Court File No. 26493

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Alberta)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and-

STEVE BRIAN EWANCHUK

Respondent

-and-

WOMEN'S LEGAL EDUCATION AND ACTION FUND ("LEAF") and
DISABLED WOMEN'S NETWORK CANADA ("DAWN CANADA")

Interveners

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S.C.C. Court File No. 26493

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PART I: FACTS

1. The Intervener Coalition, ("the Interveners"), constituted by the Women's Legal Education and Action Fund ("LEAF") and the DisAbled Women's Network Canada ("DAWN Canada") bring to this appeal extensive experience in the area of violence, particularly sexual violence, against women with disabilities and women generally. The Interveners are both national women's organizations committed to attaining equality for women consonant with the equality guarantees in the *Canadian Charter of Rights and Freedoms ("the Charter")* with a particular concern for the vulnerability of women who experience inequality in more than one way.

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2. On June 19, 1998, by Order of Mr. Justice Major, the Interveners were granted leave to intervene in the within appeal.

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3. The Interveners adopt the facts as set out by the Appellant.

PART II: POINTS IN ISSUE

4. The broad issue engaged in this appeal is whether the trial Judge erred in his interpretation of the legal meaning of consent and in the legal effect he gave to his findings regarding consent. The Interveners are before this Court because the legal meaning ascribed to the term 'consent' by the trial Judge, as upheld by the majority of the Alberta Court of Appeal, seriously undermines women's constitutional rights to equal protection and benefit of the law, meaningful security of the person and equal access to justice as guaranteed by sections 7, 15 and 28 of the *Charter*.

5. The Interveners' position regarding the points in issue is as follows:

a) The issues raised on this appeal are questions of law;

b) "Consent", as defined by s. 273.1 of the *Criminal Code*, means "voluntary agreement to engage in the sexual activity in question". "Consent", as informed by sections 7, 15 and 28 of the *Charter*, requires communication of a freely exercised, capable and deliberate agreement to the sexual activity in question. The focus of the inquiry is on verbal and non-verbal conduct and the legally permissible inferences that may be drawn therefrom;

c) The use of the term 'implied consent' in criminal sexual assault law is confusing at best and contrary to constitutional guarantees of equality and security of the person at worst. Any notion of consent which presumes that consent to sexual touching exists *ab initio* and continues to exist unless and until the complainant successfully persuades the aggressor that she does not consent must be rejected by this Honourable Court;

d) Subjective fear of the complainant negates any suggestion of legally effective consent;

e) Explicit verbal refusal by the complainant negates any suggestion of legally effective consent;

f) *Mens rea* was not in issue on the facts as presented in this case and the defence of mistaken belief in consent was not available because i) any possible mistakes were mistakes of law rather than fact; ii) there was insufficient evidence for a mistake claim; and iii) in any event, it is clear that the Respondent took no reasonable steps to ascertain consent.

PART III: ARGUMENT

A. The Appeal Raises Questions of Law

6. The Interveners adopt paragraphs 63, 81 - 84 of the Appellant's factum and submit that the appeal herein raises questions of law over which the Alberta Court of Appeal and this Honourable Court have jurisdiction in a Crown appeal.

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See also:
Regina v. Esau,[1997] 2 S.C.R. 777 at 805, para. 64 *per* McLachlin J.
Regina v. M.(M.L.), [1994] 2 S.C.R. 3
Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 233-256
Reasons of Fraser C.J.A., *Appellant's Record*, page 144, para. 28

B. The Legal Definition of Consent must Comply with the *Charter* Guarantees of Equality

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(i) Sexual Assault is an Equality Issue

7. The substantive equality guarantees in section 15 of the *Charter* represent fundamental Canadian values against which the objects of all legislation must be measured. Section 15 mandates that women are equal before and under the law and must receive equal protection and benefit of the law. Section 28 of the *Charter* requires that every *Charter* right applies equally to women and men.

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Vriend v. *Alberta*, [1998] 1 S.C.R. 493 at paras. 67-69
Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 185 *per* McIntyre J.

8. This Court has acknowledged that sections 15 and 28 of the *Charter* play a special role in the context of sexual assault. Sexual assault is inextricably linked with women's inequality because women experience an unequal and disproportionate burden of sexual victimization. As Cory J. said in *Osolin*, "[s]exual assault ... is an assault upon human dignity and constitutes a denial of any concept of equality for women."

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Osolin v. The Queen, [1993] 4 S.C.R. 595 at 669 *per* Cory J.

9. Further, while all women are vulnerable to sexual assault, certain women are more vulnerable because they suffer additional types of discrimination on the basis of, among other things, race, age, disability, or economic status. For example, DAWN

Canada's research on the link between experiencing abuse and contemplating or attempting suicide reveals that over 50 percent of women with disabilities report having experienced sexual abuse.

