In the Court of Appeal of Alberta

Citation: R v Barton, 2017 ABCA 216

Date: 20170630
Docket: 1503-0091-A
Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

Bradley Barton

Respondent

- and -

Women's Legal Education and Action Fund Inc. and Institute for the Advancement of Aboriginal Women

Intervenors

Restriction on Publication

Identification ban – See the *Criminal Code*, s 486.5.
By Court Order, information that may identify the undercover officers must not be published, broadcast, or transmitted in any manner. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information or submissions at the hearing of the application.
NOTE: This judgment is intended to comply with the restriction so that it may be published.

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Sheilah Martin

Reasons for Judgment Reserved of
The Honourable Chief Justice Fraser
The Honourable Mr. Justice Watson
and The Honourable Madam Justice Martin

Appeal from the Acquittal by
The Honourable Mr. Justice R.A. Graesser
Dated the 18th day of March, 2015
(Sitting with a Jury)

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Reasons for Judgment Reserved

I. Introduction

[1] The jury system is probably the most familiar symbol and manifestation of the Rule of Law in this country. It is enshrined in our traditions, values and the words of our foundational law, the Constitution of Canada. The verdict of a jury is the product of the reason and collective human experience of people taken from their busy lives to work together in an unfamiliar, yet vital, enterprise. But juries, consisting of 12 lay persons, cannot properly discharge their duties if the instructions they receive on the law are incorrect, inconsistent or non-existent on key legal issues of decisive significance. Nor is there any reasonable chance for jurors to discharge their duties impartially if trial judges fail to warn them about relying on improper myths and stereotypes when jurors have been implicitly or explicitly invited to do just that. This is especially so in trials involving sexual offences. Despite our society's recognition of individual autonomy and equality, there still remains an undeniable need for judges to ensure that the criminal law is not tainted by pernicious and unfair assumptions, whether about women, Aboriginal people, or sex trade workers. Failing to meet that need can undermine the jurors' ability to apply the law objectively and correctly. Regrettably, in this case, the jury charge was deficient in all these respects.

[2] Bradley Barton (Barton) was charged with first degree murder in the death of Cindy Gladue (Gladue). Gladue was found dead in the bathtub in a hotel room occupied by Barton. She died from blood loss from a perforation more than 11 centimeters long that went completely through, and ran almost the full length of, her vaginal wall.

[3] The Crown's theory was that, on the evening of June 21, 2011, Gladue was incapacitated because of a blood alcohol level of 340 milligrams percent. Barton used a sharp object to cut Gladue's vaginal wall in the early morning hours of June 22.[1] When Gladue began to bleed heavily, Barton carried her to the bathroom and put her into the bathtub. Alternatively, the Crown argued that even if the jury had a reasonable doubt whether Barton cut Gladue's vaginal wall with a sharp object, Barton would nevertheless still be guilty of unlawful act manslaughter on the basis that Barton caused Gladue's death in the course of a sexual assault.

[4] The defence contended that while Barton tore Gladue's vaginal wall and caused her death, this was a non-culpable act of homicide. Barton testified that he and Gladue had engaged in sexual relations on June 20, 2011 and again the night of June 21 before she died in the early hours of June 22. He admitted that he caused Gladue's death. But he claimed this was an "accident" from consensual sexual activity and should not result in criminal liability.

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[1] We refer to June 21 as the night Gladue died since that is when the interactions with Barton began that led to her death on June 22.

[5] A jury found Barton not guilty of first degree murder and not guilty of the lesser included offence of manslaughter. The Crown has appealed the acquittals on several grounds, seeking a new trial on first degree murder. The defence contends there were no reviewable errors and the jury verdict should not be lightly disturbed.

[6] We have determined that the errors of law in the trial and in the jury charge were several in number, serious in scope, and significant in impact. They include erroneous instructions on what use the jury could make of Barton's after the fact conduct; misleading instructions on motive; non-compliance with s 276 of the *Criminal Code* limiting the admissibility of prior sexual conduct evidence; failing to adequately warn the jury about improper reliance on sexual conduct evidence; and providing deficient and internally inconsistent instructions on unlawful act manslaughter, including failing to instruct the jury properly on the law of sexual assault relating to "consent", the "sexual activity in question" and mistaken belief in consent; and failing to instruct the jury properly on dangerousness and manslaughter. These errors of law negatively compromised the jury's ability to properly assess the evidence and apply the law correctly. We are satisfied the errors might reasonably have had a material bearing on the acquittals: ***R v Graveline***, 2006 SCC 16, [2006] 1 SCR 609 [***Graveline***]. Therefore, we allow the appeal, set aside the acquittals and order a new trial on the charge of first degree murder.

[7] This case has exposed the flaws in the legal infrastructure used for instructing juries on sexual offences in Canada. As part of our analysis, we explain why the present content of accepted jury charges contributes to persistent analytical problems in applying the law on sexual offences.

[8] We have also concluded the time has come to push the reset button for jury charges in this country for cases involving an alleged sexual assault. First, there exists an imperative need to align jury charges in use nationally with changes to the law on sexual assault adopted years ago. Key provisions in some jury charges have fossilized concepts Parliament sought to remove a quarter century ago. Second, there is a requirement to ensure that jury charges communicate the present law correctly and effectively to jurors – and to judges who often use jury charges for self-instruction on judge-alone trials. Third, despite efforts to thwart them, myths and stereotypes continue to stalk the halls of justice in cases involving sexual offences, enabled sometimes by inadequate jury charges. Fourth, these persistent presumptions and problematic jury charges reduce the entitlement of individuals to the equal recognition and protection of the law. This inequality falls most heavily on women since sexual assault has been, and continues to be, largely a gender-based crime.[2] The vast majority of victims are female, and the vast majority of perpetrators male.[3]

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[2] ***R v Osolin***, [1993] 4 SCR 595 at 669 [***Osolin***], Cory J ("Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women"); ***R v Ewanchuk***, [1999] 1 SCR 330 at para 68 [***Ewanchuk***], L'Heureux-Dubé J ("Violence against women takes many forms: sexual assault is one of them"). That said, there is no doubt that men too can be, and are, victims of sexual assault and women can be, and are, perpetrators of this crime. The comments made in these Reasons apply with equal force to

[9] The continuation of these problems is an affront to the will of Parliament and to the standards of our mature society committed to equality under the law. Were there no concerns about jurors and others in the justice system continuing to make unfair assumptions based on a complainant's prior sexual history, a rape shield law would not be needed in Canada. But it is. And were there no legitimate public concerns about the handling of sexual assault cases generally, there would be no calls for better education on this topic for all involved in the justice system. But there are. And if jury charges in use nationally warned jurors adequately about improper reliance on myths and stereotypes, there would be no requirement to tackle this issue. But there is. As guardians of all constitutionally protected rights, courts must do what is necessary to rein in what remain clear and present dangers to a fair trial for sexual offences.

[10] We now turn to the reasons for our conclusions. We begin with the factual background relating to the first degree murder charge (Part II). We then outline the grounds of appeal advanced by the Crown (Part III). Next, we set out the standard of review as it relates to jury charges (Part IV). We then deal with the errors in the jury charge on Barton's after the fact conduct and what ought to have been included in the jury instructions on this issue (Part V). That takes us to the problematic jury instructions on motive (Part VI). We then explore the errors in failing to comply with the requirements of s 276 of the *Code* regarding prior sexual conduct evidence and the consequences of that failure (Part VII). In the next part, we explore in further detail the reasons for reforming jury instructions and include draft jury instructions about invalid myths and stereotypes and prior sexual conduct for consideration (Part VIII).

[11] We next review errors in the charge on unlawful act manslaughter beginning with the errors in the instructions on "consent", "sexual activity in question", and mistaken belief in consent. That then takes us to other concerns with the jury instructions including the manner in which both the *mens rea* for sexual assault and "reasonable steps" were dealt with. As part of this analysis, we also explore certain problems with pattern jury instructions on some of these issues and set out draft instructions for consideration. In this part, we also identify errors in the jury instructions on dangerousness and manslaughter (Part IX). Finally, we note the unresolved issue of whether apparent consent – where the complainant consented or her conduct raised a reasonable

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complainants who are male and accuseds who are female.

[3] As stated by Janine Benedet in "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013) 18:2 Rev Const Stud 161 at 165 [Benedet, "Marital Rape"]: "There can be no doubt that crimes of sexual violence are gendered. In Canada in 2011, women were eleven times more likely than men to be sexually victimized, and 8 in 10 victims of police-reported intimate partner violence were women. In 2009, 92% of victims aged 15 years and older of sexual offences (including sexual assault, sexual exploitation, and incest) were women. In 99% of incidents of sexual violence against women, the accused perpetrator was male". Sexual assault is a prevalent, often under-reported crime: ***R v Seaboyer; R v Gayme***, [1991] 2 SCR 577 at 648-649 [***Seaboyer***], per L'Heureux-Dubé J.

doubt about the lack of consent – should be vitiated as a matter of public policy where death is caused by sexual activity involving a dangerous act (Part X).[4] The conclusion follows (Part XI).

II. Trial Evidence

A. Barton's Testimony About How Gladue Was Injured

[12] Barton was the sole witness to the circumstances of Gladue's death.

[13] He testified that on June 21, 2011, the night Gladue died, they agreed to meet at a hotel bar in Edmonton. Barton and work colleagues Kevin Atkins and Rick Wessles were staying at the hotel as part of a moving job. Barton and Atkins were drinking in the bar when Gladue arrived. All stayed until closing time. Barton said that on the prior night, June 20, 2011, he had agreed to pay Gladue $60.00 for "Everything" which he defined as "Intercourse, sex".[5] He did not testify to any such conversation on June 21, 2011. He said only that he and Gladue agreed to the same price and he believed she knew what she was coming for. The hotel video shows all three walking down the hall at 12:42 a.m. on the early morning of June 22. Gladue's gait is uneven; she appears to grab towards a wall and lean on Barton at various times. At some point, referring to Gladue, Barton asked Atkins "do you want a piece?"[6] Atkins declined. Gladue and Barton went into Barton's hotel room alone.

[14] According to Barton, they each had a beer, Gladue then took her clothes off in the bathroom, and he hid his wallet under the mattress. Gladue came out of the bathroom and sat naked on the edge of the bed. Barton described how he placed fingers from his left hand into Gladue's vagina. He said his left hand, formed into a conical shape, penetrated her about a centimeter or two past his knuckles and he "thrust" for about ten minutes. He said he was standing and she was seated on the corner of the bed, and she never laid on the bed. As he was thrusting his hand into her vagina, she was performing oral sex on him.

[15] Barton said that when he withdrew his hand from her vagina, he noticed blood. He asked her whether she was having her period and he claimed she replied "Maybe I am".[7] Barton then

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[4] In determining the circumstances that may vitiate "apparent consent", the Supreme Court used that phrase to cover cases where the complainant consented or her conduct raised a reasonable doubt about the lack of consent: ***R v Hutchinson***, 2014 SCC 19 at para 4, [2014] 1 SCR 346 [***Hutchinson***]. We use "apparent consent" in these Reasons in the same context as did the Supreme Court, namely to cover both categories of cases.

[5] Appeal Record (AR) 1103/26-30.

[6] AR 1120/22.

[7] AR 1128/30-35.

decided that he did not want to have intercourse with her, refused to pay her, and told her to wash up and leave. He testified he went into the washroom first to clean his hands. When he returned to the room, he said Gladue was sitting on the bed. He claimed she then went into the bathroom, at which point he said he got into bed and promptly fell asleep with Gladue still in the bathroom. He denied carrying her into the bathtub. He said that when he woke up in the morning, he found Gladue in his bathroom tub. She did not appear to be moving.

B. Physical Evidence Relating to Barton

[16] Barton is 6'1", weighed 220 pounds at the time of these events, was employed as a mover and admitted his work was very physical and required strength. Exhibits at trial capture both the size and shape of the hand he claims he inserted into Gladue's vagina. The Exhibits demonstrate that Barton has a large left hand. Measured from the Exhibits, from the tip of his middle finger to the one centimeter beyond his knuckle that he claims to have inserted into Gladue appears to be approximately 14 centimeters (about 5½ inches) in length. Even in the conical shape he alleges he used, the widest part, at his knuckles, measured approximately 11 centimeters (about 4¼ inches) across. In these Reasons, the reference to Barton's "hand" means 5½ inches of his hand in length including his 4¼ inch wide knuckles and all five of his fingers formed into a conical shape. These measurements do not include the circumference of Barton's hand.

C. Barton's After the Fact Conduct

[17] The evidence of Barton's conduct after he claimed to have found Gladue on the morning of June 22 comes from various sources: Barton himself; available video camera footage; Barton's cell phone records; physical evidence found by the police; and the testimony of numerous individuals. They included friends and co-workers, Atkins and John Sullivan; the desk clerk and maintenance worker; two police officers who were among the first officers on the scene; and an undercover police officer who rode in a van with Barton and had a recorded conversation with him.

[18] According to Barton, he woke up between 7:20 and 7:25 a.m., got out of bed, and went into the bathroom. He saw a great deal of blood and noticed Gladue immobile in the bathtub. He stepped in the blood, panicked, grabbed a towel, wet the towel, and wiped up blood from his feet and part of the floor. He denied using the toilet at any time.

[19] Barton testified that he then got dressed quickly in his work clothing, grabbed his wallet from under the mattress, packed his bag and "just got right out of the hotel room".[8] He said he left the hotel through the northeast door, which led directly to a parking lot where his moving van was parked. Barton admitted that he took the towel that he used to wipe up the blood and threw it into an outside garbage can in the far corner of the parking lot. The police found this towel and confirmed it contained blood and DNA from Gladue.

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[8] AR 1131/13.

[20] Barton went to his moving van, threw his duffle bag inside the van, and went back to the hotel. The videos show, and the hotel clerk confirmed, that at 7:43 a.m., Barton checked out and handed in his room key card. Barton left the hotel, got into his van, and started the engine. He spoke with Atkins and Wessles, arranging for them to go to the job site.

[21] Barton then called and waited for Sullivan. Sullivan found Barton in the driver's seat of the van with the motor running. When Sullivan asked if they were going to have a good day, Barton replied something like "not until the police come".[9] Barton told Sullivan there was a woman in his room bleeding. He claimed he did not know her, she had showed up at his hotel door the night before and asked to take a shower, and he let her in. Sullivan testified he told Barton to call 911 and he would take care of the moving job. Barton and Sullivan talked for four or five minutes before Barton went back to the hotel. Sullivan drove the van to the worksite with Barton's duffle bag in it.

[22] The video shows that at 7:51 a.m., Barton was at the lobby doors of the front entrance. At 7:56 a.m., he appeared in the hallway with a coffee cup in his hand. The hotel clerk testified that Barton asked for a new key card to his room because he claimed he had forgotten some papers in it. At 7:58 a.m., Barton is seen with a key card in his hand walking back towards his room. Barton entered and dialed 911 using the hotel phone at 8:03 a.m. An emergency alarm went off at the front desk indicating a 911 call was being made from one of the hotel rooms. The hotel clerk sent the maintenance worker to check on Barton's room.

[23] When Barton called 911, he asked for the police. The audio recording and transcript of that call was played and entered as an exhibit at trial. Barton told the 911 operator that a woman he did not know came to his room, knocked on his door at about 10:30 p.m. the night before and wanted to use his shower. He went to bed and woke up the next day to find her dead in his bathtub. Among other statements, Barton told the 911 operator that he was physically shaking.

[24] The first two police officers arrived at the hotel at 8:08 a.m. They were followed shortly by two more police officers, Constables Jeff Sliwa and Cameron Jones, who eventually brought Barton to Edmonton Police Services headquarters. The police saw Barton sitting on the bed and talking on the phone to the 911 operator. Barton told Constable Jones that he first saw Gladue having a smoke outside the hotel and added "I didn't do anything. I'm married, and I don't do this stuff."[10]

[25] The police took photographs and swabs from various surfaces and articles. At that time, the police believed they were investigating a fatality, not a homicide. It was not until June 23, 2011,

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[9] AR 25/17-18.

[10] AR 342/13-14.

when the autopsy was performed and it was discovered that Gladue's vaginal wall had been perforated, that the nature of the investigation changed.

[26] An undercover detective rode in a prisoner security van with Barton. The detective's conversation with Barton was recorded and played in full at trial. During that ride, Barton initiated the conversation and denied any involvement with Gladue's death. His account of what happened differed completely from his evidence at trial.

D. The Forensic Evidence

[27] The forensic evidence included an autopsy conducted by Dr. Graeme Dowling and his opinion, the opinions of Dr. Catherine Carter-Snell, Constable Nancy Allen on blood splatter evidence, Dr. Graham Jones on toxicology evidence, a DNA analysis, police photographs, the testimony of police officers and other evidence admitted by consent. The defence presented the expert evidence of Dr. Janice Ophoven.

[28] Gladue was 36 years old, 5'5" and weighed 110 pounds. There was no dispute that Gladue suffered a catastrophic injury, involving the total perforation of her vaginal wall, and that she died as a result of blood loss. There was a large gaping hole over 11 centimeters (4 inches) long, which passed completely through her vaginal wall and ran almost the full length of her vagina. There was also agreement that Gladue suffered other less serious injuries too, including on her labia and bruising between her anus and vagina.

[29] Expert evidence was divided about the nature and cause of the fatal wound Barton inflicted. The Crown's two experts said the perforation was a cut caused by a sharp instrument. The defence expert said the perforation was a laceration, not a cut, and it was the result of blunt force trauma.

[30] Dr. Dowling, a Crown expert in forensic pathology, conducted the autopsy on Gladue on June 23, 2011. Dr. Dowling noticed bleeding on the right side of the pelvis. He testified that, as he was trying to find out where the blood was coming from, "I suddenly saw something which you shouldn't see when you're looking from above and down into the pelvis. I saw the wall of the vagina".[11]

[31] Dr. Dowling explained the difference between blunt injuries/lacerations and sharp injuries/cuts.[12] Dr. Dowling concluded Gladue died of a perforating sharp injury of the vagina.[13]

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[11] AR 769/13-15.

[12] A laceration generally results from crushing force that crushes tissues causing the skin to split. The edges of lacerations are generally scraped because of the crushing force. When looking into the depths of a laceration, bridging can be seen. Bridges are little tiny blood vessels, bits of fat and strings of tissue not broken by the force of impact. But

He confirmed that if it was a sharp injury, as in a cut, not a great deal of force would have been required to inflict the damage done. But if it was a blunt trauma, then "considerable" or "excessive force" would have been required.[14] Dr. Dowling described "considerable force" as being enough force that an "independent person would say, you know, you are going to hurt that person".[15]

[32] Perforation from blunt trauma would be painful and result in bleeding relatively quickly. He testified that if it was a fast bleed, death due to blood loss would take at least several minutes during which there would have been different stages. First, the victim would have moved from being conscious to being unable to move and speak or cry out. Next, she would have fallen into unconsciousness, and last, she would have been in irreversible shock.[16] If a slow bleed, then it might take hours for the victim to die.[17]

[33] Dr. Dowling found no evidence of menstruation.

[34] Given the results of Dr. Dowling's autopsy, Gladue's death became a homicide investigation. Because it was such a highly unusual injury, Dr. Dowling preserved Gladue's vagina.

[35] The second Crown expert, Dr. Carter-Snell, was qualified as an expert in forensic assessment of patients who were sexually assaulted. Her opinion, based on photographs, was that the injury to Gladue was a cut caused by a sharp instrument.

[36] Dr. Ophoven testified as a defence expert in forensic pathology. Her opinion was based on her review of the autopsy report, photos, police reports, witness statements, investigative materials and additional materials pertaining to opinions. Dr. Ophoven inspected Gladue's preserved genitalia. She testified that she thought the superficial wound on the labia was a laceration, a "[p]retty classic tear".[18] Dr. Ophoven admitted that she was aware of Barton's version of events

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with a sharp injury/cut, scraping at the edges of the wound tends not to be seen and, generally, bridges are not seen.

[13] Dr. Dowling noted the edges of the wound had no bruising, no scraping and only at the lower end of the wound could he find bridges. The rest had a clean appearance that to him suggested a sharp, rather than blunt, injury.

[14] AR 788/2, 8; 789/23-24.

[15] AR 788/16-17.

[16] AR 832/15-38; 833/10-21.

[17] AR 786/34-787/5.

[18] AR 1367/38-39. Of the major wound, she thought the tears occurred irregularly through the vaginal wall. She was of the view the tissue bridges indicated a laceration because some tissue had not come apart and some had. As well, she noted hemorrhaging into the tissue and hematoma or bruising all around the laceration. She did not think the

prior to forming her opinion. She stated Gladue's injury could have been caused by Barton placing his hand in a conical shape a centimeter or two past his knuckles into Gladue's vagina.[19] She also thought placing his hand into Gladue's vagina the day before could have impacted her vaginal wall strength on the following day.

[37] Neither forensic pathologist claimed extensive direct experience with injuries or deaths caused by manual perforation of a vagina, but both were familiar with the literature.

E. The Blood Evidence

[38] Constable Nancy Allen was qualified by consent to give opinion evidence on bloodstain pattern analysis. Gladue was found lying on her back in the bathtub of Barton's hotel bathroom. Constable Allen examined the blood patterns within the bathtub, on its edges, and on the water taps and concluded they were consistent with Gladue repeatedly moving within the bathtub while actively bleeding. Constable Allen also found evidence that the bedding had been re-arranged and there were cleanup activities in respect of both the bedding and the bathroom.

[39] When the police entered the hotel room, the bedspread was crumpled on the floor beside the bed. Dr. Dowling testified that the perforation of Gladue's vagina would have resulted in heavy bleeding, and there was heavy bleeding on the bedspread. Constable Allen concluded the bedspread had been in another position when the accumulation of blood made contact with the surface of the bedspread. A beige coloured blanket was also found on top of the bed, and there were transfer and saturation stains near the center of the bed. Constable Allen concluded those stains were consistent with liquid blood coming into contact with those surfaces, and that such blood could have soaked through from the bedspread.[20] Diluted bloodstains were observed on the lower half of the bed sheet, which remained on the bed below the beige blanket.[21] She also observed altered stains by dilution on the west pillowcase. The east pillowcase had a transfer stain, with liquid blood making contact with the pillowcase. Barton denied that Gladue ever laid on the bed and said she only sat on its northeast corner.

[40] In addition to dilution stains on the bedding, Constable Allen pointed to three areas in the bathroom that were "consistent with clean-up activity": the flooring near the bathtub; the front vertical surface of the bathtub; and the front vertical surface of the toilet bowl below the toilet

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absence of abrasions was decisive. The wound was irregular with microtears along the surface edges, bridging and bruising.

[19] AR 1390/36-1391/7.

[20] AR 463/38 - 464/7.

[21] Diluted bloodstains means there has been alteration and dilution with another liquid.

seat.[22] Barton stated he only wiped the floor where he stepped and specifically denied wiping the side of the bathtub or the toilet.

[41] Constable Allen found that while the carpet was a dark colour, there did not appear to be blood spatter evidence on the carpet between where Barton said Gladue was sitting on the corner of the bed and the bathroom. The Crown theory was that because of the absence of blood in the area where Gladue would have been required to walk to enter the bathroom, Barton carried Gladue into the bathtub. As well, a woman in the adjacent room said that at about 2:00 a.m., she heard what she thought was a loud thud from the room next door.

F. The Toxicology Evidence

[42] Dr. Jones testified that at the time of her death, Gladue's blood alcohol level was 340 milligrams per hundred millilitres of blood, more than four times the legal limit. He indicated that even a person tolerant of alcohol would be impaired and would show some signs of impairment.

G. Further Physical Evidence

[43] Officers who investigated the scene examined the garbage in the room and looked in some garbage containers outside the hotel. They collected the bedding, clothing and personal belongings. In one of the exterior bins, they found a hand towel with small red stains. The hand towel appeared to have been wet and then air dried. They did not find a knife or sharp instrument.

[44] Only after the autopsy on June 23, 2011, when Dr. Dowling concluded that Gladue had been fatally injured with a sharp object, did police return to the hotel to search for a weapon. Police searched the hotel garbage containers and the area behind the hotel (in the parking lot and in a grassy area near the train tracks). The search was not very thorough. Because the grass went up to one's knees, according to one of the police officers, it was like looking for a needle in a haystack.[23]

III. Grounds of Appeal

[45] The Crown submitted the trial judge erred in law in:

1. the instructions to the jury with respect to motive;

2. making a ruling under s 276 of the *Code* without any application and without a hearing on the issue;

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[22] AR 471/38-39.

[23] AR 421/6-11.

3. the instructions to the jury with respect to manslaughter; and

4. instructing the jury that Gladue's consent on a previous occasion could be used to support a finding of honest but mistaken belief in consent by Barton on the night Gladue died.

