COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER:	1503 0091A
TRIAL COURT FILE NUMBER:	120294731Q1
REGISTRY OFFICE:	Edmonton
APPELLANT: STATUS ON APPEAL:	Her Majesty the Queen Appellant
RESPONDENT: STATUS ON APPEAL:	Bradley Barton Respondent
JOINT INTERVENORS:	Women's Legal Education and Action Fund Inc. & Institute for the Advancement of Aboriginal Women
DOCUMENT:	**FACTUM**

Appeal from the Acquittal of the Honourable Mr. Justice R. A. Graesser
Dated the 18th Day of March 2015

FACTUM OF THE JOINT INTERVENORS

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I. Facts

A. Summary

1. This appeal concerns the content and limits of consent to sexual activity under Canadian law. The Women's Legal Education and Action Fund and the Institute for the Advancement of Aboriginal Women (the "Interveners") submit that the trial Court made two errors regarding the material issue of Cindy Gladue's alleged consent to sexual activity with the Respondent. First, the Court below admitted evidence of Ms. Gladue's sexual history, including her engagement in sexual activity in exchange for payment, that risked distracting the jury from the step-by-step analysis of subjective consent to sexual activity that is required by Canadian law. Second, the Court failed to inform the jury that consent to a given form of sexual touching does not extend to the use of any conceivable degree of force by one's sexual partner. The Court thereby abjured the fundamental tenet of Canadian criminal law that: "Having control over who touches one's body, and how, lies at the core of human dignity and autonomy." (*R v Ewanchuk*, [1999] SCJ no 10, para 28, per Major J) (**TAB 28 of the Appellant's materials**).

2. Ms. Gladue died after engaging in sexual activity with the Respondent, as a result of a wound that the Respondent inflicted upon her. The Court and the jury therefore had no direct evidence to determine her "subjective internal state of mind to the touching at the time that it occurred" (*Ewanchuk*, para 26, per Major J). Rather, the Respondent testified as to his negotiation with Ms. Gladue regarding the sexual activity that was to occur, the activities that he claims actually occurred on the two nights under consideration, and Ms. Gladue's behaviour before, during and after the sexual activity. Other information supplied to the jury about Ms. Gladue engaged racist and sexist myths and stereotypes about Indigenous women, particularly Indigenous women who engage in sexual activity for payment. The trial Court's uncritical admission of irrelevant and prejudicial information, coupled with the inadequacy of its jury charge regarding the Canadian law of consent to sexual activity, constituted errors in law.

3. The Interveners have intervened in this case to address:

- whether it is always incumbent on a trial judge to require an application to be made under s. 276 of the *Criminal Code* before allowing introduction into evidence of a sexual assault complainant's sexual history; and

- whether or not consent to a specific sexual activity is also consent, in law, to any degree of force a sexual partner uses while performing that activity.

4. As noted in *R v Pickton,* 2010 SCC 32, at para 19, as a general principle, "a trial judge has a duty to instruct the jury on all routes to liability which arise from the evidence, even if the Crown chooses not to rely on a particular route." (**TAB 1**), (See also *R v Cousins*, [1997] NJ No 229 (CA) at paras 23-24 (**TAB 2**), leave to appeal denied: [1997] SCCA no 543). In this case, that duty included instructing the jury about the Canadian law related to sexual history evidence and consent to sexual activity in a manner that dispelled the potential operation of discriminatory myths and stereotypes and focused the jury's attention on the proper analysis of these issues.

B. Background Facts

5. This case turns on whether Ms. Gladue consented to every sexual act that occurred with the Respondent, and in particular whether her alleged consent extended to the use of any conceivable degree of force during sexual touching. There was no evidence on which the jury could conclude that Ms. Gladue contemplated or agreed to the infliction of bodily harm, so the issue of whether one can legally consent to sexual assault causing bodily harm is not before this Court.

6. Evidence and argument concerning Ms. Gladue's sexual history permeated the trial. In her opening statement, Crown counsel characterized Ms. Gladue as a "prostitute" who "struck a working relationship" with the Respondent. Evidence regarding the paid context of Ms. Gladue's engagement in sexual activity with the Respondent was elicited by both counsel during the trial. The defence's closing address emphasized its argument that Ms. Gladue's expectation of, and agreement to, every aspect of the sexual activity undertaken with the Respondent could be inferred from her engagement in sex work (Transcript: pp 14, 29, 812, 813, 1083, 1084, 1102, 1151, 1200, 1202, 1207, 1208, 1210, 1228, 1251, 1280, 1641, 1644, 1666). The trial judge put the defence's theory of the case to the jury as follows:

> The theory of the defence is that Mr. Barton caused the accidental death of Cindy Gladue. This is based on his experience of some 26 hours earlier where they had similar sexual activity and his interactions with her on the night in question. He had her consent during manual stimulation of her vagina on June 22nd. In doing so, he passed his knuckles 1 or 2 centimeters further than the night before and, unforeseeably to him, perforated Ms. Gladue's vaginal wall, causing bleeding and death. (Transcript, p 1761, lines 5-10)

7. Ms. Gladue's identity as an Indigenous woman was also emphasized throughout the trial, using the non-preferred term of "Native". Ms. Gladue was described as "Native" in appearance, and was frequently referred to by both counsel and witnesses as "the Native woman", and "the Native girl" rather than by name. (Transcript: pp 143, 164, 177, 178, 179, 323, 1301, 1302, 1303, 1305, 1308, 1314, 1317, 1321, 1322). Neither party explained why this emphasis on Ms. Gladue's Indigenous identity was relevant to the material issues at trial.