> Masuda, S. (1996) *Safety Network Community Kit: From Abuse to Suicide Prevention and Women with Disabilities, Research Summary,* Vancouver: DAWN Canada: DisAbled Women's Network Canada at 9 -10

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(ii) The Evolution of Sexual Assault Law

10. The purpose of modern sexual assault law is to protect women's autonomy. That has not always been so. Historically, laws relating to sexual assault and rape were constructed as the antithesis of women as self-directed, autonomous agents. Women were considered chattels and the law responded by protecting the proprietary rights men had in women. The law of rape evolved to focus on protecting women from physical injury. However, despite this shift, respect for a women's ability to consent or demonstrate non-consent was often missing.

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> *Regina* v. *Park* [1995] 2 S.C.R. 836 at 865, para. 41 per L'Heureux-Dubé J.
> Stuart, D. and Delisle, R.J., *Learning Canadian Criminal Law* 6th ed. (Toronto: Carswell, 1997) at 512
> Backhouse, C., "Nineteenth Century Canada in Rape Law, 1800-92" in *Essays in the History of Canadian Law*, vol. II, ed. D.H. Flaherty (Osgoode Society,1983) 200 at 203-204, 205-9, 235-6
> Cornaviera, R.,"The Reform of Sexual Assault Laws," (1993) 2 *Ont. Crown Attorney's Newsletter* 1 at 3 - 4

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11. The current sexual assault law is premised primarily on recognizing and protecting women's sexual autonomy. As L'Heureux-Dubé J. stated in *Park*,

> ... the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in.

> *Regina v. Park,* [1995] 2 S.C.R. 836 at 866, para. 41 *per* L'Heureux-Dubé J.
> *Regina v. Cuerrier*, [1998] S.C.J. No. 64 at para.123 *per* Cory J., at paras. 11-12 *per* L'Heureux-Dubé J.
> *Regina v. M.(M.L.)*,[1994] 2 S.C.R. 3

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12. In *Regina v. Davis,* Green J.A. expressed similar findings about the purpose of our sexual assault law,

> The focus now is on protecting bodily integrity in a broader sense, which, in turn implies a right to sexual self-determination to make choices freed from undue pressures that unacceptably constrain

alternatives.

Regina v. *Davis* (1998), 159 Nfld. & P.E.I.R. 273 at 305, para. 96 (Nfld.C.A.)

(iii) Consent and Equality

13. Since the 1970s Parliament has sought to bring the laws of sexual assault into line with societal values about women, men, sexual assault, and equality. In 1992, Bill C-49, enacting, *inter alia,* sections 273.1 and 273.2 of the *Criminal Code*, was a significant legislative reform responsive to s. 15 of the *Charter*. By its Preamble to Bill C-49, Parliament has directed that sexual assault law be interpreted and applied in light of s.15 of the *Charter*. The Preamble of Bill C-49 states:

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> WHEREAS the Parliament of Canada is gravely concerned about the incidents of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children:
>
> WHEREAS the Parliament of Canada intends to promote and help to ensure the rights guaranteed under sections 7 and 15 of the ... *Charter*....

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An Act to Amend the Criminal Code (Sexual Assault) (Bill C-49) S.C. 1992, c. 38
Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 8
The Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person and to Amend Certain Other Acts in Relation Thereto or in Consequence Thereof, S.C. 1980-81-82-83, c. 125
Reasons of Fraser C.J.A., *Appellant's Record*, pages 152-154, paras. 51-55

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14. The concept of consent is rooted in a belief in the equality of all individuals and respect for their autonomy, agency and free will. Where consent converts what would otherwise be an attack on one's body, mind and dignity into a lawful act, the interpretation of consent must be one that respects the principles of autonomy and the agency of the person whose consent is at issue. As Doherty J.A. stated in another context in *Regina v Wills*, "[V]alid consents reinforce the principle of individual autonomy which underlies the rights set out in the *Charter*."

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Regina v. Wills (1992), 7 O.R. (3d) 337 at 349 (C.A.)
Regina v. M.(M.L.), [1994] 2 S.C.R. 3

15. This Honourable Court has rejected analyses which allow for the use of groundless myths and stereotypes about women, men and sexual activity. However, despite efforts by this Honourable Court and Parliament to define consent in a way that

respects women as persons with full legal rights, some lower courts in Canada have employed notions of consent which perpetuate the attitudes that deny women's equal right to bodily integrity and human dignity. For instance, in the case at bar, McClung J.A. stated,

> [I]t must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines. She told Ewanchuk that she was the mother of a six-month old baby and that, along with her boyfriend, she shared an apartment with another couple. ...
>
> ...[T]he sum of the evidence indicates that Ewanchuk's advances to the complainant were far less criminal than hormonal. In a less litigious age going too far in the boyfriend's car was better dealt with on site — a well chosen expletive, a slap in the face, or, if necessary, a well-directed knee.

