

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

BETWEEN:

JORDAN BILINSKI

APPELLANT

-and-

HIS MAJESTY THE KING

RESPONDENT

-and-

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF BRITISH COLUMBIA, VANCOUVER RAPE RELIEF
SOCIETY, CRIMINAL TRIAL LAWYERS' ASSOCIATION, WOMEN'S LEGAL
EDUCATION AND ACTION FUND, CRIMINAL LAWYERS' ASSOCIATION
(ONTARIO)

INTERVENERS

FACTUM

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. ("LEAF")
(Pursuant to *Rule 42 of the Rules of the Supreme Court of Canada*)

Neha Chugh

Counsel for the Proposed Intervenor,
Women's Legal Education and Action Fund

Reakash Walters

Counsel for the Proposed Intervenor,
Women's Legal Education and Action Fund

Chugh Law Professional Corporation

28 First St. West

Cornwall, ON

K6J 1B9

Email: neha@chughlaw.ca

email: rwalters@uottawa.ca

ORIGINAL TO:

Registrar

Supreme Court of Canada

301 Wellington Street

Ottawa, ON K1A 0J1

COPIES TO:

Yoav Niv Law
Suite 430, 600 6 Ave SW
Calgary, AB T2P 0S5

Yoav Niv
Tel: (587) 968-6721
Email: yoav@yoavniv.ca

Counsel for the Appellant,

**Aurelie Beland Appeals and Specialized
Prosecution**
300 332 -6TH Avenue SW
Calgary, AB T2P 0B2

Andrew Barg
Tel: (403) 297-8477
Email: andrew.barg@gov.ab.ca

**Counsel for the Respondent, His Majesty
the King**

**Criminal Appeals British Columbia
Prosecution Service**
600 – 865 Homby Street
Vancouver, British Columbia V6Z 2G3

Mila Shah
Crystal Tomusiak
Tel: (236) 888-6248
Email: mila.shah@gov.bc.ca

**Counsel for the Intervener, Attorney
General of British Columbia**

Supreme Law Group
440 Laurier Ave, West Suite 200
Ottawa, ON K1R 7X6

Moira S. Dillon
Tel: (613) 691-1224
Email: mdillon@supremelawgroup.ca

Agent for Counsel for the Appellant

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Lea Desjardins
Telephone: (613) 786-0106
Email: lea.desjardins@gowlingwlg.com

**Agent for Counsel for the Respondent, His
Majesty the King**

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Matthew Estabrooks
Telephone: (613) 786-0211
Email: matthew.estabrooks@gowlingwlg.com

**Agent for the Intervener, Attorney General
of British Columbia**

Crown Law Office, Criminal
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9

Andreea Baiasu
Raof Zamanifar
Tel: (416) 326-4600
Email: andreea.baiasu@ontario.ca

**Counsel for the Intervener, Attorney
General of Ontario**

University of British Columbia
Peter A. Allard School of Law
1822 East Mall,
Vancouver, BC V6T 1Z1

Janine Benedet
Isabel Grant
Tel: (604) 802-0637
Email: benedet@allard.ubc.ca

**Counsel for the Intervener, Vancouver
Rape Relief Society**

Daniel Brown Law LLP
400-103 Church Street,
Toronto, ON M5C 2G3

Mark C. Halfyard
Heather Gunter
Tel: (416) 297-7200 Ext: 102
Email: halfyard@danielbrownlaw.ca

**Counsel for the Intervener, Criminal
Lawyers' Association (Ontario)**

Supreme Law Group
440 Laurier Ave, West Suite 200
Ottawa, ON K1R 7X6

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)**

Pringle Law

300 – 10150 100 St NW
Edmonton, AB T5J 0N8

Laura Matalas

Curtis Steeves

Tel: (780) 424-8866

Email: lmatalas@pringlelaw.ca

**Counsel for the Intervener, Criminal Trial
Lawyers' Association**

Public Prosecution Service of Canada

160 Elgin St, 12th Floor
Ottawa, ON K1A 0H8

Lauren Whyte

Blair MacPherson

Tel: (867) 333-9279

Email: lauren.whyte@ppsc-sppc.gc.ca

**Counsel for the Intervener, Director of
Public Prosecutions**

Public Prosecution Service of Canada

160 Elgin St, 12th Floor
Ottawa, ON K1A 0H8

Eric Marcoux

Tel: (867) 336-0762

Email: eric.marcoux@ppsc-sppc.gc.ca

**Agent for Counsel for the Intervener,
Director of Public Prosecutions**

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BETWEEN:

JORDAN BILINSKI

Appellant

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WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Intervener

**FACTUM OF THE INTERVENER,
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. ("LEAF")**

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

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**PARTS I & II – OVERVIEW & LEAF’S POSITION
ON THE QUESTION IN ISSUE**

