“Noticing” Intersectionality in Sexual Assault Trials: The Influence of Feminist Organisations on the Barton Decision

by

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ABSTRACT

In what some might consider to be a ground-breaking decision, the Supreme Court of Canada (SCC), in the case of *R v Barton*,[1] took judicial notice of the fact that myths, stereotypes and discriminatory practices which operate against sexually assaulted women within the Canadian criminal justice system become compounded when the woman in question is Indigenous and more so, when the Indigenous woman is a sex worker. Given the circumstances of the case, several feminist organisations filed factums on appeal as interveners prior to the SCC's decision.

This thesis aims to explore the intersectional arguments of the feminist interveners vis-a-vis their influence on the decision in *Barton*, as well as possible impact(s) the reasoning of the SCC could have within the justice system, going forward. In achieving this aim, I engage the methodology of doctrinal research. I also interview some lawyers who acted as counsel for intervening organisations at the SCC and experienced the dynamics of the case from a close vantage point. The theoretical approach adopted is Indigenous feminism, given the intersectional nature of the *Barton* dynamics.

The conclusions drawn and recommendations made following the results of the research are crucial in critical assessments of the *Barton* decision, for lawyers, sexual assault complainants, and the criminal justice system. Most importantly, they are crucial for Indigenous women, who have for too long, had to deal with multiple layers of discrimination within the Canadian society and the criminal justice system as a consequence of the intersection between their race and their gender.

Keywords: Barton, Sexual Assault Trials, Indigenous women, Interveners, Intersectionality

[1] *R v Barton*, 2019 SCC 33 [*Barton*].

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DEDICATION

For the Almighty God, “I Am Who I Am,” my fountain of wisdom and pillar of strength.

For my parents, Captain Suona-Obiate Offor Rtd. (NN) and Mrs. Furo Oby Offor whose prayers, words of encouragement, mental support, and strong emotional presence have kept me grounded through my entire academic journey.

For my brother, Ekituate Daniel Offor, for whom I stay motivated even in the face of challenges.

For my grandmothers, the most beautiful epitomes of feminine strength and power.

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For all missing and murdered Indigenous women and girls whose spirits must never be forgotten.

For all minority women whose lights will never be dimmed by colonial and post-colonial oppression.

For social justice and the strife for an equal and equitable society.

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CHAPTER ONE

SETTING THE STAGE

1.0 INTERVENTION, INTERFERENCE, AND INFLUENCE: AN INTRODUCTION

The development of legal realism in the early 20th century challenged the formalist narrative that judicial decisions are arrived at only by judges' application of legal reasons to the facts of cases in a rational, mechanical, and deliberative manner.[1] Legal realists argue that judges often make decisions under the influence of extraneous factors, whatever those factors might be. The realist ideology becomes relevant when we consider the controversies which led to the Supreme Court of Canada's (SCC) recent decision in *R v Barton;*[2] a decision which mirrored the feminist theory of intersectionality within the context of the complainant's Indigeneity. Reiterating the Alberta Court of Appeal's (ABCA) position, the SCC took judicial notice of the fact that myths and stereotypes which operate against sexually assaulted women within the Canadian justice system, become compounded when the woman in question is Indigenous, and more so, when the Indigenous woman is a sex worker.

At the SCC, the defendant/appellant argued that the ABCA's position was unduly influenced by extraneous factors. By extraneous factors, the defence meant the submissions of the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund (LEAF), which acted as joint interveners in the case. In the defence's words, "the appellant suffered considerable prejudice from the actions of the joint interveners and the treatment of their submissions by the ABCA." They further argued that the ABCA allowed the interveners to expand the points in issue when it accepted submissions which conflicted those of the Crown and defence on appeal.[3] One of those submissions was that the repeated references to the Indigenous complainant as a "prostitute" and "Native girl" caused significant prejudice at the trial level and exacerbated the trial judge's disregard for section 276 of the *Criminal Code*.[4] In essence, the defence was saying that but for the interveners' 'interference', the ABCA might not have considered certain 'extraneous' issues, the outcome of the appeal might have been different, and the SCC would not have had to address them, with the input of even more feminist interveners.

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[1] Shai Danziger et al, "Extraneous Factors in Judicial Decisions" (2011) 108(17) Proc Natl Sci USA < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3084045/ > [perma.cc/NFJ8-K27V].
[2] 2019 SCC 33 [*Barton*].
[3] *R v Barton*, 2019 SCC 33 (Factum of the Appellant, Bradley David Barton) at para 44 [Appellant Factum].
[4] The current version of the *Criminal Code*, RSC 1985, c C-46; Section 276 was enacted in the 1992 amendment [*Criminal Code*].

This thesis is thus, geared towards (a) analysing the extent of influence—if any—that feminist organisations had on the *Barton* decision at the appeal courts; (b) determining whether if such influence existed, it caused unfairness to the defendant/appellant; and (c) projecting possible impacts that the SCC's "intersectional" decision could have for sexual assault trials, particularly those involving Indigenous complainants, going forward. Achieving this aim will require that four questions be answered:

1. How did we get here— where the SCC takes judicial notice of the prejudices associated with being a female Indigenous sexual assault complainant?
2. To what extent did the intersectional analysis of the feminist organisations influence the decision of the SCC?
3. Did these organisations even get their analysis on intersectionality right?
4. How might the *Barton* decision influence future sexual assault trials?

By way of introduction, and given the subject matter of this thesis, a good place to start will be a discussion of the practice of intervention in appellate courts within the Canadian justice system in contexts which directly border on the research aim and questions. I shall, thereafter, outline the methodological and theoretical approaches intended to be employed through the course of the research. I shall conclude this chapter with a thesis road map, to broadly explain the trajectory that subsequent chapters will take and set the tone for the entire research project.

1.1 THE PRACTICE OF INTERVENTION AT APPEAL COURTS IN CANADA

Deeply entrenched in the procedural makeup of Canadian courts of appeal and the SCC, is the practice of intervention— a partial shift from the traditional adversarial legal procedure in which disputes are resolved by an impartial adjudicator after a presentation of competing arguments by the parties directly involved in the dispute.[5] The practice allows third parties who have some interest in the issues raised in a trial to put before the courts, submissions on legal issues which align with their interests.[6] I refer to the "shift" as partial because the courts are still believed to be conscious of the need to preserve the core of the adversarial nature of the adjudicatory process—which is, that decisions are made having weighed the arguments of direct

[5] Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48(3) Osgoode Hall LJ at 384 [Alarie & Green, "Interventions at the Supreme Court"].
[6] *Supreme Court of Canada Rules* 2002-156, r 57(2) [*SCCR*].

parties to the case, and no one else. Thus, the allowance to present submissions before the court, does not give interveners 'party' status; they are merely *amicus curiae*, friends of the court.

Summarily put, the rules of intervention as developed by the courts require that interested parties in both civil and criminal appeals seek leave of the court to intervene, by filing a motion and an attached affidavit.[7] When leave is granted, interveners are limited to a brief factum and sometimes, an appearance at the hearing of the appeal.[8] The only exception to the need for leave is in cases where constitutional questions are stated by the court; in such cases, federal and provincial attorneys general and territorial justice ministers have the power to intervene as of right.[9] In reviewing applications for leave to intervene, courts must consider the interest of the applicant in the questions raised and the usefulness of the proposed intervention to the court.[10] Interested parties must thus, (a) describe their interest in the proceeding, as well as any prejudice they would suffer if their intervention were denied;[11] and (b) identify the position they wish to support with respect to the proceeding, and explain how their submissions are uniquely relevant to it.[12] The SCC Rules also state that interveners cannot raise any new issues to the proceeding or make any statement concerning the outcome of the appeal (unless otherwise ordered by a judge).[13]

The rules are practically the same at provincial courts of appeal,[14] the major difference being that unlike Manitoba's provincial court of appeal rules,[15] some provinces' rules are silent on conditions that interveners must fulfil to be granted leave to appeal. This does not mean, however, that no conditions for leave exist in such provinces. For instance, in Ontario, case law has since established that the proper matters to be considered in determining whether to grant leave to intervene are: (a) the nature of the case; (b) the issues which arise; and (c) the likelihood

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[7] *Ibid*, r 57(1).
[8] Alarie & Green, "Interventions at the Supreme Court", *supra* note 5 at 383.
[9] Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act, Art. 5.1.3 < https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch16.html#section_5 > [perma.cc/2QMM-SE5Q] [Guideline of the Director].
[10] *Ibid*; See also *Bazley v. Children's Foundation et al.*, (1996) 75 B.C.A.C. 177 at 180.
[11] *SCCR*, *supra* note 6, r 57(1).
[12] *Ibid*, r 57(2).
[13] *Ibid*, rr 59(3) and 42.
[14] *Manitoba Court of Appeal Rules* 2021- M.R. 35, rr 46.1(1) [MCAR]; *Alberta Rules of Court*, 2010- AR 124, rr 14.37(2) and 14.58; *Ontario Rules of Civil Procedure* 2021- OR 383, r 13.02.
[15] *Ibid.*

of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.[16] A comparison of these conditions with the SCC rules stated above would reveal substantial similarities. It has in fact, been said that [whether at the SCC or provincial courts of appeal], the governing principles for leave to intervene as a friend of the court are "largely uncontroversial."[17]

While the rules of intervention and the mechanism by which it operates are quite clear, it is doubtful whether the same can be said for the motivation behind the courts' growing liberalism towards it. Although the practice has existed for a long time, the past two decades at the SCC particularly, have seen a progressive increase in the SCC's grant of leave to intervene. Between 2015 and 2018 alone, there was a sixty-three percent rate of intervener participation, with a yearly average of 252 – a visibly upward trend from the 182 yearly average between 2000 and 2008.[18] In total, an average of fifty-five percent of appeals to the SCC between 2000 and 2020 have featured at least one intervening factum. This increase may suggest the perceived usefulness of intervenors in the eyes of the Supreme Court of Canada. However, as noted below, other explanations have been proffered to account for this increase.

