

2017

CAC No. 461056

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

Her Majesty the Queen

Appellant

- and -

Bassam Al-Rawi

Respondent

- and -

Women's Legal Education and Action Fund Inc. and
Avalon Sexual Assault Centre Society

Intervenors

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PART I – OVERVIEW OF THE APPEAL

1. This appeal offers an opportunity to clarify the law of capacity and consent to sexual relations in the context of an intoxicated complainant who has not lost consciousness at the time of the sexual assault. The Intervenors submit that this area of law must be developed in a manner that advances women's equality and autonomy.
2. Existing jurisprudence has articulated various legal tests for capacity to consent to sexual activity. In their application, these tests do not reflect the affirmative standard of voluntary, autonomous consent required by s. 273.1(1) of the *Criminal Code*¹ and informed by s. 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter").²
3. Moreover, discriminatory stereotypes about intoxicated women, their credibility, and their propensity to consent to any sexual activity continue to pervade the case law.
4. This lack of clarity reinforces women's inequality in the context of an already highly gendered crime. The courts have recognized sexual assault as a form of sexual inequality; it is committed predominantly by men against women and girls.³ Women from disadvantaged groups, including young women, are particularly at risk.⁴ The consumption of alcohol is a factor exploited by men who commit sexual assault, while at the same time contributing to a low rate of reporting, prosecution and conviction.⁵

¹ RSC 1985, c C-46 [Code].

² *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

³ *R v Osolin*, [1993] 4 SCR 595 at paras 165-68 (Cory J), Book of Authorities [BOA] Tab 32; *R v Ewanchuk*, [1999] 1 SCR 330 at paras 69-75 (L'Heureux-Dubé J concurring) [Ewanchuk], Crown Book of Authorities [Crown BOA] Tab 5.

⁴ Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41.4 *Akron Law Review* 865 at 882-84, BOA Tab 40; Janine Benedet, "Sexual Assault of Intoxicated Women" (2010) 22 *CJWL* 435 at 436-39, BOA Tab 36.

⁵ Benedet, *ibid* at 457; J. Benedet & I. Grant, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017) 37 *CR* (7th) 375 at 376 [Benedet & Grant (2017)], BOA Tab 38.

5. An equality-focused analysis is essential to the resolution of this appeal.

PART II – STATEMENT OF FACTS

6. The Intervenors were granted leave to intervene by Order of the Honourable Justice Cindy A. Bourgeois dated May 12, 2017, to provide this Honourable Court with an equality-focused perspective to the issues arising in this appeal.

PART III - LIST OF ISSUES

7. The Intervenors were granted leave to make submissions on the following issues:
 - a. The meaning of consent in law and its application in the specific context of an intoxicated complainant, as informed by s. 15 of the *Charter*,
 - b. The interpretation of the legal principles that ought to inform the concept of capacity under s. 273.1 of the *Criminal Code*, in the specific context of an intoxicated complainant, as informed by s. 15 of the *Charter*, and
 - c. The application of discriminatory myths and stereotypes about women, including intoxicated women, in the analysis of the law and the assessment of evidence of capacity and consent to sexual activity under s. 273.1 of the *Criminal Code*.

PART IV – STANDARD OF REVIEW

8. The Intervenors do not take a position on the merits or the disposition of the appeal.

PART V - ARGUMENT

A. The meaning of consent under s. 273.1 of the *Criminal Code* and its application in the context of an intoxicated complainant.

9. In the instant case, the trial judge found that the Crown had adduced “no evidence” of lack of consent, because the complainant suffered from alcohol-induced memory loss and could offer no direct evidence of her state of mind.⁶ This appeal raises the issue of the meaning of consent under s. 273.1 of the *Criminal Code*, and its application in the context of an intoxicated complainant experiencing alcohol-induced memory loss.

10. The Intervenors submit that the *Charter* values of equality and autonomy support an independent assessment of “non-consent in fact”, before the issue of capacity is considered. In assessing non-consent, the Court must examine the circumstantial evidence available, and must avoid reliance on discriminatory myths and stereotypes.

(i) “Non-consent in fact” must be assessed independently of incapacity.

11. Even where, as in the case at Bar, a complainant’s capacity to consent is in issue, courts must engage in a distinct inquiry to determine whether the Crown has established “non-consent in fact” beyond a reasonable doubt. An assessment of non-consent ought normally to occur before turning to the issue of incapacity, in order to promote women’s autonomy and decision-making power.

12. The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine, under s. 273.1(1), whether the evidence establishes the absence of a voluntary agreement by the complainant – in her own mind – to engage in the sexual activity in question. If a reasonable doubt exists as to a lack of voluntary

⁶ Decision dated March 1, 2017, Appeal Book, Tab 3, p 19, lines 9-11 and p 22, lines 1-4 [*Trial Decision*].

agreement, the second step is to consider whether any circumstances vitiated any apparent consent, pursuant to s. 273.1(2) or s. 265.⁷

13. The Intervenors are troubled by a tendency in judicial decision-making to conflate the two steps of the consent analysis in cases involving an intoxicated complainant.⁸ In such cases, judges may acquit the accused after finding a reasonable doubt as to incapacity, without analyzing evidence of the complainant's subjective non-consent.⁹
14. A distinct analysis of evidence of non-consent is important because, the Intervenors submit, the threshold for saying 'no' to sexual activity ought to be recognized as *lower* than the threshold for saying 'yes'. As explained by Professors Benedet and Grant:

A woman who may not understand fully the meaning of consenting to sexual activity in a particular context may nonetheless know that she does not [want] to be touched by this person in a sexual way. In other words, she may be capable of saying "no" but not capable of saying "yes" in a particular context. Thus it should be possible to conclude that a woman was incapable in a particular context of giving consent and yet did not consent to the sexual touching.¹⁰

When understood in this way, there is no inconsistency in finding as a matter of fact that a complainant did not consent to sexual activity, and also that she would have been incapable of providing affirmative consent due to incapacity.¹¹ The Court need only consider incapacity where a reasonable doubt exists as to non-consent.

15. A failure to assess non-consent undermines complainants' equality in several ways.

⁷ See e.g., *R v. Hutchinson*, 2014 SCC 19 at para 4 [*Hutchinson*], Crown BOA Tab 8.

