a s. 269 prosecution.... In interpreting what constitutes an objectively dangerous act, the courts should strive *to avoid attaching penal sanctions to mere inadvertence*. The contention that no dangerousness requirement is required if the unlawful act is criminal should be rejected.

108. In other words, the need for the Crown to prove that an act is objectively dangerous exists to ensure that an accused person *is not wrongfully convicted*, and helps establish an appropriate level of fault for the offence. To be sure, where a jury is not instructed on an element of manslaughter, and a conviction is entered, the failure to charge properly might result in reversible error.[194] But if the jury is *not* instructed upon the need to prove a required element of the offence, the Crown cannot be said to have been prejudiced by this failure.

109. Consider, for example, the following part of the jury charge:

> If you find beyond a reasonable doubt that Ms. Gladue had no capacity to consent or did not consent and Mr. Barton did not have an honest but mistaken belief in her capacity to consent, or if you find beyond a reasonable doubt that Mr. Barton exceeded the limits of any consent given to him by Ms. Gladue, you will have found that he committed an unlawful act on Ms. Gladue, namely sexual assault, which caused her death, and therefore you should convict him of manslaughter.[195]

How could this charge possibly *disadvantage* the Crown? It made it clear that the Appellant was guilty of manslaughter so long as the jury found that a sexual assault had actually taken place. It removed an element that otherwise needed to be proven in order to convict the accused of manslaughter. To the extent that there was an error, it was an error that benefitted the Crown.

---

[193] *R v DeSousa*, [1992] 2 SCR 944 at 961 [Emphasis added].
[194] See *R v Miljevic*, 2011 SCC 8 at para 20, per Fish J dissenting, referred to with approval in the ABCA Decision, para 268 **[Tab 2 A.R.]**.
[195] Trial Transcript, Vol 5, 1759/27-32 **[Tab 7 A.R.]**.

110. At para 277, the ABCA suggests that the jury may have transferred the *mens rea* required to vitiate consent (intention to cause bodily harm) and wrongly applied it to unlawful act manslaughter where Ms. Gladue did not consent, or lacked capacity to consent. But there is no reason to believe this occurred. The trial judge was extremely careful to segment the discussion around vitiating consent so as not to contaminate the jury's assessment of alternate pathways to guilt, noting that "if you are satisfied... that Mr. Barton intended to inflict serious hurt or nontrivial bodily harm on Ms. Gladue... then the issue of consent does not arise."[196]

PART IV: COSTS

111. The Appellant does not seek costs, and makes no submissions as to costs.

PART V: NATURE OF THE ORDER REQUESTED

112. The Appellant respectfully requests that this Appeal be allowed, that the decision of the Court of Appeal of Alberta be set aside, and that verdict of acquittal be restored. In the alternative, should this Court conclude that the Court of Appeal of Alberta erred with respect to its treatment of the grounds of appeal relating to motive and after-the-fact conduct, but that a new trial is required because of some other error, it should restore the acquittal for first degree murder and direct a new trial on a charge of manslaughter only.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT Edmonton, Alberta this 30th day of May 2018.

SIGNED BY:

PETER SANKOFF
Counsel for the Appellant

DINO BOTTOS
Counsel for the Appellant

[196] Trial Transcript, Vol 5, 1753/5-10 **[Tab 7 A.R.]**. The separation of the two routes was reinforced at 1760/20-25; 1770/2-8 **[Tab 7 A.R.]**.

PART VI: TABLE OF AUTHORITIES

JURISPRUDENCE

TAB NO.		PARAGRAPH REFERENCE
	Borowski v Canada (Attorney General), [1989] 1 SCR 342	38
	Carter v Canada (Attorney General), 2012 BCCA 502	39
	Cullen v The King, [1949] SCR 658	20
	International Fund for Animal Welfare Inc v R, [1988] 3 FC 590 (CA)	39, 48
	Lee Chun-Chuen v The Queen [1962] 3 WLR 1461 (PC)	57
	MacGarvie v Friedmann, 2012 BCCA 109	39
	McDonald v Brookfield Asset Management Inc, 2016 ABCA 419	36
	R c Clarke, 2015 QCCA 1995	31, 33
	R c Laliberte, 2015 QCCA 1633	33
	R v AP, 2011 ONSC 2716 at para 14, reversed on other grounds 2013 ONCA 344	83
	R v A(SC), 2013 ABCA 80	39
	R v Ahenakew, 2007 SKCA 54	39
	R v AJB, 2007 MBCA 95	26
	R v Alfred, [1994] 3 CNLR 88 (BCSC)	50
	R v Alves, 2014 SKCA 82	19
	R v Araya, 2015 SCC 11	57, 60
	R v Armstrong (1971), 3 CCC (2d) 424 (BC CA)	19
	R v Barton, 2016 ABCA 68	43
	R v Barton, 2017 ABCA 216	16, 26, 32, 34, 48, 49, 52, 56, 57, 58, 61, 66, 71, 74, 75, 77, 80, 87, 88, 89, 90, 92, 93, 97, 99, 106, 108
	R v Bell, (1998) 126 CCC (3d) 94 (NWTCA)	91
	R v Borden, 2017 NSCA 45	33
	R v Bouchard, 2013 ONCA 791	23
	R v Burback, 2012 ABCA 30	35
	R v Campeau, 2009 SKCA 4	19
	R v CCF, [1997] 3 SCR 1183	79
	R v Chahal, 2018 ABCA 132	20
	R v Cloutier, (1988), 43 CCC (3d) 35 (Ont CA)	53
	R v Cook, 1997 CarswellQue 7 (CA)	53
	R v Daley, 2007 SCC 53	60
	R v DeSousa, [1992] 2 SCR 944	107
	R v Dunham (1949), [1950] 1 DLR 498 (NB SC(AD))	20
	R v Edgar (2000), 142 CCC (3d) 401	53

SECONDARY SOURCES

STATUTORY PROVISIONS

	devant la Cour d'appel de l'Ontario En vigueur: le 1er mars 2017	