Also unclear and worthy of consideration are the constraints on intervention. Particularly, at what point do we draw the line, such that "intervention" (mere submissions of third parties and not arguments for one side or another) does not transmogrify into "interference" (where interveners are accorded direct party 'privilege')?[19] How much influence do interveners generally have on court decisions? Is intervener influence even quantifiable in the first instance? The answers to these questions are relevant not just because they border on the dynamics of the *Barton* decision and the subject matter of this thesis; but because with the growing rate of intervener participation, if clear boundaries are not established, there is the worry that we might gradually head to a point where the traditional adversarial process is completely taken over by the interveners and intervention.

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[16] *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd.*, (1990) 74 OR (2d) 164 (CA) at 167.
[17] *Jones v Tsige*, (2011) 106 OR (3d) 721 (CA) at para 20.
[18] Geoffrey Callaghan, "Intervenors at the Supreme Court of Canada" (2020) 43(1) Dal LJ at 2-3 < https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1457&context=dlj > [perma.cc/7RGZ-25HX] [Callaghan, "Intervenors at the Supreme Court of Canada"].
[19] Literally, "intervention" and "interference" are considered synonyms. In this thesis, however, "Interference" is used to imply situations where interveners act outside of their powers such that they "interfere" with the appeal process and in that sense, cause unfairness to both the process and the parties.

1.1.1 Issue One: The Courts' Growing Liberalism – What Purpose do Interveners Serve?

Callaghan has suggested that there is little information on the role that the SCC justices think interveners play in the adjudicative process, and even the existing information is conflicting;[20] the motivations for and consequences of the practice are just not clearly understood.[21]

In search of some clarity, a 2010 study by Alarie and Green examining SCC decisions between 2000 and 2008, broadly identified three possible motivations for the SCC's grants of leave to intervene, and functions that the practice may satisfy.[22] The first motivation identified was *Accuracy*, the possibility that "hearing from interveners might provide objectively useful information to the court *(i.e.*, interveners might promote the "accuracy" of the court's decision making). The second was *Affiliation*, the possibility that "the practice of intervention allows interveners to provide the "best argument" for certain partisan interests that judges might want to "affiliate" or be associated with. The third motivation was *Acceptance*, the possibility that **"**interventions are allowed mainly (if not only) so that intervening parties feel they have had their voices heard by the court and the greater public, including Parliament, regardless of the effect on the outcome of the appeal *(i.e.*, the court might be promoting the "acceptability" of its decisions by allowing for an outlet for the expression of strongly held views for or against a certain outcome).[23] The researchers concluded that the accuracy rationale provides the best explanation for the liberal approach the SCC has adopted in granting leave to interveners.[24]

In Matten's view, the usefulness of interveners to trial and appeal processes is three-pronged – substantive, procedural and symbolic. In the substantive sense, interveners can elaborate certain points of law, or point out jurisprudential patterns, in ways that most parties are not equipped to do. Procedurally, interveners remind the court of the broader societal impact that their decisions will have, serving as intermediaries between the court, the parties and the society. Lastly, the practice symbolizes that the judicial process is receptive to diverse views.[25]

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[20] *Ibid* at 3.
[21] Alarie & Green, "Interventions at the Supreme Court", *supra* note 5 at 381.
[22] *Ibid* at 383.
Ibid at 384.
[24] *Ibid* at 406; Callaghan, "Intervenors at the Supreme Court of Canada", *supra* note 18 at 9.
[25] Carissima Mathen "The Expanding Role of Interveners: Giving Voice to Non-Parties" (2000) Manitoba: Law Society of Manitoba Isaac Pitblado Lectures at 105.

The David Asper Centre for Constitutional Rights, in its *Barton* intervening factum suggested that in addition to proffering different legal perspectives than those put forward by the parties, interveners play a balancing role in the appeal process. According to the David Asper Centre, it has often been through the submissions of interveners such as LEAF that the biases respecting women, youth and sexual assault complainants have been brought to the attention of the courts; and the appropriate balance, including the overall fairness of the proceedings, has been reinforced.[26]

From the lens of judges, Sopinka J stated in *R. v. Morgentaler*[27] [and this aligns with Alarie and Green's position], that the purpose of intervention is "to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal." In *Pederson v. Alberta,*[28] the ABCA suggested that even if all other factors were in favour of the intervention, there is no use granting leave to appeal if the proposed intervener will not contribute usefully to the appeal with fresh perspectives.[29] It was for this lack of "fresh perspective" that the Federal Court of Appeal (FCA), in the 2015 case of *Ishaq v Canada (Minister of Citizenship and Immigration) [Ishaq],* dismissed six motions for intervention by several feminist organizations. The basis of the FCA's decision was that none of the organizations had established that they would "advance different and valuable insights and perspectives that will actually further the court's determination of the matter."[30]

Brodie proffers an interesting perspective, opining that the SCC's liberalization of the practice of intervention has nothing to do with any adjudicatory purpose they might serve, but is merely a strategy to bolster the legitimacy of the court's activist turn as "defender of disadvantaged groups," and justify the "unconscionable power grab" which it initiated in the post-*Charter* era. In his words:

> Why did the Court adopt the position of lobbyists so decisively? It is important to recall the broader background to this development. During the

[26] *R v Barton,* 2019 SCC 33 (Factum of the David Asper Centre for Constitutional Rights) at para 9 [DACCR Factum].
[27] [1993] 1 SCR 462.
[28] 2008 ABCA 192.
[29] *Ibid* at para 9.
[30] 2015 FCA 151. The Court relied on the court's decision *in Canada (Attorney General) v Pictou Landing First Nation* [Pictou] 2014 FCA 21.

> early and mid-1980s the Supreme Court used its power of judicial review more actively than it ever had before. It staked out bold new ground using the Charter, placing no significant limits on its own powers to review government actions and replace the judgment of government officials with its own. No court can do such a thing for long without the support of political interests…so the Supreme Court found these groups to be useful allies in legitimating its extraordinary activism. By accommodating interest groups, the Court blunted their potentially damaging criticism. Allying itself with 'disadvantaged groups' furthermore provided a justification for what otherwise might appear to be an unconscionable power grab.[31]

Brodie might have used more direct and assertive—almost accusatory— language, but when his opinion is placed side by side Alarie and Green's "Acceptance" theory, the possible motivation they suggest, is the same: a quest for legitimacy. As an aside, while Brodie's point may be valid, it should be noted that not all interveners are activists or equality seeking. It is arguable that there are just as many corporate interveners as there are equality seeking interveners before the SCC. Corporate interveners have often made submissions at the SCC in cases like *Orphan Well Association v. Grant Thornton Ltd.*,[32] *Reference re Genetic Non-Discrimination Act*,[33] and *Reference re Environmental Management Act*.[34]

Considering the different views expressed and going back to Callaghan's suggestion that the already little information existing is conflicting, it seems to me that the issue is less of the existence of conflicting information, and more of the fact that interveners can, and do serve a multiplicity of purposes. It would be unrealistic to expect that the SCC's generous acceptance of the practice must be motivated by one reason alone. These different motivations can co-exist even though some might be stronger than others. For instance, while the legitimacy argument might be true, it is difficult to deny the gap that interveners fill as intermediaries between the

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[31] Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002) at 47-48; See also Callaghan, "Intervenors at the Supreme Court of Canada", *supra* note 18 at 12.

[32] [2019] 1 S.C.R. 150. Some corporate interveners in the case include Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association.

[33] 2020 SCC 17. Canadian College of Medical Geneticists intervened in this case.

[34] 2020 SCC 1. Some corporate interveners in the case include Canadian Energy Pipeline Association, Trans Mountain Pipeline ULC, Enbridge Inc., Railway Association of Canada, Explorers and Producers Association of Canada, Canadian Fuels Association, Suncor Energy Inc., Imperial Oil Limited, Husky Oil Operations Limited, Cenovus Energy Inc., Canadian Natural Resources Limited, and Canadian Association of Petroleum Producers.

courts and the public, especially as the outcome of criminal trials affect not just the defendant, but the public (the State).

Regardless, what is more concerning than the role interveners play or why the courts are so friendly towards them, is the existence—or not—of clear boundaries, so that interveners remain friends of the court and do not become parties themselves, interfering with the fairness and integrity of the adjudicatory process.

1.1.2 Issue Two: Where Intervention Stops and Interference Begins

> The 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 Neve*, [1996] 8 WWR 294 at para 16, 184 AR 359 (CA). 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.[35]

The above statement was made by the ABCA in *R v Vallentgoed*.[36] The court was clearly wary of a situation where interveners become interferers, thereby distorting the appeal process. The risk of distortion is of acute concern where the intervention might be directly or indirectly adverse to the defendant in the case. As succinctly put by Honourable Mr. Justice Jack Watson, "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."[37] The question then becomes whether and how it is possible for courts to set boundaries such that decisions are made solely based on the issues raised by the actual parties to the trial process.

