Court File No. 40447

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HIS MAJESTY THE KING

Appellant
(Respondent)

-and-

EDWIN TSANG

Respondent
(Appellant)

-and-

INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY,
ATTORNEY GENERAL OF ALBERTA,
ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE,
WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and WOMEN'S LEGAL EDUCATION AND ACTION FUND
and TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA

Interveners

FACTUM OF THE INTERVENERS, WEST COAST LEAF and WOMEN'S LEGAL EDUCATION AND ACTION FUND

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

Megan Stephens
Megan Stephens Law
1900 – 439 University Avenue
Toronto, ON M5G 1Y8
Tel: 416.900.3319
Email: megan@stephenslaw.ca

Humera Jabir
West Coast LEAF
PO Box 28051 West Pender Street
Vancouver, BC V6C 3T7
Tel: 604.684.8772 Ext. 112
Email: hjabir@westcoastleaf.org

Borden Ladner Gervais LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Agent for Interveners,
West Coast Legal Education and Action Fund Association and
Women's Legal Education and Action Fund Inc. (LEAF)

Roxana Parsa
Women's Legal Education and Action Fund (LEAF)
1420 – 180 Dundas Street West
Toronto, ON M5G 1Z8
Tel: 416.595.7170
Email: r.parsa@leaf.ca

Counsel for the Interveners,
West Coast Legal Education and Action Fund Association and
Women's Legal Education and Action Fund Inc. (LEAF)

ORIGINAL TO: **Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

Ministry of Attorney General
Criminal Appeals
600 – 865 Hornby Street
Vancouver, BC V6Z 2G3

Susanne Elliot
Christie Lusk
Tel: 604.660.1126
Fax: 604.660.1133
Email: susanne.elliott@gov.bc.ca

Counsel for the Appellant,
His Majesty the King

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks

Tel: 613.786.0211
Fax: 613.788.3573
Email: matthew.estabrooks@gowlingwlg.com

Agent for the Appellant,
His Majesty the King

Fowler & Blok
1200 – 1111 Melville Street
Melville Law Chambers
Vancouver, BC V6E 3V6

Richards S. Fowler, K.C. |
Eric Purtzki
Tel: 604.684.1311
Fax: 604.681.9797
Email: rfowler@fowlerbloklaw.ca

Counsel for the Respondent,
Edwin Tsang

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: 613.282.1712
Fax: 613.288.2896
Email: msobkin@sympatico.ca

Agent for the Respondent,
Edwin Tsang

Pringle Chivers Sparks Teskey
1720 – 355 Burrard Street
Vancouver, BC V6C 2G8

Gregory P. Delbigio, K.C. |
Daniel J. Song, K.C.

Tel: 604.669.7447
Fax: 604.259.6171
Email: greg@gregdelbigio.com
djsong@pringlelaw.ca

Counsel for the Intervener,
Independent Criminal Defence Advocacy Society

Justice and Solicitor General
Appeals and Specialized Prosecutions Office
3rd Floor, Centrium Place
300, 332 – 6 Avenue SW
Calgary, AB T2P 0B2

Sarah Clive
Tel: 403.297.6005
Fax: 403.297.3453
Email: sarah.clive@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

Caissy, Roussin, Beauchamp, avocats
Bureau 5 – 49, boul. Saint-Benoît Ouest
Amqui, QC G5J 2B8

Hugo Caissy | Myralie Roussin | Elisabeth Beauchamp
Tel: 418.629.4404
Fax: 418.629.3515
Email: hcaissy@ccjbslg.qc.ca

Counsel for the Intervener,
Association québécoise des avocats et avocates de la défense

Charlebois-Swanston, Gagnon, avocats
166 rue Wellington
Gatineau, QC J8X 2J4

Paul Charlebois

Tel: 819.770.4888 Ext: 105
Fax: 819.770.0712
Email: pcharlebois@csgavocats.com

Agent for the Intervener,
Association québécoise des avocats et avocates de la défense

