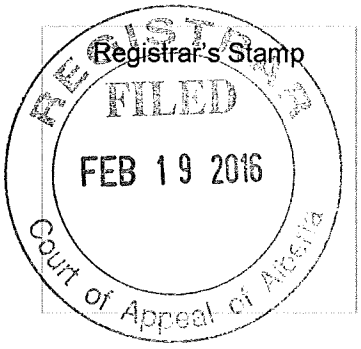
COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBER:	1503 0091A
TRIAL COURT FILE NUMBER:	120294731Q1
REGISTRY OFFICE:	EDMONTON
APPLICANTS:	WOMEN'S LEGAL EDUCATION AND ACTON FUND INC. & INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN
STATUS ON APPEAL:	PROPOSED JOINT INTERVENERS
RESPONDENT:	HER MAJESTY THE QUEEN
STATUS ON APPEAL:	APPELLANT
RESPONDENT:	BRADLEY BARTON
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	**RESPONDENT'S MEMORANDUM OF ARGUMENT**

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I. Introduction

1. The Respondent, Bradley Barton, opposes the Joint Application to Intervene by the Women's Legal Education and Action Fund Inc. and the Institute for the Advancement of Aboriginal Women (together the "Proposed Interveners").

II. Argument

2. The appropriate place to begin is by recognizing that interventions in criminal cases are a rarity. As Veldhuis J.A. recently noted in *R. v. Vallentgoed*:[1] **(TAB 1)**

> [T]he discretion to grant intervener status should be exercised sparingly, particularly in criminal proceedings where the dispute must remain between the accused and the Crown: *R. v. N. (L.C.)*, [1996] 8 W.W.R. 294 (Alta. C.A.) at para 16. Interventions in criminal appeals are "generally shunned by the courts for a variety of policy and prudential reasons", especially the risk "that the hearing of other voices can distort an appeal": *R. v. A. (J.L.M.)*, 2009 ABCA 324 (Alta. C.A.) at para 2, (2009), 464 A.R. 310 (Alta. C.A.).

3. These risks are particularly acute here. The Proposed Interveners' submissions ignore the admonition of the Federal Court of Appeal in *Batchewana Indian Band v. Canada (Minister of Indian Affairs)*,[2] **(TAB 2)** to the effect that "... an intervenor in an appellate court *must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence*".

4. The first ground of appeal asks this Court to consider whether the Trial Judge erred in law in his instructions to the jury with respect to manslaughter, and the focus of the Crown is upon the extent to which the mental element of the offence was correctly explained. In contrast, the Proposed Interveners have argued an entirely new route of liability, hoping to narrow the definition of "sexual activity" in s. 273.1(1) in a manner not contemplated at trial, and in a way that has never been recognized in Canada before.

5. There are multiple concerns with this approach. First, it does not adhere to the ground of appeal being argued by the Crown. As Costigan J.A. noted in *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)*,[3] **(TAB 3)** "... it is in-appropriate for an intervener to extend legal argument well beyond that raised in the

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[1] 2016 ABCA 19 at para. 6.
[2] (1996), 199 N.R. 1 at para 2 (Fed. C.A.)[Emphasis added].
[3] 2008 ABCA 391 at para 7. See also *Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal*, 2005 ABCA 143 at para. 5. **(TAB 4)**

court below and that advanced by the parties". Although the Crown's exact position on appeal is somewhat difficult to discern because of its inconsistent statements – both at trial and in its appeal factum – about the relationship of a person's consent to the objective foreseeability of bodily harm, their main line of argument suggests that in assessing the validity of a person's consent, a court should "consider whether the complainant consented to force that the accused ought to have known would have risked bodily harm".[4] In other words, "consent must be evaluated in the context of any risk of bodily harm that is objectively foreseeable".[5] **(TAB 5)** While novel in its own right, the Crown is asking that any decision on actual consent involve an evidentiary determination in which objective risk is simply one factor, albeit an important one, to consider.