Reasons of McClung J.A., *Appellant's Record*, pages 136, 142, paras. 4, 21
Regina v. *Seaboyer*, [1991] 2 S.C.R. 577 at 604, *per* McLachlin J., at 651-2, *per* L'Heureux-Dubé J.
Regina v. M. (M.L.),[1994] 2 S.C.R. 3
Regina v. Park, [1995] 2 S.C.R. 836 at 884 para.38 *per* L'Heureux-Dubé J.
Regina v. Esau, [1997] 2 S.C.R. 777 *per* McLachlin J.
Regina v. *Osolin*, [1993] 4 S.C.R. 595 at (para. 49)
Sheehy, E., "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989) 21 *Ottawa L.Rev.* 741

16. Women experience an unequal and disproportionate burden of sexual victimization. Therefore, women's constitutional rights to equal treatment and benefit of the law and equal security of the person must guide and inform the interpretation of sexual assault laws, specifically the meaning of consent. The legal definition of consent must be interpreted in a way that confronts sexual assault as a practice of inequality. The Interveners submit that such an interpretation must reject any notion of women as presumptively accessible and endorse a vision of women as autonomous agents. An interpretation of consent which treats women as anything less than fully autonomous and self-directed denies women as a class the equal protection and benefit of the law and compounds the inequality of the least powerful or most vulnerable groups within society. The law of consent must be consistent with equality rather than perpetuate inequality.

Canadian Charter of Rights and Freedoms, ss. 7, 15, 28
Regina v. Park, [1995] 2 S.C.R. 836 at 863-864, para. 38 *per* L'Heureux-Dubé J.
Regina v. Esau,[1997] 2 S.C.R. 777 at 796, para. 39 *per* L'Heureux-Dubé J.
Retail Wholesale and Department Store Union v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 593,

600 *per* McIntyre J.
Martin, S., "Some Constitutional Considerations on Sexual Violence Against Women", (1994) 32 *Alta*.L. Rev. No. 3, 535 at 536-537
McInnes, J. and Boyle, C., "Judging Sexual Assault Law Against a Standard of Equality", (1995) 29 *U.B.C. Law Review* No. 2, 341 at 341-352

C. *Actus Reus* in Sexual Assault - Absence of Consent

(i) Consent is Communicative Conduct

17. Section 273.1(1) of the *Criminal Code* defines consent as " the voluntary agreement of the complainant to engage in the sexual activity in question." In *Esau*, McLachlin J., L'Heureux-Dubé J. concurring, recognized the deliberate nature of consent when she stated:

> Consent in the context of the crime of sexual assault...embraces notions of legal and physical capacity to consent, supplemented by voluntary agreement or concurrence in the act in question.... Consent [is defined as] 'capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action'.

Regina v. Esau,[1997] 2 S.C.R. 777 at 805-6, 810, paras. 64, 73, *per* McLachlin J.
Criminal Code, s. 273.1
Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 257

18. The Interveners submit that consent is an action taken by the woman - a word, gesture or other action - that communicates voluntary agreement to the specific sexual activity in question. Without such a voluntary agreement sexual touching is assaultive. The legal issue to be decided in considering consent is whether the complainant communicated to the accused agreement to engage in sexual activity through verbal or non-verbal conduct and whether those words or conduct were voluntary. The totality of the circumstances must be examined in order to determine whether a woman's action constitutes consent in law.

Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 277
Regina v. Park,[1995] 2 S.C.R. 836 at paras. 73-76
Regina v. Esau,[1997] 2 S.C.R. 777 at paras. 38-44
Regina v. Jobidon, [1992] 2 S.C.R. 714
Regina v. O'Connor (1998), 159 D.L.R. (4th) 304 at 320 (B.C.C.A.)

19. Conduct communicating consent need not be verbal. The means by which consent is communicated will depend on the circumstances of each case. For

instance, in an on-going intimate relationship, partners develop refined and subtle ways to express their voluntary agreement to engage in sexual contact.

> *Regina v. Esau*,[1997] 2 S.C.R. 777 at 811-812, paras. 76-77 *per* McLachlin J.
> Weiner, R., "Shifting the Communication Burden: A Meaningful Consent Standard in Rape" (1983) 6 *Harvard Women's L.J.* 143 at 159
> McInnes, J. and Boyle, C., "Judging Sexual Assault Law Against a Standard of Equality", (1995) 29 *U.B.C. Law Review* No. 2, 341

20. This Court has affirmed that a contextually sensitive approach is necessary in assessing the reality of consent and the existence and impact of any factors that tend to negate true consent. In particular this Court has held that in determining consent the entire encounter must be examined within the context of the relationship to the alleged assaulter including the power imbalances in that relationship and having regard to all of the circumstances surrounding the assault. Accordingly, communicative conduct must be assessed in context to determine the issue of consent.

> *Regina v. Litchfield*, [1993] 4 S.C.R. 333 at para. 34 *per* Iacobucci J.
> *Regina v. Daigle*, [1997] A.Q. No. 2668 (Que. C.A.), aff'd [1998] S.C.J. No. 54
> *Regina v. Saint-Laurent* (1993), 90 C.C.C.(3d) 291 at 313-314 *per* Fish J.A. (Que.C.A.)