In *Morgentaler*,[38] the SCC stated that the allowance to present the court with submissions does not entitle interveners to widen or add to the points in issue, not even on the ground that it is a response to an argument made by the appellant if the respondent has chosen not to raise the issue. In *Friedmann v. MacGarvie*,[39] in considering the factors weighing against granting intervener status, Honourable Madam Justice Bennett suggested that the first trick is to identify the line which divides raising new issues, from providing insight and analysis on the particular questions of law which have been identified by parties and the court. It is, therefore, safe to conclude that

[35] *R v Vallentgoed*, 2016 ABCA 19 at para 6; see also *R v JLA*, 2009 ABCA 324 at para 2.
[36] *Ibid.*
[37] *Ibid.*
[38] [1993] 1 SCR 462.
[39] 2012 BCCA 109.

once an intervener introduces new issues outside the scope of those raised by the parties to the trial, rather than merely commenting on the issues already raised, the line between intervention and interference is crossed.[40] In this regard, introducing new issues must be distinguished from raising omitted or overlooked questions of law relevant to issues which have already been identified and established by parties. Within the context of *Mortgentaler* and *MacGarvie,* the latter will not constitute interference because as opposed to widening or adding to points in issue, it is merely commenting on already established points in issue. Insofar as interveners' submissions respect the scope of the appeal as defined by the parties, then they are within the bounds of their authority.[41]

Another line between intervention and interference is that which separates outrightly and purposefully supporting the position of one party, from making principled submissions on points of law pertinent to the appeal,[42] even though those submissions may tend to support one party's position. Interveners ought not to take a position on the outcome of the appeal, but merely to enlighten the court on the points of law relevant by the issues;[43] they are granted access for the purpose of making principled submissions on legal points pertinent to the appeal and not to advocate for a particular result.[44]

In *R v Middleton,* the Ontario court of appeal suggested that intervention becomes interference when the intervener's argument focuses too heavily on factual matters specific to the case. In rejecting an application to intervene, the court stated:

> It is difficult to conceive how meaningful submissions could be made on this point without reference to factual scenarios that would, implicitly if not explicitly, touch on the particular facts of the case. If so, the appellant would be faced with two, possibly divergent, sets of arguments dealing with the fitness of sentence. That is not, in my view, the function of an intervener in a criminal proceeding. This approach does not conform to the types of submissions interveners are permitted to make during a criminal proceeding.[45]

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[40] It is worthy of note that the Supreme Court Rules permit a judge to allow an intervener to supplement the record with new evidence or "adduce further evidence" to allow an intervener to raise a new issue. See *SCCR, supra* note 6, r 59(1)(b).
[41] Guideline of the Director, *supra* note 9, art 5.3.
[42] See *Friedmann v MacGarvie*, 2012 BCCA 109 at para 28.
[43] Guideline of the Director, *supra* note 9, art 5.3.
[44] See *Carter v Canada (Attorney General)*, 2012 BCCA 502 at para 15; Appellant factum, *supra* note 3 at 13.
[45] *R v Middleton*, 2010 ONCA 610 at paras 9-10.

A possible definer which researchers are yet to consider is what I term "the ratio-obiter test." In my view, what we could look out for in determining whether the intervention-interference line has been crossed is whether the statements of the court which particularly reflect intervener submissions constitute the ratio of the decision or the obiter. If parts of the decision which appear to mirror intervener submissions constitute only obiter remarks, then it might be safe to conclude that there has been no interference with the appeal, and vice versa. The reason for this distinction is that the implications of the ratio and obiter are traditionally different; while the ratio is crucial, being the reason for the decision and the actual ruling of the court on points of law, obiter remarks are just remarks made by the courts which do not affect the outcome of the case. A contrary argument may be put forward, however, when we consider the SCC decision in *R v Henry.*[46] In *Henry,* the SCC rejected a strict dichotomy between the ratio and obiter. According to the SCC, courts should start from the premise that obiter dicta from the SCC is binding; and the proximity between the ratio and the obiter should determine the weight to be attributed to the obiter.[47] If we go by the logic in *Henry,* the ratio-obiter test may not work, because then, it would not matter whether the parts of the decision which appear to mirror intervener submissions constitute ratio or obiter remarks— the line between intervention and interference would be crossed, regardless.

Another possible test could be a variant of the Tort Law "but-for test," necessitating that we ask, "but for the submissions of the intervener, would the court have arrived at the decision?" If the answer is in the negative, then it might be said that there has been an interference in the trial process.

Ultimately, it is left to the judges to control the entire process, so that the line that separates intervention from interference is not crossed. In the words of Mr. Justice James MacPherson of the Ontario court of appeal,

> As a judge, you can structure the role played by interveners. For example, interveners can be directed in terms of the time they are given in your appellate court, or instructed to only submit a factum but not do an oral argument. These are all ways to ensure that interveners don't take over a

[46] 2005 SCC 76.
[47] *Ibid* at paras 52 to 59.

> case. I usually would be more inclined to accommodate interveners, than to restrict them.[48]

Flowing from the above is the question of how much influence, if any, interveners do have on court decisions. Little information, if not none, exists in this regard. Even the few researchers who have examined the topic, have found it difficult to reach a conclusion. Alarie and Green, for instance, concluded at the end of their study that while we can suggest possible motivations for the SCC's allowance, it is generally still hard to say exactly how much influence interveners have on the SCC's decisions.[49] The difficulty is not surprising, especially because matters like this are subjective and consequently, the lines are often blurred. If an intervener's submissions align with the arguments of either party, for instance, and the court's decision aligns with that argument which is common to the intervener and the said party, how can we say whose submission exactly influenced the court's decision? Maybe researchers have not looked too deeply into it for concern that it would involve a lot of speculation on the thought processes of judges; not to mention the difficulty that establishing a pattern of reasoning may entail, given the thousands of cases that have involved intervention and interveners. For present purposes, however, we are concerned specifically with possible intervener influence in the case of *Barton.*

1.2 RESEARCH METHODOLOGY

The methodologies adopted are doctrinal and qualitative legal research methods. I conduct a literature review of relevant primary and secondary literature relating to the subject matter; and employ case law, legislation, journals, textbooks and *Barton* intervening factums to analyse my research questions and draw relevant conclusions. Databases like the University of Manitoba online library, CanLii, and the Supreme Court of Canada archives are the key sources of the literature employed.[50]

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[48] Peter Dostal and Jessica Gin-Jade Chan," Principle and Imagination in Judging: A Conversation with Mr. Justice James MacPherson" (2006) 15 Dal J Leg Stud 273 at 275 < https://commentary.canlii.org/w/canlii/2006CanLIIDocs17?zoupio-debug#!fragment/zoupio-_Toc3Page2/(hash:(chunk:(anchorText:zoupio-_Toc3Page2),notesQuery:'',scrollChunk:!n,searchQuery:'role%20of%20interveners',searchSortBy:RELEVANCE,tab:search)) > [perma.cc/TDF5-EPP5].

[49] Alarie & Green, "Interventions at the Supreme Court", *supra* note 5 at 406; Callaghan, "Intervenors at the Supreme Court of Canada", *supra* note 18 at 9.

[50] Other databases like HeinOnline, JSTOR and Lexis Nexis were also employed; in addition to the Google Advanced Search Engine.

Qualitative data was collected by interviewing lawyers who acted as counsel for interveners in the *Barton* case at the SCC. My selection of interviewees, while limited in scope, was purposive, as it includes front liners who experienced the SCC *Barton* appeal from a close vantage point. In addition to the doctrinal research and analysis, these interviews supplement insights derived from my personal analysis of *Barton*, as well as relevant primary and secondary literature. Importantly, they help anchor my reflections on the research questions to be answered.

1.3 THEORETICAL APPROACH

The primary theoretical approach adopted is "Intersectional Feminism." Intersectional feminism is just one of the many strands of the feminist legal theory, a theory that has "always been informed by, and grounded in, the need to engage strategically with law to improve social conditions for women," particularly minority women.[51] It is particularly relevant to this thesis because the factums of the feminist interveners, as well as the ABCA and SCC's decisions in *Barton* appear to mirror the theory.

Recourse is made secondarily to the human rights theory, specifically within the context of Indigenous oppression and marginalization within Canadian society and justice system.

1.4 CONCLUSION: THESIS ROAD MAP

In this chapter, I have given a background to the thesis, and clearly outlined the research questions, as well as the research methodology and theoretical approaches to be adopted in search of answers to those questions. I have also addressed pertinent issues relating to the concept and practice of intervention within contexts which are relevant to understanding the subject matter of the thesis and which will be useful for more in-depth analyses of issues bordering on the research questions in latter parts of this work.

Chapter two will comprise of a literature review of primary and secondary material relevant to Intersectionality and Canadian sexual assault laws within the context of the issues that were adjudicated in *Barton*. Specifically, I shall consider the origin of intersectionality, its core ideas, possible gaps in the theory, and how the theory fits into the dynamic of Indigeneity and social strata – to better appreciate the events in *Barton.* I shall also discuss the social, legislative

[51] Boyd, S.B. and Parkes, D., "Looking Back, Looking Forward: Feminist Legal Scholarship in SLS" (2017) 26(6) Soc & Leg Stud at 735-756.

and judicial history behind section 276 of the *Criminal Code,* as well as the response of the criminal justice system vis-a-vis its treatment of sexual assault complainants, post-section 276. In all these, I shall, where necessary, identify gaps that need to be filled and questions that need to be answered as far as these topics are concerned.

Chapter three will be divided into two parts. Both parts will be geared towards understanding the backstory to the interveners' submission that the complainant's Indigeneity caused her to suffer an extra layer of prejudice in *Barton*. Part A will historically analyse the experiences of Indigenous women with the Canadian justice system up until present time, while Part B will cover the development of the feminist movement in Canada (including Indigenous feminism) and the relationship feminist organizations have had with the SCC as interveners. In Part B, I shall narrow the conversation to sexual assault and other gendered offences, specifically considering what ways, if any, that the feminist movement has influenced legislative and policy change in that regard.

In chapter four, I shall summarise the facts and decision of the court of appeal and the SCC in *Barton*; the backgrounds of the feminist interveners being considered; a synopsis of their arguments in *Barton*, especially as they relate to intersectionality; an analysis of whether the interveners got their intersectional analysis right; and the controversy surrounding the courts' decision.

Finally, in chapter five, I shall draw conclusions on the answers to my research questions identified in this chapter. To help anchor my reflections on these questions, I shall analyse the results of the qualitative interviews which I conducted with lawyers who acted as counsel to interveners in *Barton*. The interview results will form a core part of the findings of this research, as they will allow for an objective perspective to otherwise subjective considerations.

Giving that Barton has now been retried and convicted, a post-script will follow chapter five, detailing the current state of events as at the time of completion of this thesis.

CHAPTER TWO
LITERATURE REVIEW

2.0 INTRODUCTION

In chapter one, I laid the foundation for this thesis by discussing issues pertaining to the practice of intervention in Canadian appellate courts. I also stated the thesis questions, as well as the methodological and theoretical approaches employed in finding answers to those questions.