Peck and Company
610 – 744 West Hastings Street
Vancouver, BC V6C 1A5

Mark Iyengar | Benjamin Reedijk
Tel: 604. 669.0208
Fax: 604.669.0616
Email: miyengar@peckandcompany.ca

Counsel for the Intervener,
Trial Lawyers Association of British Columbia

Norton Rose Fulbright Canada LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Jean-Simon Schoenholz
Tel: 613.780.8654
Fax: 613.230.5459
Email: jean-simon.schoenholz@nortonrosefulbright.com

Agent for the Intervener,
Trial Lawyers Association of British Columbia

Table of Contents

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The so-called "rule against ungrounded common-sense assumptions" (the "Rule") has emerged in recent years as a basis for appellate review of credibility assessments. This has significant implications in sexual assault cases, which often turn on a trial judge's credibility findings. This Court is called upon to determine whether the Rule is an appropriate standalone basis for appellate review and, if so, to clarify the scope of its application. The decision under appeal demonstrates some of the concerning consequences of the Rule's application. The British Columbia Court of Appeal (BCCA) held that the trial judge had erred in her credibility findings by making common-sense assumptions not grounded in the evidence and that those errors were sufficiently material to justify overturning the respondent's conviction for sexual assault.

2. West Coast Legal Education and Action Fund Association (West Coast LEAF) and the Women's Legal Education and Action Fund Inc. (LEAF) (the "Interveners") submit that the application of the Rule has significant and concerning implications for the development of sexual assault law and for sexual assault complainants. This, in turn, could impede access to justice for sexual assault complainants, who are more likely to be women, girls, trans, and non-binary people, including those who experience intersecting axes of marginalization arising from their race, Indigeneity, sexual orientation, gender identity, disability status, and age.

3. The Interveners submit this Court should put an end to the use of the Rule as a standalone basis to review a trial judge's credibility findings in sexual assault cases. The Rule is too amorphous to be applied by appellate courts in a meaningful manner, is at odds with the deference owed to trial judges' factual findings, and risks both undermining the dignity and equality rights of complainants and resurrecting twin myth reasoning. In the alternative, if this Court accepts the Rule is an appropriate basis for appellate review, guidelines should be established regarding its application – particularly in sexual assault cases where myths and stereotypes continue to affect both the consent analysis and credibility findings. In applying the Rule in sexual assault cases, appellate courts must consider both the entire evidentiary record and reasons, avoid substituting their own stereotypical assumptions, and ensure that their analysis properly reflects the law of consent.

PART II – POSITION ON QUESTION IN ISSUE

4. The Interveners' primary position is that the "rule against ungrounded common-sense assumptions" is not, on its own, an appropriate basis for an appellate court to set aside a trial judge's credibility findings in sexual assault cases. Alternatively, the Interveners submit this Court should set clear parameters to assist appellate courts with the Rule's application to avoid undermining the equality, dignity, and privacy rights of sexual assault complainants.

PART III – STATEMENT OF ARGUMENT

A. The Rule should not be a standalone basis to review trial judges' credibility findings

5. The "rule against ungrounded common-sense assumptions" is increasingly being used to review trial judges' credibility assessments in sexual assault cases.[1] The Rule, as distinct from the "rule against stereotypical assumptions",[2] should not be a standalone basis for reviewing trial judges' credibility findings because it: (i) is too amorphous to be applied in a meaningful and consistent manner; (ii) is incompatible with this Court's longstanding jurisprudence concerning both the deference owed to trial judges' credibility assessments and the functional approach required when assessing judges' reasons; and (iii) risks undermining the dignity and equality rights of complainants and resurrecting prohibited twin myth reasoning.

i. The Rule is too amorphous to be applied meaningfully and consistently

6. Unlike the rule against assumptions rooted in myths or stereotypes, which has both a clear rationale and cognizable boundaries, the "rule against ungrounded common-sense assumptions" lacks sufficient precision to constitute a meaningful standard for review. It is an error of law for a trier of fact to assess the credibility of a complainant solely based on the correspondence between a complainant's behaviour and *stereotypical* understandings about how victims are expected to behave, whether prior to or after the alleged sexual offence.[3] It is also an error of law to base

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[1] See, for example, *Bright v. R.*, 2020 NBCA 79; *R. v. J.L.*, 2018 ONCA 756; *R. v. Cepic*, 2019 ONCA 541; *R. v. Kodwat*, 2017 YKCA 11; *R. v. JC*, 2021 ONCA 131 [*JC*]; *R. v. Roth*, 2020 BCCA 240, *R v. Pastro*, 2021 BCCA 149 [*Pastro*].