21. Two Justices of this Court have accepted that consent must be viewed from the standpoint of communication rather than from the standpoint of a private mental state of the complainant. L'Heureux-Dubé and McLachlin JJ. have further acknowledged that the act of consenting has normative consequences in our society and, in this way, is performative. As Professor Vandervort explains,

> The social act of consent consists of communication to another person, by means of verbal and non-verbal behaviour, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform. Consenting, like promising, is thus performative, a behaviour that has normative consequences. To consent is to waive a right and relieve another person of a correlative duty. Consent thus alters the rights and duties between the persons who are parties to an agreement created by communication.... [C]onsent is an act that has specific legal consequences. The only conditions are that it be voluntary and knowing or informed, that is, freely given with reference to some general or specific concrete objective or content. ...
>
> It is thus clear that any analysis of consent must consider what, if anything, was actually communicated, as well as whether that

communication was voluntary.

Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 267
Regina v. Park, [1995] 2 S.C.R. 836 at 863-871, paras. 38 - 44 *per* L'Heureux-Dubé J., adopting Vandervort
Regina v. Esau, [1997] 2 S.C.R. 777 at 805-807,809-810, paras. 64-69,73, 76 *per* McLachlin J., adopting Vandervort

22. Even prior to the enactment of sections 273.1 and 273.2 of the *Criminal Code*, when the law of consent was clarified by Parliament, this Court held that the law of consent did not require the complainant to offer even a "minimal word or gesture of objection" for absence of consent to be proved by the prosecution. As a matter of law, silence alone, non-resistance alone and failure to attempt to escape alone do not constitute consent.

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Regina v. M.(M.L.), [1994] 2 S.C.R. 3 at 4 (silence or non-resistance is not consent)
Regina v. Esau,[1997] 2 S.C.R. 777 at 811 para 76
Regina v. Livermore, [1995] 4 S.C.R. 123 at 137, para. 21 (failure to try to escape car is not consent)
Regina v. Wills (1992), 7 O.R. (3d) 337at 349(C.A.) (acquiescence and compliance signal only a failure to object; they do not constitute consent)
Regina v. Stanley, [1977] 36 C.C.C. (2d) 216 (B.C.C.A.) (consent forced upon him...would amount only to a submission, an acceptance of what may have seemed inevitable)
McInnes, J. and Boyle, C., "Judging Sexual Assault Law Against a Standard of Equality", (1995) 29 *U.B.C. Law Review* No. 2, 341 at 357 fn 38

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23. If the law is interpreted such that silence, non-resistance or failure to attempt escape constitute consent, it would amount to discrimination against women generally and would have a particularly negative and disproportionate impact on women with disabilities, some of whom are unable to actively resist a sexual assault, escape or communicate non-consent.

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(ii) "Implied" Consent Does Not Apply to Sexual Assault Law

24. The Interveners submit that an erroneous and discriminatory assumption grounded the various legal errors committed by the trial Judge and the majority of the Alberta Court of Appeal. That is, when it comes to sexual assault, a woman must clearly and unequivocally communicate her lack of consent because, absent such a showing, any man, even as in this case, a relative stranger, may assume without asking that she consents to having sex. This assumption manifested itself most clearly in the trial Judge's use of a notion of "implied consent" which obligated the complainant to

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communicate her fear of the Respondent to the Respondent.

> Reasons of Moore J., *Appellant's Record*, pages 124-126
> Reasons of McClung J.A., *Appellant's Record* , pages 138-139
> Reasons of Fraser C.J.A., *Appellant's Record*, pages 149-151, paras 41-42, 44-50
> Cornaviera, R.,"The Reform of Sexual Assault Laws," (1993) 2 *Ont. Crown Attorney's Newsletter* 1 at 18
> Hinch, R. "Inconsistencies and Contradictions in Canada's Sexual Assault Law" (1988) 14 *Cdn Public Policy* 282 at 284

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25. It is submitted that the constitutionally permissible definition of consent, as set out in s. 273.1 of the *Criminal Code*, does not admit of an operating assumption that women are sexually available unless and until they can oppose or resist sexual advances. When the law recognizes women as autonomous agents, it cannot at the same time recognize a presumption of consent to sexual touching. Consent must be communicated by a conscious, capable person. In all cases, consent is something a person actually does. It cannot be "presumed", "assumed" or "intuited".

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> Reasons of Fraser C.J.A., *Appellant's Record*, pages 155-159, paras. 59-68

26. While consent can be communicated by words, it can also be communicated through actions and gestures. The issue in each case will be solely whether there has been communication of consent by words or conduct to the activity in question pursuant to the provisions of s. 273.1 of the *Code*. The question is simply one of consent or absence of consent. Fraser C.J.A. captured this in her Reasons when she stated,

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> ...while it is possible to speak of a complainant's actual consent being implied or inferred through actions, as opposed to expressed through words, in both cases, the words or actions, taken in their context, must evince <u>a voluntary agreement by the complainant to engage in the impugned sexual conduct</u>. Simply, it must be real consent. It also means that it is wrong in law to assume that a woman gives her "implied consent" to sexual activity unless and until she overtly signals her non-consent. With the 1992 *Code* amendments, Parliament rejected this discredited theory of "implied consent". *[emphasis in original]*

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> Reasons Fraser C.J.A., *Appellant's Record*, pages 158-159, para. 67

27. 'Equivocal' conduct, like all communication will always be interpreted by the accused and the courts. However, if the accused engages in sexual activity in the face of equivocal communication, he runs the risk of being mistaken as to consent. When a court interprets equivocal communication it either finds that there was no consent or it

finds that there is a reasonable doubt whether the Crown has proved absence of consent.