⁸ See e.g., *R v Nyznik*, 2017 ONSC 4392, BOA Tab 29; *R v Heraldson*, 2012 ABCA 147, Crown BOA Tab 7; *R v LC*, 2002 BCSC 1467, BOA Tab 26; *R v JM*, [2003] OJ No 3493 (OCJ) (QL), BOA Tab 20; aff'd *R v JWM*, [2004] OJ No 1295 (QL), Crown BOA Tab 10; *R v H(SL)*, 2003 SKPC 148 at para 22, BOA Tab 17.

⁹ See e.g., *Trial Decision*, Appeal Book, Vol 1, Tab 3.

¹⁰ Janine Benedet & Isabel Grant, "A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law" (2012) 43 *Ottawa L. Rev.* 1 at para 58, BOA Tab 37 [Benedet & Grant (2012)].

¹¹ *R v Kishawyineew*, 2017 SKQB 177 at paras 96-98 [*Kishawyineew*], BOA Tab 24; *R v BSB*, 2009 BCCA 520, BOA, Tab 6. But see *R v Jensen* (1996), 90 OAC 183 (ONCA) at paras 18-21, BOA Tab 19.

16. First, it reintroduces discredited notions of “implied” consent that have been rejected by the courts and by s. 273.1 of the *Criminal Code*. Though a judge may have a reasonable doubt that a complainant was incapable of consenting, it does not follow that there must also be a reasonable doubt as to her *subjective lack of consent*.¹² Intoxicated women are not presumed to exist in a perpetual state of consent, vitiated only by incapacity. Where there is circumstantial evidence of non-consent, it is imperative that the courts recognize and evaluate that evidence.¹³
17. Second, failing to engage in a distinct inquiry into non-consent before turning to incapacity undermines women's autonomy and decision-making power. Where the evidence establishes non-consent beyond a reasonable doubt, a distinct consent analysis avoids placing unnecessary limits on a woman's right to make informed decisions about sexual activity when she has been drinking.
18. Third, failing to analyze non-consent may obfuscate the underlying context of gender discrimination. An analysis of non-consent allows the Court to consider exploitative circumstances or behaviour by the accused that contributed to the sexual assault or undermined the voluntariness of any purported “consent”,¹⁴ such as any pre-existing power dynamic or whether the accused targeted the complainant because of a discriminatory belief she was sexually compliant or helpless due to her intoxication.
19. In summary, the two-step consent analysis for assessing voluntary agreement to sexual touching must be properly applied to protect women's equality and autonomy.

¹² Benedet & Grant (2017), above at 381, BOA Tab 38.

¹³ Benedet & Grant (2012), above at para 35, BOA Tab 37.

¹⁴ Melanie Randall, “Sexual Assault Law, Credibility and “Ideal Victims”: Consent, Resistance, and Victim-Blaming” (2010) 22 CJWL 397 at 407, BOA Tab 41; Benedet & Grant (2012), *ibid*, paras 4, 22-23, 34, 45.

- (ii) Circumstantial evidence may establish non-consent beyond a reasonable doubt when no direct evidence is available due to memory loss.

20. The subjective definition of consent may be difficult to apply in cases involving intoxication, where the complainant is unable to recall her state of mind at the time of the sexual assault due to alcohol-induced memory loss. In such cases, it is appropriate for courts to consider all relevant circumstantial evidence of non-consent, to determine whether the complainant's non-consent must be inferred.¹⁵

21. Having regard to the definition of consent in s. 273.1(1) of the *Criminal Code*, this assessment must be highly contextual. It must focus on whether the complainant *wanted* the particular sexual act in question to take place—with the particular accused, at the time it occurred, and in the factual circumstances confronting the complainant.¹⁶

22. Subject to Section A(iv), below, the Interveners support consideration of the following types of circumstantial evidence that have been relied upon in previous cases to support an inference of non-consent. No single factor will be determinative and not all factors will have the same relevance or weight in every case.

23. *The complainant's prior familiarity with or relationship to the accused.* Courts have relied on the fact that the accused was a complete stranger to the complainant at the time of the assault to support an inference of non-consent.¹⁷ In other cases, the fact the accused was a relative,¹⁸ or trusted friend,¹⁹ was probative of non-consent.

¹⁵ *R v Griffin*, [2009] 2 SCR 42 at para 27, BOA Tab 14. The Crown is often called upon to prove the state of mind of an accused who does not testify based solely on circumstantial evidence.

¹⁶ *R v Barton*, 2017 ABCA 216 at para 183 [*Barton*], Crown BOA Tab 3.

¹⁷ *Kishawiyinew*, above at paras 83, 93, BOA Tab 24. But see Interveners' submissions at para 33, below.

¹⁸ *R v Esau*, [1997] 2 SCR 777 at paras 92, 95, 97 (McLachlin J dissenting), BOA Tab 13.

¹⁹ *R v Anderson*, 2010 YKSC 32 at para 129, BOA, Tab 3.

24. *The complainant's evidence about her personal habits or attitudes*, including any typical routines or practices, may be relevant. A complainant's evidence that she would never have consented to sexual activity with a particular partner,²⁰ or at a particular time,²¹ has also been considered probative of non-consent in cases of alcohol-induced memory loss, but courts must approach such evidence with caution so as not to reintroduce discriminatory myths about women's prior sexual conduct.²²

25. *The age of the complainant*, including relative to the accused, may support a reasonable inference of non-consent.²³ These facts may undermine the credibility of an accused's evidence on consent, or constrain the "voluntariness" of the complainant's purported agreement to the sexual activity.

26. Other relevant evidence may include:

- a. The complainant's physical or emotional condition at the time of the assault;²⁴
- b. The timeline of events leading to the assault;²⁵
- c. The location of the assault and related considerations such as the likelihood of public exposure,²⁶

²⁰ *R v JR*, [2006] OJ No 2698 (QL) at para 38 [*R v JR (ONCS)*], Crown BOA Tab 13, aff'd 2008 ONCA 200; leave to appeal ref'd [2008] SCCA No 189, BOA Tabs 21-22; *R v Kontzamanis*, 2011 BCCA 184 at paras 27-31, BOA Tab 25 [*Kontzamanis*].

²¹ *Kontzamanis*, *ibid* at paras 27-31; *R v JR (ONCS)*, *ibid* at para 38: the trial judge accepted the complainant's testimony that she had received recent medical advice to abstain from sexual intercourse.

²² See the Intervenor's submissions at para 34, below.