[46] During the oral hearing, the Court also raised the question of potential error in the instructions to the jury on after the fact conduct. Counsel properly and ably addressed that topic.[24]

[47] In the course of this appeal, other concerns arose about the jury instructions on "accident", reasonable steps and vitiation of consent. None were advanced as free-standing grounds of appeal. In light of ***R v Mian***, 2014 SCC 54, [2014] 2 SCR 689 [***Mian***], and since this is a Crown appeal, we are not entitled to treat these as independent grounds of appeal or decide this appeal to Barton's disadvantage on these issues. We have not done so. Nonetheless, since we are ordering a new trial on other grounds, we make some observations on identified errors to ensure they will not be repeated. Where issues remain open for determination, they will be determined as considered appropriate by the new trial judge. Our comments on issues in this latter category are *obiter* only.

IV. Standard of Review

[48] The law in Canada has moved away from a patronizing view that jurors will not understand or apply the law correctly unless it is given to them in rigid formulae. The substance of the charge is more important than its adherence to or departure from prescriptive formulas: ***R v Daley***, 2007 SCC 53 at para 30, [2007] 3 SCR 523 [***Daley***].[25] The law demands properly, not perfectly, instructed juries: ***R v Jacquard***, [1997] 1 SCR 314 at para 62 [***Jacquard***]; ***R v Araya***, 2015 SCC 11 at para 39, [2015] 1 SCR 581.Thus, the Supreme Court of Canada has repeatedly endorsed a functional approach to appellate review of a trial judge's jury charge: ***R v Mack***, 2014 SCC 58 at para 49, [2014] 3 SCR 3. Errors must be examined "in the context of the entire charge and of the trial as a whole": ***R v Jaw***, 2009 SCC 42 at para 32, [2009] 3 SCR 26 [***Jaw***].

[49] Moreover, over the past 30 years, the law has also moved to a more inclusionary policy on the law of criminal evidence and procedure: ***R v Corbett***, [1988] 1 SCR 670 [***Corbett***]. In the interest of adjudicative fairness and the search for the truth, the courts have opted for more flexible

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[24] The Court gave both Crown and defence an opportunity to submit further materials in writing on after the fact conduct. None were submitted.

[25] As stated by the Supreme Court at para 30: "The cardinal rule is 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."

and justice-focused discretion for trial judges. This evolution has imposed a commensurate duty on trial judges to take proactive steps to avoid misuses and abuses of evidence and procedure. It is called gatekeeping for a reason. Our centuries old confidence in the jury system rests on juries understanding and applying the principles of law faithfully. They will do so provided they are properly instructed. But since they lack the "lens of judicial experience", jurors need to be helped to think like the judges they are, and avoid forbidden reasoning and distractions.

[50] A jury acquittal will not be overturned lightly: ***R v Sutton***, 2000 SCC 50 at para 2, [2000] 2 SCR 595. However, under s 676(1)(a) of the *Code*, the Crown may appeal an acquittal on a question of law. Misdirection or non-direction in a jury charge is a question of law, subject to a standard of correctness: ***R v Elder***, 2015 ABCA 126 at para 12, 599 AR 385. A trial judge is required to "set out in plain and understandable terms the law the jury must apply when assessing the facts": ***Daley***, *supra* at para 32. That includes instructing the jury on all avenues to conviction which arise from the evidence irrespective of both the Crown and defence positions: ***R v Pickton***, 2010 SCC 32 at para 19, [2010] 2 SCR 198 [***Pickton***].

[51] A trial judge also has a general duty to explain the critical evidence and assist the jury in linking that evidence to the issues it must consider in reaching a verdict: ***R v Rodgerson***, 2015 SCC 38 at para 30, [2015] 2 SCR 760 [***Rodgerson***]. The main objectives are to decant and simplify the instructions and make the charge case-specific, permitting the jurors to focus on the triable issues: ***Jacquard***, *supra* at para 13. A jury charge may be so unnecessarily confusing that it constitutes an error of law: ***R v Hebert***, [1996] 2 SCR 272 at para 8.

[52] To obtain a new trial, the Crown must satisfy the appellate court that the errors might reasonably be thought to have had a material bearing on the acquittal: ***Graveline***, *supra* at paras 14, 16.

[53] In this case, the trial judge consulted counsel about the instructions to the jury, and all versions of the charge were submitted as part of the record. Counsel have an obligation to assist the trial judge in composing the charge: ***R v Karaibrahimovic***, 2002 ABCA 102 at paras 48-49, 164 CCC (3d) 431; ***R v Cudjoe***, 2009 ONCA 543 at para 155, 68 CR (6th) 86; ***R v Allen***, 2009 ABCA 341 at paras 62-64, 249 CCC (3d) 296 [***Allen***], aff'd 2010 SCC 42, [2010] 2 SCR 648; ***R v Lilgert***, 2014 BCCA 493 at para 37, 318 CCC (3d) 30. But the ultimate responsibility for the content of the jury charge rests with the trial judge: ***Pickton***, *supra* at para 27. Thus, it is the final instructions that the trial judge provided to the jury that are the focus of this Court's inquiry.

V. Errors in Jury Charge on Barton's After the Fact Conduct

A. Introduction

[54] "After the fact conduct" or, as it is sometimes called "post offence conduct", refers to anything said or done by an accused after the commission of the offence alleged. It includes a vast array of words and conduct. In his charge to the jury, the trial judge defined this category of evidence as "things that Mr. Barton is alleged to have said or done after the incident charged in the indictment".[26]

[55] Both Crown and defence acknowledged at the hearing of this appeal that the trial judge erred in law in his treatment of this nuanced subject. But counsel disagreed about the significance of that error.

[56] We have concluded that the admitted error had a material bearing on the acquittals. To explain our conclusions, we first provide an overview of certain aspects of the law on after the fact conduct and then explain the errors in the charge and their significance.

B. Overview of the Law on After the Fact Conduct

[57] "After the fact conduct" or "post offence conduct" – which includes actions and words – is a form of circumstantial evidence. The trier of fact is attempting to draw inferences about what occurred at the time of the alleged crime by reference to what happened afterward.[27] Since after the fact conduct is once removed from the events, drawing inferences based on that conduct may be more difficult than doing so from an accused's words and actions at the time of the offence.

[58] Nevertheless, while special limiting instructions may sometimes be necessary, this evidence is presumptively admissible: ***R v White***, 2011 SCC 13, [2011] 1 SCR 433 at para 18 [***White (2011)***]. Hence, the trial judge, as the evidentiary gatekeeper, must determine the relevance and purpose for which the proposed evidence is tendered: ***White (2011)***, *supra* at para 22. It is an error of law for the trial judge to fail to assist the jury in understanding the relevance of specific after the fact conduct to live issues in a trial. Most important, the trial judge should outline to the jury the reasonable inferences they may draw from after the fact conduct and ensure that unreasonable inferences are not put to the jury: ***White (2011)***, *supra* at para 167.

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[26] AR 1742/9-10.

[27] As stated in ***R v Peavoy*** (1997), 34 OR (3d) 620 (CA) at 629: "Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person."

[59] After the fact conduct may support certain inferences, including that (1) the defendant did not act lawfully (unlawful conduct or culpable act – consciousness of guilt); and (2) the defendant should or should not be believed (credibility): Faisal Mirza, *Criminal Jury Charge Practice* (Markham: LexisNexis, 2015) at 111-112.

[60] It is up to the jury as the trier of fact, not the judge, to decide whether to draw an inference or which one: ***White (2011)***, *supra* at para 137; ***R v Campbell***, 2015 ABCA 70, 599 AR 142. The jurors are to be told that they are entitled to consider after the fact conduct in the context of all the evidence, including the evidence related to the lethal harm inflicted on the victim and what happened to the victim following that assault: ***Rodgerson***, *supra* at paras 22-23. After the fact conduct is to be assessed in context with common sense as to its implications. Accordingly, jurors should also understand that it is open to them to infer that where the after the fact conduct "is out of all proportion to the level of culpability admitted, it might be found to be more consistent with the offence charged": ***R v White***, [1998] 2 SCR 72 at para 32 [***White (1998)***].

[61] Finally, the jury is entitled to find that the after the fact conduct touches on the credibility and reliability of the defence version of the narrative, particularly whether that narrative makes any sense. In assessing the accused's after the fact conduct, the jury determines whether that conduct is related to the commission of the offence as opposed to being explicable by reference to something else, and the weight to ascribe to it in reaching a verdict. The trial judge must leave reasonable inferences to the jury. Unfortunately, that did not happen in this case.

C. Analysis of the Jury Charge on After the Fact Conduct

[62] The key issues arising from Barton's after the fact conduct are whether he was aware he had committed an unlawful act (consciousness of guilt) and his credibility. The trial judge erred in the jury instructions on both issues.

1. Misdirection on Consciousness of Guilt

[63] The Crown and defence agreed that the trial judge erred in telling the jury first:

> 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 accident.[28]

and then in restating the proposition in similar language at the end of the charge on this topic:

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[28] AR 1742/29-31.

> This evidence *might only be used* to draw an inference relating to Gladue's injuries being *accidental* [Emphasis added].[29]

[64] Four interrelated errors arose from these misstatements of law.

[65] First, this wording led the jury to believe that this evidence was not logically and legally capable of supporting an inference that Barton was demonstrating consciousness of guilt. But after the fact conduct can constitute evidence of guilt: ***White (2011)***, *supra* at paras 17-22. This one-sided instruction improperly restricted the jurors' fact-finding role. It left them with the mistaken impression they could only use this evidence in relation to Barton's claim that Gladue's injuries were accidental and even then, it was not clear how this evidence related to any claim of "accident".[30] Indeed, the trial judge told the jurors – twice – that they could *not* use Barton's after the fact conduct to infer guilt.

[66] However, the other inference was that Barton's after the fact acts and statements, or any combination thereof, demonstrated consciousness of guilt. Conduct is not assessed in a freeze frame manner. That conduct included Barton's cleaning up the scene, disposing of the bloody towel that would have contained his DNA and Gladue's blood in the garbage bin outside the hotel, leaving the hotel, getting into a running van and only returning later to the hotel room, and lying to six different people about key facts. These actions fall into several recognized types of relevant after the fact conduct: destruction of evidence; concealing of evidence; erasing a link to the scene; and concoction and fabrication of lies. Consequently, Barton's after the fact actions, including his admitted lies, were capable of supporting the inference that he knew that he had at least committed a culpable act: ***Rodgerson***, *supra* at para 20; ***R v Figueroa***, 2008 ONCA 106 at para 34, 233 OAC 176; ***R v Jones*** (2006), 214 OAC 225 at paras 5-8, 211 CCC (3d) 4 (CA). And yet, this reasonable inference was effectively removed from the jury.

[67] Second, by taking this inference away from the jury, the trial judge usurped the jury's role. The defence argued that Barton's conduct – concealment, flight, and lies – could support the inference that Barton was scared, not because he killed anyone or committed a crime, but because he was found with a dead woman in his bathtub and wanted to hide from his wife and employer that he had sex with another woman. However, the Crown argued that this evidence could also support the inference that Barton was aware he had committed a culpable act, particularly given the nature and extent of his after the fact conduct. In this regard, it was open to the trial judge to instruct the jury that they could consider whether Barton's after the fact conduct was out of all proportion to his stated rationale for a cover up. It was for the jury to weigh the evidence and determine which, if either, inference to accept.

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[29] AR 1743/18-19.

[30] We address the "defence" of "accident" later in these Reasons.

[68] Third, by instructing the jury that they could not infer guilt from Barton's after the fact conduct, the trial judge contradicted other accurate portions of the charge that the jury may infer guilt in certain circumstances. This undoubtedly further confused the jury.

[69] Fourth, by restricting the relevance of Barton's after the fact conduct to whether or not Gladue's death was an "accident", the trial judge failed to point out that such conduct could go to the overall credibility of Barton's testimony as to what happened. It is to that topic we now turn.

2. Non-Direction on Barton's After the Fact Conduct and Credibility

[70] The Supreme Court has repeatedly confirmed that an accused's after the fact conduct may be used to undermine or impugn the accused's credibility: ***White (1998)***, *supra* at para 26; ***Jaw***, *supra* at para 39. Appellate courts too have consistently recognized that this is a permissible use of after the fact conduct: ***Allen*** at para 97; ***R v Head***, 2014 MBCA 59 at para 49, 306 Man R (2d) 186; ***R v Feil***, 2012 BCCA 110 at para 63, 282 CCC (3d) 289.

[71] However, the trial judge failed to inform this jury that they could use Barton's after the fact conduct, including admitted lies, in assessing his credibility. This fatal flaw cuts right to the heart of this case. Barton's credibility was very much at issue since he was the only person in a position to describe not only what he claimed happened the night Gladue died but also what he claimed happened the night before. The Crown's major premise was that Barton lied about what he did with – and to – Gladue. The Crown's closing argument emphasized how often Barton made false statements and the frequency and ease with which he admitted fabricating untruths. The Crown claimed Barton's evidence was not credible or reliable, based in part on what it asserted was other more reliable evidence, including the forensic and blood evidence.

[72] Had the jury been properly instructed, many of Barton's after the fact actions and statements might have impacted the jury's assessment of his honesty, trustworthiness and believability. That included lies to Sullivan; the hotel clerk; the 911 operator; the initial investigating officer; Constable Jones, Atkins; and an undercover officer. It also included actions such as Barton's recorded 911 call in which he described both his mental and physical state, telling the operator he was "scared shitless" and "shaking like crazy". It was open to the jury to compare this description to the contradictory testimony of other independent witnesses who saw Barton on the phone to the 911 operator or shortly thereafter. As the ultimate finders of fact, the jurors were entitled to decide whether Barton's after the fact conduct had implications for his overall credibility. But they did not know that. Indeed, they were effectively told the exact opposite.

[73] The trial judge properly instructed the jurors that they may believe all, none or part of Barton's evidence. The trial judge also provided the jury with Barton's justifications for acting and speaking as he did. However, the jurors were never instructed – as they should have been – that Barton's after the fact conduct could bear on his credibility, whether or not they also found it showed a consciousness of guilt. The jurors were also not instructed – as they should have been –

that they could take Barton's admitted lies into account when determining whether they believed any part of Barton's testimony. Further, the jury instructions never mentioned – as they should have done – that Barton admitted to making various statements, then admitted they were false and that he had lied in them. These key omissions were not remedied in any other part of the charge. Indeed, the jury instructions referred repeatedly – and wrongly – to Barton's testimony as given, implying that the jury should evaluate critical legal issues based solely on what Barton testified happened. This too was an error of law.[31] The jurors should have been instructed that they were entitled to decide what inferences were likely based on evidence they found as fact.

D. Conclusion

[74] In the result, the jury charge on after the fact conduct was inaccurate, incomplete, inconsistent and, in the end, incomprehensible.

[75] For the reasons noted, the Crown has satisfied its burden to demonstrate that the failure to properly instruct the jury on the use of after the fact conduct might reasonably have had a material bearing on the acquittals: ***Graveline***; ***Vézeau v The Queen***, [1977] 2 SCR 277. We are of the view that a new trial on first degree murder is justified on this ground alone.

VI. Instructions on Motive

[76] Motive concerns the ulterior motivation of a person in committing an offence.[32] That can include not only an objective the perpetrator seeks to achieve but also *animus* towards a person or category of persons. Whether to refer to motive in the jury charge falls within the general discretion of the trial judge: ***Lewis v The Queen***, [1979] 2 SCR 821 at 833-837.

[77] While evidence of a motive is usually admissible, the Crown is not required to prove the existence of a motive as a matter of law. There are two principal reasons for this. First, many who perpetrate criminal acts do not have a specific motive for doing so. As stated in ***R v O'Grady***, 1999 BCCA 189 at para 17, 120 BCAC 129: "[t]o deny motive in an apparently motiveless crime simply does not lead anywhere". Second, Parliament defines crimes on the basis of the relevant *actus reus* and *mens rea*, and rarely makes motive an essential ingredient to an offence. Motive is not a statutory element of the crimes alleged in this case, being murder or unlawful act manslaughter, or

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[31] We address this issue in more detail later in these Reasons.

[32] As circumstantial evidence, motive evidence generally involves a reasoning bridge of propensity. Like other evidence, it is subject to the weighing of probative force versus prejudicial effect. The nature of the evidence said to show motive may well be prejudicial: see ***R v Handy***, 2002 SCC 56, [2002] 2 SCR 908; ***R v Hart***, 2014 SCC 52 at paras 73-74, [2014] 2 SCR 544.

the alleged underlying offence, sexual assault: ***R v Lutoslawski***, 2010 ONCA 207 at para 36, 258 CCC (3d) 1.[33]

[78] The Crown led no evidence of Barton's motive in doing what he did and the trial judge rejected defence counsel's argument that there was a proved absence of motive. Nevertheless, the judge instructed the jury on motive. The Crown contends the trial judge should not have done so.

[79] Reading the charge as a whole, we have concluded that the overall effect of the trial judge's charging the jury on motive left this jury with the erroneous impression that the Crown's case was deficient because the Crown had failed to prove a motive. The jury would likely have placed undue emphasis on the need for the Crown to prove motive. While they were told, in one sentence, that the Crown did not carry that burden, they were also told that the Crown had introduced no evidence of motive. More significant, 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.[34] In particular, the trial judge instructed the jury:

> If you conclude that Bradley Barton had no motive to commit a particular offence, it would be an important fact for you to consider. It is a factor that might support Mr. Barton's denial of guilt and raise a reasonable doubt that the Crown has proven its case.[35]

[80] This jury did not need assistance on motive, either in this form or at all, to arrive at a just conclusion. In addition, the trial judge focussed the jury on "motive to commit a particular offence" and spoke of the defence submission that Barton had no "motive to kill Cindy Gladue".[36] With this narrow focus, the jury would likely have concluded that proving that Barton had an *advance* motive to *kill* Gladue was a necessary part of the Crown's making its case, when it was not. Further, the jury was never told how lack of motive could raise a reasonable doubt that the Crown had proven its case – and for what part of which offence.

[81] In addition, the jury was not told how a more generalized purpose or attitude could qualify as motive. 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. Directions on that form of *animus* might have been relevant to what inferences a jury could

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[33] "Sexual assault does not require proof of an improper or ulterior purpose." The Supreme Court upheld this decision in brief reasons: 2010 SCC 49, [2010] 3 SCR 60. See also ***R v GB***, 2009 BCCA 88, 244 CCC (3d) 185.

[34] AR 1740/33-34.

[35] AR 1741/2-5.

[36] AR 1741/2; 1741/12.

reasonably draw from it. Had it been appropriate to charge on motive – which, in our view, it was not – a balanced approach to this issue would have been required. The potential significance of the context here could not simply be ignored. That includes the high risk of physical violence for sex trade workers. This was a foundational basis for the Supreme Court's striking down certain prostitution-related provisions of the *Code*: ***Canada (Attorney General) v Bedford***, 2013 SCC 72 at para 88, [2013] 3 SCR 1101 [***Bedford***].[37] We are not deciding that instructions to this effect should have been given. We refer to this to underscore that what *was* said about motive was not only erroneous but unbalanced.

[82] Moreover, the instructions on motive were part of a larger whole that contained serious legal errors. While Barton denied the *mens rea* for any unlawful act, the trial judge's instructions on this point were incomplete. For example, the trial judge failed to inform the jury that sexual assault could be based on any one of knowledge, wilful blindness or recklessness, or that manslaughter required only objective foreseeability of the risk of bodily harm. Any charge on motive takes on an even greater significance when combined with serious omissions about how the Crown could establish the *mens rea* of sexual assault or manslaughter.

[83] As a result, the trial judge's instructions on motive helped create an unfair imbalance in the overall instructions. Juries are presumed to follow the instructions they are given about the law: ***Corbett***, *supra*; ***R v Griffin***, 2009 SCC 28 at paras 72-73, [2009] 2 SCR 42; ***R v SB***, 2016 NLCA 20 at para 108, 336 CCC (3d) 38, per Green CJNL in dissent [***SB***], aff'd 2017 SCC 16, [2017] SCJ No 16 (QL). The jurors would likely have placed undue emphasis on the Crown's failure to prove motive, not just because the judge chose to charge on this topic in a one-sided manner, but because they were left unaware of how the Crown could make its case.

[84] Accordingly, for these reasons, the erroneous instructions on motive satisfy the test in ***Graveline***. This error affected both the charge of murder and the included offence of manslaughter.[38]

VII. Failure to Conduct Admissibility Hearing on Prior Sexual Conduct

A. Introduction

[85] In the Crown's opening statement, Gladue was described as "a prostitute" who struck up a working relationship with Barton. Barton testified at trial that he and Gladue engaged in sexual

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[37] As found by Himel J in ***Bedford v Canada***, 2010 ONSC 4264 at para 293, 102 OR (3d) 321, "Evidence ...provided to the court confirms that prostitutes in Canada face a high risk of physical violence...."

[38] As noted by Green CJNL in ***SB***, *supra* at para 93, explaining the ***Graveline*** test, this Court is not required to conclude that the errors in the instructions on motive *necessarily* affected the outcome although we believe they did.

relations on June 20, and again on June 21, the night she died. This evidence of what Barton alleged transpired on June 20 figured prominently in the mistaken belief in consent defence that Barton advanced and in the trial judge's instructions to the jury.

[86] Procedurally, there was never a *voir dire* to deal with the admissibility of this sexual history evidence under s 276 of the *Code*. The defence made no application to have this evidence admitted. Nor did the Crown object to its admission. And the trial judge did not question the absence of a defence application or *voir dire* on the admissibility of this evidence. As a result, there was no consideration of, or decision on, whether this evidence was admissible under s 276 or at common law *and for what purpose*: ***R v Seaboyer*; *R v Gayme***, [1991] 2 SCR 577 [***Seaboyer***].

[87] On appeal, the Crown submitted the trial judge erred in law in admitting this defence evidence without determining its admissibility under s 276 or the common law. The Crown said this led to procedural and substantive unfairness. The defence disagreed. It contended that s 276 does not apply to a charge of murder, the evidence would have been admissible had a *voir dire* been held, and even if there was an error, there was no prejudice.[39] The defence asserted the evidence was relevant to the narrative of events, the expert testimony on factors affecting the strength of Gladue's vaginal wall, and Barton's state of mind, including his asserted belief that Gladue consented to what Barton claimed he did.

B. The History and Requirements of s 276

1. Early History

[88] At one time in Canada, there were no statutory limitations on how a complainant in a case involving a sexual offence could be cross-examined. Various myths, stereotypes, assumptions, beliefs or whatever one wishes to call them found a welcome home in courthouses throughout this country. They disadvantaged and discriminated against victims of sexual offences. When the charge was rape, a woman's sexual reputation, or even the suggestion of her previous sexual acts, true or not, was often used to undermine her credibility or allege a propensity to consent. This frequently led to her being seen as less worthy of the law's protection. Given widespread public concerns about the resulting unfairness, Parliament introduced the first "rape shield" provisions into the *Code* in 1982.[40]

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[39] The defence implicitly invoked s 686(1)(b)(iv) of the *Code*. Under this section, an appeal court may dismiss an appeal notwithstanding any procedural irregularity at trial providing the trial court had jurisdiction and the appeal court is satisfied the appellant suffered no prejudice thereby.

[40] While the provisions became s 276 and s 277 of the 1985 *Code* (RSC 1985, c C-46), they were originally s 246.6 and 246.7 respectively in the *Code*: see *An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person and to Amend Certain Other Acts in Relation Thereto or in Consequence Thereof*, SC 1980-81-82-83, c 125, s 19, amending RSC 1970, c C-34 [1982 *Code* Amendments].

[89] The Supreme Court addressed the constitutionality of these sections in ***Seaboyer***. It recognized that ss 276 and 277 were designed to overcome what continue to be known as the "twin myths": (1) that a sexual assault complainant who consented to sexual activity in the past is more likely to have consented to the sexual activity at issue; and (2) that a woman is less worthy of belief because of her sexual history. It upheld s 277, which excludes evidence of sexual reputation for the purpose of determining credibility, stating at 612: "The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited...." However, the majority of the Court concluded that while the legislative goal was laudable, the rape shield provision as then drafted was overbroad: ***Seaboyer***, *supra* at 598. While the majority struck it down as unconstitutional, the Court set out common law principles that trial judges were to follow in determining the admissibility and use of this type of potentially prejudicial evidence.

2. The Current s 276

[90] Following ***Seaboyer***, Parliament adopted new rape shield legislation to protect Canadians, enacting the current s 276 of the *Code* as part of Bill C-49. Bill C-49 made significant amendments to the law on sexual offences: *An Act to Amend the Criminal Code (Sexual Assault)*, SC 1992, c 38 [1992 *Code* Amendments].[41] Bill C-49 was not passed in a legal or social vacuum. It marked Parliament's third attempt since the 1970s to address legitimate public concerns about the need to ensure fair treatment of complainants in sexual assault trials. The legislative record is clear that Bill C-49 was designed to promote equality rights and protect complainants from the inappropriate use of stereotypical assumptions about women and their sexuality in cases involving sexual assault.[42]

[91] The 1992 *Code* Amendments covered a number of areas in which Parliament believed the criminal justice system was failing victims of sexual assault. The specific purpose of s 276 was to protect complainants from invasive cross-examination about irrelevant aspects of their past sexual conduct. It prohibits evidence of prior sexual activity with the accused or others unless a judge determines that evidence is of specific instances of sexual activity, is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice: s 276(2) of the *Code*.