28. It is submitted that the complainant's verbal and non-verbal conduct in this case was not equivocal and it was not capable of communicating consent to engage in sexual activity with the Respondent. At no time did the complainant express a willingness to engage in sexual contact or actively participate in sexual contact with the Respondent. The Respondent's first move toward the complainant's breasts was met with her elbows pushing his hands away accompanied by the word "No". Thereafter, his sexual rubbing and grinding of his pelvis into hers was met with silence, more "No's" and frozen inaction. It is submitted that, in the circumstances of the case at bar, it was not open to the trial judge to conclude that the complainant communicated consent by: (a) the fact that she entered the trailer; (b) the content of the conversation prior to or during the sexual contact; (c) her initial brief massage of the Respondent's shoulders; (d) her silence; (e) her attempt to hide her fear of the Respondent; (f) her failure to attempt to escape earlier than she did; or g) her utterance of the words "No".

29. There can be no "implied consent" even to "minor" sexual touching. Violation of the sexual integrity of a woman occurs when, as in this case, an initial sexual assault is used to explore the possibility of further sexual contact. One sexual assault can not be a "reasonable step" to ascertain whether the complainant consents to further sexual contact without creating violations of women's s. 7, 15 and 28 *Charter* rights.

> *Regina v. Chase*, [1987] 2 S.C.R. 293
> McInnes, J. and Boyle, C., "Judging Sexual Assault Law Against a Standard of Equality", (1995) 29 *U.B.C. Law Review* No. 2, 341 at 370 fn.68
> *Criminal Code*, Section 273.2(b)

30. Like the offence of assault, the offence of sexual assault encompasses a wide range of intentional behaviours - from momentary touching to prolonged brutal attacks. It might be suggested that the interpretation of consent as requiring communication of voluntary agreement to engage in specific sexual activity will result in an overly broad application of sexual assault law. In practice this is unlikely to be a problem. The loving intimate partner who touches his partner in a sexual manner without her prior communicated consent is as unlikely to be prosecuted for sexual assault as the

colleague who takes his office-mate's pen is to be prosecuted for theft. In appropriate circumstances, however, both the sexual touching and the pen theft may well be worthy of criminal sanction. When sexual touching without communicated agreement of a complainant gives rise to a criminal charge (acknowledging that, practically speaking, not every sexual touching without consent will result in a complaint), the court must evaluate all of the factors relevant to both the *actus reus* and the *mens rea* in deciding
10 whether the accused is liable to be convicted in the whole of the circumstances.

Regina v. Jobidon, [1991] 2 S.C.R. 714 at 743 *per* Gonthier J.

31. The development of the concept of "implied consent" in the sports cases is inapplicable in sexual assault law. In sport, those who decide to play a particular game consent to some bodily contact necessarily incidental to the game. In those cases, the issue is the scope of the consent, not whether 'implied consent' exists. In their
20 interactions with men, women are not engaged in an unrelenting and continuous sexual game in which consent to sexual touching is implied.

Reasons of Fraser C.J.A., *Appellant's Record, page 165, paras. 85-87*
Regina v. Leclerc (1991), 67 C.C.C.(3d) 563 (Ont.C.A.)
Regina v Cey (1989), 48 C.C.C. (3d) 480 (Sask. C.A.)

32. Finally, the Interveners support Fraser C.J.A.'s conclusion that:

> judges [should] avoid the use of the term 'implied consent' in sexual assault cases so long as the lingering myths of victim
> 30 resistance continue to find welcome greeting in some courtrooms in this country.

The unfortunate history of the term "implied consent" invites confusion and misinterpretation and, thus, the terminology should be rejected in criminal sexual assault law.

Reasons of Fraser C.J.A., *Appellant's Record*, page 158, para. 66

40 **(iii) Subjective Fear Negates Consent - s. 265(3)(b)**

33. Where the complainant fears the application of force she is not consenting to the sexual activity. As L'Heureux-Dubé J. noted in *Cuerrier*,

> Parliament has recognized with s. 265(3), that in order to maximize the protection of physical integrity and personal autonomy, only consent obtained without negating the voluntary

agency of the person being touched, is legally valid.

Regina v. Cuerrier, [1998] S.C.J. No. 64 at para. 12

34. It is the position of the Interveners that the trial Judge erred in applying an objective test to determine whether the complainant's fear of the Respondent vitiated consent pursuant to s. 265(3)(b) of the *Code*. The error was compounded by his finding that the complainant must communicate her fear to the Respondent. It is submitted that any determination of whether the complainant's words or conduct were voluntary, and not engaged in by reason of coercion caused by fear of the application of force, must be made on a subjective basis and be referenced to the circumstances and the sexual activity in question.