[2] See *JC*, at paras. 57-74. and *Pastro*, at paras. 4-5 distinguishing between these two rules.

[3] See, for example, *R. v. Seaboyer*, [1991] 2 S.C.R. 577 [*Seaboyer*] at p. 604 (regarding twin myths); see also *R. v. D.D.*, [2000] 2 S.C.R. 275; *R. v. A.R.J.D.*, 2018 SCC 6; *R. v. D.R.*, 2022 SCC 50 (concerning stereotypes re delays in disclosure or the failure to avoid a family member who was the alleged abuser).

credibility findings on stereotypical understandings of how a person accused of sexual offences will conduct themselves in sexual encounters.[4] Those assumptions are legal errors in part because, as this Court has repeatedly emphasized, "myths and stereotypes continue to haunt the criminal justice system"; they risk "jeopardiz[ing] the truth-seeking function of the trial and "undermin[ing] the dignity, equality and privacy rights" of complainants.[5] Accused persons from marginalized communities also experience the deleterious impact of stereotypes that can lead to propensity reasoning on the part of the trier of fact.[6]

7. The Rule does not target concerns about the inappropriate reliance on value-laden or prejudicial beliefs that may interfere with the truth-seeking process (or create barriers to access to justice for marginalized or vulnerable groups who are more likely to be the subject of myth or stereotype-based reasoning). Instead, the Rule seeks to guard against trial judges relying on "speculation" or "conjecture" when drawing factual inferences from circumstantial evidence. As Justice Paciocco explained in *R. v. JC,* the Rule "does not bar using human experience about human behaviour to interpret evidence"; it prohibits the use of "'common-sense' or human experience to introduce *new considerations not arising from evidence*, into the decision-making process".[7]

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[4] See, for example, *R. v. Quartey,* 2018 SCC 59. See also *R. v. Cepic,* 2019 ONCA 541 at para. 24 (where the Court found the trial judge relied on stereotypes about male aggression when describing the evidence of the accused, a male dancer in a strip club).

[5] *R. v. J.J.,* 2022 SCC 28 [*J.J.*] at para. 1. See also *Seaboyer,* at pp. 602-604 (*per* McLachlin J., as she then was, for the majority); pp. 650-670 (*per* L'Heureux-Dubé J., in dissent but not on this issue re the pervasiveness of myths and stereotypes); *R. v. O'Connor* [1995] 4 S.C.R. 411 at paras. 120-128 (*per* L'Heureux-Dubé J., in dissent but not on this issue), *R. v. Mills,* [1999] 3 S.C.R. 668 at paras. 90-94; *R. v. Darrach,* 2000 SCC 46 at para. 33; *R. v. Barton,* 2019 SCC 33, at paras. 1, 55, 107 [*Barton*]; and *R. v. Goldfinch,* 2019 SCC [*Goldfinch*] at paras. 119 and 141.

[6] While those accused of sexual assault can be the subject of stereotyping, men have tended to benefit from stereotypical assumptions in sexual assault jurisprudence, with the exception of homophobic or racist stereotypes that cast certain men as sexual predators. See Janine Benedet, Comment on *R. v. Tsang,* 2022 BCCA 345, 2022 CarswellBC 2858, Criminal Reports (Westlaw).

[7] *JC,* at para. 61 [emphasis added].