In this chapter, I shall be reviewing literature on issues which are pertinent to the *Barton* decision and will be relevant for subsequent discussions– issues like (a) myths and stereotypes against complainants which pervade sexual assault trial processes vis-à-vis the admission of complainants' sexual histories in evidence; (b) the effectiveness of legislation which have been emplaced to address those myths and stereotypes; (c) the complexity which might ensue in particular, when the complainants are Indigenous; and (d) as a corollary, the feminist theory of Intersectionality and the place of Indigenous women within that theory. The aim is to establish what existing literature says and identify what is missing; what makes the *Barton* conversation relevant.

The key role that the interaction between gender and race plays in this research, and the ensuing discussions, necessitate conversations on the gendered and racialized nature of sexual assault. I will thus, examine the gendered nature of sexual assault in section 2.1 below; and in later parts of this chapter, discussions will follow on how gender and race interact to exacerbate susceptibility to sexual assault.

2.1 THE GENDERED NATURE OF SEXUAL ASSAULT

Sexual Assault as Rotenberg puts it, is a "violent crime,"[1] punishable under the *Criminal Code* of Canada.[2] Beyond a crime, however, it is a menace which is deeply rooted in societal issues. Hodgson and Kelley opine that sexual assault "…pervades a 'sexual mystique' that is rooted in traditional, historical, cultural and legislative responses."[3] While these issues and responses will in some regards, be addressed in latter parts of this chapter, it must first be

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[1] Cristine Rotenberg, "From Arrest to Conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014" (26 October 2017), online: < https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm > [perma.cc/D9KS-Y869] [Rotenberg, "From Arrest to Conviction"].

[2] The current version of the *Criminal Code*, RSC 1985, c C-46; S. 276 was enacted in the 1992 amendment [*Criminal Code*].

[3] Hodgson, James & Debra Kelley, "Sexual Violence: Policies, Practices, and Changes" in James F. Hodgson & Debra S. Kelley, eds, *Sexual Violence: Policies, Practices and Challenges in the United States and Canada* (London: Praeger, 2002) at 2.

established that they are in many ways, gendered in nature, with (a) women and girls being on the receiving end; and (b) men almost always being the perpetrators. Busby thus, describes sexual assault as "a pervasive, systemic method of creating and sustaining male dominance over women."[4] In Ubell's words, sexual assault is "a persistent form of violence against women" which is rooted in gender inequality.[5] Rotenberg calls it a "gendered violent crime;"[6] Johnson stresses that it is, in fact, the most gendered of crimes[7] and Elaine Craig has noted that women are more likely to be sexually assaulted by men during their lifetime than to obtain a university degree.[8] To statistically contextualize the situation, the Ontario Ministry of the Status of Women estimates that one in three Canadian women will experience sexual violence at some point during their lifetimes;[9] and the Research and Statistics Division of the Department of Justice Canada states that as opposed to 5 per 1000 men, the rate of sexual assault victimization per 1,000 women is 37 incidents,[10] that is, according to Conroy and Cotter, an estimated 553,000 Canadian women yearly.[11] Sinha further writes for Statistics Canada in a 2013 publication that men are responsible for 83% of police-reported violence committed against women.[12]

It will, therefore, not be out of place to employ the pronouns, "she" and "her" to refer to victims of sexual assault or complainants in sexual assault trials, going forward, while employing

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[4] Karen Busby, "Sex Was in the Air': Pernicious Myths and Other Problems with Sexual Violence Prosecutions" in Elizabeth Comack, *Locating Law: Race/Class/Gender/Sexuality Connections* (Halifax: Fernwood Publications, 2014) at 257 [Busby, "Sex was in the Air"].

[5] Rose Mary Lynn Ubell, "Myths and Misogyny: The Legal Response to Sexual Assault" (2018) at 1, online (pdf): *Master of Studies in Law Research Papers Repository* < https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1005&context=mslp > [perma.cc/7SWM-KFQ2] [Ubell, "Myths and Misogyny].

[6] Rotenberg, "From Arrest to Conviction," *supra* note 1.

[7] Elizabeth Sheehy, *Sexual Assault in Canada* (Ottawa: University of Ottawa Press, 2012) at 613 [Sheehy, *Sexual Assault in* Canada].

[8] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018) at 219 [Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*].

[9] Ubell, "Myths and Misogyny," *supra,* note 5 at 1. Ontario Ministry of the Status of Women, *Statistics: Sexual Violence* (Toronto: Government of Ontario) accessed 01 August 2017 < http://www.women.gov.on.ca/owd/english/ending-violence/sexual_violence.shtml. > [perma.cc/HWJ4-Q7H2].

[10] Statistics Canada, "Just Facts: Sexual Assault" (2014) at 1, online (pdf): *Department of Justice* < http://publications.gc.ca.uml.idm.oclc.org/collections/collection_2018/jus/J23-4-4-2017-eng.pdf > [perma.cc/8C8N-XRP3].

[11] Chris Bruckert & Tuulia Law, *Women and Gendered Violence in Canada: An Intersectional Approach* (Toronto: University of Toronto Press, 2018) at 109 [Bruckert & Tuulia, *Women and Gendered Violence in Canada: An Intersectional Approach*].

[12] Maire Sinha, "Measuring violence against women: Statistical trends" (25 February 2015) at 10, online (pdf): *Statistics Canada* < http://www.eapon.ca/wp-content/uploads/2016/04/Measuring-violence-against-women-Statistical-Trends.pdf. > [perma.cc/5QTS-7P2F].

the pronouns, 'he' and 'him' in reference to perpetrators of the offence. This is not to say that men and boys do not experience sexual assault victimization – in fact, many researchers, from Brennan to Perrault have reported that a disturbing percentage of men are victims of sexual assault yearly[13] – it is rather, to say that women experience victimization at a level that is disproportionate to the experiences of that of men.

2.2 MYTHS, STEROTYPES AND SECTION 276 OF THE CRIMINAL CODE

McDonald and Tijerino record that in the past three decades, Canada has witnessed dramatic changes to the criminal justice system's response to sexual assault, through legislative reform, policy and judicial interpretation.[14] These drastic responses have, according to Fraser, often been in response to feminist advocacy against systemic prejudices which work against sexual assault victims—the majority of which are women and girls.[15] Giving a historical background, Tang narrates that prior to the enactment of the 1983 *Criminal Code*, Canadian sexual assault laws were governed by common law principles — proof of penile-vaginal penetration, for instance, was required to establish the *actus reus* of the offence; the penile-vaginal penetration had to be forcible; the testimony of the complainant had to be corroborated; the complainant must have reported the incident immediately after its occurrence in order to be believed; and husbands could not be charged for raping their wives.[16] At this time, the offence of sexual assault was restrictively recognised as "rape." Cotter and Savage posit that these Common Law principles operated to silence, oppress and discriminate against women, who have always constituted the majority of sexual assault victims.[17]

Another area where discriminatory principles prevailed against women was the introduction of evidence of complainants' sexual histories. Busby explains that historically, there

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[13] Susan McDonald & Adamira Tijerino, "Male Survivors of Sexual Abuse and Assault: Their Experiences" (2013) at 5, online (pdf): < https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_8/rr13_8.pdf > [perma.cc/YPG9-5STD] [McDonald & Tijerino, "Male Survivors of Sexual Abuse and Assault: Their Experiences"].
[14] *Ibid*, at 5.
[15] Jennifer Fraser, *Claims-Making in Context: Forty Years of Canadian Feminist Activism on Violence Against Women* (PhD Thesis, University of Ottawa, 2014) at ii.
[16] *Criminal Code*, RSC 1983, c C-127 [*CC 1983*]; Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 Intl J Off Ther & Comp Crim 258 at 259 [Tang, "Rape Law Reform in Canada"].
[17] Adam Cotter & Laura Savage, "Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces" (5 December 2019) at 3, online: *Statistics Canada* < https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00017-eng.pdf?st=93xWnJss > [perma.cc/MV7U-WR3Q]; Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*, *supra*, note 8 at 219.

was no limitation on the admissibility or use of evidence of a complainant's sexual activities prior to that which formed the subject matter of the charge. Such evidence, however, inferred some common law-abetted myths and stereotypes which were prejudicial to complainants.[18] Common amongst these myths were the 'twin myths' that an 'unchaste' woman was (a) more likely to have consented to the sexual activity in question; or (b) less worthy of belief.[19] In *R v L.S,*[20] Justice Doherty further explained that because of the absence of limitations, defence counsel were free to adduce the 'sexual history' evidence, usually via cross-examination of complainants, and argue, relying on the inferred myths and stereotypes, that their credibility was questionable or that they most likely consented to the present sexual activity. Prior sexual activity evidence was thus, used to "blacken the character of the complainant, distort the trial process, and undermine the ability of the criminal justice system to effectively and fairly try sexual allegations."[21]

In what McDonald and Tijerino have described as the most significant legal changes,[22] the 1983 Bill c-127 *Criminal Code,* ostensibly responded to the deficiencies in the existing sexual assault laws.[23] Brennan and Taylor-Butts recall, for instance, that the new provisions replaced the offence of rape with a new offence of sexual assault which it defined as "all incidents of unwanted sexual activities, including attacks and sexual touching."[24] In essence, the determination of sexual offences no longer required penile-vaginal penetration, only that there be some sexual elements to the acts; and a spouse of a victim could be charged for sexually assaulting her.[25]

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[18] Evidence that a complainant was unchaste, for instance, would infer that she was more likely to have consented to the sexual activity in question, or that she was less worthy of belief; See Busby, *supra,* note 3 at 280-281.
[19] See Busby, "Sex was in the Air", *supra* note 4 at 280-281.
[20] *R v L.S.,* 2017 ONCA 685 at para 79; See also *R. v Brown*, 2019 NSSC 177 at para 55 [*Brown*].
[21] *Ibid.*
[22] McDonald & Tijerino, "Male Survivors of Sexual Abuse and Assault: Their Experiences," *supra* note 13 at 5.
[23] Tang, "Rape Law Reform in Canada," *supra* note 16 at 259. Some of these amendments included the abolition of the doctrines of corroboration and recent complaint, as well as the criminalisation of marital rape; Bruckert & Tuulia, *Women and Gendered Violence in Canada: An Intersectional Approach, supra* note 10 at 112.
[24] Bruckert & Tuulia, *Women and Gendered Violence in Canada: An Intersectional Approach*, *supra,* note 11 at 113. See also *CC* 1983, *supra,* note 16, s.246.1. In *R v Chase* [1987] 2 S.C.R. 293, about three years after the 1983 enactment, the SCC held that a forty-year old man who grabbed a teenage girl's breast was guilty of sexual assault; the SCC overturned the New Brunswick Court of Appeal's much earlier decision that grabbing a teenage girl's breasts was not sexual assault because breasts, just "like a man's beards," were secondary characteristics. See [1987] 2 S.C.R. 293; See Busby, "Sex was in the Air", *supra* note 4 at 267.
[25] *Ibid.*