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Reasons of Moore J., *Appellant's Record, page 123*
Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 269-273

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35. The Interveners rely on Chief Justice Fraser's analysis that, as a matter of statutory construction s. 265(3)(b) does not import an objective standard. Further, the very nature of consent as voluntary agreement is incompatible with a legal construction that equates "consent" with submission or a lack of resistance caused by a fear of force, on the basis that the fear is found to be "unreasonable". As Fish J.A. found in *Saint-Laurent:*

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> "Consent" is...stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.

Regina v. Saint-Laurent (1993), 90 C.C.C.(3d) 291 at 311 per Fish J.A. (Que.C.A.)
Reasons of Fraser C.J.A., *Appellant's Record,* pages 162-162, paras. 76, 78-81

36. Canadian courts have accepted, in the context of criminal sexual assault, the principle enunciated by this Court in *Norberg v. Weinrib*, that the relative power and powerlessness of the aggressor and the victim will affect consent. In the case at bar, the power imbalances were highly significant: The Respondent was almost twice the age and size of the complainant. He had ownership and control over the space in which they were enclosed and he had economic power over the complainant.

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Regina v. Litchfield, [1993] 4 S.C.R. 333 at paras. 8-10 *per* Iacobucci J.
Norberg v. Weinrib, [1992] 2 S.C.R. 226 at 247, 252-255 *per* LaForest J.

> *Regina v. Livermore*, [1995] 4 S.C.R. 123
> *Regina v. Daigle*, [1997] A.Q. No. 2668 (Que. C.A.), aff'd [1998] S.C.J. No. 54
> *Regina v. Saint-Laurent* (1993), 90 C.C.C.(3d) 291 at 313-314 *per* Fish J.A. (Que.C.A.)
> *Regina v. G.(R.)* (1994), 38 C.R. (4th) 123 (B.C.C.A.)

37. The Interveners acknowledge that, on the facts of this case, the complainant's fear would be "reasonable" on an objective assessment. The complainant is a small 17 year old woman. She attended at 9:00 a.m. for a job interview with the male Respondent, a stranger who was almost twice her age and size. The Respondent wanted to keep the 'interview' private, choosing his van over the public mall as suggested by the complainant. After hearing about the job in the van, the complainant agreed to view some of the Respondent's work inside his attached trailer. The Respondent closed the door to his trailer after they entered. He began touching the complainant and talking about how he liked to 'take out' his employees. When his touching came around her stomach and close to her breasts the complainant said "No" and pushed him away with her elbows. Thereafter, the Respondent persisted in escalated sexual contact. He ignored her verbal expressions of "No", persisted with grinding his pelvis against hers while telling her "he could get me so horny so that I would want it so bad, and he wouldn't give it to me because he had self-control and because he wouldn't want to give it to me". The complainant was afraid. It is submitted that in these circumstances any reasonable woman would have been afraid and would have good reason to be afraid. This is so particularly in light of the reality that women and children are the overwhelming targets of sexual assault in society.

> Evidence of the Complainant, *Appellant's Record*, page 45, lines 1-10
> Martin, S., "Some Constitutional Considerations on Sexual Violence Against Women", (1994) 32 *Alta.*L. Rev. No. 3, 535 at 543

38. The Interveners submit, however, that in other cases, the equally real fear experienced by a complainant may not lend itself so readily to validation by an objective test. It is submitted that only a subjective test can ensure that s. 265(3)(b) of the *Code* provides equal protection of the law for the personal autonomy of all complainants. Section 15 of the *Charter* requires that a subjective test be adopted.

39. Further, the law does not create an obligation on the complainant to communicate her fear to the sexual aggressor. There is no one appropriate response

to sexual assault. The woman who finds herself in the immediate situation is best placed to determine the course of action that will allow her to survive the sexual assault. No other person or court can effectively do that. Indeed, if the law demanded that a woman must communicate her fear to her aggressor, it would place many women at greater risk of harm. In the case at bar the complainant determined that the safest course was not to 'egg on' her aggressor. In that way she believed she was avoiding a

10 greater use of force.

> *Regina v. Seaboyer,* [1991] 2 S.C.R. 577 at 651-652 *per* L'Heureux-Dubé J.
> *Regina v. O'Connor* (1998), 159 D.L.R. (4th) 304 at 319 para. 31 (B.C.C.A.)
> Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 272, fn. 96

(iv) Expression of Lack of Agreement Must be Given Legal Effect

40. Section 273.1(2)(d) of the *Criminal Code* provides that no consent is obtained

20 where the complainant expresses by words or conduct a lack of agreement to engage in the activity. Consent must be communicated prior to or contemporaneous with the specific sexual activity in question. Further, s. 273.1(2)(e) makes it clear that consent can be revoked at any time.