²³ *R v JWM*, above at para 62, Crown's BOA Tab 10.

²⁴ Where the complainant was vomiting the only reasonable inference based on "human experience and logic" was that she did not consent: *R v BSB*, above at paras 72-73, 90, BOA Tab 5.

²⁵ The time between the complainant encountering the accused and the sexual touching supported an inference of non-consent in *Kishawynew*, above at paras 83, 97, BOA Tab 24. But see Intervenor's submissions at para 33, below.

²⁶ *R v Ashlee*, 2006 ABCA 244 at para 38, BOA Tab 4: "[i]t is highly unlikely, bordering on the absurd, that a woman would consent, in anticipation of her pending unconsciousness, to two men exposing and fondling her breasts on a public street in broad daylight in downtown Edmonton."

- d. The distressed, shocked or confused reaction of the complainant upon discovering or learning of the assault.²⁷

27. *Conduct of the accused.* Although consent for the purposes of *actus reus* is subjective, the conduct of the accused may also be circumstantially relevant to non-consent. Where there is evidence of predatory behaviour on the part of the accused before or after the assault, it should be considered relevant circumstantial evidence that no consent was sought or provided.²⁸ After the fact conduct of the accused demonstrating a consciousness of guilt may also support an inference that the complainant in fact communicated her non-consent to the accused in accordance with s. 273.1(2)(d).²⁹

- (iii) Circumstantial evidence may support an inference that there was no voluntary agreement due to exploitative conduct on the part of the accused.

28. In analyzing evidence of non-consent, courts may consider any circumstances that constrained or eliminated the voluntariness of her consent under s. 273.1(1).

29. Reasonable inferences about a complainant's consent to sexual contact must be made with recognition of the context of gender inequality in which her consent is sought. This context includes the fact that intoxicated women are more likely to be targeted for sexual assault.³⁰ It includes, as well, the complainant's experience of any intersecting characteristics historically associated with discrimination – such as gender identity, age, Indigeneity, disability, socioeconomic status, or sexual

²⁷ *Ibid* at para 97; *R v James*, 2014 SCC 5 at para 5, BOA Tab 18. But see para 35, below.

²⁸ *Kishawynew*, above at paras 93, 101, BOA Tab 24, where the accused strategized to isolate the complainant or close avenues of escape. Some trial judges have described predatory behaviour on the part of the accused, such as urging excessive drinking, without recognizing it as circumstantial evidence of non-consent: e.g., *R v Tariq*, 2016 ONCJ 614 at paras 15, 20 [*Tariq*], Crown BOA Tab 19.

²⁹ See e.g., *Barton*, above at paras 63-69, Crown BOA Tab 3.

³⁰ *Benedet*, above at 438-39, BOA Tab 36.

orientation – which may render her more likely to be targeted for sexual violence and may impact the voluntariness of any purported consent.

30. Such circumstances may diminish the voluntariness of the complainant's agreement to sexual contact even where they have not eliminated her capacity to consent entirely.³¹ The Supreme Court of Canada has recognized that the voluntariness of consent may be constrained, short of incapacity, in other contexts.³²

31. Consideration of this larger context in evaluating consent is required to advance the *Charter* values of dignity and equality, and to avoid legal interpretations that would diminish the prohibition against sexual assault in Canadian law.

(iv) Reliance on circumstantial evidence must not reinforce discriminatory myths or stereotypes.

32. In assessing circumstantial evidence, the Court must be cautious to avoid discredited myths or stereotypes about sexual assault and sexual assault complainants. While the circumstantial evidence identified above may be probative of *non-consent*, the reverse may not be true. Certain evidence is never probative of affirmative consent.

33. While lack of any prior relationship between the complainant and the accused may, along with other evidence, support a reasonable inference of non-consent, a pre-existing relationship does not make it more likely that the complainant was consenting. Section 273.1 of the *Criminal Code* requires that consent relate to the sexual activity in question, be ongoing, and that it may be withdrawn at any time. To infer consent to the sexual activity in question from an existing relationship between the complainant

³¹ *Ibid* at 461.

³² *Norberg v Wynrib*, [1992] 2 SCR 226, BOA Tab 1; *Benedet & Grant* (2012) at para 59, BOA Tab 37; *R v Stender*, 2005 SCC 36, affirming *R v SDG* (2004), 72 OR (3d) 223.

and the accused, or from prior consent to sexual activity, relies on impermissible reasoning based on the rejected notion of “implied” consent, and must be avoided.³³

34. Similarly, an examination of the pre-existing habits or attitudes of the complainant should not be an invitation to delve into sexual history evidence, contrary to s. 276.

35. Moreover, while a complainant’s reaction upon discovering the assault may support an inference that the sexual act was non-consensual, the *absence* of distressed reaction to an assault, or a delay in reporting, does not make it more likely she consented. It is impermissible, in assessing consent, to rely on stereotypes about how a person who has been sexually assaulted would “normally” behave or respond.³⁴ Many factors can affect how an individual reacts to an assault, including trauma, injury, fear, experiences of colonialism, cultural or religious mores, or stigmatization.

(v) No role for appraisals as to the “wisdom” of the complainant’s conduct.

36. Courts also must not allow considerations of the “fault” or “responsibility” of the complainant to colour their assessment of consent. It is *not* relevant to assessing consent that the complainant’s intoxication was self-induced, or that the complainant engaged in behaviour of which the trial judge might disapprove.³⁵

37. Commentary regarding the “wisdom” of a complainant’s decision-making or “poor judgment” during the period leading to a sexual assault commonly appears in trial judgments in cases involving intoxicated complainants.³⁶ Such appraisals of the

³³ See e.g., *Barton*, above at para 129, Crown BOA Tab 3.

³⁴ Parliament rejected the myth that “credible” victims of sexual assault will report the assault at the first opportunity by abrogating the doctrine of “recent complaint”: *Code*, s 275.

³⁵ *Benedet*, above at 460, BOA Tab 36; *Nyznik*, above at paras 186 ff, BOA Tab 29.