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[41] Section 2 amended s 276 while also adding new ss 276.1-276.5.

[42] See the statement of Minister of Justice, the Honourable Kim Campbell, submitting for second reading Bill C-49 in *House of Commons Debates*, 34th Parl, 3rd Sess, Vol 132 (8 April 1992) at 9504-9508. The Preamble to the 1992 *Code* Amendments states that Parliament is gravely concerned about the prevalence of sexual assault against women and children, intends to promote the full protection of the rights guaranteed under ss 7 and 15 of the *Charter*, and wishes to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and are fair to complainants as well as to accused persons.

[92] Section 276 now sets out a mandatory and structured decision-making process when the defence wishes to adduce evidence of prior sexual conduct. It requires a written application by the defence to determine whether the evidence is admissible, usually before the trial begins; prohibits the "twin myths" reasoning; establishes the criteria to be applied to evidence adduced for non-prohibited purposes; and requires judges to provide reasons, and set out the allowable purposes, for any evidence ruled admissible.

[93] At the application stage, an affidavit is required detailing particulars of the evidence sought to be adduced and its relevance to an issue at trial. This gives the Crown notice so they may prepare and respond to arguments about admissibility: ***R v Wright***, 2012 ABCA 306 at para 8, 536 AR 320 [***Wright***]. If the trial judge does not screen out the evidence as clearly inadmissible, the written application is followed by an evidentiary hearing. To protect the complainant's equality and privacy rights, that hearing is held *in camera* in the absence of the jury. The affiant must submit to cross-examination limited to whether the proposed evidence is admissible. While evidence elicited through cross-examination cannot subsequently be used to establish guilt, it can be used to challenge credibility: ***R v Darrach***, 2000 SCC 46 at para 67, [2000] 2 SCR 443 [***Darrach***]. In determining admissibility, a judge must take into account a list of factors, including the need to remove from the fact-finding process any discriminatory belief or bias: s 276(3) of the *Code*. Further, s 276.4 specifically requires a trial judge to instruct the jury on the uses that it may – *and may not* – make of sexual conduct evidence ruled admissible.

[94] The Supreme Court upheld the constitutionality of the current version of s 276 in ***R v Darrach***. It stressed that an accused does not have the right "to adduce misleading evidence to support illegitimate inferences": ***Darrach***, *supra* at para 37. Since s 276(1) only excludes irrelevant evidence, it does not infringe an accused's rights.

[95] A decision on admissibility of sexual conduct evidence is a question of law: s 276.5 of the *Code*. So too is the failure to comply with the mandatory procedures in s 276: ***Wright***, *supra* at para 10; ***SB***. Since these procedures were not followed before the defence evidence about Gladue's sexual activity with Barton the night prior to her death was admitted at trial, that takes us to the preliminary issue of whether s 276 applies to a charge of first degree murder under s 235(1) of the *Code*.

C. Why s 276 Applies to First Degree Murder under s 235(1) of the *Code*

[96] Section 276(1) states that:

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

> *(a)* is more likely to have consented to the sexual activity that forms the subject matter of the charge; or
>
> *(b)* is less worthy of belief. [Emphasis added]

[97] Section 276(2) prohibits admission of evidence of prior sexual conduct unless the judge determines it is admissible in accordance with the mandatory procedures set out in s 276.1 and s 276.2. It too uses the same wording as s 276(1), namely that it applies "in proceedings in respect of an offence" referred to in s 276(1).

[98] The Crown's initial theory was that Barton committed sexual assault with a weapon when he cut Gladue's vaginal wall with a sharp instrument. After Barton testified about thrusting his hand up and into Gladue's vagina, the Crown initially argued in the alternative that his admitted actions constituted sexual assault causing bodily harm (s 272 of the *Code*), a position repeated on appeal. Later in the trial, the Crown agreed that the unlawful act sufficient for unlawful act manslaughter would be sexual assault (s 271 of the *Code*).[43] These offences are included among those listed in s 276(1). Therefore, for purposes of s 276, nothing turns on which offence the Crown alleged as the unlawful act at trial. On appeal, the defence contended that Barton was not required to make an application to admit the evidence of his prior sexual conduct with Gladue because s 276(1) and s 276(2) apply only to those sections specifically listed, and first degree murder is not one of them.

[99] The issue therefore may be stated this way: Is this murder charge under s 235(1) caught by s 276(1) and s 276(2)? The answer turns on the wording and proper interpretation of the phrase "proceedings in respect of an offence" under one of the listed sections. We would add that we do not discern a difference for these purposes in the French version of the text, which reads: "... une infraction prévue aux articles ..."[44]

[100] The little academic commentary on this issue appears divided. In *The Practitioner's Criminal Code* (Markham: LexisNexis, 2016) at 276-1, Alan Gold states this section "applies to all proceedings *involving* the enumerated sex offences". However, authors Michelle K. Fuerst, Mona Duckett & Frank Hoskins, in *The Trial of Sexual Offences Cases* (Toronto: Carswell, 2010) at

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[43] This record reveals that by the end of the evidentiary portion of the trial, it was agreed amongst counsel and the trial judge that the alleged unlawful act would be "sexual assault"; see AR 1693/6-1694/7; 1720/41-1722/3.

[44] For a bilingual statute, one seeks to ascertain the common meaning in context: ***R v Mac***, 2002 SCC 24 at paras 5-6, [2002] 1 SCR 856; ***R v Daoust***, 2004 SCC 6 at paras 26-34; [2004] 1 SCR 217; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: Lexis Nexis, 2014) at 118-119; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 343-349.

6.1.2, state that one of the required factors for excluding evidence under s 276(1) is that the "accused is charged with one of the enumerated offences". No support is provided for this proposition though they acknowledge that where the requirements are not met, the common law principles in ***Seaboyer*** would apply.

[101] The preferred approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 SCR 27 at para 21; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 7 [Sullivan]. The task is to determine the intent of Parliament, insofar as this can be done, by looking at the words and the scheme and object of the provision. Every part of a provision or set of provisions should be given meaning if possible: Sullivan, *supra* at 211; ***R v Hutchinson***, 2014 SCC 19 at para 16, [2014] 1 SCR 346 [***Hutchinson***].

[102] Parliament enacts with knowledge of its own statute books and with an understanding of usages of language. It deliberately chose broad words – proceedings in respect of an offence – when it defined the scope of s 276(1) and s 276(2). As confirmed by Dickson J in ***Nowegijick v The Queen***, [1983] 1 SCR 29 at 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[103] Parliament did not limit either section to instances in which an accused was "charged" with the listed offences. Had Parliament intended to restrict sections 276(1) and 276(2) to a *prosecution* for sexual assault or sexual assault causing bodily harm as opposed to *proceedings* in respect of a sexual assault or sexual assault causing bodily harm, it could readily have said so. It did not. Therefore, reading the broad, flexible wording Parliament chose in its grammatical and ordinary sense, we have concluded that Parliament intended that the mandatory regime under s 276 apply whenever the "proceedings" before the court were in relation to, with reference to, or in connection with a listed offence. In other words, the listed sexual offence need not be the offence charged. It is enough that the proceedings are "in respect of" the sexual offence, which they certainly are when the sexual offence is an underlying, predicate or lesser included offence of the offence charged.

[104] There will be many instances where this is so. This case is one of them. Barton was charged with first degree murder. Parliament has made it clear under s 231(5) of the *Code* that murder is first degree murder when death is caused while committing or attempting to commit a sexual assault. While such a crime may be charged as first degree murder without particularity, there can be no doubt that the proceedings are "in respect of", that is connected to, the alleged sexual assault. After all, in order to return a verdict of guilty of first degree murder, the jury would need to be satisfied beyond a reasonable doubt that an offence of sexual assault (under one of s 271 (sexual

assault), s 272 (sexual assault causing bodily harm) or s 273 (aggravated sexual assault) of the *Code*) was attempted or committed while death was subjectively intended and caused. Moreover, the included offence of unlawful act manslaughter is also tied to whether Barton committed an offence of sexual assault (whether under s 271, s 272 or s 273) since the Crown's theory is that one of these offences is the unlawful act.

[105] Where, as here, the legal inquiry includes whether a listed sexual offence can be proven, the Crown is required to establish each constituent element of one of these sexual offences in the same manner as it would have been required to do had the accused been charged with that offence. This demonstrates the rationale for Parliament's selecting the approach it did. Because it could not foresee all the circumstances in which an accused would seek the admission of sexual history evidence, Parliament determined that its policy objectives were best served by providing that s 276(1) and s 276(2) would apply to any "proceedings in respect of" the listed offences.

[106] This interpretation is also consistent with the scheme of the provision, its object and Parliament's intention. The legislative purpose behind s 276 is to eradicate from criminal law the "twin myths" that complainants who have had sexual contact with the accused or others are more likely to have consented and are less credible. It is also designed to promote gender equality by removing prejudicial and potentially misleading evidence from the truth seeking process.

[107] Where a listed offence is, as here, an underlying offence to both the first degree murder charge and the included offence of unlawful act manslaughter, those purposes are not diminished simply because the victim has died. As Punnett J aptly stated in ***R v Iverson,*** 2014 BCSC 2400 at para 180, [2014] BCJ No 3130 (QL), citing ***R v Dempsey***, 2001 BCSC 371 at para 35, 2001 CarswellBC 2394 [***Dempsey***], "evidence that would be inadmissible pursuant to s 276 if the victim were alive is not rendered admissible merely by virtue of his or her death". Canadians would be shocked if a victim of crime could be stripped of his or her dignity after death. They would be equally shocked if a charge of murder where an underlying act is alleged to be sexual assault were treated differently, for purposes of s 276, than a case in which sexual assault were charged directly. To do so would place form over substance and invite prosecutors to charge sexual assault along with murder in cases in which the two were linked. This makes no sense.

[108] Indeed, it is all the more important to prevent irrelevant evidence about the victim's past sexual conduct from compromising the fair trial process when the victim has died at the hands of the accused – and the only one left to testify as to the circumstances is the accused. This is especially so where the defence advanced includes the accused's alleged mistaken belief in consent to the very sexual activity that caused the victim's death. Requiring compliance with s 276 ensures that a claimed mistaken belief cannot be based on misleading evidence about prior sexual conduct from which the jury is invited to draw improper inferences.

[109] For these reasons, the mandatory regime under s 276 applied to the charge of first degree murder and ought to have been followed by the defence, Crown and trial judge. It was not.

[110] Finally, in any event, even if s 276 did not apply directly, the trial judge would nevertheless have been required to conduct a similar admissibility analysis under the common law evidentiary principles set out in ***Seaboyer***; ***Dempsey***. That did not happen either.

D. Consequences of Failing to Follow s 276

1. The Crown's Failure to Object

[111] The defence contended that the Crown's failure to object to Gladue's sexual history evidence or request a hearing indicates that the Crown and trial judge regarded the evidence as admissible. We reject this argument. The procedures and considerations under s 276 are mandatory and place obligations on the Crown, the defence and the trial judge. The vital interests served by s 276 in protecting the equality and privacy rights of complainants are not within the gift of counsel or the Court. They are not to be sacrificed or waived by any of the participants in the trial.[45]

[112] The ultimate responsibility lies with the trial judge to ensure that irrelevant evidence which may mislead the jury is eliminated from the fact finding and reasoning process.[46] The Crown's failure here to object to the defence not following the mandatory process under s 276 of the *Code* did not absolve the trial judge from correctly applying the law or make this evidence admissible: ***R v AJB***, 2007 MBCA 95 at para 51, 225 CCC (3d) 171. While the Crown's position at trial was wrong in law, the error here was a failure of the trial judge's gatekeeping function.

2. Sexual Conduct Evidence

a. Evidence of Sexual Conduct the Night Before Gladue Died

[113] Barton testified about what he claimed happened the night before Gladue died. He said that on June 20, Gladue put his penis in her mouth, then after a few minutes, he put his left hand down to her vagina and started putting first one, then two, three, and four fingers into her vagina. This

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[45] This is not merely a procedural *Code* provision which the Crown may have been entitled to waive. We recognize that, in an appropriate case, the Crown may concede relevance or other statutory considerations. But what the Crown cannot concede is the necessity for a mandatory hearing under s 276. Moreover, the judge, as gatekeeper, is always required to comply with the statutory procedures, including providing reasons and articulating permissible and impermissible uses of any evidence admitted.

[46] An accused is not entitled to a trial which takes in inadmissible evidence, let alone one with misdirections on the law: ***Pickton***, *supra* at paras 26-27. Trial judges have a gatekeeping obligation to ensure that evidence allowed into trials is relevant and does not invite improper reasoning: see ***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23, [2015] 2 SCR 182 for affirmation of this duty in the context of expert evidence.

went on for 5 to 10 minutes. He took his hand out, she took her mouth off his penis and put her legs on his shoulders and they had sex.

[114] When Barton was asked if there was any discussion with Gladue about why she was coming to Barton's room on the second night, June 21, he replied, "no ... just she knows what she was coming for, and we agreed on the same price as the night before."[47] That night, Barton described Gladue's going to the bathroom and coming out naked. She sat on the corner of the bed; he was standing and she put his penis in her mouth. In that position, he said he eventually started putting all his fingers in her vagina and thrusting. By his own admission, the sexual activity that took place June 21 was more invasive, forceful and of greater duration: he put his fingers in farther, one or two centimeters past his knuckles, and thrust harder and for longer.

[115] The sexual activity Barton said occurred the night before Gladue died is clearly caught by s 276 as it is, if true, evidence of prior sexual conduct.

b. Calling Gladue a "Prostitute" and "Native Woman"

[116] The Crown, defence and trial judge all referred to Gladue as a "prostitute" in front of the jury at various points in the proceedings.

[117] The joint interveners, the Women's Legal Education and Action Fund and the Institute for the Advancement of Aboriginal Women, argued that the Crown's labelling of Gladue, in its opening statement, as a "prostitute" who had "struck a working relationship" with Barton was inadmissible sexual conduct evidence.[48] They argued that s 276 creates a categorical prohibition on the admission of sexual history evidence to support one of the twin myths, regardless of which party seeks to introduce that evidence. They submitted that the trial judge did not ask the Crown to address the relevance, probative value or prejudicial effect of characterizing Gladue as a prostitute. Nor did the trial judge caution the jury as to the inferences it could – and could not – draw from that characterization. Moreover, they contended that in the final instructions, the trial judge wrongly said a factor important to consent was that Gladue was a prostitute.

[118] The interveners also argued that these errors were compounded by the references to Gladue as a "Native girl" or "Native woman"; these were prejudicial both independently and in combination with calling her a prostitute. They asserted that the jurors were invited or permitted to draw the prohibited inference that because Gladue was presented as a "Native" prostitute, she was even more likely to have consented to the sexual activity that was the subject of the charge. In their view, because of widespread racial bias against Aboriginal people, specific and detailed

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[47] AR 1121/11-12.

[48] AR 14/15-16.

instructions were required beyond the generic caution provided to ensure the jurors acted fairly and impartially.

[119] To those who would immediately say, "of course it is relevant that she was a prostitute", our answer is this. A decision that sexual conduct evidence is admissible requires compliance with s 276. Parliament has called for a careful consideration of underlying assumptions according to a set of stated factors. Given the limits of s 276 in its current form, it is open to an accused to apply to introduce evidence of a complainant's prostitution. This is so notwithstanding that, as early as ***Seaboyer***, L'Heureux-Dubé J (in dissent but not on this point) observed that "[e]vidence of prior acts of prostitution or allegations of prostitution ... is never relevant and, besides its irrelevance, is hugely prejudicial."[49] However, whether an accused will succeed in opening this generally prejudicial door is another question: ***R v Nepinak***, 2010 BCSC 1677, 82 CR (6th) 362; ***R v Ingman***, 2004 SKQB 87, 246 Sask R 305; ***R v Roper*** (1997), 98 OAC 225, 32 OR (3d) 204 (CA).

[120] Section 276 was intended to replace quick conclusions based on false logic and discriminatory thinking about who consents, who tells the truth and what is relevant with a careful and structured analytical process designed to balance evidence in the search for the truth, notably by excluding misleading evidence in support of illegitimate inferences. Everyone in Canada, including sex trade workers, is entitled to that protection.

[121] To put this issue in context, the evidence is that on June 20, Barton asked a man in the parking lot, Steve, if he knew of any "lady friends" Barton could have sex with. Later that first evening, Steve introduced Gladue to Barton. According to Barton, he and Gladue discussed how much it would cost him. She asked for $100.00, and he negotiated the price down to $60. Barton said he agreed to pay this amount on both nights. On the second night when Barton and Atkins were in the hotel bar drinking with Gladue, Barton again met Steve. Steve was concerned that there were two of them, but Barton assured Steve that Gladue would only be with him. Barton told Steve not to worry, "you know me" and gave him $5. Later when walking back to his hotel room, Barton offered Atkins "a piece" of Gladue. From that evidence, all that is known is that on two occasions, Gladue agreed to accept money for having sex with Barton.

[122] Expressly referring to Gladue as a prostitute conveyed that she was a female sex trade worker who made her living by routinely and habitually performing sexual activities for money. Prostitution is largely a gendered practice. Most prostitutes are female; most buyers are male.[50]

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[49] ***Seaboyer***, *supra*, at 690.

[50] As noted in Benedet, "Marital Rape" at 182-183 in reference to the evidentiary record in ***Bedford***: "It was clear from this evidence that prostitution is a gendered practice. Most prostitutes are women and girls...; almost all of the buyers and most of the pimps are men.... There was evidence that for Aboriginal women, the effects of racism and colonization contributed to their entry into prostitution".

Calling someone a prostitute is a form of sexual conduct evidence caught by s 276 if advanced by the defence, and governed by ***Seaboyer*** if advanced by the Crown. Since it is not evidence of a specific instance of sexual activity as required under s 276(2)(a), it is, by itself, inadmissible. It also amounts to evidence of sexual reputation which is separately prohibited under s 277, regardless of who seeks to tender it.

[123] This one word – prostitute – had the effect of ushering in Gladue's prior sexual conduct with all the others, real or imaginary, who may have paid her for sex. Gladue was referred to as a prostitute at least 25 times during the trial. Where a participant in sexual activity is a prostitute, a litany of unjust stereotypes about autonomy and consent persist in our society. That is so regardless of the label used to describe the person who sells sex for money.[51] At the top of the list is that a prostitute will consent to anything for money. Linked to this is another improper belief, namely that once a prostitute has agreed to sell sex for money, the prostitute has given "implied consent" to any and all sexual acts to which the prostitute is then subjected. And perhaps worse yet, labelling someone a prostitute signals to the jurors that the prostitute is "deserving" of harm sustained on the job because prostitutes "choose" to engage in a risky profession: ***Bedford***, *supra* at para 80.

[124] To compound this problem, the jurors were repeatedly told that Gladue was a "Native girl" or "Native woman". In particular, she was referred to as "Native" approximately 26 times throughout the trial by witnesses, defence counsel and Crown counsel. In one instance, the witness was directly asked to describe Gladue's ethnicity. In other circumstances, witnesses introduced and used the term "Native" or "Native woman" as a descriptor of Gladue and defence counsel, and Crown counsel continued to use that descriptor while questioning the witness.

[125] The defence argued there was no evidence before this Court to support the Interveners' submission that widespread racism against Aboriginal peoples was likely to negatively influence jurors.[52] It suggested a commission of inquiry or parliamentary committee would be required to properly evaluate the Interveners' submission. We reject this argument.

[126] Courts in this country have long recognized that the potential for racial prejudice against visible minorities in the justice system is a notorious social fact not capable of reasonable dispute: ***R v Spence***, 2005 SCC 71 at para 5, [2005] 3 SCR 458 [***Spence***]. Jurors may consciously or subconsciously consider certain people less worthy and this bias can shape the information

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[51] A more sanitized label such as "sex trade worker" would not be a complete answer to the problems here. Why? It is not simply the label that taints the fact-finding process. It is the baggage that comes wrapped up with the label. Irrespective of the one used, there is no equivalency between labels attached to a person selling sex, typically a woman, and the person buying it, typically a man. The label for the former is usually more negative than for the latter.

[52] See Factum of the Respondent at para 99.

received during the trial to conform with the bias: see ***R v Parks*** (1993), 84 CCC (3d) 353 at 372 (Ont CA); ***Spence*** (inter-racial crime); ***R v Find***, 2001 SCC 32, [2001] 1 SCR 863 (nature of the charges); and ***R v Kokopenace***, 2015 SCC 28, [2015] 2 SCR 398 (representativeness in juries and impartiality). Hence, beginning almost two decades ago in ***R v Williams***, [1998] 1 SCR 1128 [***Williams***], Canadian courts moved from a "hands-off" approach to the recognition that courts could, *and should*, take proactive steps to prevent racism from compromising trials.[53]

[127] In this case, the trial judge ought to have addressed the repeated references to Gladue as a "Native" girl and "prostitute" to overcome the real risk of reasoning prejudice. And yet, the only caution given to this jury was this limited generic one typically offered in every jury trial:

> When examining the evidence, you must do so without sympathy or prejudice for or against anyone involved in these proceedings. That means you must now make good on your promise to put aside whatever biases or prejudices you may hold or feel. It also means that sympathy can have no place in your deliberations.[54]

[128] This standard caution in the final instructions was not wrong in itself. But it was inadequate to counter the stigma and potential bias and prejudice that arose from the repeated references to Gladue as a "prostitute", "Native girl" and "Native woman".[55] Those references implicitly invited the jury to bring to the fact-finding process discriminatory beliefs or biases about the sexual availability of Indigenous women and especially those who engage in sexual activity for payment. What was at play here, given the way in which the evidence unfolded, was the intersection of assumptions based on gender (woman), race (Aboriginal) and class (sex trade worker). We emphasize that we are not suggesting that counsel or the trial judge sought to insinuate improper thinking into the minds of this jury. Nevertheless, without a sufficient direction to the jury, the risk that this jury might simply have assumed that Barton's money bought Gladue's consent to whatever he wanted to do was very real, indeed inescapable. Add to this the likely risk that because Gladue was labelled a "Native" prostitute – who was significantly intoxicated – the jury would

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[53] In deciding that an Aboriginal accused should have been allowed to challenge potential jurors for cause, the Supreme Court accepted the findings of reports on disadvantage and discrimination involving Aboriginal peoples. That included the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, 1996). As stated in ***Williams***, *supra* at para 21: "To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it".

[54] This was in the closing charge: AR 1733/6-9. In the opening instructions, the only caution was: "You must also put aside any preconceptions or personal prejudices you may have": AR 5/38-39.

[55] As in ***R v Breeze***, [2009] EWCA Crim 255, where each member of the Court was "troubled by the drum like repetition of the point" (para 23), repetition to excess of even a permissible point can have an impermissible effect.

believe she was even more likely to have consented to whatever Barton did and was even less worthy of the law's protection. This is the very type of thinking that s 276 was introduced to eradicate.[56]

[129] Prior consent to sexual activity is not a blanket authorization, or for that matter, any authorization, for future sexual activity. Decades ago, Parliament jettisoned the marital rape exception to rape and the idea that a wife was legally obliged to submit to sexual activity at the behest of her husband.[57] Today, we recognize that each person's entitlement to human autonomy, especially in sexual matters, is essential to the bodily integrity and security of that person. Our law does not abide discriminating against sex trade workers by depriving them of the rights accorded to every citizen in this country merely because they are sex trade workers. Juries need to understand this as a matter of law. Just as it is improper to impose "implied consent" to sexual activity on a spouse or person in an intimate relationship, a jury needs to be told that a sex trade worker does not give her "implied consent" to whatever sexual acts the client decides to do and still less to whatever degree of force the client inflicts upon her incidental to the sexual acts. Canadian law does not recognize "implied consent" to sexual activity, and this protection extends to everyone in our society.

[130] The jury charge here was further skewed by the trial judge's acting on a defence request to warn the jury that they could draw no negative inference *against Barton* for being the type of person who used prostitutes. That such a caution was requested and considered necessary clearly shows that the trial judge accepted the defence position that Gladue's being a prostitute would likely have a negative impact on the jury's thinking. The sting of this warning was that if Barton's actions were somehow viewed as discrediting Barton, it was because prostitutes, including Gladue, should be regarded as discreditable. That was the message left with this jury. It was false and prejudicial. To caution the jury on the stigma and potential prejudice only from the perspective of Barton's character and reputation did not counter the stigma and potential prejudice to Gladue's rights to equality and privacy and the state's interests in a fair trial from Gladue's being labelled a prostitute.