> *Criminal Code*, ss. 273.1(2)(d), (e)

41. Any analysis of consent that recognizes the sexual autonomy and liberty of

30 women as independent agents with legal rights must, at the very least, acknowledge that to say 'No' is to communicate non-agreement, and such an expression must have an enforceable legal effect. To accept otherwise is to encourage a host of myths, including that a woman's "No" really means "Try Again" or "Persuade me". Such a result would be a perverse denial of equality and dignity for all women in that the practical effect would be to deprive women of one of the most basic forms of sexual self-determination: the right to be free from unwanted sexual contact and the right to

40 have legal effect given to their expressed word: "No".

> Reasons of Fraser C.J.A., *Appellant's Record*, page 168, paras. 92-96
> Estrich, S., "Rape", (1986) 95 *Yale L.J. (No. 6)* 1087 at 1127-1132

42. It is respectfully submitted that, it constitutes legal error for a trial judge to attach no legal significance to the communication "No". In this case, the trial Judge

decontextualized the event such that the complainant's "No's" were rendered legally ineffective.

Reasons of Fraser C.J.A., *Appellant's Record*, pages 166-169, paras. 91-96
Regina v. Litchfield, [1993] 4 S.C.R. 333 at para. 34 *per* Iacobucci J.

(v) Conclusion on Consent

10 43. It is submitted that the law's treatment of consent as communicative conduct reflects and promotes the ends of justice for men and women. First, the focus on conduct represents a reasonable and equality-promoting approach. Sexual relations are based on mutuality and parties to sexual contact must be able to rely on what the other is saying and doing. Second, an emphasis on the complainant's verbal or non-verbal conduct, as opposed to her "state of mind", promotes certainty and fairness in the application of the law for accused persons because the focus is on what the
20 complainant actually said or did, not on whether the accused read the complainant's mind correctly. Third, focusing on communication as an external matter allows the court to identify and decide what conduct constitutes consent in law. Similarly, in determining whether the *mens rea* of the offence has been made out, focusing on communication will help to identify and avoid reliance on stereotypic beliefs.

Regina v. *Park* [1995] 2 S.C.R. 836 at 868-870, paras. 46-48 *per* L'Heureux-Dubé J.
Regina v. Esau,[1997] 2 S.C.R. 777 at 806, para. 66 *per* McLachlin J.
McSherry, B., "Constructing Lack of Consent" in Easteal, P., *Balancing the Scales: Rape Law*
30 *Reform and Australian Culture*, Sydney: The Federation Press, 1998

D. *Mens Rea* In Sexual Assault

44. Once the trial judge determines that the *actus reus* has been made out in that Crown has proved absence of consent beyond a reasonable doubt, the next step is to determine whether the requisite *mens rea* has been proved. It is not open to a trial judge to construct the notion of 'implied consent' as a 'hybrid' of the *actus reus* and the
40 *mens rea*. If an accused infers consent where no consent has been given, then the accused has a 'mistaken belief in consent' and his belief must be tested according to the established law on mistaken belief in consent.

Reasons of Fraser C.J.A., *Appellant's Record*, pages 169-171, paras. 98-102

45. It is submitted that in analysing a defence of mistaken belief in consent, the threshold question is to determine whether the mistake being asserted is a legal or factual one. If it is a mistake of law, it affords no defence. If it is a mistake of fact, it can only be considered by the trier of fact if there is sufficient evidence to raise it.

(i) Mistake Of Law vs. Mistake Of Fact

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46. For full *mens rea* offences, only mistakes based on a belief in the existence of facts regarding the circumstances of the offence which, if true, would render the accused's act innocent, will operate as a mistake of fact. On the other hand, mistakes based on the meaning, scope or application of a law do not exonerate the accused.

> *Criminal Code*, R.S.C. 1985, c. C-46, s. 19
> *Regina v. Molis*, [1980] 2 S.C.R. 356
> *Regina v. Foster*, [1992] 1 S.C.R. 339
> *Regina v. Jones*, [1991] 3 S.C.R. 110
> Williams, G., *Criminal law*. Theal Part 2nd ed. (Stevens and Sons,1961) at 287-293
> Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 233-256

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47. Interpretation and application of the defence of mistaken belief in consent to sexual activity should be consistent with the operation of the defence of mistake of fact in other areas of criminal law. To be exculpatory the belief must be such that if the facts were as the accused believed them to be, his actions would not have violated the law. The defence should not be available to an accused who wrongly appreciates or who is indifferent to the legal significance of the facts.

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> Vandervort, L., "Mistake of Law and Sexual Assault: Consent and Mens Rea: (1987-8) 2 *C.J.W.L.* 233 at 233-309.
> McInnes, J. and Boyle, C., "Judging Sexual Assault Law Against a Standard of Equality", (1995) 29 *U.B.C. Law Review* No. 2, 341

48. The Interveners submit that what is often characterized as mistaken belief in consent really amounts to no more than an incorrect interpretation of the legal significance of the facts known to the accused. For example, where an accused wrongly presumes consent from immaterial and irrelevant circumstances such as the complainant's style of dress, discussion of personal matters, her marital status, her economic circumstances, or her willingness to visit him alone in his apartment late at night, he is not mistaken about any fact, but is choosing to rely on his mistaken beliefs about the sexual availability of women. Consent is a legal issue that cannot depend

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upon the accused's myth-driven assumptions.