1. Jury instructions are the law in action. They shape how jurors understand consent and they contribute to how sexual assault survivors experience the system’s response to their allegations. Where those instructions do not adequately guard against a jury’s potential reliance on myths and stereotypes about women, or where they are unclear or ineffective, they risk producing unreliable verdicts and exposing survivors to unnecessary trauma.
2. The “little difficulty” instruction fails to deliver on its intended purpose. It does not dispel myths and stereotypes operating in the background of sexual assault trials. It is conclusory and threatens to distort the jury’s deliberative process. An instruction intended to simplify the analysis risks introducing fresh confusion. LEAF urges this Court to depart from the “little difficulty” instruction and proposes an alternative framework for the Court’s consideration.
3. Deficiencies in jury instructions have consequences for survivors of sexual assault. Survivors’ experience with the criminal legal process and continued engagement after initial reporting is shaped by whether the process is intelligible, coherent, and fair. Clear jury instructions that accurately articulate the law, and expressly remove irrelevant considerations from the jury’s analysis, are one meaningful way to guard against bias and re-traumatization for survivors.

PART III – STATEMENT OF ARGUMENT

A. How Courts Communicate About Sexual Assault Is Impactful

4. How courts communicate about sexual assault has consequences that extend well beyond the resolution of individual cases. In the courtroom, unclear or inaccurate jury instructions risk

producing unreliable verdicts and unnecessary retrials. For survivors, the clarity and logical strength that courts and legal actors use to articulate the law of consent is one measure by which to ensure that justice system actors, including jurors, do not rely on myths and stereotypes when applying sexual assault law. In addition, when the law of consent is communicated in a way that is inaccessible or internally confusing, it affects whether survivors report, how they are treated when they do, and whether they feel the system meaningfully understood their experience. The clarity with which courts and legal actors articulate the law of consent may also discourage or encourage survivors' continued involvement in the criminal legal process. Outside the bounds of the criminal legal system, clarity in the law serves as the foundation from which the public understands sexual assault law.

a. Clear Jury Instructions are Essential for Trial Reliability

5. Jury instructions are the primary vehicle through which the law is conveyed to the trier of fact. Inaccurate or confusing jury instructions risk producing unreliable verdicts that may not withstand appellate scrutiny and could lead to retrials. For survivors of sexual assault, the trial process already often serves as an additional site of trauma. The experience of being cross-examined on one's private sexual history, having one's credibility challenged, and reliving the violent events of a sexual assault in a public venue can compound the substantial harm complainants experience.¹ Ensuring that jury instructions are clear and legally accurate is one meaningful way to protect survivors from the trauma of a retrial.

¹ *R v RV*, [2019 SCC 41](#) at paras 32-33; *R v JJ*, [2022 SCC 28](#) at para 120.

6. This concern for clarity in jury instructions is not new. In *Barton*, the Court of Appeal of Alberta recognized that jury instructions on the *mens rea* of sexual assault required increased clarity where the defence of honest but mistaken belief in communicated consent has not been raised or has no air of reality. The Court was particularly concerned with ensuring the Crown did not bear the burden of disproving the defence of HBMBC where it was not a live issue.²

To address this concern, the Court proposed the following instruction:

“If you are satisfied that the Crown has proven beyond a reasonable doubt that the complainant did not consent to that sexual activity, you should have *little difficulty* in concluding that the accused knew or was willfully blind to the fact that the complainant was not consenting to the sexual activity in question or was reckless and chose to take the risk.”³

7. Similar language has been adopted in several cases to guard against this concern.⁴ The National Judicial Institute’s Model Jury Instructions also note that where the defence of HBMBC is not raised or has no air of reality, “there is authority for the proposition” that judges should instruct on the *mens rea* of sexual assault using the “little difficulty” instruction.⁵ LEAF agrees that where the *actus reus* of sexual assault has been established and the defence of honest but mistaken belief in communicated consent is not a live issue, juries should be provided with clear guidance on the subjective fault requirement with respect to consent. Language should be developed to prevent an unavailable defence from being introduced “through the back door.”⁶

² *R v Barton*, [2017 ABCA](#) 216 at paras 238-239.

³ *R v Barton*, [2017 ABCA](#) 216 at fn 105 [emphasis added].

⁴ *R v Lafferty*, [2024 NWTCA](#) 9 at paras 24-30; *R v MacIntyre*, [2019 CMAAC](#) 3 at para 64; *R v Ellis*, [2025 ONCJ](#) 592 at para 22; *R v Degale*, [2024 ONCA](#) 720 at paras 14-18; *R v HW*, [2022 ONCA](#) 15 at paras 96-98; *R v Al-Akhali*, [2025 ONCA](#) 229 at para 20.