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[56] As pointed out by Green CJNL in ***SB***, *supra* at paras 101-102: "By prohibiting admission of sexual history evidence to support the inferences leading to the twin myths, Parliament has signaled that because of the significant dangers of influencing the jury to engage in lines of reasoning based on those myths, it is not sufficient to allow them to hear it even with an appropriate cautionary instruction. Subsection 276(1) of the *Criminal Code* forbids their hearing it at all.... It is only where that type of evidence is to be used for some other legitimate purpose that it may become admissible and then only after balancing probative worth against potential prejudicial effect and giving a careful limiting jury instruction...."

[57] The concept of "implied consent" does not apply to any group of women in Canada irrespective of whether they are married, living with intimate partners or in a relationship. Parliament abolished the marital rape exemption in the 1982 *Code* Amendments. Today, the idea of permitting rape in marriage is a concept most Canadians would not even have heard of. Section 273.1(1) of the *Code* was intended to ensure that sexual autonomy and choice existed for all women in Canada. No group or class is denied that protection.

[131] One very real consequence of not conducting the analysis required under s 276 is that the trial judge never addressed whether prostitution generally, or the alleged sexual activity between Gladue and Barton the prior night, was relevant to any issue in the trial. Nor did the trial judge address the further question whether the evidence had significant probative value that was not substantially outweighed by its prejudicial effect. Most important, had s 276 been followed, the trial judge would have been obligated to set out in the required ruling what use the jury could – and could not – make of the admissible evidence. The trial judge's failure to reflect on the scope of admissibility of this evidence may well have influenced other contents of his charge to the jury as well.

[132] Finally, even if it were determined that the commercial context of the sexual relationship between Barton and Gladue on the night she died was relevant for certain purposes, that would not require repeatedly labelling Gladue a prostitute, and still less a Native prostitute, any more than it would require labelling Barton a john.

3. The Admissibility of Prior Sexual Conduct Evidence

a. Relevant Considerations Affecting Admissibility Assessment

[133] The defence argues that even if these mandatory procedures had been followed, the prior sexual history evidence would inevitably have been admitted because it was relevant to the narrative, the expert testimony on what may have affected the strength of Gladue's vaginal wall, and Barton's asserted belief that Gladue consented to what he said he did the night she died.

[134] It is difficult to assess these arguments since the proper application process was not followed and the specific evidentiary record that should underpin the s 276 analysis is lacking. While we do have the trial record, s 276 contemplates discrete and distinct inquiries, issue specific cross-examination and a separate evidentiary foundation. To simply assume that Barton would have testified at the more focussed s 276 hearing as he did at the trial may not be a fair assumption. In addition, since there will be a new trial at which s 276 will be followed, some caution is required in exploring the implications of a s 276 hearing.

[135] It is nevertheless helpful to point out certain important considerations for resolution by the new trial judge. Under s 276(2), the burden of proof would be on Barton to establish on a balance of probabilities that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. The terms "significant" and "substantially" mean that "both sides of the equation are heightened in this test, which serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity": ***Darrach***, *supra* at para 40.

[136] As a result, the suggestion that all this evidence would inevitably have been admitted as "narrative" does not take sufficient account of the test for admissibility under s 276(2). Narrative

would not ordinarily meet that test. After all, one could conceivably argue that any prior sexual activity between parties is "narrative" in some sense. To be admitted under s 276(2), evidence of prior sexual conduct must be related to an admissible subject matter such as a specific fact essential to the defence. It is the loss of *that* evidence which would be measured against the countervailing factors set out in s 276(2) and s 276(3) of the *Code*. To simply say "narrative" is not enough. The trial judge would need to determine if the only possible "relevance" of the "narrative" evidence in this case would be to introduce precisely the inappropriate thinking based on prior sexual conduct which is presumptively prohibited by s 276. There are other ways to explain how Barton and Gladue met on the fatal night, that they engaged in sex for money, and the two were strangers to each other without leading evidence of prior sexual conduct between them.

[137] The submission that the evidence of what happened on the first night was potentially relevant to the condition of Gladue's vaginal wall is also neither obvious nor inevitable. The suggestion is that, maybe, by inserting a lesser part of his hand into her vagina the night before, Barton weakened her vaginal wall such that when he inserted more of his hand deeper and for longer the next night, he ripped open the already weakened wall and that is why she bled to death. Any such suggestion would require an evidentiary record built on a more solid foundation than Dr. Ophoven's speculation about the vaginal strength of women generally or Gladue in particular. Nor would this speculation be bolstered through conjecture about what "could" have happened by Barton's placing part of a hand into Gladue's vagina the night before.[58] This simply doubles the degree of speculation. Dr. Ophoven had no familiarity with Gladue to bolster a supposition that one prior interaction with Barton, especially as he sought to describe it, would have weakened her vaginal wall so as to produce such a substantial wound.

[138] More important, it is not clear in any event how this argument would help Barton since he admitted causation and the law requires that he take his victim as he finds her. That is especially so if he is also the cause of any weakened pre-condition.

[139] Section 276 is most often used in relation to claims of mistaken belief in consent: ***Darrach***, *supra* at para 59. Barton testified that he believed Gladue was consenting to his thrusting his hand into her vagina the night she died, in part because, on his testimony, she consented to his doing something similar the evening before. Had the defence advanced this justification for admission of evidence of what happened the prior night as part of an application under s 276, the trial judge would have been required to address three issues, as will the new trial judge.

[140] First, does Barton's claimed mistake of fact constitute a mistake of fact or mistake of law? Second, has Barton provided evidence to satisfy an air of reality test that he took reasonable steps *the night Gladue died* to ascertain that Gladue voluntarily consented *that night* to the more invasive nature of the sexual activity and increased degree of force he intended to apply and for a

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[58] AR 1391/13-39.

longer duration?[59] In the context of an admissibility hearing under s 276, this air of reality test must necessarily precede consideration of the air of reality test for mistaken belief in consent.[60] Since evidence of prior sexual conduct is presumptively inadmissible, this evidence should not be admitted for trial unless the defence has satisfied the air of reality threshold on this issue at the admissibility hearing.[61] To allow prior sexual activity to be itself used as a reasonable step for ascertaining present consent is precisely the reasoning Parliament has rejected. Third, does the defence of mistaken belief in consent meet the air of reality threshold?[62] The focus must necessarily be restricted to "how the prior sexual history mistakenly led the accused to believe that the complainant was affirmatively communicating consent on the incident in question": S Casey Hill, David M Tanovich & Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed (Toronto: Canada Law Book, 2016) (loose-leaf updated 2016, release 2), ch 16 at 16:20.50.30, 16-18.

[141] Finally, had the defence followed the procedure under s 276, it would have been required to indicate that it sought admission of this evidence for this purpose. That would have brought this suggestion to the fore and allowed the Crown a reasonable opportunity to address it.

[142] In the result, we are unable to conclude that had the required procedure been followed, this evidence would necessarily have been admitted or for what purpose.

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[59] Parliament has provided that mistaken belief in consent is not a defence unless the accused has taken reasonable steps to ascertain that the complainant was consenting: s 273.2(1)(b) of the *Code*.

[60] At one time, it was suggested that reasonable steps under s 273.2(b) of the *Code* is for the trier of fact after the air of reality test has been met: ***Ewanchuk***, *supra* at para 60. The ultimate decision on the merits certainly is. But recent decisions have concluded that if the defence of mistaken belief in consent is raised, reasonable steps must also go through the air of reality filter when a court is determining if there is an air of reality to that defence: see Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham: LexisNexis, 2015) at 1100; Kent Roach, *Criminal Law*, 6th ed (Toronto: Irwin Law, 2015) at 450-451; ***R v Flaviano***, 2013 ABCA 219, 553 AR 282, aff'd 2014 SCC 14, [2014] 1 SCR 270; ***R v Cornejo*** (2003), 68 OR (3d) 117 (CA) at paras 2-3, 19 [***Cornejo***]; ***R v Despins***, 2007 SKCA 119 at paras 11-12, 47, 299 Sask R 249 [***Despins***].

[61] As explained by Elizabeth A Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 483 at 502 [Sheehy, *Sexual Assault*] with reference to ***Cornejo*** and ***Despins*** and the conclusion there must be an air of reality an accused took reasonable steps to ascertain consent before considering the "mistake" defence: "These rulings are important because they keep alleged 'honest mistakes' away from the jury or judge unless there is some evidence to support the accused having taken reasonable steps."

[62] Later in these Reasons dealing with unlawful act manslaughter, we address the errors in the trial judge's treatment of both the mistaken belief in consent defence and the issue of reasonable steps.

b. Evidence of Prior Sexual Conduct Inadmissible Regarding Gladue's Consent

[143] That said, we assume for the sake of argument that Barton's evidence about the claimed sexual activity with Gladue the night before was admissible under s 276(2) in support of his claimed mistaken belief in consent the night she died. Even so, Barton's evidence of their sexual conduct the first night and Gladue's being a "Native" "prostitute" were never admissible for the purpose of establishing that Gladue consented to the sexual activity in question the night she died. Parliament has defined consent for this purpose as "the voluntary agreement of the complainant to engage in the sexual activity in question": s 273.1(1) of the *Code*.

[144] Barton's testimony that on the second night "she knows what she was coming for" led jurors deep into forbidden twin myths territory, territory into which this jury was permitted to wander at will without any caution at all at an appropriate place in the trial.[63] This evidence wrongly invited the jurors to *infer Gladue's subjective consent* to the sexual activity that caused her death from what took place the night before she died. This is quite apart from the fact that on Barton's own evidence, the sexual activity on the fatal night was of a different degree of invasiveness, force and duration.

[145] Moreover, this jury was not even given a mid-trial limiting instruction when they first heard this evidence of prior sexual conduct. A mid-trial instruction serves to inform the jurors, from the outset, what limited use can, *and cannot*, be made of this kind of evidence. Typically, this would be done around the time the evidence was heard by the jurors to avoid leaving them to form tentative, but improper, conclusions from that evidence: see David Watt, "Juror Inoculation: The Use of Mid-Trial Jury Instructions" (National Judicial Institute, April 20, 2016) at 3. A limiting instruction must include a brief description of the evidence and a clear statement of the permitted and *prohibited* uses. None was given in this case. That meant there was a time during which the jurors would not have understood the impermissible uses of evidence they had already heard about Gladue's prior sexual conduct. This had serious consequences since the jurors were left to mull over how to use this evidence until the final instructions.

[146] Jury charges in use nationally indicate that judges should caution the jury about not using evidence of prior sexual conduct "to infer that the complainant is *more likely to have consented* to the sexual activity in question" or that the complainant is "*less worthy of belief*". This wording, which comes from the twin myths identified in ***Seaboyer***, is virtually identical to the text in s 276(1) of the *Code*. It is important to understand that s 276(1) is an evidentiary rule that excludes irrelevant evidence: ***Darrach***, *supra* at para 37. That is why the textual reference in s 276(1)(a) is to the fact that sexual conduct evidence is "not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge". The operative words are "not admissible to

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[63] AR 1121/11.

support an inference". Whether fact A makes fact B more likely than not is the test for *legal relevance*: ***R v Jackson***, 2015 ONCA 832 at para 122, 332 CCC (3d) 466, leave to appeal to SCC refused, 36829 (30 June 2016) [***Jackson***]; see also ***Cloutier v The Queen***, [1979] 2 SCR 709 at 731.[64]

[147] In other words, s 276(1) is directed to the *inadmissibility of sexual conduct evidence* for either purpose set out in subsections (a) and (b) and its *consequential irrelevance in law*. Therefore, while s 276 provides an answer on the limits of legal relevance of sexual conduct evidence for these purposes, the critical point is this. It does not provide a complete answer on how to instruct juries on the prohibited uses of sexual conduct evidence especially in light of Parliament's decision, as part of the 1992 *Code* Amendments, to add a definition of consent under s 273.1(1) of the *Code* for sexual offences.

[148] The combined effect of s 276(1)(a) and s 273.1(1) is that unless a judge decides otherwise, evidence of past sexual conduct between a complainant and the accused (or others) is *irrelevant* both to whether the *complainant consented* to the sexual activity that is the subject of the charge and to the complainant's credibility.[65] The danger in using the language of legal relevance when instructing jurors is that it can be misleading and confusing. It can be misleading if it leaves jurors with the impression that prior sexual conduct may be relevant to the complainant's subjective consent or that there is an *onus on the Crown* to prove beyond a reasonable doubt that the prior sexual conduct is irrelevant to the complainant's consent.[66] And it can be confusing if jurors are left wondering what the trial judge meant in saying they cannot use the fact the complainant consented previously to sexual activity with the accused "to infer that she is more likely to have consented to the sexual activity that forms the subject matter of the charge".

[149] This opaque instruction would likely leave a jury to wonder: does evidence of prior sexual activity go on the consent scale in assessing whether the complainant consented or not? The

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[64] In ***R v Vallentgoed***, 2016 ABCA 358 at paras 63-64, 344 CCC (3d) 85, leave to appeal to SCC granted, 37403 (4 May 2017) [***Vallentgoed***], this Court agreed with ***Jackson*** on this issue. ***Vallentgoed*** added that while there is only one level of "relevance", the further removed fact A is from fact B in logic and common sense, the less probative value it has. Eventually, the distance diminishes the probative value to the vanishing point.

[65] Where mistaken belief in consent is not a live issue at trial, then evidence of prior, unrelated sexual activity between the complainant and accused will seldom be relevant for any purpose: ***R v Crosby***, [1995] 2 SCR 912 at para 10 [***Crosby***]. If it is determined to be relevant, the jury must be instructed as to its limited use: ***Crosby***, *supra* at paras 10-14. ***Crosby*** was a unique situation of a *contradiction between statements* by the complainant as to whether she went to the place the day in question with the intention of having sex with the accused.

[66] ***Ewanchuk*** states that there are only two answers available to a fact-finder on the *actus reus* of sexual assault: the complainant provided her voluntary agreement to the sexual activity in question or she did not. That assessment is based on her credibility and evidence relevant to the date and events in question and not on theories of what is likely in the present case based on her prior sexual conduct.

answer is that it does not. Given the definition of "consent" under s 273.1(1), evidence of consent to sexual activity between a complainant and an accused on a *prior* occasion is *irrelevant to whether the complainant consented* at the time in question.[67] Therefore, jurors should be told this in plain language. Speaking to them in the lexicon of legal relevance does not convey this key point.

[150] Further, to state that evidence of prior sexual conduct cannot be used to infer that the complainant is "less worthy of belief" may not adequately bring home to the jury the point that should be made in terms that non-lawyers can understand. This objective might be better accomplished by stating that the jury is prohibited by law from using the admitted evidence of prior sexual conduct "against the complainant in assessing her credibility. The fact she has engaged in sexual activity with the accused on other occasions does not make her testimony less likely to be true."[68]

[151] The first time the parties even addressed the use of this prior sexual conduct evidence between Barton and Gladue was at the post-trial jury charge conference. The trial judge's first draft jury charge would have wrongly told the jurors they could use Barton's evidence of what he said that he and Gladue did the night before as evidence that Gladue subjectively consented on the fatal night. The Crown pointed out this error. In the final charge, at one point, the trial judge 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.[69] Nonetheless, in an earlier portion of the final charge on the issue of consent, the trial judge clearly implied the contrary.[70]

[152] Therefore, the final instructions did not compensate for the absence of the necessary mid-trial instruction. Moreover, they were internally inconsistent on whether this evidence was relevant to whether Gladue consented to engage in the sexual activity which caused her death. It was not.

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[67] Of course, depending on the circumstances, a trial judge may decide that evidence of prior sexual conduct is relevant to an accused's claimed mistaken belief in consent and therefore admissible for that purpose. But that goes to *the accused's mental state*, not to whether the *complainant subjectively consented* to what the accused did.

[68] The last sentence is from pattern jury charges. Similarly, prior sexual conduct evidence involving other parties could not be used to impugn the complainant's credibility either.

[69] AR 1754/19-22.

[70] AR 1753/40-1754/16. We address this aspect of the charge further later in these Reasons.

E. Conclusion

[153] For these reasons, s 276 of the *Code* applied to this charge of first degree murder. The trial judge erred in law in not following its mandatory provisions. This, coupled with the admission of prior sexual conduct evidence without any adequate warning to the jury, had a material bearing on the acquittals. So too did the internally inconsistent final instructions to the jury on the evidence of prior sexual conduct. Thus, we are satisfied the ***Graveline*** test is met. The errors identified under this ground of appeal are sufficient to justify a new trial on the original charge.

[154] The Supreme Court has repeatedly recognized that sexual conduct evidence may mislead the jury and distort the truth-seeking process. Trial judges must not allow evidence of prior sexual conduct to enter the trial without compliance with the *Code* requirements. Further, should that evidence be admitted, a case specific instruction that answers the risks of reasoning prejudice is essential. This case is emblematic of the problems that can arise when the necessary precautions are not followed.

VIII. Draft Jury Instructions for Consideration

A. The Need for Reform of Pattern Jury Instructions

[155] Later in these Reasons, we analyze particular errors in the trial judge's instructions on the law of sexual assault and how some are rooted in part on pattern jury instructions still in use nationally. At this point, to situate the need for reform in its proper context, we must stress four points.

[156] First, if jury instructions do not reflect statutory reforms, Parliament's changes to the criminal law may be minimized, undermined or indeed rendered meaningless. That is especially so where the root causes of problems Parliament sought to cure can themselves be traced back to problematic jury instructions. This is so for any area of the law. But it has special resonance when it comes to sexual assault given the past willingness, tendency, or inclination not only to import the "ghost element" of victim resistance into the law of sexual assault but also to rely on improper myths and stereotypes to deny complainants the full protection and equal benefit of the law. Our review of certain key provisions in pattern jury charges for sexual assault reveals that they have essentially been frozen in time, being substantially similar, if not identical, to what they were prior to the 1992 *Code* Amendments.

[157] Second, it is incontrovertible that Parliament's 1992 *Code* Amendments on sexual offences contained in Bill C-49 were intended to be substantive in content and material in effect. Prior to these reforms, Parliament had before it a mountain of evidence identifying serious inequities in the law on sexual offences, inequities which were embedded in jury charges then in use. This being so, it cannot be reasonably suggested that these Amendments were merely cosmetic, accomplished nothing substantively and thus warranted no material changes to jury charges. Bill C-49 was intended to reform the law in Canada, especially on the issue of consent – and did. Parliament

explicitly changed the law in Canada on consent from a negative notion to a positive notion of sexual mutuality and agreement. However, a strong substantive definition of consent means little if it is not implemented. As the law on sexual offences changes – statutorily and jurisprudentially – jury instructions must change too.

[158] Third, drafting jury instructions is difficult. Trial judges must cope with pressures to ensure that jury charges are accurate, seamless and understandable despite the frequently changing trial landscape, compressed time frames and limited resources. Trial judges cannot be expected to know every single aspect of every single legal issue that comes before them. The law today is far too complicated. Hence the need for trial judges to rely on pattern jury instructions for assistance. Great care must be taken to ensure that pattern jury charges are in conformity with existing law. Equally important, they must be understandable to lay people. The failure to instruct jurors in terms ordinary human beings can understand does little to engender confidence in the delivery of justice in Canada. And still less to ensure that the criminal law is administered in a fair and impartial manner.

[159] Fourth, in dealing with evidence that risks jurors relying on discredited myths and stereotypical thinking in cases involving sexual offences, it is often insufficient to simply instruct the jury on the letter of the law. What is missing and what is required to ensure that the law is properly understood and applied is an explanation of the underlying myths the law is designed to overcome.[71] This is especially so given the obvious: jurors assess credibility and find facts. But reliance on unfair assumptions can adversely impair these essential roles. While an appeal court can correct errors of law, it cannot correct distorted credibility assessments and discriminatory fact-finding. And even though perverse acquittals are permitted under Canadian law, they ought not to be induced by unbalanced jury charges.

B. Jury Warning Regarding Improper Assumptions in Sexual Offences

[160] It is the trial judge who is in the best position to assess the potential impact of discriminatory thinking on the fairness of the trial and the impartiality of jurors in cases involving sexual offences. Not every mistake will necessarily be reviewable error. Ultimately, it is the trial judge who is responsible for ensuring a fair trial according to law. Thus, it falls to the trial judge to provide, when appropriate, more than a generic caution to the jury regarding the potential for reliance on improper myths and stereotypes.

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[71] "The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e., who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimization does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained": ***Seaboyer***, *supra* at 650, per L'Heureux-Dubé J.

[161] To ensure that the fairness of the trial is not compromised, trial judges should consider providing jurors with appropriate instructions to counter the very real risk of unwarranted assumptions where sexual offences are involved. This is now the practice in the United Kingdom: see ***R v Miller***, [2010] EWCA Crim 1578; ***R v MM***, [2007] EWCA Crim 1558; ***R v D(JA)***, [2008] EWCA Crim 2557; ***R v Breeze***, [2009] EWCA Crim 255.[72] The purpose is not to give an impression of supporting a particular conclusion but to warn the jury against approaching the evidence with preconceived assumptions which distort the truth-seeking process. The forces that animated the necessity for these instructions in the United Kingdom have not passed Canada by. We endorse the requirement for comparable instructions in Canada and recommend that those responsible for drafting jury instructions for potential use nationally consider incorporating them into pattern jury charges.

[162] A caution in the opening instructions to the jury would be appropriate where, as here, the case involves not only gender (a woman) but also race (Aboriginal) and class (sex trade worker). A draft opening instruction could include the following. In making this suggestion, we stress that this is by way of example only. Further refinements may well be called for based on submissions by Crown and defence counsel:

> While the charge in this case is first degree murder, it also involves an underlying offence, an alleged sexual assault [or sexual assault causing bodily harm]. It would be understandable if one or more of you came to this trial with assumptions as to what constitutes sexual assault, what kind of person may be the victim of sexual assault, what kind of person may be a perpetrator of a sexual assault, or what a person who is being, or has been, sexually assaulted will do or say. It is important that you should leave behind any such assumptions about the nature of the offence. Experience tells the courts that there is no one way in which sexual assault happens. There is no one model or stereotype of a perpetrator of sexual assault or a victim of sexual assault. We know that victims of sexual assault may react in many different ways. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways.

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[72] Jennifer Koshan, "Judging Sexual Assault Cases Free of Myths and Stereotypes" (2 November 2015), *Ablawg* (blog), online: <https://ablawg.ca/wp-content/uploads/2015/11/Blog_JK_Wagar_Oct_31_2015.pdf> at 4: "The *Crown Court Benchbook* was published in 2010 by the Judicial Studies Board to assist judges in crafting jury directions. Chapter 17 deals specifically with directions for sexual offences, and was included at the behest of the Solicitor General following research calling into question the impact of the *Sexual Offences Act* 2003, c 42 (UK), legislation overhauling this area of the law with a view to decreasing wrongful acquittals in such cases."

> The person who died, Ms. Cindy Gladue, was Aboriginal. It is equally important that you leave behind any assumptions about the characteristics, nature and behaviour of women of Aboriginal heritage. Experience tells the courts that certain assumptions people make about people of different races or gender, including generalizations about Aboriginal women, are unsound and unfair. Everyone in this country is entitled to have their actions assessed as an individual and not on the basis of assumptions attributed to them because of their gender, race or class.
>
> Therefore, I instruct you as a matter of law that you must approach this case dispassionately, putting aside any view as to what you might or might not have expected to hear, and especially putting aside any view as to what you might or might not think about any of these issues, including about sexual assault or sexual relationships or male or female sexuality or Aboriginal women, and make your judgment strictly on the evidence you will hear from the witnesses.[73]

C. Jury Instructions on Prohibited Use of Evidence of Prior Sexual Conduct

[163] Again assuming for the sake of argument that evidence of Gladue's prior sexual conduct were found admissible for some limited purpose at the new trial, the mid-trial instruction could usefully include the following as to the prohibited uses of that evidence.[74] Should the trial judge consider it appropriate, an instruction to this effect could be included in the final jury instructions, reinforcing through needed repetition the limited permissible use of that evidence. We caution this draft instruction is a suggestion only. As with all jury instructions, it is beneficial if the trial judge reviews drafts in advance with Crown and defence. This militates against the need to recharge the jury should the trial judge determine that either counsel has any legitimate concerns.[75]

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[73] We have relied in part on draft jury charges used in the United Kingdom in dealing with sexual offences: See United Kingdom, Judicial College, "*Crown Court Compendium Part 1: Jury and Trial Management and Summing Up*", online:https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf>. This was used for parts of first and last paragraphs. In addition, in the last paragraph, we have added "including about sexual assault or sexual relationships or male or female sexuality". This wording is referred to in Lucinda Vandervort, "The Defence of Belief in Consent: Guidelines and Jury Instructions for Application of Criminal Code Section 265(4)" (2005) 50:4 Crim LQ 441 at 451.

[74] The draft warning is case specific and would require adaptation where the complainant is alive to testify.