8. Mr. Barton's testimony regarding Ms. Gladue's consent to sexual activity was elicited in a manner that relied on evidence of an initial conversation between them and sexual activity performed approximately 26 hours before the sexual activity that caused Ms. Gladue's death. The Respondent testified that he and Ms. Gladue agreed that he would pay Ms. Gladue $60 for "everything", meaning: "Intercourse, sex" (Transcript, p 1103, lines 26-30). The Respondent testified that he and Ms. Gladue engaged in a range of sexual activity, including him initiating manual penetration and culminating in sexual intercourse (Transcript, p 1106, lines 13-15). As to whether he noticed any "problems or difficulties or disagreement on her part", Mr. Barton answered "No. None at all. It was good." (Transcript, p 1105, lines 4-6).

9. The sexual activity that formed the predicate charge for manslaughter occurred on the night of June 21-22, 2011. Mr. Barton testified that Ms. Gladue "knew what she was coming for" and agreed to the same price as the previous night (Transcript, p 1121, lines 9-19). The Respondent testified that he commenced manual penetration as Ms. Gladue gave him oral sex: "I was thrusting her. … A little harder than the night before. And maybe – maybe a little farther... Probably I was down a little farther than the night before." (Transcript, p 1124, lines 25-31) He testified that he interpreted Ms. Gladue to be enjoying the sexual activity: "things were good. She was – I was enjoying it, she was enjoying it, good moans." (Transcript, p 1128, lines 23-25.) Mr. Barton testified that Ms. Gladue did not express any disagreement or objection to the sexual activity (Transcript, p 1124, lines 8-12).

II. Grounds of Appeal

10. The Crown's Notice of Appeal raises four grounds of appeal. The Interveners' submissions address the first and third grounds concerning the law of consent and the admissibility of evidence of the deceased's prior sexual history:

> 1. The learned trial judge erred in law in his instructions to the jury with respect to manslaughter;
> ...
> 3. The learned trial judge erred in law in making a ruling under s. 276 of the *Criminal Code* after the close of evidence without any application having been brought by the defence and without a hearing on the issue.

The Interveners will address the s. 276 issue first, as this evidentiary issue is logically prior to the issue of consent underlying the predicate offence for manslaughter.

III. Standard of Review

11. The Interveners submit that questions of law regarding the admissibility of sexual history evidence, and the interpretation of the *Criminal Code* and the common law regarding the limits of consent, are subject to this Court's review on a correctness standard (*R v Kasim*, 2011 ABCA 336 at para 8 (**TAB 3**)).

IV. Argument

A. Past Sexual History Evidence

12. Both Crown and defence introduced evidence regarding Ms. Gladue's sexual history with the Respondent and evidence regarding the fact that her sexual activities with the Respondent took place in the context of a paid encounter. The trial judge admitted this evidence, and permitted argument based on this evidence, without requiring the defence to file an application under s. 276(2) of the *Criminal Code* and without the careful consideration of relevance, probative value and prejudicial risk that is required by the decision of McLachlin J (as she then was) in *R v Seaboyer,* [1991] SCJ No 62 (**TAB 42 of the Appellant's materials**). The generic caution offered to the jury was inadequate to address the risk that this evidence and argument would invite the jury to draw upon discriminatory myths and stereotypes when analyzing whether Ms. Gladue consented to the particular sexual activity that formed the basis of the manslaughter charge.

13. There were two types of sexual history evidence admitted at trial. First, evidence was admitted that Ms. Gladue had engaged in sexual activity with the Respondent for money on June 20, 2011, "the first night". Second, counsel and witnesses characterized Ms. Gladue as a "prostitute". Both the reference to prior sexual activity and the characterization of Ms. Gladue engaged significant risks of prohibited myths entering the reasoning process. Prior to the introduction of any sexual history evidence, a trial judge must consider the relevance of such evidence and weigh its probative value and prejudicial risk.

14. Section 276 addresses the "twin myths" that a sexual assault complainant who has consented to sexual activity in the past is more likely to have consented to the sexual activity at issue (s. 276(1)(a)), and that a woman may be less worthy of belief because of her sexual history (s. 276(1)(b)). The provision seeks to counter the risk that evidence of a woman's sexual history will be used to encourage "inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes" (*R v Osolin,* [1993] SCJ no 135 at para 168 (**TAB 4**)). As shall be explained in section IV (B), consent must be addressed relative to the specific sexual activity at issue in the trial. Permitting sexual history evidence to enter the trial without the careful analysis required by s. 276(2), and anticipated in *Seaboyer*, undermines Parliament's clear objective in enacting s. 276: that is, to address the prevalence of sexual violence against women in Canada, while promoting and protecting the rights guaranteed under ss. 7 and 15 of the *Charter* (preamble to *An Act to Amend the Criminal Code (Sexual Assault)* (Bill C-49) SC 1992, c 38 (**TAB 5**)). It is essential to women's sexual equality, autonomy and dignity that they are never deemed to have consented to sexual activity because of their sexual history or because they consented on a prior occasion.