³⁶ See e.g., *R v Rand*, 2012 ONCA 731 at para 16, BOA Tab 33; *R v KC*, 2016 ABPC 242 at para 59, BOA Tab 23; *Heraldson*, above at paras 9, 12 (citing trial decision), Crown BOA Tab 7.

complainant's conduct are patently irrelevant to the issue of consent and perpetuate the stereotype that women are responsible for the sexual violence against them.³⁷

38. Comments of this nature risk depriving women of the equal benefit and protection of the law by allowing discriminatory myths and stereotypes to inform the assessment of evidence or credibility. These include stereotypes that "good girls" or "real victims" do not consume alcohol.³⁸ Comments about the "ill-advised" or "risky" nature of the complainant's conduct improperly suggest the complainant is to blame for their own assault or is "deserving" of the harm sustained, due to her own actions.³⁹ Such comments must be avoided: "No behaviour by the woman, other than voluntary consent itself, gives a man the green light to apply force of a sexual nature to her."⁴⁰

B. The interpretation and application of the legal principles governing capacity to consent under s. 273.1 of the *Criminal Code*, in the context of an intoxicated complainant.

39. There is a need for judicial clarification of the law of capacity as it applies to an intoxicated complainant who has not lost consciousness prior to the assault. Sections 273.1(1) and 2(b) of the *Criminal Code* provide that "[n]o consent is obtained ... where the complainant is incapable of consenting."

40. Trial-level and appellate decisions in this context have articulated and applied a range of legal standards to govern capacity to consent to sexual contact.⁴¹ Many of these

³⁷ See e.g., *Nyznik*, above at paras 190-91, BOA Tab 29.

³⁸ *Ibid*; *Gotell*, above at 878-80, BOA Tab 40; *Randall*, above at 408-09, 411, 413-14, BOA Tab 41.

³⁹ See by analogy, *Barton*, above at paras 123, 128, Crown BOA Tab 3.

⁴⁰ *Benedet*, above at 441, BOA Tab 36.

⁴¹ In *R v MAP*, 2004 NSCA 27 at para 39 [*MAP*], Crown BOA Tab 12, for instance, this Honourable Court affirmed the trial judge's decision that an intoxicated complainant lacked the capacity to consent due to "her failure to appreciate the difference between right and wrong, the nature, quality and import of what she was doing and that she did not, at the material time, have an operating mind", despite this unusual articulation of the test.

formulations do not align with the requirements for affirmative consent in s. 273.1 of the *Criminal Code*, or with the *Charter* values of equality and personal autonomy. Moreover, even where courts do articulate an acceptable legal threshold for capacity to consent, their treatment of the evidence suggests they have nonetheless applied a different, lower threshold in practice.

- (i) The legal standard to be applied to the concept of “capacity”: the starting point is the definition of consent as informed by s. 15 of the *Charter*.

41. The starting point for determining whether a complainant has capacity to consent to sexual contact is an examination of the definition of consent in the *Criminal Code*.

42. Section 273.1 of the *Criminal Code* establishes an affirmative consent standard for the purposes of the offence of sexual assault. It defines consent as a “voluntary agreement”⁴² – not to sexual touching in general, but to a specific act with a specific person at a specific time and place.⁴³ The complainant must provide valid consent throughout every phase of the sexual activity, and may withdraw consent at any time.⁴⁴

43. A central concern animating this definition of consent is the recognition of a woman’s inherent right to exercise full control over her body and to engage only in sexual activity on a voluntary and informed basis.⁴⁵

⁴² *Code*, s. 273.1(1).

⁴³ *R v Seaboyer*, [1991] 2 SCR 577 (QL) at para 208 (L’Heureux-Dubé J dissenting) [*Seaboyer*], BOA Tab 35; *Hutchinson*, above at para 54, Crown BOA Tab 8; *Barton*, above at para 183, Crown BOA Tab 3.

⁴⁴ *R v JA*, 2011 SCC 28 at para 66, Crown BOA Tab 1.

⁴⁵ *Ewanchuk*, above at para 75 (L’Heureux-Dubé J concurring), Crown BOA Tab 5.

- (ii) Legal standard of “capacity” requires the complainant to have the ability to make and communicate a voluntary and informed decision.

44. The threshold for capacity to consent must meaningfully mirror this affirmative consent standard. In other words, the legal standard for capacity to consent requires that the complainant both be able to make a voluntary, informed and autonomous decision, and also be able to effectively communicate that voluntary agreement.

45. The legal standard for capacity to consent must be sufficiently high to give effect to Parliament’s stated intention in enacting s. 273.1 to “promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15” of the *Charter*,⁴⁶ and to protect women’s personal autonomy, physical and psychological integrity, and human dignity. These values underpin the criminalization of sexual assault.⁴⁷

46. With these principles in mind, the Intervenor endorses a legal standard for capacity to consent that includes, on an ongoing basis, the complainant’s:

- a. Understanding of the nature of the specific sexual act in question;⁴⁸
- b. Ability to assess the risks and consequences associated with the act in the particular circumstances confronting the complainant,⁴⁹ including physical risks (such as pregnancy or disease) and social risks (such as public exposure);
- c. Understanding that she has a choice as to whether to participate or decline to participate in the act;⁵⁰ and
- d. Capacity to communicate consent.

⁴⁶ Preamble, *Code (An Act to amend the Criminal Code (sexual assault))*, S.C. 1992, c. 38).

⁴⁷ *Ewanchuk*, above at para 74 (L’Heureux-Dubé J concurring); para 28 (Major J), Crown BOA Tab 5.

⁴⁸ See e.g., *Barton*, above at para 210, Crown BOA Tab 3.

⁴⁹ *R v Aminian*, [1999] OJ No 4240 (QL) (ONCA) (disability-related incapacity), BOA Tab 2.

⁵⁰ *Ibid*; *R v Daigle* (1997) 127 CCC 3(d) 130 (QCCA) at 137; aff’d [1998] 1 SCR 1220, BOA Tabs 11-12.

47. The Intervenor submits that capacity to consent must be context- and situation-specific. The level of capacity required to consent to the sexual activity in question may vary depending on the circumstances. As Professors Grant and Benedet explain, "It may ... require a higher level of capacity to consent to unprotected sexual intercourse than to a kiss."⁵¹ This is because "the risks and consequences of consenting are different in different situations and the ability to understand more serious risks and consequences may in turn require a higher level of capacity."⁵²

48. Circumstances rendering a complainant more likely to be targeted for sexual assault may weigh in favour of a higher level of capacity for valid, informed and voluntary consent. Exploitation of pre-existing power dynamics, for instance, may compound an intoxicated complainant's difficulty understanding she has a choice not to participate in the sexual act, thereby eliminating her capacity to provide voluntary, autonomous consent.