Most noteworthy for present purposes, however, was the *Code's* "rape-shield" provision in section 246.6(1), restricting the admissibility of the sexual history evidence to three circumstances – (a) testimony by someone other than the defendant stating that it was he, and not the defendant, who committed the acts in question; (b) to give evidence of sexual activity to support a mistaken belief defence; and (c) to rebut evidence adduced by the Crown on the complainant's sexual reputation. The provision was purportedly geared towards curbing the permeation of prejudicial myths and stereotypes against complainants in sexual assault trials, but according to Busby, it changed very little;[26] defence counsel would still often introduce evidence of complainants' sexual histories to impugn their credibility and suggest the twin myths.[27] Bruckert et. al further narrate that the SCC worsened the situation in the 1991 case of *R v Seaboyer*[28], when it expanded the three already insufficient 1983 sexual history evidence limitations to include open-ended situations, ruling that the section 246.6(1) provision was unconstitutional because it infringed on an accused's right to life, liberty, and security of the person and the right to a fair trial.[29] According to Busby and Ubell, the public outrage and feminist lobbying following the *Seaboyer* decision and the open-ended situations it created, led to parliament's enactment of more restrictive "rape-shield" provisions—[30] section 276 of the 1992 Bill c-49 *Criminal Code* amendment. Before considering section 276, it is worthy of note that Bill c-49 also brought into law the affirmative consent requirement. By virtue of section 273.1 of the *Code*,[31] the "consent" element in sexual assault law was redefined to mean the voluntary agreement of the complainant to engage in the sexual activity in question, rather than, for instance, whether she offered a sufficient degree of resistance whether she consented on a previous occasion.[32]

2.2.1 Section 276 of the Criminal Code

Section 276 provides as follows:

> 276. (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the

[26] Busby, "Sex was in the Air", *supra* note 4 at 267.
[27] *Ibid.*
[28] 1991 CanLII 76 at 625 [*Seaboyer*]; *Ibid*.
[29] Bruckert & Tuulia, *Women and Gendered Violence in Canada: An Intersectional Approach, supra* note 11 at 113.
[30] Ubell, "Myths and Misogyny", *supra* note 5 at 37; Busby, "Sex was in the Air", *supra* note 4 at 281.
[31] *Criminal Code*, *supra* note 2.
[32] Busby, "Sex was in the Air", *supra* note 4 at 270.

accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or

(b) is less worthy of belief.

Conditions for admissibility

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

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

(b) is of specific instances of sexual activity;

(c) is relevant to an issue at trial; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Section 278.92 (3) further lists the factors that judges must consider in determining whether evidence is admissible under subsection (2) above, including (a) the interests of justice, including the right of the accused to make a full answer and defence; (b) society's interest in encouraging the reporting of sexual assault offences; (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or bias; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant's personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant.

Provision is also made for salient procedural rules to support the substantive. Pursuant to sections 278.93 to 278.95, where evidence of the complainant's prior sexual activities is sought to be admitted, an application in writing must be made to the court stating (a) detailed particulars

of the evidence sought to be admitted, and (b) the relevance of that evidence to an issue at trial. Upon submission of the application, if the trial judge is satisfied that the evidence is capable of being admitted under section 276 (2), a hearing must be held.[33] The hearing must be in camera; not even the jury can observe it. The complainant is also not compelled to participate.[34] Following the hearing, the trial judge must provide reasons, setting out whether any of the evidence is admissible,[35] and if any of the evidence is admissible, then (s)he must instruct the jury on the permissible and non-permissible uses of the evidence.[36] In addition, section 278.94 (2) provides that the complainant though not a compellable witness, may appear and make submissions; and pursuant to section 278.94 (3), the judge shall, as soon as feasible, inform the complainant, of her right to be represented by counsel.

2.2.2 Policy versus Reality: The Response of the Criminal Justice System to Section 276

Gluzman has asserted that section 276 exists to preserve the integrity of the administration of justice and encourage the reporting of sexual assault offences.[37] While it is difficult to fault Gluzman's view, the frame within which she conceptualizes the policy behind section 276 might be too broad for present purposes. A more specific statement of the section 276 policy is that of Elaine Craig:

> The objective of section 276 of the *Criminal Code* is to eliminate the misuse of evidence of a complainant's sexual activity for irrelevant or misleading purposes, while also ensuring that an accused's right to a fair trial is not compromised. Essentially, this involves removing any discriminatory reasoning based on gendered stereotypes about sexuality and sexual assault. This also involves providing some protection against the use of sexual history evidence to perpetuate unnecessary incursions on the dignity and privacy interests of complainants.[38]

The question then becomes, "has section 276 lived up to the policy behind it?" Craig, Busby and Dufraimont do not seem to think so. According to Craig, defence counsel have failed

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[33] *Criminal Code*, *supra*, note 2, s 278.93(1).
[34] *Ibid*, s 278.93(3) and s. 278.94(1).
[35] *Ibid*, s 278.94(4).
[36] *Ibid*, s 278.96.
[37] Helena Gluzman, "A Delicate Act of Judicial Balancing: Breathing New Life into Section 276 of the Criminal Code" (22 October 2019) at 6, online (pdf): < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472112 > [perma.cc/5P2X-QSS4] [Gluzman, "A Delicate Act of Judicial Balancing: Breathing New Life into Section 276 of the Criminal Code"].
[38] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Canadian Bar Review 1 at 51 [Craig, "Section 276 Misconstrued"].

to heed to the section 276 provision; and trial judges have sometimes interpreted and applied it out of context, sometimes completely disregarded the section, and other times, devised alternative means of introducing prejudicial myths and stereotypes into the trial process.[39] For instance, in the case of *R v Wright,*[40] the defence counsel repeatedly questioned the complainant about sexual activities with the accused hours preceding that which formed the subject matter of the case; one of the questions, for instance, was, "[a]nd if I was to suggest to you that you, in fact, had vaginal sex with Nick in the park, you wouldn't agree with that?" and there was neither an objection by the Crown counsel nor an intervention by the trial judge.[41] Dufraimont narrates the case of *R v Wagar*, where the trial judge, Justice Camp, asked the complainant why she could not just keep her knees together to ward off the sexual assault.[42] Busby gives examples of cases like *R v J.A*, where the trial judge completely disregarded section 276 and admitted evidence of the complainant's prior participation in sadomasochistic sexual activities with the accused without conducting a *voir dire* to rule on its admissibility;[43] and *R v Rhodes*, where the trial judge who ought to protect the process against inferences supporting myths and stereotypes was the one who introduced these prejudicial inferences into the process, when he minimized the complainant's assault for the reason that "sex was in the air" because her behaviour and appearance, as well as that of her friend, were provocative and enticing to the accused, who was a merely a 'clumsy Don Juan.'[44] Craig has attributed this disregard for section 276 to a combination of factors including possible lack of clarity on how the section operates; and continuous reliance on the unwelcome and outdated myths in its interpretation and application.[45]

Busby observes that asides these direct examples, sexual history evidence has been employed indirectly, despite the existence of section 276 provisions; for instance, seeking to admit evidence that because a complainant had been previously abused, "she has a disordered

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[39] *Ibid* at 45.
[40] Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession, supra* note 8 at 168.
[41] *Ibid.*
[42] (2014) CarswellAlta 2756 [*Wagar*]. The Canadian Judicial Council later recommended Justice Camp's removal from the bench; See Lisa Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44:2 Queen's LJ 316 at 332.
[43] *R. v J.A.*, 2011 SCC 28 at paras 12-19. See also Busby, "Sex was in the Air", *supra* note 4 at 283. The appeal court's decision was, however, overturned by the Supreme Court based on the reasoning that an unconscious person cannot consent to sexual activity.
[44] Justice Dewar's inference fuelled the myth that women are at fault for their sexual assaults; See Busby, "Sex was in the Air", *supra* note 4 at 284.
[45] Craig, "Section 276 Misconstrued", *supra* note 38 at 45.

sexual perception that could lead to misinterpretations, overreactions and false criminal accusations," and therefore, her credibility is at issue.[46] In *R v Sanichar*, the complainant had previously been abused as a teenager by her step-father who was again the accused in the present case. She had, the first time, reported the abuse to relevant authorities and her step-father had, in fact, faced prior charges for the assaults. The complainant had also written a letter to the accused, expressing her anger at the events. Based on these facts, the Ontario court of appeal, overturned the defendant's conviction because of 'the trial judges inadequate examination of credibility in light of the historical nature of the abuse and the defendant's anger."[47] Although the decision was overturned by the SCC, the court of appeal was definitely implying that the complainant's dislike for the defendant which she expressed in the letter may have given reason for her to fabricate the complaint.[48]

From a feminist perspective, Ubell states that the current state of the justice system undermines sexual equality because despite the robust appearance of the law on the books, the application of the law is fraught with complications and deficiencies that severely prejudice and harm the victim, thereby providing inadequate protection.[49] Busby notes Gotell's 2006 research on sexual history applications after *R v Darrach,*[50] where the SCC held that in cases where it is unclear whether the evidence should be admitted, the judge should admit the evidence.[51] Gotell's research revealed that there was "not a single case in which a lower court judge ha[d] seriously considered gendered inequality or the prejudicial effects of sexual history evidence;"[52] and that of all cases where defense counsel sought to admit sexual history evidence, judges allowed for admission in fifty-three percent of the cases.[53]