8. This is an amorphous standard, framed at a very high level.[8] It is not tied to valid concerns about reliance on stereotypical assumptions that impede truth seeking. This capacious standard allows appellate judges to decide what is or is not a permissible "common-sense" inference, without requiring any meaningful rationale for those distinctions. By way of example, the court below held that the trial judge's finding that it was "unlikely" that the respondent and the complainant had shared a gin and tonic "given that they were mostly strangers" was permissible, falling into the "class of inferences that could fairly be drawn".[9] In contrast, the trial judge's rejection of the respondent's evidence that the complainant had encouraged and enjoyed "rough sex" was impermissible, as it was rooted in an ungrounded common-sense assumption.[10] So, while it is apparently a legitimate inference to decide that someone would not likely want to share a drink with a near stranger, it is not legitimate to reject the evidence that they would want rough sex. The Rule is so malleable that it gives appellate courts license to substitute their own opinions for those of the trier of fact. It allows them to circumvent this Court's longstanding jurisprudence concerning the deference owed to a trial judge's credibility findings and the functional approach to assessing reasons,[11] ignoring the oft-cited proposition that "where credibility is a determinative issue, deference is in order and intervention will be rare."[12]

ii. The Rule encourages highly invasive appellate review of trial judge's reasons

9. Where a trial judge's credibility findings are alleged to be rooted in an ungrounded common-sense assumption, appellate courts often begin with a probing review of the reasons. But instead of adopting the "functional approach" to their review of reasons,[13] this rule prompts appellate courts to "finely parse the trial judge's reasons in search for error",[14] cherry-picking through a "word-by-word analysis"[15] in search of common-sense assumptions that are ungrounded.

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[8] The "capaciousness" of the rule has been seen as both its strength and principal weakness: see, Lisa Dufraimont, "Current complications in the law on myths and stereotypes" (2021) 99 Can Bar Rev 536 at pp. 562-563.

[9] *R. v. Tsang*, 2022 BCCA 346 [BCCA Decision] at para. 40.
[10] BCCA Decision, at paras. 41-65.
[11] *R. v. R.E.M.*, 2008 SCC 51 [*R.E.M.*] at para. 32.
[12] *R.E.M.* at para. 32.
[13] As this Court first opined was required in *R. v. Sheppard*, 2002 SCC 26.
[14] See *R. v. G.F.*, 2021 SCC 20 [*G.F.*] at para. 69.
[15] *R. v. Gagnon*, 2006 SCC 17 [*Gagnon*] at para. 19.

The Rule has been applied almost exclusively in sexual assault cases, which turn largely on credibility findings, yet appellate courts seem to approach this review without regard to this Court's caution that "the sufficiency of the reasons should be considered in light of the deference afforded to trial judge's credibility findings."[16]

10. Indeed, this Court has repeatedly emphasized that a trial judge's credibility findings deserve significant deference[17] because the fact finder "has the benefit of the intangible impact of conducting the trial,"[18] and "[a]ssessing credibility is not a science", making it challenging for trial judges "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events." This is why this Court has found that, absent a palpable and overriding error by the trial judge, their "perceptions should be respected."[19] Appellate courts' increasing use of the ungrounded common-sense assumption rule is particularly troubling in cases, such as this, where the reviewing court appears to substitute its own common-sense assumptions, at times rooted in myths and stereotypes,[20] for those it claims the trial judge relied on.

iii. The Rule risks undermining the dignity and equality rights of complainants

11. If the Rule continues to be applied by appellate courts, there is a real risk that complainants will be asked highly intrusive, personal, and traumatic questions about their sexual preferences, practices or even hypothetical behaviours as Crowns seek to "appeal proof" the record and guard against assertions that there is no evidence to ground "common-sense assumptions" in judges' reasons. Decisions like the case at bar suggest that additional evidence about personal preferences or "predilections"[21] would be required to bolster a complainant's testimony about what occurred to "ground" a trial judge's factual findings. It is unclear what additional evidence an appellate court would require about a complainant's sexual practices to substantiate the trial judge's credibility assessment. It is possible a complainant would be required to provide evidence to disprove a myriad of assumptions to rule out "the unpredictable, surprising, and out-of-character ways in which