15. Section 276(1) 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. The inferences prohibited by s. 276(1) are always improper. In *R v Boone,* 2016 ONCA 227 at para 37, (**TAB 6**), the Ontario Court of Appeal held that: "the 'twin myths' are prohibited not only as a matter of social policy but also as a matter of 'false logic'." (See also *Seaboyer,* at 605.) It is thus necessary for the trial judge to ensure that a jury is not invited to

draw the prohibited inferences, and to ensure that "irrelevant evidence which may mislead the jury is eliminated in so far as possible" (*Seaboyer*, at 605). In turn, to guard against reliance on discriminatory myths is to promote and protect women's substantive equality, particularly the substantive equality of Indigenous women and of women who exchange sexual activity for payment. In every case, trial judges, Crowns, and defence counsel must ensure that a woman is not considered to have consented to the sexual activity at issue because of her sexual history.

16. In considering whether to admit the evidence under s. 276(2), the trial judge is required by s. 276(3) to take into account, among other considerations, the need to remove from the fact-finding process any discriminatory belief or bias (s. 276(3)(d)); the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury (s. 276(3)(e)); and the potential prejudice to the complainant's personal dignity and right of privacy (s. 276(3)(f)).

17. When the defence seeks to introduce sexual history evidence for a purpose other than raising one of the prohibited inferences, the inquiry moves to a hearing under s. 276.2 to determine if sexual history evidence is admissible pursuant to s. 276(2). This evidence must relate to a specific instance of sexual activity and be relevant to an issue at trial. If these two requirements are satisfied, s. 276(2)(c) still requires the trial judge to weigh whether the evidence has *significant* probative value that is not *substantially* outweighed by its prejudicial effect to the proper administration of justice. With respect to this weighing, in *R v G.G.*, 2015 ONSC 5321, at para 24 (**TAB 7**) the Court explained:

> [T]he requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice". The Supreme Court recognized in *Darrach* that there are inherent "damages and disadvantages present by the admission of such evidence". Consequently, evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect.

18. Section 276.2(3) requires a trial judge to give reasons for the determination as to the admissibility of prior sexual history evidence. No such reasons were issued by the Court below.

19. In the trial that forms the basis for the present appeal, the defence introduced evidence regarding sexual activity between Ms. Gladue and the Respondent on the night before her death.

This encounter did not form the basis of any charge against the Respondent. The Interveners submit it was incumbent on the defence to make a s. 276(2) application before such evidence was adduced, and that the trial judge had a duty to ensure s. 276(2) was satisfied prior to admission of the evidence. These provisions are mandatory (*R v Wright*, 2012 ABCA 306 at para 10 (**TAB 46 of the Appellant's materials**)). Section 276(2) *requires* a trial judge to receive and decide an application to admit sexual history evidence before the accused may introduce *any* evidence regarding a sexual assault complainant's sexual history.

20. The *Criminal Code* does not explicitly contemplate the instance in which the Crown introduces sexual history evidence. However, in *Seaboyer*, McLachlin J characterized processes that prohibit reliance on the twin myths as a specific "application of the general rules of evidence governing relevance and the reception of evidence" (at 633–4). It is a basic rule of evidence that only relevant evidence may be admitted at a trial (*Seaboyer* at 609; *R v White,* 2011 SCC 13, at para 54 (**TAB 8**); *R v MT,* 2012 ONCA 511 at para 53 (**TAB 9**)). The judicial guidelines set out by McLachlin J in *Seaboyer* did not suggest that the need for a careful analysis of the admissibility of sexual history evidence was confined to evidence adduced by the defence.

21. In this case, the Crown repeatedly characterized Ms. Gladue as a "prostitute". This information would have been inadmissible under the *Criminal Code* if the defence had introduced it because it is not evidence of a specific instance of sexual activity (s. 276(2)(a)). More importantly, this characterization was irrelevant to the material question of whether Ms. Gladue consented to every sexual act that occurred during her encounter with the Respondent on the night of June 21-22. In *Seaboyer*, Justice L'Heureux-Dubé J, writing in dissent but not on this point, observed, "[e]vidence of prior acts of prostitution or allegations of prostitution … is never relevant and, besides its irrelevance, is hugely prejudicial" (*Seaboyer*, at para 220).

22. The trial judge did not ask the Crown to address the relevance, probative value or prejudicial effect of characterizing Ms. Gladue as a "prostitute". He did not clearly caution the jury as to the inferences it could draw from that characterization.

23. In this case, there is a significant risk that evidence of Ms. Gladue's sexual activity with the Respondent on the night before her death, coupled with the stigma and myths evoked through repeated characterizations of Ms. Gladue as a "prostitute" and a "Native girl" or "Native woman", invited the jury to draw the prohibited inference that she was "more likely to have consented to the sexual activity that forms the subject-matter of the charge" (s. 276(1)(a)).