The literature considered in this regard all appear to lean towards the same stance – that section 276 has not lived up to the policy behind it. While the subjective nature of legal decisions

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[46] *Ibid*, at 287; Ubell, "Myths and Misogyny", *supra* note 5 at 41.
[47] R v Sanichar, [2012] ONCA 117, reversed 2013 SCC 4. See also Busby, "Sex was in the Air", *supra* note 4 at 287; Ubell, "Myths and Misogyny," *supra* note 5 at 41.
[48] Ubell, "Myths and Misogyny", *supra* note 5 at 41.
[49] *Ibid* at 32.
[50] [2000] 2 SCR 443.
[51] Busby, "Sex was in the Air", *supra* note 4 at 282.
[52] *Ibid*. See also Lise Gotell, "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship" in Dorothy Chunn et al, *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2006) [Gotell, "The Discursive Disappearance of Sexualized Violence"].
[53] *Busby,* "Sex was in the Air*", supra* note 4 at 282.

makes it difficult to statistically analyse them, there are very clear cases (as seen above) where the facts and circumstances speak for themselves. It is arguable that the 'clear' cases where counsel and judges have contravened section 276 are just a handful out of a pool of other cases where counsel and judges might be keeping the spirit of section 276 alive. Also valid, however, is the argument that the offence of sexual assault is so sensitive, so invasive and so personal to victims that even one case of injustice for a complainant is enough to suggest that the law has not served its purpose. In any case, Craig has suggested that there is a collective responsibility amongst defence counsel, Crown attorneys and trial judges to do better, not just with respect to section 276, but sexual assault trials generally.[54]

2.2.3 Bill C-51 Amendment and Complainants' Right to Counsel

In December 2018, Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, introduced new provisions governing the admissibility of evidence in sexual assault cases. Amongst other provisions, the Bill, via sections 278.93 to 278.95, repealed and replaced the *voir dire* procedure set out in 1992's sections 276.1 to 276.5. While the procedure largely remained the same, section 278.94 (2) and (3) were the added ingredient:

> **Section 278.94 (2)** The complainant is not a compellable witness at the hearing but may appear and make submissions.
>
> **Section 278.94 (3)** The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

The provision clearly gives complainants the right to "appear and make submissions" in the *voir dire* process under section 276 of the *Criminal Code*. More interestingly, the provision gives complainants the right to be represented by counsel. This is as opposed to what obtained previously where complainants were regarded merely as third parties in the process who had no participatory rights. In the case of *R v A.C.*,[55] the trial judge stated that the amendment serves the purpose of allowing the courts to hear the complainant's perspective, to help them in making decisions that do not perpetuate the twin myths or offend the provisions of section 276. The provision has, however, invited criticism from lawyers in and out of the courtroom, who argue

[54] Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession, supra* note 8.
[55] *R v A.C.*, 2019 ONSC 4270 [*A.C.*].

that granting complainants a right to make submissions and be represented by counsel during the *voir dire* process is unfair, unconstitutional, and unnecessary.

For instance, in a submission to the Parliament's Standing Committee of Justice and Human Rights, the Canadian Criminal Lawyers' Association (CLA) argued, amongst other things, that the provision is unfair to the accused and undermines his right to full answer and defence,[56] contrary to sections 7 and 11(d) of the *Charter of Rights and Freedom.*[57] In their view, an essential part of effective cross-examination is the ability to confront witnesses with unexpected questions or contradictory evidence in order to gauge their reactions and responses. When the complainant is granted a right to counsel thus, notice to be present, the effect is that the complainant who is the Crown's key witness, and her counsel will have advance knowledge of ordinarily privileged information on the defence's theory and proposed questions. The complainant/witness' ability to prepare for cross-examination during the trial is thus enhanced, and worse, the defendant's ability to ask her about it is limited as a function of solicitor-client privilege between her and her counsel. The ultimate result is that cross-examination of the complainant during the trial is limited, and the risk of wrongful conviction is increased due to the 'unfair' advantage afforded the complainant.[58] The defence counsel in *A.C.*[59], argued along similar lines, submitting that giving complainants the right to "appear and make submissions" and to be represented by counsel, is contrary to the principles of fundamental justice and thus, in breach of section 7 and section 11(d) of the *Canadian Charter of Rights and Freedoms (Charter).*[60] The counsel posited that the right to "appear and make submissions" and "participate" at the hearing naturally necessitates that the complainant must be afforded the same level of disclosure of the defence's trial plan as the Crown, thereby rendering the trial unfair, violating the principle against self-incrimination, and unfairly putting the complainant in a

[56] Criminal Lawyers' Association, "Submissions on Bill C-51: An Act to Amend the Criminal Code and the Department of Justice Act and to Make Consequential Amendments to Another Act" (2017) at 11, online (pdf): *Criminal Lawyers' Association* < https://criminallawyers.ca/resources/legislation/ > [perma.cc/LP2Y-FWFB] [CLA, "Submissions on Bill C-51"].

[57] *Canadian Charter of Rights and Freedoms*, s.7 & 11(d), Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 7 of the *Charter* provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" and section 11(d) provides that "Any person charged with an offence has the right…[t]o be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." [*The Charter*].

[58] CLA, "Submissions on Bill C-51", *supra,* note 56.

[59] *A.C., supra* note 55.

[60] *The Charter, supra* note 57.

position to adjust her testimony and make cross-examination ineffective based on the privileged information now at her disposal. The defence also contended that the new provisions infringe on the Crown's exclusive authority to prosecute criminal trials.[61]

The *A.C.* court ruled against the defence's submissions, clarifying that the amendment serves the purpose of allowing the courts to hear the complainant's perspective, to help them in making decisions that do not perpetuate the twin myths or offend the provisions of section 276. The court further stated that it is the trial judge's duty as *a gatekeeper* to ensure that the complainant's involvement in the *voir dire* process is focused and limited to the issues of the *voir dire* and not diverged by, for instance, engaging in unfair questioning of the accused.[62] In other words, insofar as the complainant's participation is limited to the purpose of determining the admissibility of the sexual activity evidence in question, the Bill C-51 amendment allowing for claimant participation in the *voir dire* process does not offend the *Charter* or affect the accused's rights in any way.[63] This decision represented, however, what the court in *R v Zabihullah,*[64] referred to as "the first line of cases"—cases where various provincial courts found the impugned provisions of the *Criminal Code* to be constitutional.[65]

On the opposing end of the first line of cases is "the second line of cases," where provincial courts have held that the impugned provisions are wholly unconstitutional and of no force and effect. In *R v Reddick,* the court held – and this was in line with the defence's argument in *A.C* – that the impugned sections of the Bill C-51 *Criminal Code* amendment violate accused persons' section 7 and 11(d) *Charter* rights. In the words of the court,

> [T]he complainant is provided with an opportunity to tailor their evidence to the revealed defence. The result would be to significantly weaken the effectiveness of cross-examination conducted by the accused… The use of the sexual assault shield provisions involves a delicate balancing act between the protection of complainants and the accused's right to full answer and defence…A complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system.

[61] *A.C., supra,* note 55 at paras 12 & 32-33; see also *Darrach, supra* note 50 at para 32.
[62] *Ibid,* at paras 69-71.
[63] *Ibid.*
[64] 2021 SKQB 127.
[65] Other "first line cases" include *R v C.C.,* 2019 ONSC 6449; *R v F.A.,* 2019 ONCJ 391; *R v A.T.,* 2020 ONCJ 576; *R v A.M.*, 2020 ONSC 8061; *R v Whitehouse,* 2020 NSSC 87; *R v Barakat*, 2021 ONCJ 44; and *R v Green*, 2021 ONSC 2826.

> Yet a fair balance must be achieved so that the limitations on the cross-examination of complainants in sexual assault cases do not interfere with the right of the accused to a fair trial.[66]

In a "third line of cases," including *R v R.S* and *R v J.J.*,[67] the court, in a bid to overcome the difficulties identified by *Reddick* above,[68] "read down" the impugned provisions by postponing the section 276 *voir dire* to the end of the complainant's evidence-in-chief. The rationale behind this "third-line" approach is that delaying the *voir dire* will eliminate the risk of the complainant tailoring their testimony to the revealed defence; and balance the complainant's right to counsel and cross-examination, against the accused's right to full answer and defence.

In disagreeing with the approach taken in *R.S* and *J.J.*, the court in *Reddick* argued that:

(a) delaying the voir-dire is a "re-write" of the section which explicitly states that the accused's affidavit must be provided 7 days prior to trial. The implication of this is to defeat the spirit and purpose of the section.[69]

(b) delaying the application to be heard after the complainant's examination-in-chief would create substantial practical difficulties and delay the trial for weeks or months. For instance, the trial would necessarily be halted to allow the disclosure of the records. Counsel for the complainant would have to be retained, meet with the complainant, prepare a response, file materials, and argue the matter in front of the trial judge.[70]

J.J. has been granted leave to appeal by the SCC.[71] The decision of the SCC will settle the apparent controversy amongst the three lines of cases. Until then, whether the Bill C-51 provisions for complainants' right to counsel and to appear and make submissions remain valid and constitutional will differ, depending on the precedent set in the province where the deciding court is situated.

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[66] *R. v. Reddick*, 2020 ONSC 7156 at paras 58 to 59 [*Reddick*].
[67] *R v R.S.*, 2019 ONCJ 645 [*R.S.*]; *R v J.J.*, 2020 BCSC 29; and *R v J.J.*, 2020 BCSC 349.
[68] Other second line cases where the court have taken the same approach as *Reddick* include *R v A.M.*, 2019 SKPC 46; *R v J.S.*, [2019] AJ No 1639 (QL); and *R v D.L.B.*, 2020 YKTC 8.
[69] *Reddick, supra* note 66 at para 69.
[70] *Ibid* at paras 71-73.
[71] 2020 S.C.C.A. No. 111.