49. A contextual, situation-specific evaluation of capacity to consent is one that affirms the right of women to make decisions about their sexual activity even after having consumed alcohol, while still accounting for the exploitative and gendered context in which women are targeted for the crime of sexual assault.

(iii) A level of incapacity approaching unconsciousness is not the appropriate standard for capacity to consent to sexual activity under s. 273.1.

50. The Court ought to reject a threshold for incapacity that requires the Crown to prove an intoxicated complainant was insensate, an automaton, or suffering from impairments approaching unconsciousness. Few trial judgments have adopted this

⁵¹ Benedet & Grant (2017), above at 379, BOA Tab 38.

⁵² *Ibid.* See also Benedet & Grant (2012), above, BOA Tab 37.

low threshold for capacity.⁵³ A number of judgments have purported to adopt a higher threshold, but have nonetheless described the standard as “minimal”⁵⁴ or “not ... a very significant standard of cognitive awareness”.⁵⁵

51. These formulations ought to be rejected. They are inconsistent with the law of affirmative consent as defined by the Supreme Court of Canada in *R v JA*,⁵⁶ discussed above. Considered in light of women’s inequality, they are also inconsistent with the *Charter* values of equality and personal autonomy.

52. In other cases, there is a disconnect between the stated legal standard and its application to the evidence. Many courts purport to apply a standard that requires the complainant to be able to understand the sexual nature of the act, its risks and consequences, and the right to decline to participate. In practice, however, they go on to apply a lower threshold approaching automatism or near-unconsciousness.

53. For example, most courts have required “external indicia of incapacity such as unconsciousness or sleep”⁵⁷ before finding incapacity beyond a reasonable doubt. In *R v Cedeno*, the trial judge relied on the complainant’s “*insensible* condition throughout the evening.”⁵⁸ In *R v CP*, witnesses observed the complainant lying on the ground motionless or asleep and verbally non-responsive near in time to the assault.⁵⁹ In *R v Tariq*, the complainant exhibited a “dazed and confused expression”,

⁵³ *Contra R v Mullaney*, [1998] BCJ No 2188 (QL) (BCSC) at para 16, BOA, Tab 28; *R v LC*, above at paras 6, 15-16, BOA Tab 26.

⁵⁴ *R v Jensen*, above at para 13, BOA Tab 19.

⁵⁵ *R v JWM*, above at para 56, Crown BOA Tab 10.

⁵⁶ *JA*, above, Crown BOA Tab 1.

⁵⁷ *Benedet & Grant (2017)*, above at 378, BOA Tab 38; *Tariq*, above at para 93, Crown BOA Tab 19.

⁵⁸ *R v Cedeno*, 2005 ONCJ 91 at para 20 [emphasis added], BOA Tab 7.

⁵⁹ *R v CP*, 2017 ONCJ 277 at paras 90-92, 96, 100, BOA Tab 10.

was “barely responding to her environment” and was “falling asleep or on the verge of passing out”.⁶⁰ In other cases, the complainants had lost consciousness for at least a portion of the sexual touching.⁶¹

54. Conversely, some judges have held that the Crown failed to establish incapacity beyond a reasonable doubt in cases where the evidence showed that the complainant was able to perform basic or routine functions or tasks, despite articulating a higher threshold for capacity to consent. Judges have relied on considerations such as the complainant’s ability to recall the password to her cell phone,⁶² to get out of bed, get dressed, identify she was missing her cell phone, and give her name and phone number to the hotel concierge,⁶³ or to “[appear] to be aware of her surroundings”.⁶⁴ These indicators do not address the complainant’s ability to understand the nature of the sexual act, the associated risks and consequences, or her right to decline to participate; nor are they probative of her ability to communicate her consent.

(iv) Circumstantial evidence may establish incapacity beyond a reasonable doubt if it is the only reasonable inference available to the Court.

55. As with the element of consent, courts may rely on circumstantial evidence to establish incapacity to consent, particularly where no direct evidence is available.

⁶⁰ *Tariq*, above at paras 115-16, 124; compare these descriptions with the judge’s analysis of the complainant’s capacity ten to twenty minutes earlier: at para. 111; Crown BOA Tab 19.

⁶¹ *R v Anderson*, above at para 134, BOA Tab 3.

⁶² *R v Chen*, 2016 ABQB 644 at paras 17, 59, 104, BOA Tab 9.

⁶³ *R v Meikle*, 2011 ONSC 650 at para 53, BOA Tab 27.

⁶⁴ *Heraldson*, above at para 13, Crown BOA Tab 7; see also *R v Hinds*, 2016 ONSC 95 at para 115, BOA Tab 16; *Tariq*, above at paras 86-87, Crown BOA Tab 19.

56. The following categories of circumstantial evidence may be relevant to determining whether incapacity is the only reasonable inference available on the evidence.⁶⁵
57. *Evidence of the complainant's alcohol consumption.* The complainant's own evidence, those of witnesses, and sales records or video footage may assist in establishing the level of intoxication of the complainant at the time of the assault.⁶⁶ This evidence will often be considered along with evidence of other circumstances that affected the complainant's level of intoxication, such as her prior experience consuming alcohol, her size and weight, her food consumption, or the combination of other substances.⁶⁷
58. *Evidence of alcohol-induced memory loss.* While courts have clarified that a period of memory loss alone is not conclusive of incapacity, they have accepted that it is relevant circumstantial evidence to be considered along with other evidence, including any expert evidence that memory loss occurs at extreme levels of intoxication.⁶⁸
59. *Evidence of impaired coordination, mobility, or control over bodily functions* ought to be a strong indicator, for an otherwise able-bodied woman, that the complainant lacked the ability to communicate her voluntary agreement as required by the affirmative consent standard in s. 273.1(1). While evidence such as vomiting or involuntary urination has been considered in many cases,⁶⁹ the Intervenors are troubled that courts have often failed to appreciate the significance of this evidence to the capacity to *communicate* consent. In *R v Tariq*, the trial judge observed that

⁶⁵ *R v Griffin*, above at para 27, BOA Tab 14.

⁶⁶ *MAP*, above at paras 24, 27, 28, Crown BOA Tab 12.

⁶⁷ See e.g., *R v JWM*, above at para 7, Crown BOA Tab 10.