[75] This draft does *not* include the introductory portions of the jury instructions which should refer to the evidence the trial judge has admitted and the purpose(s) for which that evidence was admitted. We acknowledge we have included the helpful instructions from *Crimji* in the fourth paragraph: *Crimji*: *Canadian Criminal Jury Instructions*, 4th ed, (Vancouver: Continuing Legal Education Society of British Columbia, 2005) (loose-leaf 2016 update) at 6.66-27.

It would be understandable if one or more of you came to this trial with assumptions as to what the evidence of Ms. Gladue's prior sexual conduct means. It is important that you leave behind any such assumptions.

To protect the constitutional rights of all Canadians, Parliament has restricted the circumstances in which evidence of a person's prior sexual conduct is admissible in a criminal trial and for what purposes it may be used. That is because past experience has taught us that to this day, some still believe that a woman who has engaged in sexual activity with others or the accused is more likely to consent to sexual activity and is less worthy of belief. These assumptions are wrong and unfair.

You have heard that Ms. Gladue agreed to engage in sexual activity with Mr. Barton for payment. Some believe that a woman who agrees to engage in sexual activity for payment will agree to anything. Some may also believe that when a woman agrees to sexual activity for payment, she gives her implied consent to all sexual activity that then follows. These assumptions are wrong and unfair. Canadian law does not recognize any concept of implied consent in sexual assault cases. The protection of this law extends to all Canadians, including sex trade workers.

This evidence [describe it] was admitted for the limited purpose(s) I have explained. You must not let this evidence influence your decision on any other issues in this trial. In fact, I must warn you that you are prohibited by law from considering this evidence for any purpose(s) other than those I have explained. This is because this evidence may be very prejudicial if it is used for purposes other than those I have described.

In particular, I must warn you as a matter of law that even if you found that Ms. Gladue consented to sexual activity with Mr. Barton the night before her death, that is not relevant to whether she consented to the sexual activity in question the night she died. The sexual activity in question is what you decide that Mr. Barton did that caused Ms. Gladue's death. Therefore, in assessing whether the Crown has proven that Ms. Gladue did not consent to what Mr. Barton did the night she died, you are prohibited by law from taking into account the fact she consented to sexual activity with Mr. Barton the night before her death.

> Second, I must also warn you that you are prohibited by law from using the fact Ms. Gladue consented to sexual activity with Mr. Barton or others on previous occasions against her.

IX. Misdirections on Unlawful Act Manslaughter

A. Introduction

[164] Under s 234 of the *Code*, "[c]ulpable homicide that is not murder or infanticide is manslaughter." The Crown's alternative theory was that the jury could find Barton guilty of the lesser and included offence of manslaughter. The only form of manslaughter the Crown alleged was unlawful act manslaughter: s 222(5)(a) of the *Code*.[76]

[165] To establish the *actus reus* of unlawful act manslaughter, the Crown must prove three elements:

(1) Barton committed an unlawful act;

(2) His unlawful act was dangerous; and

(3) His unlawful act caused Gladue's death.

[166] Since Barton admitted his actions caused Gladue's death, the trial judge informed the jurors that they were not obliged to consider the third element of causation.

[167] To establish the *mens rea* of unlawful act manslaughter, in addition to proving the necessary *mens rea* for the unlawful act (here sexual assault), all that is required is that the Crown prove the "objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act".[77] As McLachlin J explained in ***R v Creighton***, [1993] 3 SCR 3 at paras 43, 52 [***Creighton***]: "The law ... has not ...gone so far as to require foreseeability of

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[76] During submissions as to the content of the jury charge, Crown counsel raised manslaughter by criminal negligence under s 222(5)(b) of the *Code*. Crown counsel ultimately did not pursue that line of analysis (AR 1504/1-1508/30). Abandonment of a person one has seriously harmed with the abandonment contributing significantly to that person's death may or may not be manslaughter or even murder: see ***R v Nodrick***, 2012 MBCA 61, 93 CR (6th) 373, leave to appeal to SCC refused, 34947 (6 December 2012); ***R v Sinclair***, 2011 SCC 40, [2011] 3 SCR 3. Unlike other issues before this Court, this decision falls within prosecutorial discretion. Thus, this Court will not address this further.

[77] ***R v Creighton***, [1993] 3 SCR 3 at 45 [**Creighton**]; see also ***R v DeSousa***, [1992] 2 SCR 944 at 961 [***DeSousa***].

death.... The law does not posit the average victim. It says the aggressor must take the victim as he finds him."[78]

[168] The trial judge also instructed the jury on two possible pathways to conviction for manslaughter if the jury was not satisfied that the Crown had proven that Barton was guilty of first degree murder. One was the standard pathway for manslaughter in which the Crown must prove the *actus reus* and *mens rea* for both manslaughter and the underlying unlawful act. The other was the ***Jobidon*** pathway based on ***R v Jobidon***, [1991] 2 SCR 714 [***Jobidon***] in which the Supreme Court addressed circumstances under which consent to bodily harm will be vitiated for public policy reasons.

[169] While we have already determined that a new trial is warranted for first degree murder, we now turn to the Crown's contention that the trial judge failed to properly instruct the jury on manslaughter. Connected with this is another Crown ground of appeal, namely that the trial judge wrongly instructed the jury that Gladue's consent on a previous occasion could be used to support Barton's claimed mistaken belief in consent. Together, these grounds of appeal raise the linked issues of what is meant by "consent" from the perspective of both the complainant and an accused, the meaning of "sexual activity in question" and the scope of the defence of mistaken belief in consent. These are all issues on which the Crown, interveners and defence made submissions to this Court.

B. Errors in the Standard Pathway for Unlawful Act Manslaughter

[170] We have concluded that the jury instructions contained serious errors in the standard pathway instructions on both sexual assault and manslaughter. The instructions contained many material omissions, whether of basic legal concepts or applicable statutory conditions and considerations. The jury was left to fill in very important blanks. In addition, the instructions failed to keep the distinction between the two pathways – and the different requirements for each – sufficiently separate, doubtless leading to further confusion on the jury's part. Consequently, the jury would have had difficulty understanding which factors and findings were relevant to which pathway. The result was a complex charge on unlawful act manslaughter that lacked clarity and coherence, and was also incomplete and contradictory.

1. Errors Concerning the Underlying Unlawful Act

a. The Underlying Unlawful Act and Elements at Issue

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[78] She concluded that objective foreseeability did not contravene s 7 of the *Charter*. The test remains the same: see ***R v Maybin***, 2012 SCC 24, at para 36, [2012] 2 SCR 30.

[171] At trial, as noted, the Crown ultimately argued that the underlying unlawful act was sexual assault under s 271 of the *Code*. On appeal, it took the position that the unlawful act was sexual assault causing bodily harm under s 272(1)(c) of the *Code*. Bodily harm is defined in s 2 of the *Code* as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". When we refer to bodily harm in these Reasons, we mean bodily harm that satisfies this *Code* definition.

[172] Barton admitted (1) he intentionally applied force to Gladue; (2) the force took place in circumstances of a sexual nature; and (3) he caused bodily harm to Gladue. That left two key issues, namely whether the Crown had proven the absence of consent as part of the *actus reus* and the required *mens rea* of sexual assault.

b. Need to Keep Consent under *Actus Reus* and *Mens Rea* Separate

[173] In ***R v Ewanchuk***, [1999] 1 SCR 330 [***Ewanchuk***], the Supreme Court explained why consent must be treated separately at both the *actus reus* and *mens rea* stage of the analysis (at paras 48-49):

> There is a difference in the concept of "consent" as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus*, "consent" means that the complainant in her mind wanted the sexual touching to take place.
>
> In the context of *mens rea* – specifically for the purposes of the honest but mistaken belief in consent – "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.

[174] The trial judge did not instruct the jurors that consent has two distinct roles in the analysis of sexual assault: first, at the *actus reus* stage and then again, and differently, at the *mens rea* stage. The failure to inform the jury that "consent" meant different things at different stages of the analysis prevented the jurors from separately assessing each constituent element of sexual assault as they were legally obliged to do. The trial judge then compounded this error by misstating the law on what is meant by consent at each stage.

[175] We pause to stress that in ***Ewanchuk***, the Supreme Court was dealing with a case in which the disputed issue was whether the complainant had agreed to *any* sexual touching. Thus, in stating what "consent" meant for the purpose of the *actus reus* and *mens rea* in that case, the Supreme Court addressed the meaning of consent in that specific factual context where the Crown contended there was no consent by the complainant to any sexual activity. However, where, as here, it is open to a jury to find that the complainant consented to some sexual activity and the key

issue is whether the complainant consented to the sexual activity in question, then the jury must be directed to what would properly constitute "consent" in these circumstances.

c. Errors Concerning the *Actus Reus* for the Underlying Offence

[176] On this record, there were three live issues in relation to the *actus reus* requirement of sexual assault. First, did Gladue have the legal capacity to consent to the sexual activity in question given her blood alcohol level? Second, did Gladue consent, that is subjectively give her voluntary agreement, to the sexual activity in question? This may be referred to as autonomous consent or consent in fact. Third, under what circumstances should the law vitiate apparent consent as a matter of public policy where death is caused by sexual activity? On appeal, the Crown did not challenge the jury instructions on the first issue. We address the third issue later in these Reasons. We now turn to the errors in relation to the second issue, autonomous consent.

[177] The jury instructions on sexual assault addressed consent, mistaken belief in consent, capacity and force. It included the following relevant extract:[79]

> For there to have been a sexual assault, you will have to decide if Ms. Gladue consented to being touched by Mr. Barton, including consenting to sexual activity with Mr. Barton, and also including consenting to the type of sexual activity *described and demonstrated by Mr. Barton in his testimony*. There are many aspects to the issue of consent.
>
> Consent is a matter of the subjective state of mind of Cindy Gladue at the time the force was applied to her. The question is whether, at that time, she in her mind consented to the *application of force.*
>
> You will have to give careful thought about Ms. Gladue's ability to consent and whether the Crown has proven beyond a reasonable doubt a lack of consent.
>
> In this case, there is some evidence that Cindy Gladue consented to the application of some force by Mr. Barton, *including sexual activity and the activity described by Mr. Barton in his testimony.*
>
> You should understand that people do not necessarily consent because they submit or fail to resist.

[79] AR 1753/28-1754/16; Emphasis added.

> The *chronology of events between Mr. Barton and Ms. Gladue is important to aspects on this issue of consent.* You have heard that -- you have heard evidence that *Cindy Gladue was a prostitute* and that she and Mr. Barton entered into a commercial transaction for sexual relations on June 20th, 2011.
>
> *She returned voluntarily to the Yellowhead Inn* on June 21st and met Mr. Barton at approximately 11:30 that night. You should consider the evidence of Mr. Barton, Mr. Atkins, and the bartender, Tanya Dunster, as to Ms. Gladue's behaviour that night.
>
> You should also consider Mr. Barton's evidence that *similar sexual activities occurred on both nights* and that *Ms. Gladue appeared to him to be enjoying herself.*

[178] These instructions were erroneous in law in several key respects. Before explaining why, it is necessary to briefly review the law on consent.

i. Meaning of "Consent" Under the Code

[179] In 1992, Parliament amended the *Code* to step past the persistent notion that found favour in many places that unless a woman said no or resisted, she was consenting to sexual activity.[80] The 1992 *Code* Amendments included for the first time ever a statutory definition of consent in sexual assault cases: s 273.1(1). By defining "consent" to mean the "voluntary agreement of the complainant to engage in the sexual activity in question", Parliament signalled that the focus should henceforth be on whether the complainant positively affirmed her willingness to participate in the subject sexual activity as opposed to whether she expressly rejected it.[81]

[180] Parliament understood very well that a definition of "consent" was required to overcome the historical tendency to treat a complainant's *silence, non-resistance or submission* as "implied

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[80] Ten years earlier, in the 1982 *Code* Amendments, Parliament had amended a number of *Code* sections dealing with sexual offences given the adoption of the *Charter*. That included abolishing rape and indecent assault and adding the offence of sexual assault. It also included adding s 265(3) (then s 244(3)), which provided there was no consent where the complainant "submits or does not resist" because of the application of force, threats, fraud, or the exercise of authority. But juries continued to be instructed to look for verbal or physical resistance as evidence of non-consent to sexual activity: see Janine Benedet, "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution" (2014) 52:1 Alta L Rev 127 at 136. This led to pressure for further reforms, resulting in the 1992 *Code* Amendments.

[81] Lucinda Vandervort, "Affirmative Sexual Consent in Canadian Law, Jurisprudence and Legal Theory" (2012) 23:2 Colum J Gender & L 395 at 413.

consent". On that theory, the focus was on whether the complainant expressed her dissent rather than on whether she gave her assent.[82] Therefore, unless the complainant expressed her non-consent – by saying no or physically resisting – her consent to what transpired could be presumptively implied by the judge and jurors as well as the perpetrator. And often was. Not everyone took this view of the law.[83] But enough did that Parliament put an end to importing the "ghost element" of victim resistance into the law of sexual assault.

[181] In addition to adding a definition of "consent", Parliament also set out in s 273.1(2) a list of circumstances in which no consent would be obtained and made it clear in s 273.1(3) that the list was not exhaustive. Taken together, the 1992 *Code* Amendments underscored that personal sexual autonomy is essential to human dignity. People are inviolate, and unless a person gives a genuine and informed consent to what actually happened to that person, the law recognizes an assault. Viewed in this light, the positive definition of consent contained in s 273.1 of the *Code*, stressing as it does the equality of responsibility in sexual relations, is in keeping with women's equality rights under the *Charter*.

[182] Certain principles flow from this. Consent is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter": ***R v JA***, 2011 SCC 28 at para 31, [2011] 2 SCR 440 [***JA***]. Silence or failure to resist does not equal consent: ***R v B(DK)***, 2012 MBCA 114 at para 10, [2012] MJ No 405 (QL). Consent cannot be implied from the circumstances or the relationship between the accused and the complainant: ***JA***, *supra* at para 47. The consent "must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind": ***JA***, *supra* at para 34. The complainant must be conscious throughout the sexual activity in question and possess the legal capacity to consent. Consent may be revoked at any time: s 273.1(2)(e). The right to say "no" exists always, even if a person has been drinking, has said "yes" earlier, or changed his or her mind. Consent is conscious personal voluntary agreement in fact. It must be, in one word, autonomous.

[183] Nor does consent exist in the abstract. Voluntary agreement is linked expressly to engaging in the particular sexual activity in question at the time it occurs and with a particular person. A complainant must agree to the specific sexual act since "agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching": ***Hutchinson***, *supra* at para 54; ***R v Olotu***, 2017 SCC 11, [2017] SCJ No 11 (QL), aff'g 2016 SKCA 84, 338 CCC (3d) 321; ***R v Poirier***, 2014 ABCA 59, [2014] AJ No 138 (QL); and ***Flaviano***, 2013 ABCA 219, 553 AR 282, aff'd 2014 SCC 14, [2014] 1 SCR 270.

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[82] John McInnes & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29:2 UBC L Rev 341 at 353 n 30, 357 n 38.

[83] See ***R v M (ML)***, [1994] 2 SCR 3 which was based on the law as it existed prior to the 1992 *Code* Amendments.

[184] Before identifying specific errors in the instructions on Gladue's "consent", we must place this in its proper context. As noted, consent – the voluntary agreement of the complainant – must be to engage in something. The required something under the *Code* is the "sexual activity in question".

ii. Failure to Instruct Jury Properly on Meaning of "Sexual Activity in Question"

[185] Unfortunately, the trial judge failed to instruct the jury properly on the meaning of "sexual activity in question". And yet, to assess whether the Crown had proven Gladue's lack of consent to engage in the sexual activity in question, the jury was required to first determine what that sexual activity was. This is particularly important where, as here, it was open to the jury to conclude that Gladue consented to some sexual activity but the real issue was whether she consented to what the jury determined that Barton actually did that caused her death. Care and precision are required because how the sexual activity in question is characterized and described will necessarily influence the analysis and conclusion.

(1) Reviewable Errors in the Jury Charge

[186] The jury instructions on this point were both deficient and erroneous. As outlined above, the trial judge indicated that the jury had to decide whether Gladue consented to "being *touched* by Barton, including consenting to *sexual activity with Mr. Barton*, and also including consenting to the *type* of sexual activity *described and demonstrated by Mr. Barton in his testimony.*"[84]

[187] First, the question was not whether Gladue consented to the *type* of sexual activity, much less to what *was described and demonstrated by Barton in his testimony*. Parliament has determined that the consent must be to engage in the "sexual activity in question": ***JA***, *supra* at para 34. Sexual activity in question means the sexual activity that a jury determines actually happened. If the complainant did not voluntarily agree to what the accused actually did, then there is no valid consent under the *Code*. Equally important, Parliament did not say that consent to engage in the "type" of sexual activity in question would do. The reason is obvious. For example, if the "type" of sexual activity Gladue consented to was described to the jury as vaginal penetration, that could include penetration by Barton's penis, fingers, hand or an exacto knife.

[188] Parliament also understood that if it defined consent as simply being consent to engage in "sexual activity" generally, this would simply perpetuate problems that Parliament sought to overcome. It was well aware of the need to ensure that because a person said yes to one form of sexual activity, that did not give the other person license to engage in more invasive or different sexual activity *without prior consent*. To permit this would be contrary to sexual autonomy and

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[84] AR 1753/28-31.

human dignity. Accordingly, Parliament rejected the notion of open-ended broad consent to sexual activity. In defining consent as it did, Parliament sought to firmly close the door to sexual exploitation and abuse. That is why Parliament mandated that the consent must be to engage in the "sexual activity in question". This is a more specific formulation grounded in the facts.

[189] Nor was the question whether Gladue consented to being "touched". Instructing the jury to this effect seriously distorted the *Code* definition of consent. To repeat, consent is the voluntary agreement to engage in the sexual activity in question. The jury instruction wrongly conflated the word "force" with "sexual activity in question". And more problematic yet, it failed to link "consent" to the "sexual activity in question".[85] The sexual activity in question here was not being "touched". And it was not the "application of some force". All sexual activity involves some "force" since "force" includes touching and sexual activity typically includes some form of body-to-body contact. Nor was it even "the application of force" generally. None of this comes close to defining the sexual activity that caused Gladue's death. Gladue did not die because she agreed to being "touched" or agreed to the "application of some force" or even "the application of force" generally. The jury instructions on consent were totally disconnected from the reality of what caused her death. The result was to wrongly erase from the jury's analysis the words "sexual activity in question" as specified in the *Code*.

[190] Second, the instructions erroneously and repeatedly directed the jury to measure whether the Crown had proven Gladue's lack of consent to the sexual activity in question against how Barton described that activity. A recurring theme in this jury charge was that Barton's version of what he did was the only version on which the jury was to decide the case. As noted, this was reviewable error in its own right. It was for the jury to determine based on all the evidence, including the expert medical evidence, exactly what the relevant facts were – not what Barton said he did but what the jury found actually happened. In this regard, the jury was entitled to take all the evidence into account including that of the expert witnesses. They were not bound by Barton's description of what he admitted to doing simply because no one was alive to dispute it. That applies not only to what Barton claimed happened the night Gladue died but also to what he claimed happened between him and Gladue the previous night.

[191] The trial judge's error in suggesting otherwise was exacerbated by the warning he gave the jury regarding the medical evidence of the forensic experts. It is not clear why the jury needed to be warned – twice as the trial judge did – that the three medical experts based their views about the amount of force necessary to tear a vaginal wall on scientific research, rather than personal experience.[86] Expertise may well be, and often is, based on academic studies and research.

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[85] We discuss this failure later in these Reasons when addressing how the trial judge dealt with the issue of Gladue's "consent".

[86] See AR 1757/1-16; 1758/38 - 1759/7.

[192] More important though, to avoid confusing the jury, the jury should have been instructed that the warning on this point did not apply to the experts' opinions on whether the wound was a cut or tear. That was an ordinary factual question within the four corners of the expertise of both forensic pathologists. The warning effectively prevented the jury from doing something the law would otherwise allow. The jury would have been entitled to reason backwards from the nature of the harm caused to conclude that Barton's version was not true. And they would have been entitled to reason further backwards that Barton intended the natural and probable consequences of his actions: ***R v Walle***, 2012 SCC 41 at paras 55-68, [2012] 2 SCR 438. But they were never instructed to this effect. This failure, combined with the jury's directed focus on Barton's version of events, meant that the jury's scope of adjudication was unreasonably restricted.

[193] Third, the jury needed to clearly understand that in the circumstances here, the "sexual activity in question" included the amount of force that Barton used in the sexual activity. Even if the sexual activity in question was described as vaginal penetration by Barton's hand, that characterization would be incomplete unless it also captured a key component of Parliament's definition of consent and assault – and that is the amount of force used. At the base of all assault is the intentional application of force. What distinguishes a touch – which is included in application of force – from a solid push or a hard punch is the force involved, even though at one very high level of abstraction, they are all types of hand-to-body contact. Where the act in question is sexual assault causing bodily harm, the amount of force an accused actually applied is necessarily an integral part of "the sexual activity in question".

[194] Instructions on the amount of force used should have been tied to Gladue's autonomous consent in fact. Admittedly, at one point in the jury charge, the trial judge did address limits on consent and whether Gladue consented to the level of force that Barton used.[87] But it was not clear to which pathway these instructions related. Consequently, this 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.[88]

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[87] See instructions at AR 1758/13-20: "When a person consents to the application of force, including during sexual activity, that consent only covers a certain amount of force. It does not cover force that goes beyond the consent. For example, supposed two people agree to have an arm-wrestling contest. Obviously, each of them consent to the application of force by the other. But that consent would only cover the force necessary for arm wrestling. It would not cover something like punching or kicking. You will have to decide 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."

[88] In addition, the example chosen was unhelpful. It was an analogy distinguishing a strength sport from a fight. The distinction between these two examples, neither of which involved sexual activity, was not of assistance on either pathway. Indeed, the example does not really fit the ***Jobidon*** pathway very well either.

[195] This jury ought to have been instructed to carefully consider which activities Gladue agreed to and the degree of force that would be used in performing them. This is especially so since the trial judge had earlier instructed the jury that "In this case, there is some evidence that Cindy Gladue consented to the application of some force by Mr. Barton, including sexual activity and the activity described by Mr. Barton in his testimony."[89] In particular, the jury ought to have been invited to determine whether the degree of force used in the sexual activity the night she died exceeded the scope of any consent Gladue gave. In assessing whether this was so, the jury ought to have been instructed to consider whether it was objectively foreseeable that the actions they concluded that Barton did that night would risk bodily harm to Gladue. Further, the jury ought to have been instructed to consider whether there was any evidence on this record that Gladue voluntarily agreed to engage in sexual activity that involved the degree of force required to rip an 11 centimeter hole in her vaginal wall. The jury also ought to have been instructed to consider the relevant forensic evidence on this along with the obvious: Gladue lived the first night and died the second.

[196] In this regard, running throughout these jury instructions is an unstated assumption. That assumption – consent to "Intercourse, sex." – in the circumstances here (woman, Native, prostitute) equaled consent to the risk of bodily harm, or actual bodily harm. With one exception, we reject 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 one exception is for those individuals who engage in sexual activity with a view to causing or risking bodily harm, as in sado-masochistic sex.[90] To bring this down to reality, when a sex trade worker gives her consent to "Intercourse, sex", that sex trade worker is not consenting to bodily harm from that sexual activity. When sex trade workers contract to sell sex, they do not agree to sign away their lives. Were the law otherwise, this would give purchasers of sex an open invitation to inflict bodily harm on sex trade workers with impunity, all under the guise of engaging in "sexual activity".

[197] Further, 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.

(2) The Sexual Activity in Question

[198] What then was the sexual activity in question here? For this purpose, we assume without deciding that the Crown did not prove that Barton cut Gladue. Leaving aside fellatio, and based solely on Barton's admissions, at a minimum, it was Barton's repeatedly thrusting his hand up and

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[89] AR 1753/40-1754/1

[90] Whether that consent would be vitiated by law is a different issue.

into Gladue's vagina for ten minutes with the degree of force required to rip an 11 centimeter hole in Gladue's vaginal wall. In this regard, the defence's own expert witness testified that Gladue died from "blunt force trauma".[91] The jury should have been instructed to consider whether it was satisfied that the Crown had proven beyond a reasonable doubt that Gladue had not consented to the sexual activity that they concluded caused Gladue's death. Again, in answering that question, 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.

[199] A further problem was the trial judge's referring to Barton's actions as "fisting". The use of this term conveyed to the jury a normalization of this sexual activity. It also implied that this is somehow a practice which, if not known to the jury, is nevertheless known within certain communities, like customers and prostitutes. Since the trial judge indicated that the jury could proceed from Barton's evidence as a premise, the jury could very well have concluded that prostitutes are willing to include this in the "Everything" included in "Intercourse, sex." However, in the interests of a balanced charge, it would have been necessary to instruct the jury that the weight of the expert evidence from literature to do with "fisting" appears to have referred to the damage it would cause and the harm or pain one would expect.[92]

[200] In any event, the issue is not whether Gladue consented to "fisting" in the abstract. To repeat, it is whether Gladue consented – or more to the point whether the Crown has proven that Gladue did not consent – to the sexual activity that the jury found occurred. Simply because potentially risky or dangerous acts may also have other names does not mean that they are not risky or dangerous. This was for the jury to decide. The jury should also have been instructed to this effect.