2.3 THE "DOUBLE-BURDEN" OF INDIGENOUS SEXUAL ASSAULT COMPLAINANTS

> When we look in the reflecting mirror that Canadian justice provides in the area of sexual assault, we do not see ourselves "at home." Indeed, when we read case law and news reports and hear people talk about their particular trauma of sexual assault, we see fragments of our colonial selves — our selves away from home. Home has balance, home is safe, and home is where we are spiritually sound. Home is where our laws matter; home is where we are honoured, as women. Home is not a courtroom.[72]

We have already seen that existing literature establish the persistence in the prejudice and discrimination that sexual assault complainants face within the criminal justice system, despite the several legislative amendments, including section 276 of the *Criminal Code.* Existing literature also suggests that the situation is worse for Indigenous women who, in the words of Prochuk, experience overlapping inequalities and systemic patterns of discrimination.[73] The 2014 General Social Survey (GSS) on Victimisation revealed, for instance, that the rate of violent victimization for Indigenous women was double that of Indigenous men and close to triple that of non-Indigenous women.[74] Lindberg et. al state that these higher rates of sexual assault among Indigenous women must be situated at the intersection of racism and sexual discrimination;[75] a theory that has since 1989, been known as 'Intersectionality.'

Hanson put it succinctly when he stated that Indigenous women face a "double-burden" of being prejudiced first as women and further, as Indigenous women.[76] This "double-burden" reveals itself in different facets of the criminal justice system, from the police to the courts.

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[72] Tracy Lindberg et al, "Indigenous Women and Sexual Assault in Canada" in Elizabeth Sheehy, *Sexual Assault in Canada* (Ottawa: University of Ottawa Press, 2012) at 257 [Lindberg, "Indigenous Women and Sexual Assault in Canada"].

[73] Alana Prochuk, "Women's Experiences of the Barriers to Reporting Sexual Assault" (November 2018) at 11, online: *West Coast LEAF* < http://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf > [perma.cc/4ES7-A747] [Prochuk, "Women's Experiences of the Barriers to Reporting Sexual Assault"].

[74] Katie Scrim, "Aboriginal Victimization in Canada: A Summary of the Literature" (2009), online: *Statistics Canada* < https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm > [perma.cc/S33U-NA8N].

[75] Cecelia Benoit, et. al, "Issues Brief : Sexual Violence Against Women in Canada" (2014) at 17, online (pdf) *:* < https://www.gov.mb.ca/msw/publications/pdf/2015_issue_brief_sexual_violence.pdf > [https://perma.cc/VL4B-4VVX].

[76]Eric Hanson, "A Brief History of the Marginalization of Aboriginal Women in Canada" online: *First Nation and Indigenous Studies Program, UBC* <https://Indigenousfoundations.arts.ubc.ca/marginalization_of_aboriginal_women/ > [perma.cc/2HM4-YGRJ].

Hanson and Prochuk have identified being Indigenous as a specific barrier to justice for sexual assault victims.[77] In 2012, Jackson wrote a newspaper article on a leaked video which surfaced online of a West Kelowna RCMP officer interrogating a seventeen-year-old Indigenous sexual assault complainant; not only did he question her without an adult or a lawyer being present, he asked questions which reeked of stereotypical assumptions and prejudice.[78] In a 2017 submission to the Government of Canada, Human Rights Watch reported that in Saskatchewan, as with practically every other province, Indigenous women do not call the police to report violence against them for fear that amongst other reasons, the police may harass them.[79] In 2019, the report of National Inquiry into Missing and Murdered Indigenous Women and Girls (NIMMIWG) revealed that Indigenous women generally have a distrust for the criminal justice system because even when they report their violation, the police invoke racist stereotypes, dismissing their complaints and outrightly discriminating against them.[80] Some of the racist stereotypes identified by the Indigenous women who were interviewed in the course of preparing the NIMMIWG report include, that Indigenous women and girls are drunks; runaways out partying; and prostitutes unworthy of follow-up.[81]

Situating the "double-burden" within trial processes, Barkaskas and Hunt explain that—in addition to the twin myths— Indigenous women have to deal with the stereotypical assumption that they are hypersexual[82] and as the NIMMIWG report puts it, "prostitutes

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[77] *Ibid* at 7; Prochuk, "Women's Experiences of the Barriers to Reporting Sexual Assault", *supra* note 73 at 6; See also Kathryn Penwill, "Reality Check: How Rape Mythology in the Legal System Undermines the Equality Rights of Women Who Are Sexual Assault Survivors" (2008) at 40, online (pdf*): Action Ontarienne Contre la Violence Faite aux Femmes* < https://aocvf.ca/wp-content/uploads/2018/03/Ressources-publications-une-veritable-course-a-obstacle-ENG.pdf > [perma.cc/U58X-859P].

[78] Hannah Jackson, "RCMP Respond to Outrage Over Sexual Assault Complainant Asked if She was 'Turned on'", *Global News* (17 May 2019), online: < https://globalnews.ca/news/5281967/rcmp-sexual-assault-interview-Indigenous-youth/ > [perma.cc/SS7L-FAYT].

[79] "Submission to the Government of Canada on Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence" *Human Rights Watch* (17 June 2017), online: < https://www.hrw.org/news/2017/06/19/submission-government-canada-police-abuse-Indigenous-women-saskatchewan-and-failures > [perma.cc/4PU2-6AXY] [Human Rights Watch, "Submission to the Government of Canada"].

[80] "Reclaiming Power and Place" (2019) The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls Vol. 1a at 650 [NIMMIWG, "Reclaiming Power and Place"].

[81] *Ibid* at 648.

[82] Patricia Barkaskas & Sarah Hunt, "Access to Justice for Indigenous Adult Victims of Sexual Assault" (October 2017) at 13, online: *Department of Justice Canada* < https://thekoop.ca/wp-content/uploads/2019/10/Access_to_Justice_for_Indigenous_Adult_V.pdf> [perma.cc/H2JW-2W63] [Barkaskas & Hunt, "Access to Justice for Indigenous Adult Victims of Sexual Assault"].

unworthy of follow-up."[83] These assumptions, occasioned by the combination of their gender and race, automatically put Indigenous sexual assault complainants in a prejudiced position which becomes exacerbated when evidence of their sexual histories is sought to be admitted. Unfortunately, in sexual assault cases, it is usually difficult to tell the race of a complainant just by reading the court judgments. This is why the SCC's acknowledgment of Hanson's "double-burden" and how it operates within the courts in *R v Barton* is considered extremely pivotal for Indigenous women and their treatment within the court system and the criminal justice system as a whole. Prior to *Barton,* the identification of the prejudices against Indigenous sexual assault complainants were based on deductions, gathered from the facts and circumstances of the relevant case. We have earlier considered Busby's example of *R v Rhodes,* for instance, where the trial judge minimized the complainant's assault based on his reasoning that "sex was in the air" because her behaviour and appearance, as well as that of her friend, were provocative and enticing to the accused, who was a merely a 'clumsy Don Juan'.[84] In *Rhodes,* we only know that the complainant was Indigenous because of a reference made to her heritage in the course of examination; and in *Barton,* as we shall later see, the ABCA might not have known of the complainant's Indigeneity if feminist interveners had not raised the issue of the "Native prostitute" reference made by Crown and defence counsel all through the trial process. In an essay written by Lindberg et. al, and published in Sheehy's edited collection of essays on sexual assault in Canada,[85] the writers told four "stories." The four stories narrate four well-known prosecutions of men who sexually assaulted Indigenous women, and the response of the criminal justice system. The essay revealed that judges in sexual assault trials struggle with understanding "what is a fact" and judging which facts ae "relevant". For instance, in one of the four cases—*R v Edmondson*—[86] an Indigenous twelve-year old girl reported having been sexually assaulted by three men, and rather than focusing on relevant facts like her age and that she was given alcohol by three men, the focus was on irrelevant issues. Some of those irrelevant issues included whether the drunken child went with the men "willingly;" whether she had previous experience with alcohol; and whether she may have been sexually assaulted by her father.[87] By the end of

[83] NIMMIWG, "Reclaiming Power and Place," *supra* note 80 at 648.
[84] Justice Dewar's inference fuelled the myth that women are at fault for their sexual assaults. See Busby, "Sex was in the Air", *supra* note 4 at 284.
[85] Lindberg, "Indigenous Women and Sexual Assault in Canada," *supra* note 72 at 257.
[86] [2005] SJ No 256 (Sask CA) at para 1.
[87] Lindberg, "Indigenous Women and Sexual Assault in Canada," *supra* note 72 at 92.

the essay, we understand that there is a "gaping chasm" between the criminal law's treatment of sexual assault committed against Indigenous women and girls on one hand, and how those crimes are understood by Indigenous women and judged by Indigenous laws, on the other.[88]

In any case, while the *Barton* decision will be considered more thoroughly in forthcoming chapters, I will now turn to considering the theory on which the "double-burden" idea and consequently, the *Barton* decision can be said to be centered—the feminist theory of intersectionality.

2.4 THE PLACE OF INDIGENOUS WOMEN IN THE INTERSECTIONALITY DISCOURSE

Many contemporary writings like that of Chang and Curp attribute the theory of Intersectionality to African-American legal scholar, Kimberle Crenshaw.[89] In 1989, Crenshaw published what Carbado et. al describe as a landmark essay, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," in which she introduced the term, "intersectionality" to address the marginalization of Black women within not only antidiscrimination law but feminist and antiracist theory and politics.[90] While agreeing with Crenshaw's coinage of the term, Hill et. al, however, take issue with the view that intersectionality began when it was named.[91] They argue that that the core ideas of intersectionality were birthed in the early 1960s by autonomous movements by women of colour who faced the combined challenges of colonialism, racism, sexism and capitalist exploitation, albeit, employing different terminologies;[92] and that many contemporary writers ignore that period. While Hill et. al may be right (the scope of this chapter does not permit an in-depth inquiry into that), the fact is that it is near impossible to speak of the feminist theory of intersectionality without mentioning Crenshaw and her works.