⁶⁸ *R v JR (ONSC)*, above at para 20, Crown BOA Tab 14.

⁶⁹ See e.g., *Tariq*, above, Crown BOA Tab 19; *R v JWM*, above at para 56, Crown BOA Tab 9; *R v Sarson* (1992), 115 NSR (2d) 445 (QL) at 4, BOA Tab 34; *Kishayinew*, above at para 98, BOA Tab 24; *Trial Decision*, Appeal Book, Tab 3.

"[c]ases where extreme intoxication h[as] led to findings of incapacity to consent tend to be cases where the evidence of intoxication is *far beyond* the loss of gross motor skills and balance."⁷⁰ This trend suggests that courts overlook the communicative nature of the *Criminal Code* definition of consent in assessing whether a complainant lacks capacity. This oversight requires judicial clarification.

60. Evidence of a loss of motor skills is also probative of the complainant's ability to avoid harm or to resist unwanted sexual advances. Avoidance or resistance are not required to establish non-consent, but where the complainant's motor skills are impaired, her reduced ability to defend against sexual violence ought to be considered, in light of all the evidence, to determine whether incapacity is the only reasonable inference.

61. *Evidence of confusion, disorientation or lack of awareness of surroundings* is regularly accepted as probative of the complainant's lack of understanding of the identity of her partner,⁷¹ the nature of the sexual act,⁷² or the physical and social risks and consequences of agreeing to the sexual activity in all the circumstances.⁷³

62. *Evidence of difficulty communicating.* Evidence of impaired speech or illegible or incoherent text messages or statements, or the inability to form words, are all probative of the complainant's inability to understand the sexual activity in question and associated risks and consequences.⁷⁴ They are also probative of her inability to effectively communicate her voluntary agreement as required by s. 273.1(1).

⁷⁰ *Tariq*, above at para 92 [emphasis added], Crown BOA Tab 19. See e.g. *R v Cedeno*, above, BOA Tab 7; *R v JWM*, above, Crown BOA Tab 10; *MAP*, above, Crown BOA Tab 12; *R v Sarson*, *ibid*.

⁷¹ *MAP*, above at para 25, Crown BOA Tab 12; *R v JWM*, above at para 52(2), Crown BOA Tab 10.

⁷² *R v CP*, above at para 115, BOA Tab 10.

⁷³ *R v Chahal*, 2002 BCPC 98 at para 15, BOA Tab 8.

⁷⁴ See e.g., *Kishayinew*, above at para 98, BOA Tab 24.

63. *Toxicology reports or other expert evidence of the complainant's level of intoxication* are not required as a matter of law, but may assist the court to draw reasonable inferences from the circumstantial evidence as a whole.⁷⁵

64. Other potentially relevant circumstantial evidence includes:

- a. Evidence of any periods of unconsciousness near in time to the assault;⁷⁶ and
- b. The timeline of events, including the duration of time between any evidence of the complainant's level of intoxication and the assault.⁷⁷

65. Because the capacity analysis must be contextual and situation-specific, the Court must engage in an analysis of all of the above evidence, as a whole, to determine whether incapacity is the only reasonable inference available to the Court.

- (v) Evidence of routine decision-making or basic tasks is not probative of capacity to consent to sexual activity.

66. The Intervenor's submit that, where the balance of the evidence set out above supports a reasonable inference of incapacity, the fact that a complainant was capable of performing routine tasks, making routine decisions, or "execut[ing] baseline physical functions" will not be sufficient to raise a reasonable doubt.⁷⁸

67. Such evidence does not address the elements necessary for capacity to consent under s. 273.1, including the complainant's ability to understand:

- a. the nature of the sexual act;

⁷⁵ *R v Hernandez*, [1997] AJ No 955 (QL) at para 5, BOA Tab 15.

⁷⁶ *R v CP*, above at paras 106, 115, BOA, Tab 10; *R v Sarson*, above at 4, BOA, Tab 34; *R v Cedeno*, above at paras 4, 10, BOA Tab 7; *R v JWM*, above at para 56, Crown BOA Tab 10.

⁷⁷ See e.g., *Tariq*, above at paras 111-12, Crown BOA Tab 19; *R v CP*, above at para 95, BOA Tab 10. Compare *R v Chen*, above at paras 94, 101-05, BOA Tab 9.

⁷⁸ See Intervenor's submissions at para 54, above. Compare *Heraldson*, above at para 7, Crown BOA Tab 7; *R v Meikle*, above, BOA Tab 27; *Tariq*, above at para 111, Crown BOA Tab 19.

- b. the risks and consequences associated with the act; or
- c. that she has a choice to decline to participate in the act.

Nor does such evidence support her ability to communicate her voluntary agreement.

68. As discussed above, the assessment of whether the Crown has established the complainant's incapacity beyond a reasonable doubt must be situation- and context-specific. An individual may have the ability to make certain decisions in her state of intoxication but not others. The assessment of capacity must be tethered to our understanding of the definition of consent, and to the circumstances facing the complainant, including the nature, risks or consequences of the specific sexual act.⁷⁹

69. In summary, the Court's approach to evaluating capacity must not diminish the effectiveness of the *Criminal Code* in combatting sexual violence and in furthering women's right to be free of sexual assault.

C. "Reasonable" inferences about capacity and consent must be grounded in the evidence, rather than discriminatory myths and stereotypes.

70. A proper application of the law of consent and capacity to consent under s. 273.1 must account for Parliament's intention to exclude discriminatory myths and stereotypes about women, including intoxicated women, from judicial decision-making, consistent with women's equality rights. The 1992 *Criminal Code* amendments, in particular, were intended to correct "quick conclusions based on false logic and discriminatory thinking about who consents, who tells the truth and what is relevant".⁸⁰ However, these myths and stereotypes continue to pervade the judicial process.

⁷⁹ *Barton*, above at para 183, Crown BOA Tab 3.

⁸⁰ *Ibid* at para 120, Crown BOA Tab 3.

- (i) A reasonable doubt may not be based on discriminatory myths or stereotypes.

71. It is a judicial error to find that a reasonable doubt exists because of speculation or assumptions informed solely or primarily by discriminatory myths or stereotypes, rather than the evidence or absence of evidence. In particular, the mere fact that a complainant was intoxicated cannot, on its own, support a reasonable inference that she was consenting, so as to raise a reasonable doubt on this issue.