(3) Pattern Jury Charges Focus on "Force" Not "Sexual Activity in Question"

[201] In fairness to the trial judge, it is apparent that he relied in part on certain content from pattern jury instructions. Pattern jury charges for sexual assault typically centre almost exclusively on whether "force" was applied to a complainant without consent. This focus on "force" is understandable, coming as it does from the definition of assault in s 265 of the *Code*. In simple terms, an assault is the application of force without consent. However, as noted, because of the way in which s 265 was being interpreted in sexual offences, Parliament identified the imperative need to expressly define "consent" for purposes of sexual offences and did so in 1992: s 273.1(1). To repeat for ease of reference, "consent" means the "voluntary agreement of the complainant to engage in the sexual activity in question". Therefore, while the rationale for speaking in terms of

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[91] AR 1376/39-1377/13; 1748/33.

[92] AR 805, 814-816, 900-901, 904, 909, 912, 959-961, 967, 975, 977-979, 1003, 1338, 1340, 1361-1362, 1366-1367, 1394, 1411-1412.

"force" was logical prior to the 1992 *Code* Amendments, now that Parliament has changed the law, it is appropriate to instruct juries on the required elements of sexual assault in a way which steps past confusing language.

[202] The first problem is this. "Force" is an easily misunderstood term. As a legal term of art under s 265, it includes touching. However, while lawyers and judges appreciate the nuances in this term, the word "force" confounds juries. And understandably so. Force in the colloquial sense is understood to mean using physical strength or power to compel a complainant to engage in sexual activity: ***R v Tremblay***, 2016 ABCA 30 at para 15, 612 AR 147 [***Tremblay***]. Not only does "force" have this connotation, that connotation also happens to be consistent with the literal definition of "force" as a noun (and as a verb) in the dictionary. In this regard, "force" is typically defined as meaning "violence, compulsion or constraint exerted upon or against a person..." (*Merriam-Webster Dictionary*, online: <http://www.merriam-webster.com/dictionary/force>), or "the use of physical strength to constrain the action of persons; violence or physical coercion" (The *Oxford English Dictionary*, online: <http://www.oed.com /view/ Entry/72847>).

[203] As a consequence, prior to the 1992 *Code* Amendments, juries would be disinclined to find an absence of consent unless there was evidence that a complainant's will had been overcome by *force* as that word is commonly understood. That meant that where no overt force was used, jurors would often treat non-resistance as consent. In other words, only "forced sex" qualified as a sexual assault. This was one of the very reasons Parliament amended the law in 1992 to provide that consent was "voluntary agreement to the sexual activity in question". Notably, it did not define consent for sexual offences as "voluntary agreement to force" and still less as "voluntary agreement to a touch".

[204] However, notwithstanding the addition of a definition of consent for sexual offences, jury charges still speak repeatedly about the use of force in the same language they did prior to the 1992 *Code* Amendments. They may never, as in the jury instructions in this case, get to the real point, namely whether the complainant consented to the sexual activity in question. And if they do, it may only be in one statement. Compare that to the repeated use of the word "force" over and over throughout pattern jury instructions. Moreover, the word "force", which the jury is supposed to understand as including only a touch, is often combined with other words denoting compulsion (and thus an assault) such as "threats or fear of the application of force or fraud or exercise of authority", likely leading, unsurprisingly, to further confusion. Accordingly, while the law has changed, this aspect of pattern jury instructions which led in part to the need to change the law has not. This calls for correction. It has also led to problems with alleged inconsistent verdicts: see this Court's decision in ***Tremblay***, *supra*; see also ***R v SL***, 2013 ONCA 176, 300 CCC (3d) 100.

[205] More fundamentally, even if the trial judge makes it clear that "force" includes a touch, that leads in turn to another serious problem. If the jury is then told, as it was here (and often is given pattern jury instructions), that the issue is whether the complainant has agreed to the application of "force", and even if the jury understands that "force" includes a touch, then the jury is essentially being instructed that as long as the complainant has agreed to a "touch", the complainant has then

agreed to all the sexual activity that follows. This is not the law. It is wrong to instruct a jury in these terms.

[206] This problem is exacerbated by the failure to separate two categories of cases – those in which the Crown alleges the complainant did not consent to any sexual activity; and those in which the Crown alleges that while the complainant consented to certain sexual activity, the complainant did not consent to the sexual activity in question. The point is this. Typical instructions used for the first category will not be sufficient and will undoubtedly mislead a jury if used for the second category. The formulation in the standard instructions might be appropriate where the issue is whether a complainant agreed to any sexual activity at all. We say "might be" because, as noted, even for this first category of cases, the focus on "force" and not on the sexual activity that actually occurred, will also likely mislead the jury. But whatever our reservations about the pattern jury charge's utility for the first category, one thing is clear. It is not appropriate for use where the Crown asserts there is evidence that the complainant consented to engage in certain sexual activity but not the "sexual activity in question". This case involved the second category.

[207] Another problem with using the word "force" the way it was done in these jury instructions is that the exact same word was employed for two different purposes. The first use of "force" was to describe acts including a touch. The second was to describe, or attempt to describe, whether the level of "force" that Barton applied exceeded what Gladue might have consented to. Given the several problems with the jury instructions here, using the same word for two distinct purposes would simply have added to the jury's confusion. This also highlights why "force" should not be the primary terminology when instructing a jury in a case involving the second category.

[208] The trial judge's failure to properly define "the sexual activity in question" had a material bearing on the acquittals. This failure was compounded by the manner in which the trial judge addressed the issue to which we now return, consent.

iii. Failure to Properly Instruct Jury on Code Meaning of "Consent"

(1) Reviewable Errors in the Jury Charge

[209] The jury instructions on consent were erroneous. A trier of fact may only come to one of two conclusions: either the complainant consented or not: ***Ewanchuk***, *supra* at para 31. The trial judge correctly told the jury that:

> Consent is a matter of the subjective state of mind of Cindy Gladue at the time the force was applied to her.[93]

[93] AR 1753/33-34. By itself, the awkward reference to a "subjective state of mind" is not plain language.

[210] However, a review of this jury charge reveals that not once did the trial judge ever instruct the jury that "consent" meant Gladue's "voluntary agreement to engage in the sexual activity in question". The jury needed to understand that it was Gladue's state of mind, and her perspective alone, that was determinative: ***Ewanchuk***, *supra* at para 27. Equally important, her consent had to be to the "sexual activity in question." On this point, the jury needed to be told that Gladue had to be sufficiently aware of what Barton intended to do to be said to have given her autonomous consent to what he actually intended to do and did as determined by the jury. The jury also needed to be instructed that even if Gladue gave autonomous consent to one form of sexual activity, that did not constitute consent to every escalation of that sexual activity, let alone different or more invasive or more forceful sexual activity.

[211] Further, not only did the trial judge fail to assist the jury with proper definitions of "consent" or "the sexual activity in question", he compounded these errors by misdirecting the jury about what was "important" to Gladue's subjective consent. In particular, he told the jury that (1) Gladue was a prostitute; (2) this was a commercial transaction; (3) she returned voluntarily to the hotel to meet Barton the second night; (4) Barton said that "similar" activities occurred on both nights; and (5) Barton thought she was enjoying herself.[94]

[212] In law, not one of these was relevant to whether Gladue subjectively consented to the sexual activity that caused her death – and this jury should never have been instructed that they were. The complainant's subjective consent to the specific disputed activity cannot be proven by the relationship between the parties, or her words and conduct on another date, or the accused's perceptions of her conduct.[95] There is no substitute for a complainant's actual consent to the sexual activity in question at the time it is occurring: ***Ewanchuk***, *supra* at para 26. This jury was wrongly led to believe that it could infer Gladue's subjective consent from a number of legally impermissible considerations. This too constituted reviewable error.

[213] In addition, the jurors were never told that Gladue retained the right of every person to physical inviolability and that Barton was not buying her – whether for himself or to offer to others. Barton was not able to contract out of the need to ensure Gladue's autonomous consent to every sexual activity he wished to perform and with the amount of force that only he knew he intended to apply. The law insists that, at the relevant time, Gladue was conscious and capable of consenting, and voluntarily agreed to each specific activity.

[214] Moreover, the jury, in the absence of express and correct direction, was likely confused about comments from the Crown, defence, Barton and the trial judge that this was a commercial transaction, under which the parties bargained, reached an agreement, and money was supposed to

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[94] AR 1754/6-16.

[95] ***JA***, *supra* at paras 34-47; ***Ewanchuk***, *supra* at paras 24-30.

change hands. Barton testified that his $60.00 was for "Everything" and that "she knows what she was coming for".[96] This evidence, and the trial judge's misstatement of what was important to consent, likely left the jury with the erroneous impression that, having agreed to sell sex for money, Gladue gave her "implied consent" to everything Barton chose to do and with the degree of force Barton chose. In addition to requiring correct instructions on the legal definition of consent, the jury should have been warned against the potential for reasoning bias on this topic. It was not.

[215] Finally, the legal standard does not change when the complainant dies. The jury needed to appreciate they were being asked whether they were satisfied that the Crown had proven that Gladue did not subjectively agree to having Barton thrust his hand so far into her vagina and with such force that he ripped her vaginal wall, whether for $60 or at all. Instead, the trial judge invited the jury to consider, *in assessing whether Gladue consented*, that "similar" activity occurred on both nights. In doing so, he erred. As noted earlier, he deleted the instruction from his first draft that wrongly stated that the jury could take Gladue's consent the prior night into account in deciding whether she consented the night she died. But after doing so, the trial judge then reintroduced this same error into the charge in this more subtle, yet equally incorrect, manner. The issue is not whether Gladue consented to "similar" activity the night before; it is whether she consented the second night to engage in the "sexual activity in question". The trial judge's statement further ignores the admitted key factual differences between the sexual activity on the two nights.

(2) Deficiencies in Pattern Jury Charges on "Consent"

[216] Again, certain errors in the charge on "consent" can be traced back to the way that pattern jury instructions deal with this issue. Here too, problems exist. When instructing a jury on "consent", it will rarely be sufficient to simply quote the words from the *Code*. Why? Because what is meant by consent has been the subject of a number of key decisions by the Supreme Court through the years. Every one of those cases went to the Supreme Court because someone argued that "consent" meant something other than what the Supreme Court ultimately decided it meant. The substance of the current law on this issue – which is absolutely critical in every sexual assault case – should be conveyed in jury instructions.

[217] Thus, for example, the jury could be instructed, when the judge is dealing with consent in the context of the *actus reus* and the complainant's consent, as follows. We readily concede that further refinements may be required, including by judges in individual cases.[97] We also recognize the great advantage of having a national committee update jury charges in this area. These draft suggestions are intended to be the start of a conversation, not the end of it.

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[96] AR 1103/27; 1121/11.

[97] It is a given that it is ideal if the trial judge is able to zero in on the real issues in dispute and focus the jury's attention on those issues without distracting the jury about non-contentious issues.

> Consent means the voluntary agreement of the complainant to engage in the sexual activity in question: did she subjectively consent in her mind to that activity at the time it was occurring? The consent must be to each and every sexual act in question. The complainant is under no obligation to express her lack of consent. Silence does not equal consent. Nor does submission or lack of resistance. Agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching. To be valid, the complainant must be conscious and capable of consent throughout the sexual activity. Consent cannot be implied from the relationship between the accused and the complainant. A complainant may revoke consent or limit its scope at any time.[98]

[218] Pattern jury instructions typically provide no such guidance. Instead, after quoting the definition of consent from the *Code*, they often include, as the trial judge did here, the following instruction on consent. It is substantively the same as the wording used to instruct juries *before* the 1992 *Code* Amendments to "consent":

> Even if the complainant submitted or did not resist, this does not *necessarily* mean that the complainant voluntarily agreed to what the accused did [Emphasis added].

[219] The implication of this instruction is remarkably clear – and remarkably inaccurate. What it tells the jury is that while submission or lack of resistance does not *necessarily* mean that the complainant consented, submission or lack of resistance could very well mean that the complainant did consent. Indeed, this instruction effectively implies that typically both submission and failure to resist do equal consent for purposes of sexual offences under the *Code*. Neither does. To suggest otherwise is incorrect in law. Indeed, it is a mistake of law to believe that silence or passivity constitutes consent: ***Ewanchuk***, *supra* at para 51; ***R v M(ML)***, [1994] 2 SCR 3 at 4; see also Janine Benedet, "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution" (2014) 52:1 Alta L Rev 127. To instruct the jury in this way amounts to a revivication of the concept of "implied consent"; unless a woman says no, she has given her implied consent to sexual activity.

[220] A variation of this theme along the following lines is equally problematic:

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[98] This is based on the law as set forth in cases like ***Ewanchuk*** and ***JA***.

> Consent requires the complainant's voluntary agreement, without the influence of force, threats, fear, fraud or abuse of authority, *to let the physical contact occur* [Emphasis added].

[221] This may be adequate for purposes of an assault under s 265 but it will not do for an alleged sexual assault.[99] It implies that if the complainant "let the physical contact occur", she has consented. The qualifying words would likely lead a jury to conclude that a complainant consented to the sexual activity unless the sexual activity involved force, threats, fear, fraud or abuse of authority. Or at least it would raise a reasonable doubt on consent in their minds. The problem? This instruction implies that silence equals consent. In doing so, it essentially reintroduces yet again the idea that unless a woman resists, she has consented. This is wrong on many levels. The very language implies a subject/object relationship rather than a mutual relationship based on consent. Moreover, it effectively invites a jury to conclude that if the complainant was silent in the face of what happened, the Crown has failed to prove the *actus reus* of sexual assault. But there is no obligation under Canadian law for the complainant to express her lack of consent before the *actus reus* of sexual assault can be made out: ***JA***, *supra* at paras 37, 41. As judges, we do not have the right to erase "only yes means yes" from s 273.1(1) and write in "silence means yes".

[222] As part of pushing the jury instruction reset button, these concerns should be addressed to ensure that pattern jury instructions are in full conformity with the law.

[223] All of this helps explain why the issue of Gladue's consent should never have been put to this jury the way it was – and equally, it helps explain why it was. As noted, the question is not whether Gladue gave her consent to the "application of some force" or even the "application of force" because, as noted, force includes touching. Thus, it was wrong in law to instruct the jury to consider whether Gladue agreed to "the application of some force" or the "application of force". This was wholly disconnected from the real issue before this jury – did Gladue voluntarily agree to the sexual activity that caused her death? It all comes back to the "sexual activity in question". That is what the issue of consent must be linked to – *consent to the sexual activity that caused her death as determined by the jury*. Therefore, stating or implying as was done here that it was enough that Gladue consented to "sexual activity" generally or "the application of force" or "the application of some force" constitutes a reversible error of law, one that unquestionably misled the jury.

[224] For these reasons, the jury instructions were flawed in the treatment of the *actus reus* of sexual assault.

d. Incomplete and Deficient Instructions on the *Mens Rea* for Sexual Assault

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[99] We should not be taken as endorsing this for alleged assaults under s 265 either.

i. Reviewable Errors in the Jury Instructions

[225] The *mens rea* of sexual assault is commonly stated to consist of two elements: (1) intention to touch; and (2) knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, on the part of the person touched. Thus, the inquiry now is – or at least should be – whether the complainant said "yes" either expressly through words or unambiguous affirmative conduct: ***Ewanchuk***, *supra* at para 49. Or to put it the way that L'Heureux-Dubé J did in ***R v Park***, [1995] 2 SCR 836 at para 39 [***Park***], cited approvingly in ***Ewanchuk***, *supra* at para 45:

> the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes".

[226] Recklessness is "knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur": ***Sansregret v The Queen***, [1985] 1 SCR 570 at 584 [***Sansregret***]. Wilful blindness is a substitute for actual knowledge and involves an awareness of the need for some inquiry but choosing not to make the inquiry in order not to know the truth: ***Sansregret*** at 584; ***R v Esau***, [1997] 2 SCR 777 at para 70 [***Esau***].

[227] Even though any one of knowledge, recklessness, or wilful blindness is sufficient in law, the trial judge only referred to one of three ways in which the Crown could prove that Barton had the *mens rea* for sexual assault – actual knowledge. That is evident from the following instruction to the jury on this issue:

> The Crown must also prove that Mr. Barton knew that Ms. Gladue did not consent or that she did not consent validly.[100]

[228] In failing to include instructions on recklessness and wilful blindness, the trial judge erred in law. We note that both were included in early drafts of the jury charge but then removed from the final instructions. They ought not to have been removed. Quite apart from the forensic evidence, on his own evidence, Barton admitted he used more force, his actions were more invasive and of longer duration, and he had not asked Gladue for her permission to do so. On this evidentiary record, it should have been left to the trier of fact to determine whether Barton simply assumed Gladue's consent because he paid her for "Everything" and was therefore either reckless or wilfully blind to the absence of Gladue's consent to the sexual activity that caused her death.

[229] Moreover, Barton testified that Gladue began moaning and groaning at some point while he was thrusting his hand into her body up and into her vagina, something she had not done the

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[100] AR 1755/31-32.

night before. He did not know Gladue or her body; they had met only the night before and on his evidence engaged in sexual activity once. He knew he was thrusting deeper, harder and longer. It should have been left to the trier of fact to determine whether Gladue's moaning and groaning which could have indicated pain or pleasure or both or neither constituted "ambiguous conduct" which put Barton on notice to make further inquiries: ***R v Cornejo*** (2003), 68 OR (3d) 117 (CA) at para 21 [***Cornejo***]; ***R v TS***, [1999] OJ No 268 (CJ) at para 158. An accused's speculation as to what was going on in the complainant's mind provides no defence: ***Ewanchuk***, *supra* at para 46; ***Park***, *supra* at para 44. These were issues for the jury to decide, not the trial judge.

[230] The jury instructions were also confusing and erroneous on three other points. First, suggesting, as they did, that there is a difference between consent and valid consent implies that somehow something less than valid consent will do. It will not. This wording is taken in part from pattern jury instructions. But those instructions intend that one alternative or the other be put to the jury, not both. And if the latter is put to the jury, it must be completed to direct the jury to what is in issue. Here, the issue was whether Gladue had the capacity to consent given the degree of her intoxication. Accordingly, the instruction should have expressly focussed on whether Barton knew that Gladue was not consenting validly given her degree of intoxication.

[231] Second, this instruction was untethered to the "sexual activity in question". This too was a mistake. All three forms of *mens rea* must be tied expressly to the sexual activity in question. To repeat, consent is to something; the something is the sexual activity in question.

[232] Third, instructing a jury to determine whether the Crown has proven that an accused knew that the complainant "did not consent" is ambiguous in meaning, circular in nature and confusing in result. Why? It never gets to the point of what consent means for the purpose of proving the necessary *mens rea*. This gap – and it is large – leaves open the question of what it takes in law to bring home to the accused that the complainant was not consenting to the sexual activity in question. A juror should not have to guess at what it is that the Crown must establish. If that happens, it can lead to an "unreasonable doubt" founded not on the law or facts but on confusing and confused jury instructions.

ii. Deficiencies in Pattern Jury Instructions on Mens Rea of Sexual Assault

[233] Again, in fairness to the trial judge, this part of the instruction comes from pattern jury instructions. This instruction *predates* both Parliament's adding for the first time a definition of "consent" in the 1992 *Code* Amendments for sexual offences and later Supreme Court decisions clarifying what "consent" means for purposes of the *mens rea* of sexual assault. Despite these changes in the law, this jury instruction has remained essentially the same for more than a quarter century.

[234] To understand why this instruction is fundamentally flawed and misleading to a jury, it is first necessary to understand the current law and how it differs from the pre-1992 *Code* Amendments. As noted, under the current law, the question is not whether the accused was aware

the complainant said "no" to the sexual activity in which he wished to engage (although this will certainly also attract culpability). It is whether the accused was aware the complainant did not say "yes".[101] The wording of the pattern jury charge, which follows, fails to clarify this point for the jury:

> Did the accused know that the complainant did not consent to the force that the accused applied?

[235] This instruction does not explain to the jury what is meant by "consent" in this context.[102] The Supreme Court has stressed that there is a difference in the concept of "consent" as it relates to the *actus reus* and the *mens rea* of sexual assault: ***Ewanchuk***, *supra* at paras 48-49. But a juror would not know this. Add to this that in many cases, the accused may advance the defence of mistaken belief in "consent", and the magnitude of the deficiency here is not difficult to see. This is particularly so when the instruction on mistaken belief in consent is also deficient.

[236] The importance of getting this part of the jury charge right in law and *presenting it in a fair and balanced manner* cannot be overstated. This instruction constitutes a critical element of any alleged sexual assault jury charge since it instructs the jury on what the Crown must necessarily prove for the jury to find that an accused has a "guilty mind". The purpose of jury instructions is to clarify, not confuse. Jurors are entitled to know with as much clarity as language is capable of conveying precisely what the law is. To fail to instruct jurors in a manner faithful to the law diminishes respect for the Rule of Law itself. Ambiguity may be the best friend of reasonable doubt but it has been a longtime enemy of a fair trial.

[237] Consequently, to avoid misleading the jury as to what is meant by "did the accused know that the complainant did not consent" – and to what – it is critical that the jury charge on this point circle back to the *Code* language of consent and to the "sexual activity in question". Only in this way will the jury be properly instructed on the law on the *mens rea* of sexual assault. To accomplish this objective, the jury could be instructed along the following lines which accord with Parliament's change in the definition of consent in the 1992 *Code* Amendments:[103]

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[101] Of course, even a yes will not do if the yes is given because of one of the grounds set out in the *Code*, including fraud, exercise of authority, threats or fear of harm. Nor is this list of circumstances in which no consent is obtained exhaustive. Whether to characterize these circumstances as lack of consent to start with or vitiation of consent is an issue we need not address: see ***Hutchinson***, *supra*, for different approaches of the majority and minority to this issue.

[102] This is quite apart from the cross-reference to the "force that the accused applied". We have already dealt with the problems in using the word "force" and de-linking of consent from the sexual activity in question. The same concern exists with what must be brought home to the accused. Awareness of lack of consent is to the "sexual activity in question."

[103] The draft wording essentially comes from ***Ewanchuk***, *supra* at paras 46-49, 51. This is not intended to be a complete set of instructions. It would also be necessary to explain that proof that the complainant did not consent can

> Did the accused know that the complainant did not affirmatively communicate either expressly through her words or through her unambiguous conduct her agreement to engage in the sexual activity in question with the accused? In other words, did the accused know that the complainant did not effectively say yes through her words and/or actions?

[238] The problem with current pattern jury charges extends beyond the need to clarify the meaning of consent for purposes of the *mens rea* of sexual assault. A further complication is this. What must the Crown prove where there is no live issue of mistaken belief in consent? In ***Ewanchuk***, *supra* at para 41, Major J made the point that: "Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement." He then added at paras 42, 49 [Emphasis added]:

> However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a *defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant.* To do otherwise would result in the injustice of convicting individuals who are morally innocent.... *As such, the mens rea of sexual assault contains two elements*: intention to touch and knowing of, or being reckless or wilfully blind to, a lack of consent on the part of the person touched....[104]

> In the context of *mens rea – specifically for the purposes of the honest but mistaken belief in consent* – "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.

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be established in one of three ways – by actual knowledge, recklessness or wilful blindness to the fact that the complainant did not consent, with explanations as to what these mean as well. Again, we stress this is a draft only and further refinements may be required. This is best dealt with by those responsible for drafting national jury instructions.

[104] There are three possible mental states available to an accused in relation to the element of consent: (1) knowledge that the complainant is not consenting or its equivalent, wilful blindness; (2) knowledge that the accused is unsure whether the complainant is consenting (recklessness); or (3) knowledge or belief that the complainant consents (mistaken belief in consent): see Alan W. Bryant, "The Issue of Consent in the Crime of Sexual Assault" (1989) 68 Can Bar Rev 94 at 141. When and if a jury determines that the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual activity in question, and all other elements of the sexual offence have been established, what else must the Crown prove factually under the first or second alternative?