24. The risk that the jury would have been distracted from its task of assessing whether Ms. Gladue consented to every sexual act performed on the night of June 21-22 was exacerbated by the evidence that characterized her as "Native". The Supreme Court of Canada has in a number of cases acknowledged the impact of widespread racism against Indigenous peoples in Canada and how this has translated into systemic racism within the criminal justice system (*R v Williams*, [1998] 1 SCR 1128 at para 54 (**TAB 10**); *R v Gladue* [1999] 1 SCR 688 at para 65 (**TAB 11**); *R v Ipeelee,* 2012 SCC 13 at paras 60, 71) (**TAB 12**). The characterization of Ms. Gladue as "Native", coupled with the characterization of her as a "prostitute", created a heightened risk that the jury would bring to the fact-finding process discriminatory beliefs, misconceptions, or biases about the sexual accessibility of Indigenous women (particularly Indigenous women who engage in sexual activity for payment). These characterizations also risked giving rise to sentiments of prejudice or hostility towards Ms. Gladue among the jury.

25. In *Williams*, the Court considered the impact of widespread bias against Aboriginal people in the community, and the realistic potential of partiality by jurors. In particular, McLachlin J took judicial notice of the impact that racial prejudice and racist stereotypes may have on jurors' assessment of evidence, and noted that "[j]urors harbouring racial prejudices may consider those of the accused's race less worthy" (para 28).

26. The myths and stigma elicited through the characterization of Ms. Gladue as a "prostitute", the objectification of her by referring to her as "the Native girl" or "the Native woman" rather than by name, and ultimately the dehumanization of her (by allowing the introduction of her pelvis and organs into evidence in complete disregard for Indigenous customary practices in caring for the dead), illustrates a failure to perceive Ms. Gladue as a rights-bearing person who was entitled to be treated with dignity and accorded equality. These

actions constituted a violation of Ms. Gladue's dignity, and ignored the s. 276(3) considerations required of a judge, as noted above.

27. As L'Heureux-Dubé J explained in her concurring reasons in *Ewanchuk*: "Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights" (para 69). This is particularly so for Indigenous women who, because of historical discrimination and gender and racial inequalities, are often viewed as less valuable, devoid of sexual autonomy and dignity. Indeed, it is a matter of public record that Indigenous women are over-represented among Canada's missing and murdered women. While judicial directions to act impartially cannot always effectively counter racial prejudice, absent such directions in this case, there is a real possibility that the jury viewed the evidence through the lens of such prejudices.

28. In sum, s. 276(1) creates a blanket prohibition on the introduction of sexual history evidence to support the prohibited inferences based on the twin myths. If the defence seeks to introduce evidence for a different purpose, it must meet the test in s. 276(2) before the evidence can be admitted. When the Crown seeks to introduce information about the sexual history of a complainant, that information should be subjected to the usual assessment of relevancy, probative value and prejudicial risk. The introduction of this information in the Court below raised a significant risk that jurors would bring to their fact-finding function persistent myths regarding Indigenous women and sexual assault.

B. Consent to the sexual activity in question

29. Given the evidence in this case, the jury should have received a thorough charge on the Canadian law regarding consent to sexual activity. They should have been instructed to consider the factual and legal limits of such consent. The trial judge's charge to the jury failed to alert them that Canadian law required a careful analysis of whether Ms. Gladue agreed to engage in every sexual act performed, with particular attention to the force with which the touching was performed. The trial judge also failed to instruct the jury that the Respondent was guilty of sexually assaulting Ms. Gladue if they found in respect of the manual penetration described by the Respondent that: (1) Ms. Gladue did not consent to manual penetration being performed with

the significant degree of force necessary to cause the wound identified on autopsy; and (2) either the Respondent was reckless as to whether Ms. Gladue was consenting or he failed to take reasonable steps to ascertain her consent.

30. Section 273.1(1) of the *Criminal Code* provides that consent to sexual activity means "the voluntary agreement of the complainant to engage in *the sexual activity in question*" (emphasis added). In *Ewanchuk*, Major J explained the rationale underlying this definition of consent as follows: "Having control over who touches one's body, and how, lies at the core of human dignity and autonomy." (*Ewanchuk*, para 28).

31. Justice Major held in *Ewanchuk* that the absence of consent "is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred" (at para 26). In *R v J.A.*, McLachlin CJ held that the complainant is "*not* required to *express* her lack of consent or her revocation of consent for the *actus reus* to be established" (*R v J.A.*, 2011 SCC 28, at para 37, emphasis in original (**TAB 53 of the Appellant's materials**).