72. The Supreme Court of Canada has described a “reasonable doubt” as one “based on ‘reason and common sense:’ it is ‘not imaginary or frivolous’; ... it is “logically connected to the evidence or absence of evidence’.”⁸¹

73. Where proof of an element of the offence requires inferences from circumstantial evidence, the reasonable doubt standard will not be met “[i]f there are reasonable inferences other than guilt”. Alternative inferences, however, must be “*reasonable* given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.”⁸²

74. In the context of sexual assault, courts must be cautious that the “human experience and common sense” with which they evaluate alternative inferences do not include discriminatory assumptions, myths or stereotypes:

As an endeavor that explicitly relies on so-called common sense and generalizations about human experience, which shift with time, inductive reasoning can be highly subjective and can easily become a breeding ground for implicit bias, discriminatory stereotyping and unreliable decision-making.⁸³

⁸¹ *R v Villaroman*, [2016] 1 SCR 1000 (QL) at para 28, Crown BOA Tab 21.

⁸² *Ibid* at para 36, Crown BOA Tab 21.

⁸³ David M Tanovich, “Regulating Inductive Reasoning in Sexual Assault Cases”, Berger et al, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Carswell, 2017) at 4, BOA Tab 42.

75. Stereotypical conceptions about women and sexual assault, in particular, “operate as a way, however flawed, of understanding the world and ... operate at a level of consciousness that makes it difficult to root them out and confront them directly.”⁸⁴

76. The history of sexual assault law in Canada demonstrates that “common sense” and “human experience” have often reflected bias and prejudice. Indeed, this area of the law developed based on sexist assumptions that undermined women’s equality.⁸⁵

77. Parliament and the courts have rejected many sexist assumptions through *Criminal Code* amendments and evolutions in the common law.⁸⁶ Lines of reasoning that assess a complainant’s credibility or the plausibility of alternative theories of innocence (“reasonable doubts”) on the basis of discredited myths and stereotypes are now legally impermissible.

(ii) A reasonable doubt as to non-consent may not be grounded in intoxication and “reduced inhibitions” alone.

78. In assessing whether a “reasonable doubt” exists as to non-consent or incapacity to consent in the context of an intoxicated complainant, courts must reject inferences that invoke discriminatory stereotypes about women, intoxicated women, or sexual assault complainants. The Crown has the burden to negate reasonable, plausible

⁸⁴ *Seaboyer*, above at para 144 (L’Heureux-Dubé J dissenting), BOA Tab 35.

⁸⁵ E.g., the myths that women want forced sexual activity and mean ‘yes’ even when they say ‘no’; that a woman who has previously consented to sexual activity is both more likely to have consented and is less credible; that a woman who does not want sexual contact could resist if she really wished to; that a woman who has been sexually assaulted will raise a ‘hue and cry’ as soon as possible; that a woman may invite a sexual assault by her conduct, dress or demeanor; that certain women must be presumed to consent to sex, including wives and sex trade workers; and that women often agree to sex and later make false complaints of sexual assault: *Ewanchuk*, above at paras 82, 89 (L’Heureux-Dubé J, concurring), Crown BOA Tab 5; *Seaboyer*, *ibid* at paras 141, 153-54, 166-68 (L’Heureux-Dubé J, dissenting); *Barton*, above at paras 88-91, 119-20, 124, 128, Crown BOA Tab 3.

⁸⁶ *Code*, s. 274-78; *Barton*, above at para 212, Crown BOA Tab 3; *Ewanchuk*, above at para 87, 95 (L’Heureux-Dubé J dissenting), Crown BOA Tab 5.

alternative theories, but “does not need to ‘negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused’”.⁸⁷ The line between “plausible” alternative theory and conjecture is crossed where an alternative theory is based on prejudice or stereotype.

79. Discriminatory stereotypes continue to pervade the case law involving the sexual assault of an intoxicated complainant. As summarized by Professor Desrosiers:

[TRANSLATION] A study of the jurisprudence indicates that the courts proceed from a tenacious cliché: that of the drunk woman devoid of all inhibition, ready to engage in sexual relations with the first person she encounters, though she may deny it the next morning.⁸⁸

80. While men who consume alcohol are perceived to be more powerful and assertive, women who do the same are considered “sexually available”. They are viewed as likely to agree to – or even initiate – sexual advances with anyone in any circumstance, due to their lowered inhibitions.⁸⁹

81. Such stereotypes have caused courts to find a reasonable doubt as to non-consent, based solely or primarily on the fact of the complainant’s intoxication and the absence of any evidence of non-consent or resistance.⁹⁰

82. Such reasoning ought to be rejected as an impermissible error of law. An inference that an intoxicated complainant consented to sexual contact cannot be “reasonable”

⁸⁷ *R v Villaroman*, above at para 37, Crown BOA Tab 21.

⁸⁸ Julie Desrosiers, *L’Agression sexuelle en droit canadien* (Quebec: Yvons Blais, 2009) at 76: « L’étude de la jurisprudence indique que les tribunaux procèdent à partir d’un cliché tenace : celui de la femme saoule dont toute inhibition sexuelle disparaît, prête à avoir des relations sexuelles avec le premier venu, bien qu’elle puisse le nier le lendemain matin. » BOA Tab 39.

⁸⁹ *Ibid* at 150; Benedet & Grant (2017), above at 382, BOA Tab 38; *R v Esau*, above at paras 94-95 (McLachlin J dissenting), BOA Tab 13.

⁹⁰ See e.g., *R v Meikle*, above at paras 40-45, BOA Tab 27.

if it is based primarily on the myth that alcohol makes women more likely to consent to any sexual encounter, with anyone, regardless of the circumstances.⁹¹

83. This reasoning also denies intoxicated women “the benefit of an affirmative consent standard” by relying on the discredited notion of “implied consent”, and effectively requiring “the Crown [to] prove that the complainant resisted in order to prove non-consent.”⁹² However, intoxicated women – like women generally – do not exist in a perpetual state of consent.