⁵ Canadian Judicial Council, Jury Instructions and their purpose (online), <https://cjc-ccm.ca/en/what-we-do/jury-instructions>.

⁶ *R v HW*, [2022 ONCA](#) 15 at para 86.

8. However, the widely adopted “little difficulty” instruction is not fit for purpose. The “little difficulty” instruction fails to address myths operating unconsciously in the background of deliberations. The instruction is conclusory, and risks distorting the jury’s deliberative process. These frailties in the jury instruction may lead to unsafe trial outcomes.
9. Culturally pervasive narratives about sexual assault, such as the supposition that if a complainant agreed to some sexual activity, she must have agreed to everything that followed, may inform jurors’ intuition about the case at issue, whether or not those assumptions are consciously recognized as explicitly engaging the HBMBC defence.⁷ An instruction that addresses this risk indirectly, by telling jurors they should have “little difficulty” reaching a particular conclusion, is unlikely to dislodge assumptions operating unconsciously for jurors. Instead, juries require an instruction that directly confronts those assumptions and provides jurors with a clear legal basis to set them aside. The “little difficulty” instruction fails to meet this standard.
10. Beyond its failure to address underlying assumptions, the instruction also improperly directs the jury’s reasoning process. The language directing that the jury should have “little difficulty” arriving at a specific conclusion is conclusory. The instruction directs the jury as to *what* to conclude rather than equipping them with the requisite information to independently reason their way through the issue and arrive at their own view based on the evidence presented by the parties. The instruction simply directs that if the *actus reus* is made out, the jury “should have little difficulty in concluding that [the defendant] was aware that the complainant did not consent to the sexual activity in question.” The instructions may

⁷ See *R v Seaboyer; R v Gayme*, [1991 CanLII 76 \(SCC\)](#), [1991] 2 SCR 577 at 653-654 (per L’Heureux-Dubé J in partial dissent).

reasonably leave jurors wondering *why* the asserted conclusion should follow so easily from the *actus reus* finding alone.

11. In *Rodgerson*, this Court directed that “[i]n crafting the jury charge, a trial judge has a general duty to inform the jury of the relevant evidence, and to assist the jury in linking that evidence to the issues that it must consider in reaching a verdict.”⁸ Though the level of detail required may vary depending on the case, the evidence should be presented to the jury in a manner that enables jury members to “fully appreciate the issues and the defence presented.”⁹ As a “judicial organ” of the criminal process, the jury hears all the evidence admitted at trial, receives instructions on the law from the judge, and retires to apply those legal principles to the facts to arrive at a verdict.¹⁰ The “little difficulty” instruction does not sufficiently equip juries to independently reason through each of the live issues at trial. Instead, it substitutes the judge’s conclusions for the jury’s own determinations.¹¹

12. The directive nature of the “little difficulty” instruction also risks distorting the jury’s deliberative process at the cognitive level. The instruction may unintentionally convey that if it is not plain to the jury that the *mens rea* has all but been proven beyond a reasonable doubt—namely, if they are experiencing more than a little difficulty reasoning through the matter—then perhaps the Crown has not met its burden.

⁸ *R v Rodgerson*, [2015 SCC 38](#) at para 30.

⁹ *R v Daley*, [2007 SCC 53](#) at para 57 quoting Christopher Granger, *The Criminal Jury Trial in Canada*, 2nd ed (Toronto: Carswell, 1996) at 249.

¹⁰ *R v Pan; R v Sawyer*, [2001 SCC 42](#) at para 43.

¹¹ This principle applies outside established exceptions, including directed verdicts and statutory presumptions, where the law otherwise circumscribes the jury’s role.

13. A juror who struggles to reason through the subjective fault requirement with respect to consent, after having been told by a judge that they should have “little difficulty” in doing so, may interpret that experienced difficulty as a signal that the *mens rea* has not been made out. However, the difficulty of moving through a particular line of reasoning is not necessarily a reliable indicator that the presented evidence was insufficient. A juror may conclude that the Crown has failed to meet its burden of proof based on their difficulty navigating the cognitive task itself, rather than on the strength of the evidence. The “little difficulty” instruction thus risks converting a standard feature of careful legal reasoning into an apparent indicator of evidentiary insufficiency.
14. In sum, the “little difficulty” instruction is not an appropriate vehicle for addressing the concern that the HBMBC defence may be introduced through the back door. The existing instruction fails to address myths and stereotypes that may otherwise escape conscious scrutiny in sexual assault trials. It is conclusory and risks distorting the deliberative process. The instruction may lead to unreliable verdicts and unnecessary retrials. This Court should not endorse its continued use. Where HBMBC is not a live issue, trial judges should provide jurors with a legal framework that will equip them to assess the relevant evidence and apply the law to the facts.
15. To correct these deficiencies and provide trial judges with a more effective alternative, LEAF proposes that pattern jury instructions directing on the *mens rea* element of consent where the defence of HBMBC is not available should first direct the jury on the subjective fault requirement with respect to consent including knowledge, recklessness, and willful blindness. Second, the instruction should adopt the Ontario Court of Appeal’s language in *H.W.* by explaining to jurors that “they should not rely on evidence if it is only relevant in supporting