32. In *R v J.A.*, the Court further emphasized that consent must be assessed from the perspective of the complainant, at the time that the touching occurred: "Parliament viewed consent as the conscious agreement of the complainant to engage *in every sexual act* in a particular encounter." (At para 31, emphasis added, see also para 46.) Chief Justice McLachlin held further that "the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind" (at para 34, see also para 44.) This principle was confirmed in *R v Hutchinson*, 2014 SCC 19 (**TAB** 10). In that case, the Court was unanimous with respect to the proposition that "the complainant must agree to the specific physical act....agreement to one form of penetration is not agreement to any or all forms of penetration" (*Hutchinson*, para 54, per McLachlin CJ and Cromwell J (**TAB 13**)). The Alberta Court of Appeal stated succinctly in *R v Ashlee,* 2006 ABCA 244 at paras 24-25: "Consent must be given to the particular activity, and at the time of the activity. ... the complainant is entitled to withdraw consent at any time." **(TAB 14)**

33. The complainant's consent cannot be implied from the circumstances of the sexual activity or from the relationship between the accused and the complainant (*J.A.*, at para 47). This principle underscores the prejudicial risk presented by the admission of evidence of Ms. Gladue's sexual history with the Respondent and by evidence of her agreement to engage in sexual activity in exchange for payment. The Respondent is not entitled to rely on the false logic that because Ms. Gladue was engaged in sex in exchange for money she must thereby have consented to all sexual touching performed by the Respondent.

34. The *mens rea* of sexual assault "is the intention to touch, knowing of, or being reckless of or willfully blind to, a lack of consent, either by words or actions, from the person being touched" (*Ewanchuk*, para 23; *R v Park*, [1995] 2 SCR 836, at para 39 (**TAB 52 of the Appellant's materials**)). In *Ewanchuk*, the Court held that the accused may deny the *mens rea* of sexual assault on the basis of a mistaken belief in consent. An accused may offer evidence that:

> ...he believed that the complainant *communicated consent to engage in the sexual activity in question*. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence. (*Ewanchuk*, para 46, per Major J, emphasis in original, see also para 47; *Park*, para 39, per L'Heureux-Dubé J, concurring; *J.A.*, para 37).

The italicized phrase, as emphasized by Major J, further confirms that consent is given or withheld on an activity-by-activity basis, and that the *mens rea* with respect to consent must similarly be determined with respect to the specific activity at the time the touching occurred.

35. Just as advance consent has been eschewed in Canadian jurisprudence (*J.A.*, paras 43-44; *Ashlee,* paras 28-29), the complainant's "silence, passivity or ambiguous conduct" cannot provide a foundation for the defence of honest but mistaken belief in consent; nor is "implied consent" a defence (*Ewanchuk*, para 51). In the case at bar, the most that the Respondent could say was that he thought in his own mind that Ms. Gladue was consenting and, while the acts were taking place, he thought her wordless moans communicated pleasure. It is clear from the jurisprudence that wordless moans are the kind of "ambiguous conduct", akin to silence, that the Court in *Ewanchuk* stated will not suffice (see *R v Rodas,* [1999] OJ 4503 (Sup Ct Just) at para

89 (**TAB 15**); *R v Cornejo*, (2003) 68 OR (3d) 117 (Ont CA) at para 21 (**TAB 16**)). The defense of honest but mistaken belief in consent depends on the accused having taken "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting" (*Criminal Code*, s. 273.2 (**TAB 54 of the Appellant's materials**)). In *R v J.A.*, McLachlin CJ explained, at para 42 (emphasis in original), that:

> ...a person wishing to avail himself of the *mens rea* defence must not only believe that the complainant communicated her consent (or in French, "*l'accusé croyait que le plaignant avait consenti*" (s. 273.2)), but must also have taken reasonable steps to ascertain whether she "was consenting" to engage in the sexual activity in question at the time it occurred.

36. At trial, the Respondent testified that Ms. Gladue "knew what she was coming for" (Transcript, p1121). Defence counsel submitted to the jury that the Respondent was entitled to believe that Ms. Gladue was consenting to the sexual activity because of her sex work: "surely she has to be appreciating that sex is about to happen. She's a prostitute, and she's consenting to the sex. And if you don't believe any of that, Mr. Barton would have obviously believed that she was consenting to sex." (Transcript, p 1649.) Defence counsel proceeded to suggest that since, on the Respondent's testimony, Ms. Gladue did not communicate a lack of consent to the sexual activity, the Respondent had a reasonable belief that she was consenting (Transcript, p 1649). However, the Supreme Court of Canada has stated unambiguously that there is no such thing as implied consent to sexual touching (*Ewanchuk*, paras 1, 31). Further, the Respondent could not rely on the transactional nature of the sexual encounter to dispense with the requirement that reasonable steps be taken to ascertain consent to every sexual act that takes place.

37. A conclusion that the Respondent was entitled to assume, because of the paid context of this encounter, that Ms. Gladue consented to any and all sexual touching, with any conceivable degree of force, would transform the law of sexual assault in Canada. This transformation would deprive those who engage in sexual activity for payment of their rights to life and to security of the person afforded by s. 7 of the *Charter* (*Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, para 86 (**TAB 17**)) and of their rights to enjoy the equal protection and benefit of the law (*Seaboyer*, at 690). It would also perpetuate discriminatory beliefs about Indigenous women, particularly in a context where Indigenous women experience disproportionate violence, including overrepresentation among missing and murdered women in Canada. Such a conclusion

would be out of step with Supreme Court of Canada authority regarding the proper approach to ascertaining consent and with the requirements of *mens rea* in respect of consent.