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[16] *R. v. Dinardo,* 2008 SCC 24 at para. 26.
[17] See, for example, *R. v. W.(R.),* 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, at paras. 131-132; *Housen v. Nikolaisen,* 2002 SCC 33; *Barendregt v. Grebliunas,* 2022 SCC 22 at para. 104.
[18] *G.F.,* at para. 81.
[19] *Gagnon,* 2006 SCC 17 at para. 20.
[20] See discussion *infra* at paras. 19-20.
[21] BCCA Decision at para. 19.

human beings sometimes do behave"[22] in order to support a common-sense assumption. This tacit requirement to adduce evidence of the complainant's predilections (or past sexual behaviours) would expose complainants to prejudicial and traumatic examination, a practice this Court has repeatedly cautioned against.[23]

12. Such a requirement would also open the door to prohibited twin myth reasoning,[24] and distort the trial process by reintroducing consideration of what is ultimately nothing more than propensity evidence under the guise of credibility assessment. Inviting or requiring evidence of complainants' "predilections" or propensities is prejudicial not only to their dignity and equality rights but also to trial integrity and fairness.

B. If the Rule is an appropriate basis for appellate review, clear guidelines must be set for its application

13. If this Court finds that the Rule is an appropriate standard against which to review credibility findings, clear guidelines are needed to assist with its application, particularly in sexual assault cases. More specifically, this Court should caution appellate courts applying the Rule that they: i) must consider both the entire evidentiary record and the judge's reasons; ii) must not substitute their own assumptions rooted in myths and stereotypes; and iii) must ensure their analysis accurately reflects the law of consent.

i. Appellate courts applying the Rule must consider the entire evidentiary record and the judge's reasons

14. Even if appellate courts are justified in scrutinizing reasons to ensure that a trial judge's findings are logically linked to the evidence, impugned statements alleged to be rooted in common-sense assumptions cannot be assessed in isolation. They must be understood in the context of "the entirety of the trial judge's reasons" and the "the record as a whole".[25] An appellate court cannot determine that a trial judge's credibility finding reveals legal error because it is rooted in a

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[22] *Pastro* at para. 44.

[23] See, for example, *Goldfinch* at para. 33 citing D.M. Tanovich, "Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013-2014), 45 Ottawa L Rev 495, at pp. 498-499.

[24] This could prolong trial proceedings as crowns need to bring *Seaboyer* applications before introducing evidence of this nature: see *Barton; J.J.*, at para. 74.

[25] *G.F.* at para. 79.

common-sense assumption with *no basis in the evidence*, without considering the *entire* evidentiary record, and the full context in which the judge's reasons were rendered.

15. This is particularly important where the impugned finding relates to the complainant's credibility pertaining to consent, which must be assessed on the basis of all relevant evidence. The absence of consent is subjective, determined by reference to the complainant's state of mind towards the touching at the time it occurred. Once a complainant asserts that they did not consent, the question is one of credibility, which the trier of fact must assess by taking into account "the *totality* of the evidence".[26] This includes the complainant's direct evidence, as well as circumstantial evidence such as their "words and actions, before and during the incident", and any ambiguous or contradictory conduct.[27]

16. The Rule risks appellate courts adopting a decontextualized approach to their assessments of a judge's reasons and placing artificial limits on the evidence considered in reviewing trial judge's findings. In this case, the BCCA relied on what it found to be a "marked departure" in the complainant's behaviour to justify limiting the evidence it considered relevant to a limited timeframe: what happened after the complainant agreed to engage in *some* sexual activity.[28] As a result, its analysis was decontextualized and rooted in its own stereotypical assumptions concerning what transpired between the complainant and the accused. This led the court to find that the judge was relying on an assumption not supported by the evidence when she concluded that the complainant did not consent to being spanked.[29] By focusing exclusively on what occurred after the complainant got into the back seat, rather than the totality of evidence, the reviewing court failed to appreciate that the trial judge's "assumption" was rooted in the complainant's own testimony[30] and behaviours spanning the entire night.