an inference that the accused believed that the complainant was consenting or had communicated consent.”¹² Third, trial judges should identify, with reference to the evidence before them, the specific types of evidence the jury should not consider in assessing the accused’s state of mind.¹³ This framework provides jurors with legal guidance that equips them to independently reason through the subjective fault requirement, while removing the HBMBC defence from their consideration where it is not a live issue.

b. Survivors’ Trust in the Justice System Depends on How the Law is Communicated

16. How courts communicate about sexual assault informs survivors’ experiences of the justice system at every stage of the process. At trial, when an unavailable defence is permitted to linger implicitly in the background for the jury to consider, survivors may experience this as another form of doubt being inserted into their case. Often survivors navigating the criminal legal process develop a feeling that the system is searching for reasons to undermine their experience, even where the facts weigh strongly in their favour. Clear and direct jury instructions that expressly remove unavailable defences from the jury’s consideration are one meaningful way to counteract that perception.
17. Survivors benefit when the process is well-reasoned and understandable. This does not require this Court to direct juries toward conviction or relieve the Crown of its obligation to prove each essential element of the offence, but it does require the process to remain fair and principled.

¹² *R v HW*, [2022 ONCA 15](#) at para 98.

¹³ *Ibid.*

18. Survivors' experiences of the justice system are shaped not only by the letter of the law, but also by how clearly and consistently it is communicated by courts and legal system actors. The law of sexual assault often reaches survivors through the officers who take their statements, the Crown attorneys who assess their files, and the lawyers and advocates who explain what they might expect from the process. But the clarity of these communications is only as sound as the legal source from which it originates. Where courts articulate the law of consent in ways that are unclear or inconsistent, that confusion filters down through every subsequent interaction, and shapes how police explain the law or how Crown attorneys communicate with complainants. Clear judicial pronouncements are therefore the precondition for any other actor in the criminal legal process communicating the law accurately and accessibly.
19. Beyond the criminal legal process, the legal frameworks that govern consent shape how sexual assault is understood and addressed in other social contexts, including on university campuses, in media coverage, on legal information websites, in sexual assault centres, and ultimately in the everyday ways that the public understands their own experiences and the experiences of others in their communities. When courts articulate the law of consent clearly, accurately, and in a manner that directly confronts myths and stereotypes, that clarity informs public understanding. The instruction LEAF proposes communicates to the public that consent and bodily autonomy are values the legal system takes seriously.

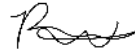
PART IV & V – COSTS & ORDER REQUESTED

20. LEAF is a non-profit organization represented on this appeal by counsel acting *pro bono*. LEAF does not seek costs and asks that no costs be ordered against it. LEAF takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of May 2026.



Neha Chugh



Reakash Walters

Counsel for the Intervener Women's Legal Education and Action Fund

PART VI – TABLE OF AUTHORITIES

#	Case Law	Cited in paragraph
1.	<i>R v Al-Akhali</i> , 2025 ONCA 229	7
2.	<i>R v Barton</i> , 2017 ABCA 216	6
3.	<i>R v Daley</i> , 2007 SCC 53	11
4.	<i>R v Degale</i> , 2024 ONCA 720	7
5.	<i>R v Ellis</i> , 2025 ONCJ 592	7
6.	<i>R v HW</i> , 2022 ONCA 15	7, 15
7.	<i>R v JJ</i> , 2022 SCC 28	1
8.	<i>R v Lafferty</i> , 2024 NWTCA 9	7
9.	<i>R v MacIntyre</i> , 2019 CMAC 3	7
10.	<i>R v Pan</i> ; <i>R v Sawyer</i> , 2001 SCC 42	11
11.	<i>R v Rodgeron</i> , 2015 SCC 38	11
12.	<i>R v RV</i> , 2019 SCC 41	1
13.	<i>R v Seaboyer</i> ; <i>R v Gayme</i> , 1991 CanLII 76 (SCC) , [1991] 2 SCR 577	9

Other Sources

	Source Document	Paragraph Referenced
1.	Jury Instructions and their Purpose , Canadian Judicial Council	7

PART VII – STATUTORY PROVISIONS

See Part VI above