C. Sexual touching causing bodily harm

38. The Respondent admits that he caused the wound that led to Ms. Gladue's death. At trial, the parties offered contradictory evidence regarding the means by which this wound was caused. The defence theory was that the wound was caused by manual penetration of Ms. Gladue's vagina. This theory was supported by the Respondent's testimony, and by expert evidence adduced by the Respondent. The Crown introduced expert evidence to suggest that a bladed instrument such as a box cutter had caused the fatal wound. The uncontested proposition that the Respondent applied the force that caused Ms. Gladue's wound raises questions about the role of consent in a context in which sexual touching causes bodily harm.

39. There is no evidence that Ms. Gladue anticipated or agreed to the infliction of bodily harm at any point in her dealings with the Respondent. Therefore, this is not a case in which the Court must resolve the question of whether public policy vitiates consent to sexual touching that is intended to cause, and does cause, bodily harm, in circumstances where the complainant consents to the infliction of bodily harm. In *R v J.A.*, the Supreme Court of Canada declined to decide "whether or in which circumstances individuals may consent to bodily harm during sexual activity" (at para 21.). Although there is no evidence that Ms. Gladue consented to bodily harm, it is necessary to review the case law regarding the vitiation of consent in order to explain why and how the Court below erred when articulating the role of consent in this case.

40. In *R v Jobidon*, [1991] 2 SCR 714 (**TAB 29 of the Appellant's materials**) the Supreme Court of Canada identified that both legal and factual limits may operate to define the scope of effective consent in terms of the law of assault. The Court held that common law limits on the circumstances in which a person may consent to the intentional application of force apply notwithstanding the codification of criminal law in Canada. The Supreme Court of Canada concluded that the common law vitiates consent "between adults intentionally to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl." (*Jobidon,* at para 125).

41. In *Jobidon,* Gonthier J provided a synopsis of Court of Appeal decisions that considered the limits of consent (paras 78-109). He emphasized that those decisions that countenanced the possibility of consent to the intentional application of force in the context of a physical fight analyzed whether the fight that ensued exceeded the limits of the participants' consent (see para 100). The cited cases plainly contemplate that – irrespective of the operation of legal limits – consent to the intentional infliction of force is limited as a matter of fact by the consenting party's subjective belief and expectation regarding those activities to which they are consenting (para 107). In other words, while a participant may consent to engage in an activity knowing that the other person will apply force to them, this does not mean that the participant has thereby consented to the infliction of bodily harm or to the use of a degree of force sufficient to cause serious hurt.

42. A line of cases decided by the Ontario Court of Appeal considers the circumstances in which consent to sexual activity will be vitiated by the infliction of bodily harm. In *R v Quashie,* 2005, 198 C.C.C. (3d) 337 at para 57 (**TAB 32 of the Appellant's materials**), the Court held that consent to sexual activity will be vitiated where an accused both intends and causes bodily harm. In *R v Zhao*, 2013 ONCA 293 (**TAB 31 of the Appellant's materials**), the Court held that, in circumstances where bodily harm has allegedly resulted from consensual sexual activity, the test is as follows:

> 1. The jury must be satisfied beyond a reasonable doubt that the accused intentionally applied force to the complainant.
> 2. The jury must be satisfied beyond a reasonable doubt that the intentional application of force to the complainant took place in circumstances of a *sexual nature* such as to violate the complainant's sexual integrity.
> 3. The jury must be satisfied beyond a reasonable doubt that the intentional application of force in circumstances of a sexual nature *caused* bodily harm.
> 4. If in addition to the above three criteria, the jury is satisfied beyond a reasonable doubt that the accused intended to inflict bodily harm upon the complainant (a subjective criterion), then consent is irrelevant, and the accused would be found guilty of sexual assault causing bodily harm.
> 5. If the jury is not satisfied beyond a reasonable doubt that the accused intended to cause the complainant bodily harm, then they would need to go on to consider whether they are satisfied beyond a reasonable doubt that the complainant did not consent to the intentional application of force by the accused.
> (*Zhao,* para 107, emphasis in original.)

43. The trial judge in this case used the *Zhao* test when charging the jury (Transcript, p 1752 lines 28-34; p 1753 lines 2-15; p 1757 lines 29-36; p 1758 lines 3-11; p 1759 lines 9-12). However, the policy concern that justifies the *Zhao/Jobidon* framework was not engaged in *R v Barton* because there was simply no evidence that Ms. Gladue anticipated or consented to the infliction of bodily harm. Given that there was no evidentiary basis on which consent to bodily harm could arise, the adoption of the *Zhao/Jobidon* framework raised two risks of error. First, it deflected the jury away from a careful analysis of the nature and limits of any consent Ms. Gladue may have given to sexual activity with the Respondent. Second, it improperly focused the jury's attention on the question of whether the Respondent intended to cause serious hurt to Ms. Gladue. In the absence of any evidence of consent to bodily harm, the test for sexual assault causing bodily harm is objective foreseeability of bodily harm.