[239] If the Crown must prove the *mens rea* that applies for the purposes of the honest but mistaken belief in consent defence regardless of whether mistaken belief in consent is even a live issue, then that would lead to this result. The Crown would bear the burden of disproving mistaken belief in consent in every sexual assault case even where mistaken belief is not a live issue whether because the air of reality threshold has not been met or the accused has advanced no such defence. This is another area in which we would invite further consideration by the national jury committee on how best to instruct jurors in this instance.[105]

e. Errors Concerning Barton's Defence of Mistaken Belief in Consent

[240] Barton challenged the Crown's evidence of *mens rea* by asserting he had an honest but mistaken belief that Gladue agreed to have him thrust his hand farther up and into her vagina with the increased degree of force he used and for a longer period of time compared to what he claimed occurred the first night. The trial judge told the jury:

> [t]here is evidence before you that raises the defence that Barton made a mistake of fact regarding Gladue's capacity to consent and to her consent to the activities they did together. Barton does not have to prove that this defence applies. The Crown must prove beyond a reasonable doubt that this defence does not apply.[106]

[241] The judge also told the jury they could use the evidence of what Barton said happened on the first night to support his belief in Gladue's consent on the second night. We have concluded there were reviewable errors in how the trial judge dealt with this issue as well.

i. Historical Context to Mistaken Belief in Consent Defence

[242] Before addressing these, it is useful to place this issue in its historical context. In ***DPP v Morgan***, [1975] 2 All ER 347 [***Morgan***], the House of Lords ruled that an accused could successfully raise the common law defence of honest but mistaken belief in consent *no matter how unreasonable the grounds for that belief.* Canada soon followed suit. In ***Pappajohn v The Queen***, [1980] 2 SCR 120 [***Pappajohn***], Dickson J, as he then was, endorsed the view of the majority of

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[105] Where mistaken belief is not a live issue, this raises the question whether a trial judge should instruct the jury (providing it is satisfied that all the required *actus reus* elements were met and the judge has properly outlined these) that: "If you are satisfied that the Crown has proven beyond a reasonable doubt that the complainant did not consent to that sexual activity, you should have little difficulty in concluding that the accused knew or was wilfully blind to the fact that the complainant was not consenting to the sexual activity in question or was reckless and chose to take the risk." Should more be required, then the jury instructions should identify what it is that the Crown must then prove to bring home to the accused culpability based on actual knowledge or its equivalent, wilful blindness or recklessness.

[106] AR 1756/2-6.

the House of Lords in ***Morgan***. In so doing, he observed that cases in which mistake can be advanced "must be few in number": ***Pappajohn***, *supra* at 155. He determined that the accused's mistaken belief did not have to be reasonably held; an unreasonable belief would do to successfully advance the defence. He added at 156 that the ongoing debate sparked by ***Morgan*** on the legitimacy of allowing an unreasonable belief to suffice was "practically unimportant because the accused's statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable".

[243] Judges in this country are well aware that, as matters unfolded, the defence of mistaken belief in consent was frequently raised in cases of sexual assault – and continues to be to this day. The defence often is: "she consented and if she did not, I had a mistaken belief in consent". Judges were not the only ones who noticed this was anything but rare. So did Parliament. As for the thought that juries would not likely believe an accused unless the accused's "mistake" was reasonable, as time passed, Parliament did not share that confidence. And with good reason. It understood that juries would abide by the instructions they were given. Those jury instructions after ***Pappajohn*** were that while an accused's belief had to be honest, it did *not* have to be reasonable. That instruction was in accord with the law.[107] With instructions to this effect, juries took judges at their words. The accused's belief did not have to be reasonably held.

[244] Parliament's first effort at reform was to add s 265(4) (then s 244(4)) in the 1982 *Code* Amendments. That section provides that when mistaken belief is a live defence, the judge *shall instruct the jury* that, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, the jury is *to consider the presence or absence of reasonable grounds for that belief*. However, that is not all that juries were told, either then or now. They continued to be instructed that a belief must be honest, *but it did not have to be reasonable*. That instruction remained consistent with the law because the 1982 *Code* Amendments did not reformulate culpability under the mistaken belief in consent defence. As a consequence, those reforms, which simply codified the common law, did little to mitigate identified concerns about the scope of the mistaken belief in consent defence.

[245] Following ***Pappajohn***, Parliament was also well aware of the way in which the defence of mistake of fact actually played out in many courtrooms in this country. Juries accepted, as they were instructed, that an unreasonable belief could justify an acquittal. This gave juries permission to acquit based on an accused's unreasonable belief in consent even though the accused's belief might be rooted in fallacious myths and stereotypes. There was an added problem with this defence. To raise the mistaken belief in consent defence, an accused had to identify a mistake of fact that led the accused to wrongly believe that the complainant was consenting. A mistake of law is not a mistake of fact. An accused cannot avoid criminal culpability by pleading he or she was

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[107] Indeed, it continues to be. The Canadian approach may be contrasted with the way in which the UK has reformed the law on this issue.

ignorant of the law: s 19 of the *Code*. No one in this country is entitled to their own law; the law binds everyone. That is the promise and majesty of the Rule of Law. But it must be conceded that with respect to sexual offences, courts sometimes allowed mistakes of law to enter the courtroom masquerading as mistakes of fact. In turn, they were permitted to ground the defence of mistaken belief in consent.[108]

[246] In the result, it did not take long before Parliament recognized that the problematic application of this defence to sexual offences required the adoption of statutory limits on this defence. Those limitations, which were part of the 1992 *Code* Amendments, are contained in s 273.2 of the *Code*. Section 273.2(a) provides that an accused cannot claim he believed the complainant was consenting if he was reckless, wilfully blind or intoxicated.[109] Equally important, s 273.2(b) provides that an accused cannot claim a mistaken belief in consent unless the accused has taken reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.[110] As explained in Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham: LexisNexis, 2015) (Manning & Sankoff, *Criminal Law*) at 1094:

> The purpose of this section is clear: to protect the security of the person and equality of women who comprise the huge majority of sexual assault victims by ensuring as much as possible that there is clarity on the part of both participants to a sexual act.

[247] Against this background, we now turn to the errors in the way in which Barton's claimed mistaken belief in consent was handled at trial and in the jury charge.

ii. Failure to Conduct Air of Reality Inquiry Regarding Mistaken Belief in Consent

[248] The trial judge failed to address the threshold issue of whether this defence had an "air of reality" and thus ought to have gone to the jury at all. The defence is not available simply because an accused asserts it. Instead, the trial judge must first determine if there is an air of reality to the defence: ***Esau***, *supra* at para 15; ***R v Osolin***, [1993] 4 SCR 595 at 682 [***Osolin***]. If there is no air of reality, for any reason, including that the statutory preconditions are not met, then the defence should not be left to the jury.

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[108] See Lucinda Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-88) 2:1 CJWL 233.

[109] This was considered a codification of the common law: ***Esau***, *supra* at para 79.

[110] The UK has taken a different approach, opting for a test of reasonableness. Under s 1(1)(c) of the *Sexual Offences Act 2003* (UK), c 42, a person commits an offence if the person "does not reasonably believe" that the other person consents. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the person has taken to ascertain whether the other person consents.

[249] In this case, mistaken belief in consent was the subject of discussion amongst the trial judge and counsel when addressing what to include in the jury charge. But as this case demonstrates, talking about it and understanding there is a legal threshold that needs to be met – with statutory requirements that must also be met – are two different things. While the air of reality threshold may not be onerous, it is an error of law to omit it: ***Park***, *supra* at para 16; ***Ewanchuk***, *supra* at para 57. At this stage, a trial judge should consider whether what is advanced was a mistake of fact and not law; is grounded in admissible evidence and the legal definition of consent; and complies with the statutory terms. In the context of this case, the trial judge should have ascertained what evidence was capable of supporting Barton's belief that Gladue communicated consent to the sexual activity that caused her death.[111] A belief that Gladue gave her consent because she was silent, did not resist or object is a mistake of law, not a mistake of fact: ***Ewanchuk***, *supra* at para 51.

[250] Moreover, there will be no air of reality if one of the statutory bars in s 273.2 is present: see ***R v Dippel***, 2011 ABCA 129 at paras 22-23, 505 AR 347 [***Dippel***]; ***Despins***, *supra* at para 6; ***Cornejo***, *supra* at para 19.[112] Since the trial judge never considered the threshold air of reality issue, he failed to consider any of these limitations too.

iii. Failure to Inform Jurors of Statutory Limits under s 273.2(a)

[251] Even if the trial judge decides there is an air of reality to the claimed defence of mistaken belief in consent, the trial judge is still required to inform the jury of the statutory limitations to this defence. The jury should have been instructed that this defence was only available if Barton, without being intoxicated, reckless or wilfully blind, honestly concluded that Gladue communicated a "yes" through express words or unambiguous affirmative conduct to his repeatedly thrusting his hand up and into her vagina longer, deeper and with the degree of force he used.[113] None of these limitations on this defence were ever put to this jury. This too was reversible

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[111] Here again, trial judges must ensure that unfounded assumptions do not taint the assessment of whether there is evidence capable of showing the complainant communicated consent to the sexual activity in question. As explained by Martha Shaffer, "The Impact of the Charter on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose" (2012) 57 SCLR (2d) 337 at 347-348: "This question requires us to interpret the complainant's behaviour and to assess what it was that she was communicating. How to read a woman's behaviour will depend on deeply entrenched attitudes about how women are supposed to conduct themselves in social/sexual situations and what specific actions mean in these contexts."

[112] Whether these are to be considered under a separate air of reality test or whether they form part of the air of reality test for mistaken belief, the result is essentially the same. They go on the scale in determining whether there is an air of reality to the mistaken belief in consent defence.

[113] As noted, on the night she died, and in contrast to Barton's evidence as to what happened the first night, Gladue began moaning and groaning. It would have been open to the trial judge to instruct the jury to consider whether Barton was reckless or wilfully blind in continuing to apply the greater, more invasive force for the longer period without

error. If any of these bars apply, an honest belief, whether reasonably or unreasonably held, will not exculpate the accused.

iv. Inadequate Instructions on Mens Rea for Purposes of Mistaken Belief Defence

[252] The trial judge told the jury that, in considering the defence of mistaken belief in consent, they could take into account Barton's testimony about the sexual activity the night prior to Gladue's death and his perceptions of Gladue's verbal and *non-verbal responses* to his sexual acts. Barton essentially claimed that the sexual activity on the first night led him to believe Gladue consented on the night she died because it was, according to him, the same activity on both nights.

[253] Assuming, without deciding, that this sexual conduct evidence was admissible and Barton's claimed mistaken belief in consent passed the air of reality threshold, there are four problems with the way in which this issue was dealt with.

[254] First, for an accused to claim that he thought the complainant consented based solely on what the two did the night before constitutes a mistake of law not a mistake of fact. The mistake of law is that the accused does not understand that consent must be given to what happened the second night. If an accused's personal beliefs do not accord with the legal definition of consent, then his belief is grounded in a mistake of law, not a mistake of fact. An accused's belief must be grounded in the complainant's *communication of consent* at the relevant time to the "sexual activity in question". Therefore, the jury should have been instructed to consider what evidence there was to support Barton's claimed "mistake" that Gladue "affirmatively communicated consent" on the second night to the sexual activity in question that caused her death.

[255] Second, factually, even though Barton said he inserted part of his hand into Gladue's vagina on each occasion, it was not the "same" activity on both nights. The defining characteristic of the sexual activity in question on the second night was arguably the amount of force used. Even on his own evidence, Barton admitted he used greater force the night Gladue died: he thrusted in further, harder and longer.[114] Instructing the jury to consider whether the sexual activity was "similar", as the trial judge did here, misled this jury. It invited them to conclude that as long as it was similar, that would do to validly ground Barton's claimed mistaken belief in consent. But again, the degree of force Barton used would be relevant in the jury's assessment of whether Barton honestly believed Gladue had consented to the sexual activity that caused her death. One of the factors that would necessarily weigh in that analysis would be whether it was objectively foreseeable that Barton's actions the night Gladue died would put Gladue at risk of bodily harm, if not actual bodily harm. This would be an important factor for the jury to consider in determining the honesty of Barton's belief. But this jury received no such instruction.

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stopping and inquiring whether he was hurting Gladue: ***Esau***, *supra* at paras 79-81.

[114] AR 1124, 1128, 1264, 1267.

[256] Third, an accused is not entitled to rely on his subjective "perceptions" of a complainant's "non-verbal responses" to his actions to ground a mistaken belief in consent where those responses are either the complainant's silence or ambiguous in themselves. Consent must be affirmatively communicated through express words or unambiguous affirmative conduct. To suggest otherwise is wrong in law.

[257] Fourth, the jury should have been given guidance about how to evaluate Barton's claimed mistaken belief in consent. At a minimum, the jury should have been told:[115]

> I am instructing you as a matter of law that a mistake by Barton that Gladue's silence, passivity or ambiguous conduct constituted consent to the sexual activity in question provides no defence. Nor does Barton's speculation about what was going on in Gladue's mind provide any defence. A mistaken belief in consent cannot be based on any of these considerations.

v. Instructions on Reasonable Steps Were Inadequate

[258] The trial judge did tell the jury that the defence was only available if Barton took reasonable steps in the circumstances known to him to ascertain her consent. But the jury needed to know what s 273.2(b) of the *Code* required of them. Under this section, mistaken belief in consent is not a defence where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." This requires the application of a "quasi-objective test". The jury would first need to decide the circumstances known to Barton and then decide on an objective basis what reasonable steps should have been taken to ascertain consent.

[259] Reasonable steps depend on the circumstances and these may be as many and varied as the cases in which the issue arises. That said, we reject the view that reasonable steps can equal no steps whatsoever. An accused's asking himself whether he should take a reasonable step is not itself a reasonable step. To suggest that reasonable steps means *no steps* flies in the face of the definition of "consent" under s 273.1(1) and Parliament's requirement under s 273.2(b) that an accused must have taken reasonable steps to ascertain *consent* in order to advance the defence of mistaken belief in consent. This idea resurrects yet again the debunked theory that unless and until a woman objects to, or resists, sexual activity, she is consenting to that activity.

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[115] This wording is consistent with the decision of the majority of the Supreme Court in ***Ewanchuk***, *supra* at para 51. We leave the precise wording to others. We appreciate that in theory, mistaken belief in consent should not even be put to the jury if it is based on silence or lack of resistance. Judges know this as a matter of law. But jurors do not. To avoid jurors wrongly thinking that any of these would ground a mistaken belief in consent defence, they need to be told that.

[260] It also assumes that all women in Canada, single, married or in an intimate relationship, are walking around this country – whether in their home, on a date, at work, at a restaurant or wherever – in a state of continuous consent to sexual activity unless and until they say "no". This is not the law. As for those who question, as defence counsel did here, "what's a man to do", the answer can be summed up in one word: "ask".[116] This is hardly an onerous obligation to impose on anyone intent on engaging in sexual activity with another person. It is respectful of sexual autonomy and human dignity. It is also consistent with the equality rights of women.[117]

[261] Parliament introduced the reasonable steps requirement to prevent sexual assault through miscommunication. Its objective in doing so was to restrain a defence based on an unreasonable belief in consent. There is no doubt that the reasonable steps requirement was intended to remedy an unfair imbalance in the criminal law as between men and women involving sexual offences. Mistaken belief in consent is a common law defence. It was the judiciary that decided this defence could be advanced no matter how unreasonable an accused's belief might be. Parliament overruled these discriminatory aspects of the common law through amendments to the *Code*.

[262] Section 273.2(b) is one of several statutory reforms implemented through the years in an effort to overcome the inequities that disadvantaged women under the common law. Section 28 of the *Charter* provides that notwithstanding anything in the *Charter*, the rights and freedoms contained therein are guaranteed equally to male and female persons. This includes not only equality rights under s 15 but also the right to security of the person under s 7. Given women's equality rights, including s 28 of the *Charter*, the criminal law in substance and in application must balance rights so that women substantively enjoy the equal benefit and equal protection of the law as do men. Sexual prerogative is not a guaranteed right under the *Charter*. But equality is. In the context of sexual offences, it comes down to this. An accused is entitled to a fair trial, not a fixed one.

[263] Therefore, this jury needed to understand that they were required to consider:

> (1) What facts were known to Barton when he decided to repeatedly thrust his hand up and into Gladue's vagina with an increased degree of force, invasiveness and duration?

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[116] We are not suggesting that this need be done literally. There are ways to ask that involve sending a clear message through other than express words. But the point is that there be an "ask".

[117] Those equality rights under the *Charter* are also grounded in Canada's international human rights obligations: see *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, Can T S 1982 No 31 (entered into force 3 September 1981, ratification by Canada 9 January 1982); *Declaration on the Elimination of Violence Against Women*, 20 December 1993, A/RES/48/104; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 October 1999, A/RES/54/4.

> (2) What steps would a reasonable person have taken in those circumstances to ascertain whether Gladue was consenting to what he proposed to do?
>
> (3) Were those steps taken?

[264] These or similar organizing questions were never provided to the jury: see ***R v Malcolm***, 2000 MBCA 77 at para 24, 147 CCC (3d) 34, leave to appeal to SCC refused, 28153 (18 January 2001). The result was necessarily a flawed and incomplete understanding of the tests to be employed. This too was fatal to the verdict: ***Dippel***, *supra* at para 15.

f. Conclusion

[265] Given the nature and magnitude of the legal errors with respect to the elements of sexual assault, we are satisfied that these errors had a material bearing on the acquittals.

2. Errors Concerning Manslaughter

a. Introduction

[266] To convict for manslaughter, the Crown must prove that an accused's actions involved "the objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act": ***Creighton***, *supra* at 45.

[267] However, the trial judge did not tell the jurors what dangerousness (the *actus reus* for manslaughter) meant in law even though the Crown asked the trial judge to define this key term for them. Further, the trial judge never mentioned that the test for *mens rea* was the objective foreseeability of the risk of bodily harm.

[268] Normally, to exclude these elements from a jury instruction on manslaughter is an error of law: ***R v Miljevic***, 2011 SCC 8 at para 20, [2011] 1 SCR 203. This is because a lay person's understanding of what is dangerous may differ from the well-established legal principle that an unlawful act is dangerous when, assessed objectively, it is likely to injure another person: ***Creighton***, *supra* at 43. In simple terms, an objectively dangerous act is one that is "likely to subject another person to danger of harm or injury": ***R v DeSousa***, [1992] 2 SCR 944 at 961 [***DeSousa***]. But the jurors would not understand this unless they were instructed on the law on this point.

[269] Nor would the jurors appreciate that, in law, objective foreseeability is judged from the standpoint of the reasonable person in the circumstances of the accused and is not based on what the accused personally knew, intended or foresaw. Nor would they realize that it is not a defence in

law that the death was unexpected or the victim's physical reaction was unforeseen by the accused: ***Smithers v The Queen***, [1978] 1 SCR 506 at 519-520. As noted in ***Creighton***, *supra* at 74:

> The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care.

b. No Unequivocal Admissions of Dangerousness and Objective Foreseeability

[270] On appeal, the defence argued that Barton had admitted his actions were dangerous (the *actus reus* of manslaughter) and that it was objectively foreseeable his actions risked some bodily harm to Gladue (the *mens rea* of manslaughter). The defence contended that based on these "admissions", there was no need to mention them, the charge became less complex, and the Crown cannot complain on appeal about something it was not required to prove at trial.

[271] A review of this record reveals that Barton did not make unequivocal admissions with respect to the elements of dangerousness and objective foreseeability of bodily harm. Even if that may have been defence counsel's intention, the trial judge does not appear to have understood this. More important, it was never conveyed clearly to the jury. This stands in contrast to other parts of the instructions where the trial judge first identified elements of the offence, and then explicitly confirmed they had been admitted. He did not do this for either of these two elements.

[272] This record indicates that the defence only went so far as to acknowledge that dangerousness may be "implicit" if the jury found a sexual assault, and then only for the standard pathway, not the ***Jobidon*** one.[118] The trial judge made similar statements to the jury. For example:

> If you have determined beyond a reasonable doubt that Mr. Barton committed an unlawful act, it is implicit in that finding that the unlawful act in this case was dangerous.[119]

[273] But saying something is "implicit" is not the same as an express admission of dangerousness and the fact that further instructions were given on dangerousness shows that dangerousness remained at issue. In addition, although Barton admitted he caused Gladue's death,

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[118] From the record and on the appeal, we understood the defence to assert that Barton only conceded dangerousness on the standard pathway, not the ***Jobidon*** pathway. The logic supporting a partial admission on the singular concept of dangerousness remains elusive.

[119] AR 1752/40-41.

there was no unequivocal admission that the actions he described carried with them the objective foreseeability of bodily harm to Gladue. Instead, the record shows that the defence repeatedly objected to the trial judge's making any reference to objective fault in the instructions.

c. Jury Instructions on Dangerousness Were Contradictory

[274] The jury was hampered further because the instructions provided on dangerousness were contradictory and confusing. The trial judge first provided an outline of issues to be determined by the jury in respect of manslaughter and correctly informed the jury that the Crown was required to prove dangerousness beyond a reasonable doubt. In three other places, the jury was told that dangerousness was "implicit" in a finding of unlawful act. In yet other places, there was no reference to dangerousness, even when it would be expected that either dangerousness or its admission would have been discussed. Later still, the jury was again expressly told they had to consider whether any unlawful act they found was dangerous.[120] There is therefore a contradiction in the jury instructions since dangerousness was, for the same purpose, described as implicit, omitted, and required as a necessary consideration.

d. Omissions and Confused Instructions Had Serious Consequences

[275] The jury could not understand how to approach manslaughter without a definition of dangerousness, a consistent explanation of the role it played in their deliberations and how the objective foreseeability standard was based on whether a reasonable person would realize that Barton's actions were likely to injure Gladue or put her bodily integrity at risk.

[276] Without this critical information, the jury could not place certain other instructions in their correct legal context. First, the trial judge provided instructions on "accident". Since Barton admitted he intentionally applied force in a sexual context that caused Gladue bodily harm, that would necessarily limit any claim of "accident" to his not having personally desired or foreseen her death. But the jury would not have known – and ought to have been told – that Barton may be held criminally responsible, if the jury found an unlawful act, as long as a reasonable person would foresee the risk of bodily harm: see ***DeSousa***, *supra* at 958, citing ***R v Larkin*** (1942), (1944) 29 Cr App R 18 at 23.

[277] Second, the jury did not know that the *mens rea* for manslaughter is assessed objectively, is satisfied by the foreseeability of the risk of bodily harm, and does not require that the accused foresee death. Confusion between the standard pathway and the ***Jobidon*** pathway in the instructions meant that this jury was left with the idea from the ***Jobidon*** pathway that the Crown had to prove that Barton subjectively intended to cause Gladue bodily harm under the standard

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[120] At AR 1758/30-32, the jury was told: "... you will have decided that Mr. Barton ... committed an unlawful act, *but you will still have to decide if that unlawful act was dangerous*" [Emphasis added].

pathway. But that is not so. All the Crown had to prove was that any reasonable person in the circumstances would have realized that what Barton did would put Gladue at risk of bodily harm, although not necessarily serious bodily harm or the precise kind of harm she suffered: ***R v Bernard***, [1988] 2 SCR 833 at 870.

[278] Third, the jury did not have the information necessary to properly evaluate or weigh the medical evidence concerning Gladue's injuries. The trial judge provided two cautions, stating:

> I caution you, however, about the use of expert opinion evidence as to the amount of force it may take for fingers or a fist to penetrate the vaginal wall. While the three experts are highly trained professionals, they all acknowledged that they have little, if any, experience with the practice of fisting and were testifying largely from things they had read on the subject. Wounds resulting from this type of activity are rare, and their observations and opinions about force and strength of vaginal walls were theoretical and not specific to Ms. Gladue.[121]

[279] We are not persuaded these cautions were necessary as they suggested specialized or first-hand knowledge was required. However, expert evidence is not generally necessary to determine objective foreseeability, which is normally inferred from the facts: ***Creighton***, *supra* at 73-74. The female body is not outside the realm of common sense inferences about objective foresight: the reasonable person standard must include and respect the biological realities of every person.

[280] The rareness of the injury is not usually a consideration in manslaughter cases. For example, an accused may claim his one blow had unusual consequences and he was personally unaware that death could occur that way. But the law rejects such defences in favour of the objective foreseeability of bodily harm and the thin skull rule. A person who engages in dangerous conduct and puts another person at risk may be held responsible for an unforeseen death attributable to that person's peculiar vulnerability: ***Creighton***, *supra* at 29. Not only was Barton obliged in law to take Gladue as he found her, all the medical experts agreed that in addition to the perforation in Gladue's vaginal wall, there was also bruising and other injuries that may have been neither trivial nor transitory. The jury could weigh such evidence themselves.

[281] With complete and accurate instructions on the law, and based on a common sense approach to the evidence and what the reasonable person would know, foresee and intend, it was open to the jury to find that even if Barton did only what he claimed he did, his act of repeatedly thrusting his hand up and into Gladue's vagina was an objectively dangerous act. Not only was this

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[121] AR 1757/6-16; 1758/38-1759/7.

done once, Barton continually thrusted his hand for ten minutes. A jury may well have concluded that this action resembled repeated punching on the inside of Gladue's body, with the foreseeable risk of some internal injury. The jury would also have been entitled to consider that digital penetration of a woman's vagina is not "rare" in sexual relations. And yet, women in this country are not turning up daily in hospitals, much less morgues, with serious bodily injuries from digital penetration. This was all for the jury to assess. However, in the end, this jury did not receive any instructions on objective foreseeability of bodily harm.