17. The requirement to consider the entirety of the record promotes substantive equality by ensuring that all factors, including lived experience, are assessed in relation to the complainant's subjective state of mind towards sexual contact. A person's identity – their gender, race,

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[26] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 [*Ewanchuk*], at para. 61.
[27] *Ewanchuk* at para. 29; Lisa Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44-2 *Queen's Law Journal* 316.
[28] BCCA Decision at para. 52.
[29] BCCA Decision at para. 53.
[30] *R. v. Tsang,* 2020 BCPC 306 [BCPC Decision] at para. 56.

Indigeneity, social class, age, etc. – affects their life experiences and influences their state of mind with respect to consent. In this case, the complainant testified that her decisions were impacted by fears connected to her gender which led her to "manage risk" by going into the back seat, instead of walking home alone in the early morning hours.[31] An appellate court reviewing credibility findings must be alive to how power imbalances linked to marginalization may impact a complainant's state of mind pertaining to consent.

18. The entire evidentiary record, and the judge's reasons read in context, must also be considered when assessing whether an impugned statement in the reasons was "material" in the sense that it was "reasoning that mattered in arriving at the impugned factual finding".[32] A decontextualized analysis of the evidence or reasons could skew assessments of materiality.

ii. Appellate courts must not substitute their own stereotypical assumptions for what they believe are the judge's ungrounded "common-sense" assumptions

19. Appellate courts applying the Rule must avoid substituting their own stereotypical assumptions about complainants for the common-sense assumptions they believe informed the trial judge's reasoning. By way of example, the BCCA seems to suggest that once the complainant had willingly engaged in some sexual activity, she was more likely to have consented to other sexual activity and/or that her claim that she did not consent "after she willingly engaged in some sexual foreplay" was less worthy of belief (or, at the very least, warranted more careful scrutiny by the trial judge).[33] Both assumptions engage in twin myth reasoning, as prohibited by s. 276(1) of the *Criminal Code* and this Court's jurisprudence. Twin myth reasoning is barred because it is "not probative of consent or credibility and can severely distort the trial process".[34] The legislative prohibition on twin myth reasoning exists to affirm the equality and dignity rights of complainants and to encourage reporting of sexual assault.[35]

20. The court below also relied on problematic stereotypes about women who consume alcohol, suggesting that the complainant's "marked departure" in behavior was consistent with her

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[31] BCPC Decision, at paras. 52-54.
[32] See *JC,* at para. 100.
[33] BCCA Decision at paras. 53-55.
[34] *Goldfinch,* at para. 43.
[35] *Goldfinch,* at para. 43.

increased intoxication, rendering her earlier conduct unreliable in assessing credibility.[36] This type of reasoning implicitly plays to troubling stereotypes about women who consume alcohol, including that they are "responsible for the consequences they suffer; sexually promiscuous or indiscriminate in their sexual choices; and more likely to lie about rape."[37] These stereotypes are compounded for Black, Indigenous,[38] and racialized women, trans and non-binary individuals.

iii. Application of the Rule must reflect the law of consent

21. In sexual assault prosecutions, trial judges' credibility assessments are typically made in relation to the key issue of consent. A reviewing court's analysis of "common-sense" assumptions that underpin credibility findings on that issue cannot be divorced from the legal principles of consent. If the focus on consent is not scrupulously maintained, the resulting analysis will be skewed and incomplete.

22. As Parliament has directed and this Court has repeatedly explained, consent is the "voluntary agreement of the complainant to engage in the sexual activity in question," which involves "particular behaviours" and is tied to the specific context in the case.[39] Consent must be freely given[40] and "specifically directed to each and every sexual act."[41] Canadian law does not recognize "implied consent"[42] or "broad advance consent."[43]

23. By way of example, the reviewing court's application of the Rule in assessing the trial judge's credibility findings failed to consider the law of consent. The BCCA seemed to rely on an