44. The Interveners submit that relying on the test articulated in *Zhao* deflected the jury away from the question of whether the Respondent secured the "conscious agreement of the complainant to engage *in every sexual act*" during his encounter with Ms. Gladue on June 21-22 (*J.A.*, at para 31, emphasis added). In a context where there is evidence that the complainant consented to the intentional application of force in respect of some sexual activity, *J.A.* requires that the jury be directed to consider whether the complainant agreed to engage in the particular sexual act that caused bodily harm. Attending carefully to the question of which activities the complainant agreed to, and to the manner in which she anticipated that they would be performed, is likewise consistent with Gonthier J's conclusion that Canadian law recognizes both legal and factual limits to consent (*Jobidon*, at para 71).

45. Directing the jury simply to consider whether the complainant consented to the intentional application of force, as contemplated by the fifth step in *Zhao*, distracts the jury from the careful analysis of consent mandated by sexual assault cases such as *J.A.* and *Hutchinson* and by assault cases such as *Jobidon*. The distinction between consent to the intentional application of *any* force and consent to the intentional application of *particular* force was not relevant to *Zhao*, *Quashie* or the companion case of *R v Nelson* 2014 ONCA 853 (**TAB 33 of the Appellant's materials**). In *Quashie* and *Nelson* the complainant testified that she had not

consented to any sexual activity (*Quashie* at paras 9 and 15; *Nelson* at para 5), and in *Zhao*, the complainant testified that she had consented to "making out" with the accused but stated that she did not consent to further sexual activity that involved a condom (at paras 13-14). Where – as in the present case – there is evidence to suggest that the complainant consented to some sexual touching, the jury must be instructed to consider whether the sexual touching that occurred exceeded the limits of that consent.

46. The second risk raised by judicial reliance on the *Zhao/Jobidon* framework is that it transformed the *mens rea* of sexual assault causing bodily harm – which requires that the Crown prove objective foreseeability of a risk of bodily harm (*Nelson*) – into a subjective test, requiring that the Crown prove that the Respondent intended to cause serious hurt to Ms. Gladue. Given the Respondent's testimony and the expert testimony in this case, the difference between proving intention to cause serious hurt and objective foreseeability of a risk of bodily harm may well have been crucial to the jury's decision-making regarding the predicate offence of sexual assault causing bodily harm.

D. Assessing consent in this case

47. Assessing the nature and limits of Ms. Gladue's consent is difficult because of the impossibility of obtaining direct evidence regarding Ms. Gladue's subjective internal state of mind at the time that the Respondent, on his testimony, engaged in manual penetration of her vagina. However, it is open to the Crown to prove sexual assault with other evidence (*R v Cook*, [1997] 1 SCR 1113, para 52 (**TAB 18**); *Ashlee, supra,* para 17). In this case, in addition to evidence regarding Ms. Gladue's injuries, the Respondent's testimony at trial provided an evidentiary record to which the Canadian law of consent must be applied.

48. The Respondent's testimony regarding the nature and limits of Ms. Gladue's consent was thoroughly enmeshed with the sexual history evidence and with the evidence regarding the paid context of their encounters. Focusing solely on the charged act, on the night of June 21-22, the Respondent stated he asked Ms. Gladue to begin sexual activity and she commenced to give the Respondent oral sex. The Respondent claimed he inserted the fingers of his left hand into Ms. Gladue's vagina. At this time, "Communication was good. There was moaning and groaning

going on, all good signs, working it really good, thrusting. It was good. All signs were go." (Transcript, p 1124, lines 5-6.) He testified that Ms. Gladue did not express disagreement with the activity. The Respondent testified that when he removed his hand from Ms. Gladue, he saw blood on it (Transcript, p 1128, lines 28-30). The Respondent claims he did not then proceed with further activity.

49. Specifically in respect of the acts to which Ms. Gladue communicated her consent, the Respondent testified that he negotiated a fee for "everything", which he defined to mean: "Intercourse, sex" (Transcript, p 1103, lines 26-30). He testified that Ms. Gladue performed oral sex on him (Transcript, p 1104, lines 29-32). He did not testify that he took any steps to ascertain whether Ms. Gladue consented to his manual penetration of her vagina, or to ask whether she was comfortable with the degree of force with which he inserted his fingers into her vagina. Since Ms. Gladue is deceased, the only evidence of her consent is the Respondent's testimony that he interpreted Ms. Gladue's moans as indicating consent (Transcript, p 1128, lines 21-25). However, non-verbal behaviours, when relied upon as expressions of consent, must be unequivocal (*Rodas,* at para 89; *Cornejo*, at para 21). In his charge to the jury with respect to considering consent for the manslaughter charge, the trial judge states:

> 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.
> 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.
> (Transcript, pp 1753-4, lines 40-1 and 1-16.)