3. Conclusion on Errors in Jury Instructions on Standard Pathway

[282] We are satisfied that these multiple errors of law in instructing the jury on unlawful act manslaughter, relating as they do to the *actus reus* and *mens rea* for both the underlying offence and manslaughter, had a material bearing on the acquittals. Accordingly, we would order a new trial for manslaughter on these grounds alone.

C. Additional Concerns Relating to the Jury Instructions

[283] We find it necessary to address two other issues linked to other grounds of appeal.

1. "Defence" of Accident

[284] Shortly after beginning the instructions to the jury on manslaughter, the trial judge set out the defence theory that Barton's fatal injury to Gladue was accidental and that therefore Barton should be acquitted outright, which is what happened.[122] The new trial judge will need to consider whether accident is available in law and should be put to the jury and for what purpose.

[285] There is a difference between "accident" as that term is used in everyday language and "accident" in law. To refer to a crash of vehicles as an "accident" is common. But in law, the crash is not an accident if it was an objectively foreseeable consequence of the conduct that caused it: see ***Maybin*** *supra* at para 35.[123] As the Supreme Court added in ***Maybin***, "Under this approach, an accused may be held responsible for "[a]n event [that is] reasonably foreseeable as part of a generic risk, even though it is improbable in its details (Glanville Williams, *Textbook of Criminal Law*, 2nd ed (London: Stevens & Sons, 1983) at 389."

[286] Where a criminal offence is alleged, "accident" may be involved on both the *actus reus* side and the *mens rea* side of the offence. However, "accident" is not a free-standing defence that

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[122] AR 1751/28-40.

[123] In ***R v Hughes***, 2011 BCCA 220 at para 72, 305 BCAC 112, the British Columbia Court of Appeal accepted the trial judge's wording that an "accident" was "well within the scope of the risk created by the accused".

can be separated from the elements of a criminal offence. Therefore, to speak in terms of "accident" or even a "defence" of accident is misleading. In law, to claim something was an "accident" really amounts to denial of a required element of the *actus reus* – the act was unintentional rather than intentional – or alternatively, a denial of the required *mens rea* – the accused did not intend the consequences of his or her conduct.[124] Lack of subjective intent to bring about the consequences that happened is often a claim in criminal cases. But that does not mean that "accident" is available as a "defence" in every case. As Manning & Sankoff, *Criminal Law* explain at 653:

> It remains a basic principle of criminal law that while a person may be taken to intend the natural consequences of intentional acts, he or she is not taken to intend the natural consequences of accidental conduct....
>
> Nonetheless, we believe that it is erroneous to consider this principle as constituting a separate defence and preferable to treat the matter as a question of voluntariness or absence of *mens rea*.[125]

[287] The trial judge charged the jury on accident as follows:

> Mr. Barton denies any intention to hurt Ms. Gladue and maintains that the wound to her vaginal wall was accidentally caused during consensual sexual activities.
>
> *There is evidence before you that raises the defence of accident.* Mr. Barton does not have to prove that this defence applies.... If you are left with a reasonable doubt about whether this defence applies, the Crown has not proven its case beyond a reasonable doubt, and therefore you must find Mr. Barton not guilty.
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> In this case it is suggested by the defence that the conduct of Mr. Barton should be excused, and he should be found not guilty of manslaughter because the harm allegedly caused by him to Cindy

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[124] See ***R v Parris***, 2013 ONCA 515, at para 106-108, 300 CCC (3d) 41.

[125] The authors go on to add at 654: "It follows that although it is a common occurrence, to talk of a defence of "accident" is at best unnecessary and at worst misleading.... [W]hat is relevant from a legal standpoint is not whether the accused is claiming that what happened was an accident, but whether this claim demonstrates the absence of one of the elements of the offence charged in that the requisite intent was not present."

> Gladue was a *pure accident* for which he is not criminally responsible.
>
> The defence of accident may succeed in these circumstances if, at the time the offences allegedly occurred, Mr. Barton was not engaged in an unlawful act.
>
> For these purposes, an accident is an *unintentional* and unexpected occurrence that produces hurt or loss.
>
> You must determine from the evidence whether there is a reasonable doubt that the harm to Cindy Gladue *came about unintentionally* and unexpectedly as a result of the conduct of Bradley Barton. If it did, and if it was not otherwise the product of an unlawful act, he is entitled to be found not guilty.[126]

[288] The trial judge's instructions on this issue were erroneous for four reasons. First, Barton's repeatedly thrusting his hand into Gladue's vagina was not an "accident". This was volitional conduct which Barton admitted, along with the fact this caused her death. Therefore, to suggest the contrary, as these instructions do in stating that "accident" is "an unintentional occurrence", constitutes reviewable error. Even on Barton's own evidence, there was nothing "accidental" about Barton's physical actions towards Gladue. Factually, this door had been firmly closed by the defence admissions and the trial judge erred in opening it.

[289] Second, Barton's claim was that he did not subjectively intend or foresee Gladue's death. But given the law on unlawful act manslaughter, that is irrelevant. If Barton's actions in causing Gladue's death constituted an unlawful act, namely sexual assault causing bodily harm, his actions would not cease to be unlawful and become an "accident" simply because Barton did not subjectively intend or foresee the specific consequences. It is not an accident in law that Barton harmed Gladue more than he anticipated. If the jury found that Barton sexually assaulted Gladue, the defence claim that he did not realize she may have had a thin vaginal wall would not make the fatal consequences an "accident". Nor would the fact he did not subjectively intend or foresee the degree of harm caused.

[290] Those consequences fall within the "thin skull" aspect of the test in ***Creighton***. To instruct a jury otherwise would be to require subjective foresight of the harm caused which the Supreme Court rejected in ***Creighton*** and ***Maybin***. And yet, contrary to the law on unlawful act manslaughter, that is what happened here. In instructing the jury, the trial judge characterized

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[126] AR 1751/28-1752/10; Emphasis added.

Barton's claimed lack of subjective foresight of the harm caused as an "accident". By diverting the jury's focus onto this irrelevant and erroneous consideration – Barton's lack of *subjective foresight* of harm – this jury was misled into thinking that absent this subjective intent, there would be no dangerous act, much less an unlawful one. But neither is so.

[291] Third, while the trial judge did state that the harm to Gladue could not be the product of an "unlawful act", this phraseology was likely too subtle for the jury to understand. In any event, these jury instructions essentially invited the jury to acquit Barton if they found that what he did was an "accident" *based on the trial judge's improper definition of accident.* We have already explained why the trial judge's concept of "accident" for purposes of unlawful act manslaughter was incorrect in law. Simply, lack of *subjective foresight* of harm is irrelevant to both the *actus reus* and *mens rea* of manslaughter.

[292] Fourth, typically, a denial of intention to cause specific consequences as here would go to the issue of whether the crime is murder or manslaughter in the event of liability for unlawful homicide. But that was not a live issue here.[127] Given the approach taken at trial to vitiation of consent, Barton's claim that he did not subjectively intend or foresee Gladue's death would have gone *only to the issue of vitiation of consent under the **Jobidon** pathway*.[128] However, not only did the jury instructions fail to make this distinction, they did not restrict the jury's consideration of this issue to this limited purpose only.

[293] At a new trial, the evidential record might well be different. There might also be other positions taken on various legal matters. Thus, this remains an open issue for the new trial judge.

2. Burden of Proof and Reasonable Steps

[294] The trial judge instructed the jury that the burden of proof was on the Crown to prove beyond a reasonable doubt that Barton did not take reasonable steps to ascertain Gladue's consent. While this portion of the instructions was not challenged on appeal, we do not want to be seen as accepting that this is a correct statement of the law. It is correct that the Crown must disprove the defence of mistaken belief in consent beyond a reasonable doubt. However, it remains an open question precisely how the reasonable steps requirement fits within the existing legal framework for the defence of mistaken belief. The Supreme Court has not had occasion to definitively resolve this issue.[129]

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[127] The Crown theory here was a cut or alternatively, a tear. Thus, the issue regarding Barton's claim that he did not subjectively intend or foresee Gladue's *death* could go *to the issue of first degree murder*. However, at trial, the defence conceded that if the Crown proved beyond a reasonable doubt that a knife or other instrument was used to cut Gladue, the necessary subjective intent would be established.

[128] We assume for this purpose that the trial judge was correct in law on this point.

[129] The Supreme Court did not specifically address the issue of burden of proof in ***Darrach***.

[295] It is apparent that there has been limited consideration of this issue even at the provincial appellate level.[130] While it has now been a quarter century since Parliament passed this legislative reform, key questions remain about its scope and application.[131]

[296] To answer the question of who bears what burden regarding reasonable steps, a number of questions would need to be explored, including the following. What is the purpose of the reasonable steps requirement? What is the historical and social context of this legislation? What policy considerations and rights are at stake here? What role do s 15, s 7 and s 28 of the *Charter* play? What was Parliament's intention in implementing the reasonable steps requirement? Was it to recast the essential ingredients of culpability under the mistake of fact defence? Was it to impose an additional burden on the Crown unnecessary to culpability and, if so, what rationale would exist for adding another element to sexual assault? Was it to test the foundation of an honest belief? And if so, how is that accomplished by requiring the Crown to prove beyond a reasonable doubt that the accused did not take reasonable steps to ascertain that the complainant was consenting? In any event, ought the jury to be instructed that whether the accused has taken reasonable steps is to be considered in assessing the "honesty" of the accused's belief?[132]

[297] It is axiomatic that ordinarily the Crown cannot be expected to prove a negative beyond a reasonable doubt. How could or would the Crown prove that an accused failed to take reasonable steps *in the circumstances known to the accused* when this knowledge exists within the mind of one person only, the accused? If the reasonable steps requirement imposes an additional burden on the Crown, what purpose would then be served by the reasonable steps requirement? And would s 273.2(b) then mean anything at all? And if so, what would it then mean and what purpose, if any, would it then serve?

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[130] It was explicitly addressed by McLachlin J (as she then was) in ***Esau*** at para 50. But the majority judgment written by Major J declined to address it. It was then addressed by L'Heureux-Dubé J in her concurring judgment in ***Ewanchuk*** at paras 98-99, but in the majority judgment Major J declined to consider it on the basis this issue was for the trier of fact only after the air of reality test had been met. Since it was not met, he had no need to consider it. Since then, as noted, courts of appeal have treated Major J's comments as *obiter* and instead adopted the approach taken by L'Heureux-Dubé, J. See ***Cornejo***, ***Despins***, and ***Flaviano***.

[131] For a thorough analysis of the reasonable steps requirement, its history and outstanding issues, see Sheehy, *Sexual Assault*.

[132] Model jury instructions published by the National Judicial Institute indicate that if the accused advances a defence of honest but mistaken belief in consent, part of the instruction should state: "[An accused] must honestly believe that [the complainant] consented to the sexual activity charged.... Nor can there be an honest belief in [the complainant's] consent to the physical contact unless [the accused] took reasonable steps in the circumstances known to [the accused] at the time to find out whether [the complainant] consented."

[298] Does Parliament have the right to reform or for that matter deny a common law defence rooted in identified inequalities?[133] Does the judiciary have the right to ignore or diminish the reasonable steps requirement in the absence of a constitutional challenge? If mistaken belief in consent is subject to an air of reality test, what would be the rationale for failing to impose a similar air of reality test for the reasonable steps requirement? Are there any other analogous requirements under the *Code* which would be of assistance in interpreting where the burden properly falls and the content of that burden?

[299] If s 273.2(b) places an evidentiary burden on an accused's ability to raise this defence, then how is that to be met? And what, if anything, turns on that? Where, as here, the issue is an alleged departure from what a reasonable person would be expected to know or inquire about, and where, as here, the courts are called on to weigh and balance rights, does it follow that an evidentiary burden of proof on an accused on a balance of probabilities would necessarily be struck down as unconstitutional: see ***R v Stone***, [1999] 2 SCR 290; ***R v Daviault***, [1994] 3 SCR 63. How is this issue affected by decisions that have dealt with the reasonable steps requirement at appeal courts in Canada or at the Supreme Court? These questions would all need to be addressed to properly resolve this issue. Given the absence of any proper argument on it, it must await another day.[134]

[300] However, regardless of the answer to these questions, one thing is clear. Assuming without deciding that the Crown were required to prove beyond a reasonable doubt that an accused had not taken reasonable steps to ascertain the complainant's consent, then the jury instructions would need to address what happened if the Crown met that burden. In particular, the trial judge would be required to instruct the jury that in that event, the jury would have no need to consider the mistaken belief in consent defence further because that defence would not be available to the accused.[135] The defence, and the jury's consideration of it, would be at an end. But in this case, the trial judge gave no such instruction. Instead, he wrongly imposed both burdens on the Crown.

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[133] Sheehy, *Sexual Assault* at 490.

[134] We recognize the law is much more developed on mistake of fact in the context of s 150.1(4). An accused can raise the defence of mistaken belief as to age but only where "the accused took all reasonable steps to ascertain the age of the complainant". It has been found that the Crown has the persuasive burden of disproving reasonable steps beyond a reasonable doubt (assuming the accused has met the evidentiary burden to establish an "air of reality"): ***R v Chapman***, 2016 ONCA 310 at para 36, 337 CCC (3d) 269, leave to appeal to SCC refused, 37058 (13 October 2016); see also ***R v LTP*** (1997), 86 BCAC 20, 113 CCC (3d) 42 at paras 16-19; ***R v Osborne*** (1992), 102 Nfld & PEIR 194 at paras 47-49, 61 (CA).

[135] On this view of the law, once the Crown has disproved reasonable steps beyond a reasonable doubt, that ends the matter. See ***R v Tannas***, 2015 SKCA 61, [2015] 8 WWR 701. The Court accepted at para 25 that there was "a procedural onus on the Crown to prove beyond a reasonable doubt that the defendant has failed to take all reasonable steps to ascertain the complainant's age", but added at para 26 that "if the court finds a *reasonable* step was not taken by the defendant, the defence of mistake of fact will not be available to the defendant, even though it might have an 'air of reality' to it".

X. Pathway Two to Manslaughter: Vitiation of Apparent Consent

A. Introduction

[301] The second pathway to conviction involved what is known as the ***Jobidon*** pathway. This involves the circumstances under which the law will, for compelling public policy reasons, intervene to vitiate consent or in a case such as this, apparent consent.[136] In this case, the Crown, defence and trial judge all proceeded on the basis that where death results from what was referred to as consensual sexual activity, consent will only be vitiated if the accused subjectively intended the bodily harm that killed the victim. Therefore, the trial judge's instructions on vitiation of consent made it clear to the jury that consent could only be vitiated if the Crown proved that Barton had subjectively intended to cause Gladue serious hurt or non-trivial harm. This interpretation of the law is based on ***R v Zhao***, 2013 ONCA 293, 297 CCC (3d) 533 [***Zhao***].

[302] During the oral hearing, we invited both Crown counsel and defence counsel to assist us in resolving whether this Court should follow the Ontario approach. In particular, we asked whether, as a matter of law, consent or apparent consent should be vitiated for policy reasons based on objective or subjective foreseeability of the risk of bodily harm in circumstances where death results from sexual activity. Both ***Jobidon*** and a later decision ***R v Paice***, 2005 SCC 22, [2005] 1 SCR 339 [***Paice***] involved consensual fist fights in which one of the combatants died. While the Supreme Court held that consent was vitiated when serious bodily harm was "intended and caused," in neither case was the level of intention discussed or determined since factually in those cases, each accused had a subjective intent to injure the deceased.

[303] Unfortunately, we received no assistance from counsel on this point. Thus, it remains an open issue that will need to be determined by the new trial judge. While we decline to definitively resolve this issue, the following comments may assist.

B. Relevant Factors

[304] It should not simply be assumed that the Ontario jurisprudence will govern. Decisions from other provincial courts of appeal may be persuasive, but they are not binding. The Ontario line of authority addressed cases of sexual assault causing bodily harm where the complainants were alive to testify.[137] The issues, reasoning and result may differ when a person dies as a result of sexual

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[136] Unlike ***Jobidon***, the element of consent in the predicate offence of sexual assault was in dispute. Whether Gladue consented to the sexual activity in question that caused her death was at issue. Thus, we characterize this as a case of apparent consent as the Supreme Court used that term in ***Hutchinson***. This captures both the case where a complainant consents or there is a reasonable doubt as to the absence of consent. In saying this, we make no comment on what may or may not be ultimately proven here.

[137] See ***R v Welch*** (1995), 101 CCC (3d) 216 (Ont CA) [***Welch***]; ***R v Amos***, [1998] OJ No 3047 (QL) (CA) [***Amos***];

activity. Further, the Ontario Court of Appeal initially adopted the objective standard and has only recently preferred a subjective standard.[138] The justification for this shift would need to be examined and evaluated, both on its own and to assess its conformity with the Supreme Court's approach in ***Jobidon***.[139]

[305] The majority in ***Jobidon*** dealt only with vitiation of consent in the course of a fist fight, but expressly contemplated that courts could develop further limitations on consent on a case-by-case basis so that "the unique features of the situation may exert a rational influence on the extent of the limit and the justification for it".[140] Parliament has also expressly granted the courts statutory authority to impose limits on consent for sexual offences in s 273.1(3).[141]

[306] In ***Jobidon***, the Supreme Court not only left the door open for courts to approach the public policy considerations underlying issues of consent differently depending on the circumstances, it employed a methodology which could be used in such cases. Policy-based limits on consent are context driven and involve the weighing and balancing of various interests.[142] This analysis would include taking into account how the context of two men agreeing to a fight, the shared goal of

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R v Robinson (2001), 53 OR (3d) 448, 143 OAC 80 [***Robinson***]; ***R v Quashie*** (2005), 200 OAC 65, 198 CCC (3d) 337, leave to appeal to SCC refused, 31017 (23 March 2006) [***Quashie***]; ***Zhao***; ***R v Nelson***, 2014 ONCA 853, 325 OAC 381.

[138] In ***Welch***, the Ontario Court of Appeal analyzed the law and law reform recommendations in Canada and other countries. It determined at 670 the intention element should be assessed objectively, not subjectively, noting this accorded with ***DeSousa***, *supra* at 961. Assault causing bodily harm requires that the accused's conduct, when viewed objectively, must be such that it would be likely to cause bodily harm to the victim. After ***Welch***, in brief reasons in ***Amos*** and ***Robinson***, the Ontario Court of Appeal then suggested the accused must have deliberately inflicted pain or injury for consent to be vitiated. This was followed up in ***Quashie***, where it was noted that, in keeping with ***Paice***, for consent to be vitiated, the accused must have "intended to inflict bodily harm" (para 57). Then came ***Zhao*** in which it confirmed a subjective standard was required.

[139] In ***Zhao***, the Court spoke of a perceived jurisprudential shift to a subjective standard (para 85) and said ***Welch*** was not good law even for cases of sado-masochism (para 98), which is how they distinguished that case. With respect, the complainant in ***Welch*** testified she never consented to the violent sexual acts, and it was the accused who tried to characterize his conduct as consensual and sado-masochistic. He was convicted.

[140] ***Jobidon***, *supra* at 766.

[141] It states: "Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained."

[142] As explained by Gonthier J in ***Jobidon***, *supra* at 744: "Policy-based limits are almost always the product of a balancing of individual autonomy (the freedom to choose to have force intentionally applied to oneself) and some larger societal interest. That balancing may be better performed in light of actual situations, rather than in the abstract, as Parliament would be compelled to do. With the offence of assault, that kind of balancing is a function the courts are well-suited to perform."

which was to injure the other, differs from the context where a man caused the death of a woman whom he paid for sexual activity, and whose consent to bodily harm was in issue.[143] Policy considerations may include how, on the wide continuum of bodily harm, death is the end point – the most serious form of bodily harm possible where personal and public interests are highest.[144] When a person is not alive to testify as to what actually happened, the relative ease with which an accused can then raise defences of consent or mistaken belief may also go on the policy scale in determining whether apparent consent ought to be vitiated in these circumstances.

[307] The court would also be required to evaluate the social utility of commercial sex and to consider legislative limitations on sexual relations designed to protect the vulnerable.[145] Courts have been called on to be responsive to the different ways in which people experience bodily harm, violence and death: ***R v Lavallee***, [1990] 1 SCR 852. Thus, relevant factors might well include the need to protect the *Charter* rights of sex trade workers and other "particularly marginalized population[s]",[146] the prevalence of sexual violence against women and children and public policy objectives in reducing and mitigating that violence. This might also raise the issue of how to fashion legal norms which take into account how often sexual violence targets the vulnerable and tracks other forms of social, racial, historic, and economic disadvantage.

[308] The balancing would necessarily include a consideration of the *Charter* rights of the accused. In deciding the parameters for vitiation of apparent consent involving death from sexual activity, a court would need to determine the appropriate *mens rea* or fault that should attract criminal culpability,[147] as well as any desired fit with related legal principles.[148]

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[143] Another factor to consider may be whether it makes sense from a public policy perspective to vitiate consent where individuals have actually agreed to risk harming each other, as in sado-masochistic sex, but not in cases where the individuals engaging in sexual activity have merely agreed to engage in sexual activity without any intention to harm each other. What would be the rationale for vitiating actual consent for the former but not apparent consent for the latter?

[144] As stated by McLachlin J (as she then was) in ***Creighton***, *supra* at 57, "[t]he criminal law must reflect not only the concerns of the accused, but the concerns of the victim and, where the victim is killed, the concerns of society for the victim's fate".

[145] Gonthier J in ***Jobidon***, *supra* at 762-763 recognized the "social uselessness" of fist fights.

[146] See ***Bedford***, *supra* at para 86.

[147] Constitutionally, a fault element is required for every offence and must reflect the gravity of the crime and the social stigma attached to its commission: ***R v Roy***, 2012 SCC 26 at para 1, [2012] 2 SCR 60. Generally, fault may be based either on an accused's (1) subjective intent to bring about a specific consequence as proven by the accused's knowledge, wilful blindness or recklessness; or (2) on what a reasonable person would foresee as a consequence of his or her actions. An objective *mens rea* standard remains a legally recognized and constitutionally permissible mental element: ***R v Beatty***, 2008 SCC 5 at para 48, [2008] 1 SCR 49.

[148] In her annotation challenging the reasoning in ***Zhao***, Professor Benedet noted that requiring intent to vitiate

[309] A court would also need to consider the rationale for vitiating apparent consent. Should the focus be on whether the activity was dehumanizing and degrading? Or should it be on whether the activity was dangerous – which would bring this standard into line with manslaughter.[149] Another issue is whether apparent consent would be vitiated when there was serious bodily harm, bodily harm as defined in the *Code*, or some other threshold.[150]

C. Summary

[310] It is clear that the focus on subjective intention to cause harm seriously distorted this trial on several other issues since the standard pathway and ***Jobidon*** pathways were not kept distinct. In the new trial, selecting the applicable standard will be a key issue, as will making sure the jury understands all potential pathways to liability and what is at issue in each.

XI. Conclusion

[311] For the reasons given, the Crown appeal is allowed, the acquittals are set aside, and a new trial is ordered on first-degree murder.

[312] This case has revealed the inescapable need in sexual offences to properly warn jurors to disregard unfair assumptions and to ensure that jury instructions adequately and accurately reflect the current law in Canada. Jury instructions are the means of ensuring that the group of citizens asked to adjudicate do so on a correct understanding of the law. It thus contradicts both the law and adjudicative justice if jury charges do not uphold fundamental concepts of the law and produce or promote verdicts unmoored to the law. The reasonable citizen, informed of the facts and possessed of understanding of the existing law, would rightly call that a denial of the equal protection and equal benefit of the law. We live in a society where every individual's life, liberty and security of the person have equal value and where every individual's autonomy has meaning. It is a society where the criminal law must reflect and respect each individual's rights and dignity. The 1992 *Code* Amendments were explicitly designed to rectify inequities in the criminal law on sexual offences and better protect women and children. Regrettably, some jury instructions in this country

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consent "is difficult to reconcile with the clear statement of the Supreme Court of Canada that the *mens rea* of aggravated assault is the *mens rea* for assault (intentional application of force plus knowledge or wilful blindness as to non-consent) plus objective foresight of bodily harm....": (2013), 3 CR (7th) 95 at 96-98.

[149] ***Welch***, *supra* at 239 focussed on whether the conduct was degrading or dehumanizing.

[150] In ***Paice***, *supra* at paras 12 and 18, the Supreme Court clarified that ***Jobidon*** applied to "serious bodily harm" intended and caused. Serious bodily harm is also the test the Supreme Court has used in both ***R v Cuerrier***, [1998] 2 SCR 371 and ***Hutchinson*** to vitiate apparent consent for fraud.

have failed to keep pace with both statutory and jurisprudential changes in the content and application of the law on sexual offences. This undermines equal justice under law. The courts cannot permit this to go on. We must correct this. And we will.

Appeal heard on September 6 and 7, 2016

Reasons filed at Edmonton, Alberta
this 30th day of June, 2017

Fraser C.J.A.

Watson J.A.

authorized to sign for Martin J.A.

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