84. A few courts have recognized this flawed reasoning and have rejected theories of innocence based on speculation and stereotypes about how intoxicated women behave. In *R v JR*, for instance, the trial judge rejected the defence theory that the complainant consented to sex with three accuseds during a period of alcohol-induced memory blackout, remarking that, “While such a belief in the aphrodisiacal powers of alcohol might find a home in some works of pornographic fiction, it does not accord with common sense, common experience or the evidence in this case.”⁹³

85. In the Interveners’ submission, the mere fact that the complainant was intoxicated and has no memory of the events, in and of itself, does not support a “reasonable” doubt as to non-consent. Where there is no evidence that the intoxicated complainant communicated through her words or actions a clear “yes” to the accused, the *only* reasonable inference available to the Court is that the complainant did not consent.

⁹¹ *R v Esau*, above at paras 94-95 (McLachlin J dissenting), BOA Tab 13.

⁹² *Benedet & Grant (2017)*, above at 382, BOA Tab 38.

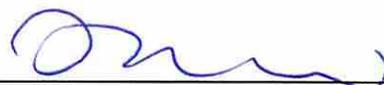
⁹³ *R v JR (ONSC)*, above at para 39, Crown BOA Tab 13. See also *R v Esau*, above at para 95 (McLachlin J dissenting), BOA Tab 13.

86. Intoxicated women are more likely to be targeted for sexual assault. Courts must ensure their reasoning does not perpetuate this inequality by relying on discriminatory or unfounded assumptions about the behaviour of intoxicated women, and the impact of that intoxication upon the likelihood that she consented to sexual touching.

PART VI – CONCLUSION

87. The law of sexual assault must continue to develop in a manner that advances – rather than undermines – women’s equality, bodily integrity, and personal autonomy. In the context of the sexual assault of an intoxicated complainant who is not able to provide direct evidence of non-consent, courts must assess all of the circumstances, without regard to discriminatory myths or stereotypes, to determine whether an inference of non-consent or incapacity is the only reasonable inference available. They must apply a threshold for incapacity that is context- and situation-specific, and which reflects the affirmative standard of voluntary, autonomous consent enshrined in s. 273.1 of the *Criminal Code*.

All of which is respectfully submitted this 2nd day of October, 2017.



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APPENDIX A – LIST OF AUTHORITIES**Case Law**

1. *Norberg v Wynrib*, [1992] 2 SCR 226
2. *R v Aminian*, [1999] OJ No 4240 (QL) (ONCA)
3. *R v Anderson*, 2010 YKSC 32
4. *R v Ashlee*, 2006 ABCA 244.
5. *R v Barton*, 2017 ABCA 216
6. *R v BSB*, 2008 BCSC 917.
7. *R v BSB*, 2009 BCCA 520.
8. *R v Cedeno*, 2005 ONCJ 91
9. *R v Chahal*, 2002 BCPC 98
10. *R v Chen*, 2016 ABQB 644
11. *R v CP*, 2017 ONCJ 277
12. *R v Daigle* (1997), 127 CCC 3(d) 130 (QCCA)
13. *R v Daigle*, [1998] 1 SCR 1220
14. *R v Esau*, [1997] 2 SCR 777
15. *R v Ewanchuk*, [1999] 1 SCR 330
16. *R v Griffin*, [2009] 2 SCR 42.
17. *R v Heraldson*, 2012 ABCA 147
18. *R v Hernandez*, [1997] AJ No 955 (QL)
19. *R v Hinds*, 2016 ONSC 95
20. *R v H(SL)*, 2003 SKPC 148
21. *R v. Hutchinson*, 2014 SCC 19
22. *R v JA*, 2011 SCC 28
23. *R v James*, 2014 SCC 5
24. *R v Jensen* (1996), 90 OAC 183 (ONCA)
25. *R v JM*, [2003] OJ No 3493 (OCJ) (QL)
26. *R v JR*, [2006] OJ No 2698 (ONSC) (QL)
27. *R v JR*, 2008 ONCA 200.
28. *R v JR*, [2008] SCCA No 189 (QL).
29. *R v JWM*, [2004] OJ No 1295 (QL)

30. *R v KC*, 2016 ABPC 242
31. *R v Kishawyineew*, 2017 SKQB 177
32. *R v Kontzamanis*, 2011 BCCA 184
33. *R v LC* 2002 BCSC 1467.
34. *R v MAP*, 2004 NSCA 27
35. *R v Meikle*, 2011 ONSC 650
36. *R v Mullaney*, [1998] BCJ No 2188 (QL) (BCSC)
37. *R v Nyznik*, 2017 ONSC 4392
38. *R v Olotu*, 2016 SKCA 84
39. *R v Olotu*, 2017 SCC 11
40. *R v Osolin*, [1993] 4 SCR 595
41. *R v Rand*, 2012 ONCA 731
42. *R v Sarson* (1992), 115 NSR (2d) 445 (QL)
43. *R v Seaboyer*, [1991] 2 SCR 577
44. *R v Tariq*, 2016 ONCJ 614
45. *R v Villaroman*, [2016] 1 SCR 1000

Scholarly Articles

46. Janine Benedet, "Sexual Assault of Intoxicated Women" (2010) 22 *CJWL* 435.
47. Janine Benedet & Isabel Grant, "A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law" (2012) 43 *Ottawa L. Rev.* 1 at para 58.
48. Janine Benedet & Isabel Grant, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017) 37 *CR* (7th) 375.
49. Julie Desrosiers, *L'Agression sexuelle en droit canadien* (Quebec: Yvons Blais, 2009).
50. Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41.4 *Akron Law Review* 865.
51. Melanie Randall, "Sexual Assault Law, Credibility and "Ideal Victims": Consent, Resistance, and Victim-Blaming" (2010) 22 *CJWL* 397 at 407.
52. David M Tanovich, "Regulating Inductive Reasoning in Sexual Assault Cases" (April 2017), Berger et al, *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto: Carswell, 2017) online: <<https://ssrn.com/abstract=2949147>> at 4.

APPENDIX B – STATUTES AND REGULATIONS

Criminal Code, RSC 1985, c C-46 as amended – Sections 256, 271, 273.1, 274, 275, 276.

Assault

265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Sexual Assault

271 Everyone who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Meaning of consent

273.1 (1) Subject to subsection (2) and subsection 265(3), **consent** means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Where no consent obtained

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

Corroboration not required

274 If an accused is charged with an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 286.1, 286.2 or 286.3, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Rules respecting recent complaint abrogated

275 The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 153.1, 155 and 159, subsections 160(2) and (3) and sections 170, 171, 172, 173, 271, 272 and 273.

Evidence of complainant's sexual activity

276 (1) 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.

Idem

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge or justice considers relevant.