From these passages, the jury may have understood that the trial judge suggested the chronology of events, the characterization of Ms. Gladue as a "prostitute", and the fact that they had "entered into a commercial transaction", to be equivalent to the ascertainment of consent. Far from

cautioning the jury against reasoning which might be tainted by the "twin myths", the learned trial judge appears to have invited that faulty reasoning in his charge to the jury. In addition, the trial judge potentially distracted the jury from the key issue of determining the limits of Ms. Gladue's consent by telling them at the outset that: "there is some evidence that Cindy Gladue consented to the application of some force by Mr. Barton, including sexual activity". The trial judge ought to have explained the test to the jurors and reminded them of relevant evidence so that they could determine whether or not Ms. Gladue consented to manual penetration being performed at all or with the degree of force used by the Respondent. The Interveners submit that the evidence falls far short of establishing that the Respondent took reasonable steps to ascertain Ms. Gladue's consent to the manual penetration or to the use of a degree of force that caused serious hurt.

50. The defence theory at trial was that the Respondent created the wound in Ms. Gladue's vaginal wall during the manual penetration to which he testified. The Respondent denied using force during this act (Transcript, p 1267, line 16; p. 1286, line 15). However, Crown pathologist Dr. Dowling testified that "quite a significant degree of force" would be required to cause this wound by blunt trauma (i.e. without the use of a sharp instrument) (Transcript, p 789, lines 21-24, pp. 815-816, lines 38-41, 1). The Interveners submit that it is consistent with the caselaw described in section IV (B and C) of this factum to hold that the ambit of consent extends to consideration of the degree of force with which sexual touching is performed. Even if there is a question about whether Ms. Gladue consented to manual penetration, there was no evidence that Ms. Gladue contemplated and agreed that the Respondent could use the degree of force that must necessarily have been used to cause the wound identified on autopsy.

51. In these circumstances, the trial judge's charge to the jury was inadequate. The generic and complicated instructions failed to offer the jury a clear decision tree that would focus their attention on the need to assess Ms. Gladue's consent to each act performed by the Respondent, and in particular on the need to consider whether she consented to being touched with the significant degree of force that must have been used in order to produce the wound observed on autopsy (Transcript, p 1753, lines 28-41 and p. 1754 line 1). Confusingly, it is not until later in

his charge, that the trial judge does acknowledge that any consent given by Ms. Gladue would have to extend to the amount of force used (Transcript, p 1758 lines 13-20).

52. The instructions given with respect to *mens rea* and consent were similarly inadequate. The trial judge instructed the jury that they should convict if the Crown proved "that Mr. Barton knew that Ms. Gladue did not consent or that she did not consent validly." (Transcript, p 1755, lines 31-32). The trial judge also instructed the jury that: "You should consider whether the Crown has proven beyond a reasonable doubt that Mr. Barton failed to take reasonable steps in the circumstances known to him at the time to satisfy himself that Ms. Gladue was consenting to the type of sexual activity he described in his testimony." (Transcript, p 1757, lines 23-26). These instructions were inaccurate to the extent that they failed to account for recklessness as a culpable form of *mens rea*. The jury would have been left with the erroneous impression that they could only convict the Respondent if he *knew* that Ms. Gladue was not consenting. Furthermore, they may reasonably have understood that the Respondent was only guilty of sexual assault causing bodily harm if he intended to cause serious hurt to Ms. Gladue. The jury was given no instruction about what would constitute reasonable steps to ascertain consent, along the lines contemplated in cases such as *Ewanchuk*. Coupled with the prejudicial assumption that a woman who agrees to engage in sexual activity in expectation of payment thereby agrees generically to "sex", these instructions failed to focus the jurors' minds on the careful analysis of consent and its limits that is required by the Canadian law of sexual assault.

E. Conclusion

53. Sexual history evidence should never be admitted without the probative value and prejudicial effect of such evidence being weighed, and a clear caution given to the jury. The Respondent's testimony regarding his sexual activity with Ms. Gladue and the defence's closing submissions were structured by a reliance on sexual history evidence. The trial judge's instructions to the jury regarding consent to sexual activity failed to identify or counter the false logic invoked by this evidence and argument. Further, the prejudicial portrayal of Ms. Gladue as a "Native" "prostitute" invited the application of sexist and racist myths and stereotypes and may well have tainted the jury's evaluation of the evidence.

54. Given the Supreme Court's acknowledgement in *Williams*, *Gladue* and *Ipeelee* of the widespread racial bias against Indigenous people in the criminal justice system, and its acknowledgement in *Ewanchuk* of the myths and stereotypes about sexual assault complainants, it is incumbent upon all actors in the justice system to avoid discriminatory myths and stereotypes in exercising their duties.

55. In light of the ways in which myths and stereotypes contributed to the errors in law in the trial below, the Interveners urge this Honourable Court to affirm the necessity of requiring analysis of the relevancy, probative value and prejudicial risk of any sexual history evidence proposed to be led according to the factors outlined in s. 276, and to affirm the duty to apply the established Canadian law of consent.

V. Relief Sought

56. As Interveners, no position on the appropriate remedy is advanced in this factum.

All of Which is Respectfully Submitted this 2nd day of MAY, 2016.

Justice Berger did not grant the Interveners leave to make oral submissions.

Per: _____
Lisa Weber
Counsel for the Interveners

LIST OF AUTHORITIES

AUTHORITIES ALREADY PROVIDED BY THE APPELLANT IN ORDER CITED IN THIS FACTUM

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