6. The Proposed Interveners suggest a much broader position on liability, proposing that any time a "sex partner uses force such that he inflicts foreseeable bodily harm in the performance of the sexual activity to which the complainant agreed, he is performing a sexual activity that is different in character from the activity to which the complainant agreed and thereby acting without her consent".[6] In effect, *any* causing of bodily harm that was objectively foreseeable when performed would be enough to constitute a sexual assault, *regardless of the complainant or the accused's actual intention.* Simply put, while the Proposed Interveners, like the Crown, are attempting to construe consent in a manner that is contrary to the prevailing law in Canada,[7] they go considerably further by submitting that whenever an accused causes objectively foreseeable bodily harm to a complainant consent is automatically vitiated.

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[4] Appellant's Factum, para. 61.

[5] To be clear, the Respondent disagrees with this position. Moreover, it is also worth pointing out that this suggestion of how the accused can be held liable was specifically eschewed by the Crown at trial. See Discussion, *Trial transcript*, Vol. 5 1724/25-31,1727/23-24. **(TAB 5)**

[6] Joint Interveners, *Memorandum of Argument*, para. 13.

[7] The Appellant and Respondent, along with the trial judge, agreed that the charge should follow the approach developed by the Ontario Court of Appeal in *R. v. Welch* (1995), 101 C.C.C. (3d) 216 (Ont. C.A.) **(TAB 6)** and *R. v. Zhao* (2013), 3 C.R. (7th) 95 (Ont. C.A.), **(TAB 7)** both of which apply the Supreme Court's decision on consent to fist-fighting - first developed in *R. v. Jobidon* [1991] 2 S.C.R. 714 – without alteration. **(TAB 8)** This charge indicated that to vitiate consent, it had to be shown that either the deceased was incapacitated from alcohol to consent to the sexual activity or that the accused intended to cause bodily harm. While the Respondent consented to this approach, it is important to keep in mind that the law on the latter route to liability remains unclear in the absence of a definitive ruling on the subject from the Supreme Court, and it is possible that causing bodily harm with an intent to do so will not necessarily result in a conviction in the context of sexual activity. See the comments of the Ontario Court of Appeal in *R. v. Zhao*, *ibid.* at para. 79. In any event, this basis for liability (which requires a subjective intention to commit bodily harm) is still considerably narrower than that advocated by the interveners.

7. Second, the intervention amounts to little more than an attempt to obtain party status to help obtain a conviction against the Respondent. As Watson J.A. stated in *R. v. A.(S.C.)*,[8] **(TAB 9)** "... a person charged with an offence should not have to face a phalanx of prosecution representatives arguing in the alternative". Watson J.A. addressed this point in greater depth in *R. v. A.(J.L.M.)*,[9] **(TAB 10)** holding that:

> Intervention by a third party in a criminal case is generally shunned by the courts for a variety of policy and prudential reasons. Without discussing all those reasons, it can be said that all necessary voices with proper standing will necessarily be heard through the traditional binary process. There is a risk that the hearing of other voices can distort an appeal. That risk of distortion is of acute concern where the intervention might be directly or indirectly adverse to the defendant in the case. Where the defendant already faces the voice of the state, the courts must necessarily be concerned about introduction of any other voice that could hurt the defendant.

8. These concerns are particularly relevant here. If this Court were to agree with the Proposed Intervener's suggested line of argument, it would create a result that is fundamentally unfair. In effect, the Court would be ordering a new trial *because the Respondent did not defend himself against a potential route of liability that the Crown did not raise in his trial or on appeal.*

9. Third, the Proposed Interveners' approach also fails to comply with their promise not to introduce new facts or evidence. The Proposed Interveners' approach asks for a departure from what the Crown agreed was the law at trial (although its position has changed markedly on appeal) effectively removing any need to show that there was a subjective intention to cause bodily harm – a lynchpin of the existing jurisprudence[10] – before convicting a person of causing bodily harm in a sexual context. The impact of a judicial decision on this point goes beyond the case at bar, extending to a wide variety of people performing sexual activity that is currently regarded as legal. For example, it is undoubtedly the case that any ruling by this Court along the lines suggested by the intervener would have grave implications for those who perform acts of "BDSM" – bondage, dominance and submission and sadomasochism – as part of their sexual practice. These individuals would be prohibited from raising their own "context"

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[8] 2013 ABCA 80 at para. 17.
[9] 2009 ABCA 324 at para. 2.
[10] *Supra*, footnote 7.

because the definition of "sexual activity" was not an issue at trial, and therefore would not have been put on notice that a novel route to liability was being addressed.