49. To allow an accused to rely on a mistaken belief in consent that is based on factors that are legally immaterial to consent is tantamount to providing a license to those who are most dangerous to women - those who still believe rape myths. Such rape myths include the views that women's consent can only be withdrawn by vigorous resistance, rapists are always strangers, women are either Madonnas (good) or whores (bad), women who are not "proper" or "respectable" (i.e. on welfare) are consenting, women who do not become hysterical are consenting, women fantasize about sexual assault, and "No" means "Yes".

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> *Regina v. Seaboyer*, [1991] 2 S.C.R. 577 at 651-654 *per* L'Heureux-Dubé J.

50. McLachlin J. has recognized that reliance on rape myths can not ground a defence of mistaken belief in consent. As stated in *Esau*:

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> Care must be taken to avoid the false assumptions or "myths" that may mislead us in determining whether the conduct of the complainant affords a sufficient basis of putting the defence of honest mistake in consent to the jury. One of these is the stereotypical notion that women who resist or say no may in fact be consenting.
>
> ...care must be taken to avoid substituting unfounded assumptions for evidence of consent. For example, in earlier times, it was sometimes suggested that the fact that a woman was a prostitute or perceived as promiscuous might amount to a circumstance entitling a man to read her refusal as consent.

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> *Regina v. Esau*, [1997] 2 S.C.R. 777 at 814-816, paras. 82-83 *per* McLachlin, J.

51. The Interveners submit that reliance on rape myths is a mistake of law. In *R. v. M.L.M.*, this Court held that non-resistance by the complainant is not consent. Consequently, an accused cannot rely on his mistaken belief that a woman consented because she did not resist. This would be a misapprehension of the legal significance of facts resulting in a mistake of law rather than a mistake of fact. As McLachlin, J. pointed out in *Esau*, that belief is not really a mistaken belief in consent, but is a mistaken belief that non-resistance indicates consent.

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> *Regina v. M.(M.L.)*, [1994] 2 S.C.R. 3
> *Regina v. Esau*, [1997] 2 S.C.R. 777 at 812, para. 77 *per* McLachlin, J.

McInnes, J. and Boyle, C., "Judging Sexual Assault Law Against a Standard of Equality", (1995) 29 *U.B.C. Law Review* No. 2, 341

52. Further, as Fraser, C.J.A. said in the present case, if the accused honestly believed that when the complainant said "No", she was not really objecting to sexual activity, he was mistaken about the legal significance of her communication. That would be a mistake of law, pursuant to section 273.1(2)(d) of the *Criminal Code* :

Reasons of Fraser, C.J.A., *Appellant's Record*, page 176, para. 115

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(ii) Insufficient Evidence -- s. 265(4)

53. Pursuant to common law and section 265(4) of the *Criminal Code* the defence of mistaken belief in consent is not available and may not be considered by the trier of fact in the absence of evidence that is sufficient to raise the defence that the accused held the mistaken belief in fact. The Interveners submit that the evidence at trial

20 provides no evidentiary support for a claim that the accused misapprehended any facts related to the verbal and non-verbal acts of communication by the complainant or to the extent to which her actions were influenced and constrained by her fear of the accused.

Criminal Code, s. 265(4)

(iii) Statutory Bar - s. 273.2

54. Pursuant to section 273.2(b) of the *Criminal Code* an accused is barred from relying on a belief in consent in a case such as the one at bar, where he takes no

30 reasonable steps to ascertain consent and where there is no evidence of any effort to ascertain consent.

Criminal Code, s. 273.2(b)

55. The nature of the steps that must be taken to ascertain consent vary with the circumstances known to the accused. Where a complainant expresses non-consent either verbally or non-verbally, the accused has a corresponding escalating obligation

40 to take additional steps to ascertain consent. There is no evidence of any such steps in this case.

Regina v. G.(R.) (1994), 38 C.R. (4th) 123 (B.C.C.A.)
Regina v. Hall, [1993] O.J. No. 3344 at 243 (Gen. Div.)

E. Conclusion

56. The statutory definition of consent was neither referred to nor employed by the trial Judge in this case and it was wholly disavowed by McClung J.A. as having no application to the appeal before him. It is respectfully submitted that the lower courts' reliance on an interpretation of the legal definition of consent that falls outside of the statutory and constitutionally permissible definition of consent constituted errors of law.

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> Reasons of McClung J.A., *Appellant's Record*, page 138, line 34
> *Regina v. Esau*,[1997] 2 S.C.R. 777 at 805, para. 64 *per* McLachlin J.
> *Regina v. M.(M.L.)*,[1994] 2 S.C.R. 3

PART IV: ORDER REQUESTED

57. The Interveners submit that the appeal ought to be allowed.

20

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF SEPTEMBER, 1998 BY

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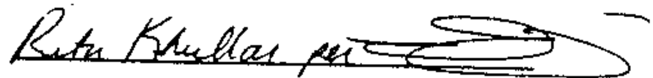

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PART V

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