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[36] BCCA Decision at para. 52.
[37] Elaine Craig, "Sexual Assault and Intoxication: Defining (In)Capacity to Consent" (2020) 98 Can Bar Rev 70 at pp. 105-106. See also Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22 Canadian Journal of Women and the Law, pp. 435.
[38] Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1a* (Vancouver: Privy Council, 2019) at pp. 648-650; Tracey Lindberg, Priscilla Campeau, and Maria Campbell, "Indigenous Women and Sexual Assault in Canada" (2012) In Sheehy, E. A. (Ed.), *Sexual Assault in Canada: Law, legal practice and women's activism.*
[39] *Criminal Code,* R.S.C., 1985, c. C-46, Section 273.1(1) CC; see also *R. v. Kirkpatrick,* 2022 SCC 33, at para. 40.
[40] *Ewanchuk* at para. 36.
[41] *R. v. J.A,* 2011 SCC 28 [*J.A.*] at para. 34.
[42] *Ewanchuk* at para. 31.
[43] *J.A.,* at para. 34.

impermissible "implied consent" approach by suggesting that the complainant could well have agreed to further sexual activity after agreeing to some sexual activity in the back seat. The court did not consider whether the respondent took reasonable steps to ascertain consent when there was a "progression of sexual activity."[44] While the defense of mistaken belief in communicated consent was not explicitly raised, this Court's guidance as to the need to take reasonable steps has resonance in the circumstances of this case.[45] The trial judge referenced this Court's decision in *R. v. Barton* and properly considered whether reasonable steps were taken to ascertain consent by the respondent given the increasingly invasive nature of the sexual activity, and the fact that the respondent and complainant were unfamiliar with each other, increasing the risk of miscommunications.[46]

24. When reviewing a trial judge's credibility findings in relation to consent, the application of the Rule must conform to the meaning of consent, including whether the respondent took reasonable steps to ascertain consent. By focusing on whether penile penetration occurred, the court below obfuscated the consent analysis and the importance of inquiring about whether the respondent took reasonable steps to ascertain consent. This approach could lead courts to rely on assumptions that are wrong in law, such as passivity and silence being equated to consent[47] or that "women can be taken to be consenting unless they say 'no'".[48]

25. Clarifying the application of the Rule will help to guard against both inconsistent appellate review and potentially destabilizing effects on verdicts in sexual assault cases.

PARTS IV AND V – SUBMISSIONS ON COSTS and ORDER SOUGHT

26. The Interveners seek no orders, including as to costs, and ask that no costs be awarded against them.

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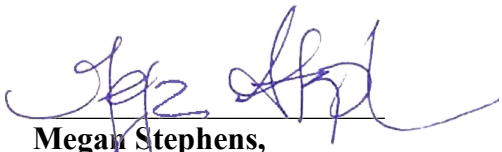
[44] BCCA decision at para. 51.
[45] BCPC decision at para. 149.
[46] BCPC decision at paras. 148-150; *Barton* at para. 108.
[47] *Barton* at para. 105, referring to *R. v. Cornejo*, 2003 CanLII 26893 (ON CA), at para. 21.
[48] *Barton* at para. 105.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May 2023.

Per:



Megan Stephens,
Humera Jabir, and Roxana Parsa

Counsel for the Interveners,
West Coast Legal Education and Action Fund Association and
Women's Legal Education and Action Fund Inc. (LEAF)

PART VII – AUTHORITIES

Caselaw

No.	Authority	Paragraph Reference
1.	*Barendregt v Grebliunas*, 2022 SCC 22	10
2.	*Bright v. R.*, 2020 NBCA 79	5
3.	*Housen v Nikolaisen*, 2002 SCC 33	10
4.	*R. v. A.R.J.D.*, 2018 SCC 6	6
5.	*R v Barton*, 2019 SCC 33	6, 12, 23, 24
6.	*R. v. Cepic*, 2019 ONCA 541	5, 6
7.	*R. v. Cornejo*, 2003 CanLII 26893 (ON CA)	24
8.	*R. v. D.D.*, [2000] 2 S.C.R. 275	6
9.	*R. v. D.R.*, 2022 SCC 50	6
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Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
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	Code criminel, L.R.C. (1985), ch. C-46	s.273.1(1)