10. With respect to the third ground of appeal, in addition to relying upon the general presumption against interveners discussed at para. 5, the Respondent's main source of apprehension is the potential for the introduction of new evidence in the guise of "context". At para. 16, the Proposed Interveners' raise the suggestion that "misconceptions and systemic bias regarding survival-level sex workers" could have played a role in the result of this trial. The same paragraph implies that the deceased's role as an Indigenous woman in the sex trade created a "heightened risk that the jury would bring to the fact-finding process discriminatory beliefs and biases".

11. Resolving the points raised by the Proposed Interveners will inevitably require proof by way of testimony, expertise and cross-examination. This is simply not the correct venue to explore such an important issue and the points raised by the Proposed Interveners risk hijacking the appeal and turning it into a judicial inquiry. The importance of requiring evidence on appeal was recently the subject of comment by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Ishaq.*[11] **(TAB 11)** In that case, Stratas J.A. denied applications from six organizations to intervene in an immigration appeal. In his reasons for doing so, he noted that:

> 17 On appeal, interveners cannot make new legal arguments that are foreclosed by the evidentiary record...
>
> 18 Nor can interveners simply import into the appeal the evidence they need to make their arguments. After all, the parties themselves cannot make new legal arguments that are foreclosed by the factual record, nor can they simply import into the appeal the evidence they need...
>
> 19 Although this is clear and elementary law, many in the intervener community seem oblivious to it. For example, in this case a number of the applicants seem to think they will be able to assert new factual matters in the area of social science in support of their submissions in the appeal. Some suggest that the Supreme Court has allowed them in the past to refer to social science insights not explored below. That may be so, but the Supreme Court has deluged us with binding decisions directly or indirectly forbidding that practice — *Palmer*, *Find*, *Spence*, *Sylvan Lake*, *Quan*, *Kahkewistahaw*, all above, more Supreme Court cases below, and many other Supreme Court cases I need not cite...

[11] 2015 FCA 151 at paras. 17-23.

> 21 Almost always, social science facts do not fall within the categories of permissible judicial notice. Matters of social science are within the purview of experts. Those matters must be adduced through the experts, and they must be available for cross-examination. Cross-examination is essential to the testing and reliability of the evidence. It cannot be taken on faith. This exercise is to be conducted in trial courts, not appellate courts: see most recently *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.) at paragraphs 53-55.
>
> 22 In appellate courts, interveners sometimes try to file in their books of authorities reports that assert social science positions not advanced in the first-instance court. Then they cite the reports as proof of certain social science matters. This is nothing more than improperly "bootlegging evidence in the guise of authorities": *Canada (Human Rights Commission) v. Taylor*, [1987] 3 F.C. 593 (Fed. C.A.) at page 608...
>
> 23 Sometimes courts adopt a more lax attitude to the admissibility of evidence concerning legislative facts, such as the reason why certain legislation was enacted: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.) at page 1099, (1990), 73 D.L.R. (4th) 686 (S.C.C.). But here we are not dealing with legislative facts. And even in the case of legislative facts, one cannot offer evidence against the opposing party's case without providing a proper opportunity for its truth to be tested: *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44 (S.C.C.) at paragraph 5, citing *Danson*.

In the Respondent's view, these same concerns are applicable in the case at bar, as there is no way to address the points the Proposed Interveners wish to raise during an appellate hearing. In the event this Court decides to grant leave to intervene, the Proposed Interveners should be restricted from adducing new evidence that is not capable of being contested. The Proposed Interveners should be restrained from supporting their position by resort to studies and commentary that are incapable of scrutiny at this level of court.

III. Relief

12. The Respondent asks that the application for leave to intervene be dismissed.

All of Which is Respectfully Submitted this 18th day of February, 2016.

Estimate of Time for Oral Argument: ~~20~~ 15 minutes.

Dino Bottos
Counsel for the Respondent, Bradley Barton

LIST OF AUTHORITIES AND MATERIALS

DESCRIPTION	TAB
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