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[88] *Ibid* at 87.
[89] Hill et. al, *Intersectionality* (Canada: Polity Press, 2016) at cap 3 [Hill et. al, *Intersectionality*]; Robert Chang & Jerome Culp, "After Intersectionality" 71:2 UKMC Law Review 485.
[90] Devon Carbado et. al, "Intersectionality: Mapping the Movements of a Theory" (2013) 10:2 Du Bois Review at 303 [Carbado et. al, "Intersectionality: Mapping the Movements of a Theory"].
[91] Hill et. al, *Intersectionality, supra,* note 89 at 1.
[92] Hill et. al, *Intersectionality, supra,* note 80 at 1.

2.4.1 The Birthing Idea

In her 1989 article, Crenshaw employed the concept of Intersectionality to explain how Black women's unemployment experiences were in many ways, shaped by the interaction of their race and gender.[93] She explained that her aim was to attack the existing problematic tendency to treat race and gender as mutually exclusive categories of experience and analysis; and how that tendency is perpetuated by a single-axis framework that is dominant in antidiscrimination law and reflected in feminist theory and antiracist politics.[94] Crenshaw centered her argument on the Black woman's experiences, stating that Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender. She further argued that the problem could not be solved by simply including Black women within an already established analytical structure because the intersectional experience is greater than the sum of racism and sexism.[95] The need to create a location that takes that intersectional experience into account in a manner which sufficiently addressed the particular ways in which Black women were subordinated, thus, birthed the term, "intersectionality". In a subsequent 1991 article, Crenshaw expatiated on this when she explained that "[a]lthough racism and sexism readily intersect the lives of real people, they seldom do in feminist and antiracist practices. So, when the practices expound identity as woman or person of colour as an either/or proposition, they relegate the identity of women of colour to a location that resists telling."[96]

Put very simply therefore, intersectionality, within feminist contexts, is the idea that a woman can experience various layers of discrimination as a function of the multiple dimensions of her identity. So, while women generally face prejudices based on their gender, even within those prejudices, some women may be more privileged than others based on their race, class, or a combination of both. Understanding this definition is imperative because, as we shall later see, it sets the context, in many ways, for appreciating the *Barton* decision and the intervening factums

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[93] Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43(6) Stanford Law Review at 1244 [Crenshaw, "Mapping the Margins"].
[94] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1:8 *University of Chicago Legal Forum* 139 [Crenshaw, "Demarginalizing the Intersection of Race and Sex"].
[95] *Ibid.*
[96] Crenshaw, "Mapping the Margins," *supra,* note 93.

which preceded it. Both the feminist interveners and the appellate courts adopted an "intersectional" approach to their analysis, recognizing that there was an interaction between the different layers of the complainant's identity, and the myths and stereotypes which revealed themselves during the trial.

Before discussing the *Barton* decision, the feminist interventions, and the ensuing controversy in the next chapter, it is important that I consider where and how Indigenous women can be located within the theory of intersectionality. This is especially because while the complainant in *Barton* was Indigenous, intersectionality, on the other hand, is rooted in Black feminism.

2.4.2 Intersectionality Beyond the Black Woman's Experience

In identifying possible gaps within the theory of intersectionality, Cho mentions three main conceptual critiques of post-intersectionality theorists: (a) the criticism of "categorical hegemony;" (b) the criticism that intersectionality is not universal or coalitional; and (c) the criticism of Intersectionality as antisystemic or non-interactive. We are here, concerned with the first two.

The categorical hegemony criticism alleges that intersectionality forces a priori, which identities matter; that it emphasizes race and gender to the exclusion of other identities, like sexuality for instance.[97] Kwan and Eskridge argue that intersectionality proponents (and by proponents, they meant Black women) responded to their own marginalization by creating "new marginal categories that by their very nature, themselves encourage the idea of categorical hegemony," focusing on the "particularities of Black women's experience," while pushing to its margins, issues like class and religion.[98] With the universality criticism, theorists like Hutchinson opine that intersectionality is exclusionary, centering Black women and their experiences, thus, having "limited relevance."[99] In Kwan and Hutchinson's view, because intersectionality

[97] Sumi Cho, "Post intersectionality: The Curious Reception of Intersectionality in Legal Scholarship" (2013) 10:2 Du Bois Review 385 at 389 [Cho, "Post intersectionality"].
[98] *Ibid* at 389. See also, Peter Kwan, "Jeffrey Dahmer and the Cosynthesis of Categories" (1997) 48:6 Hastings LJ 1257 at 1276 [Kwan, "Jeffrey Dahmer and the Cosynthesis of Categories"].
[99] *Ibid,* at 390-391. See also, Darren Hutchinson, "Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics" (1999) 47:1 Buff L Rev 1 at 12 [Hutchinson, "Ignoring the Sexualization of Race"].

originated in an article on race and gender issues –specifically, the Black female experience, it could not accommodate experiences extraneous to that subjectivity.[100]

Cho contends that both Kwan and Hutchinson's arguments were both descriptively and theoretically untrue; intersectionality is not limited to Black women's experiences and there is no reason the theory cannot engage other categories of power and experience, such as sexuality,[101] and in this case, Indigeneity. She explained, in fact, that the earliest works in the first decade of the intersectionality elaboration genre were works of women of 'varying colors and cultures' who related to the theory and sought to apply it to co-existing structures and identities. Cho calls it an 'elaboration' because beyond Black women, a lot of women of different races "tried on" intersectionality to test whether its insights applied, for example, to Asian or Latina women.[102] The result of this elaboration was the realization that, in the words of Wing, intersectionality had analytical and political relevance to women of different colors;[103] and that the original idea of intersectionality could be extended to new identity formations.[104]

In 2013, Carbado, Crenshaw and two others published a joint article on intersectionality in which they expatiated on the inclusive and flexible nature of the theory.[105] They commend Cho's article for appropriately "highlighting the temporality of intersectionality's mobility."[106] They further describe intersectionality as a 'work in progress,' suggesting that there is potentially always "another set of concerns to which the theory can be directed, other places to which the theory might be moved, and other structures of power it can be deployed to examine."[107] It is for this reason that Crenshaw described her intervention in her 1989 article as "provisional," "one way" to approach the problem of intersectionality.[108]

Hill et. al consider the issue from a different perspective. I earlier mentioned their belief that while Crenshaw coined the term, 'intersectionality,' the movement existed way before then.

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[100] *Ibid,* at 12; Kwan, "Jeffrey Dahmer and the Cosynthesis of Categories," *supra* note 98 at 1275. See also Cho, "Post intersectionality," *supra* note 97 at 392.
[101] Carbado et. al, "Intersectionality: Mapping the Movements of a Theory", *supra* note 90 at 306.
[102] Cho, "Post intersectionality", *supra* note 97 at 388.
[103] *Ibid*. See also Adrien Wing, *Critical Race Feminism: A Reader* (New York: NYU Press, 1997).
[104] *Ibid.*
[105] Carbado et. al, "Intersectionality: Mapping the Movements of a Theory," *supra* note 90 at 304.
[106] *Ibid.*
[107] *Ibid.*
[108] Crenshaw, "Mapping the Margins", *supra* note 93 at 1244.

In light of this, they state that in the United States, Black women were part of heterogeneous alliances with Chicanas and Latinas, Native American women, and Asian-American women; and though their experiences and the social movements they engendered took different forms, these groups were also at the forefront of raising claims about the interconnectedness of race, class, gender, and sexuality in their everyday life experiences.[109] For this reason, the ownership of intersectionality cannot be ascribed to Black women and their experiences only.

Speaking of class, at the intersection where race and gender meet, there is sometimes the joinder of class. While the arguments of Cho and Carbado et. al already make good the mobility of intersectionality to various concerns and layers of identity, the specific mention of the "class" concern and the possibility that it may function to add an extra burden to the "double-burden" of race and gender is pertinent because of the circumstances which surrounded the *Barton* case, as we shall see in subsequent chapters. Crenshaw herself had, in fact, encouraged the expansion and application of intersectional approaches to issues of "class, sexual orientation, age, and color."[110]

The conclusion of the totality of the above is that intersectionality is not fixed to any particular social position. The theory can and does move.[111] The place of Indigenous women within intersectionality can thus, be said to be in the mobility and inclusivity of the theory. There is also the fact that Indigenous women share a deep similarity with Black women and other women of 'varying colors and cultures'— their susceptibility to multiple layers of discrimination as a function of the interaction of their race and gender.

2.5 CONCLUSION: WHAT'S MISSING?

In this chapter, I have considered the leading literature on Canadian sexual assault laws and the feminist theory of intersectionality, in respects which are relevant to the objectives of this thesis. Two things have been established: (a) while the law makes provisions to tackle the myths and stereotypes which act against sexual assault complainants via sexual history evidence during trials, the correct application of those provisions in practice has proven quite problematic; and (b) within the location of the feminist theory of intersectionality, when the complainants are specifically Indigenous, the strength of these myths and stereotypes in trial processes could

[109] Hill et. al, *Intersectionality, supra* note 89 at 6.
[110] Cho, "Post intersectionality", *supra* note 97 at 389.
[111] Carbado et. al, "Intersectionality: Mapping the Movements of a Theory", *supra* note 90 at 306.

potentially become exacerbated. While existing literature deal extensively with the former, the same cannot be said for the latter; and that is what makes the *Barton* conversation imperative.

The sparse conversation on stereotypes in sexual assault trials within the context of Indigeneity might be a function of the fact that court judgments rarely make mention of, or reference to complainants' races. The SCC's judicial notice of the "double-burden" of Indigenous women could thus, open the door to conversations to the intersectional challenges that Indigenous, and in fact, other minority complainants, face in sexual assault trials due to the interaction of their race and gender.

Another important conversation which has barely been examined by literature and for which the *Barton* conversation is relevant, is the depth of influence that feminist theories and feminist organisations have had and should have on sexual assault trials within the bounds of intervention, as well as the development of sexual assault laws. In this regard, I later analyse the results of my interviews with lawyers who acted for intervening organisations in *Barton.*

In the meantime, the next chapter will establish contexts towards understanding the backstory to the interveners' submission that the complainant's Indigeneity caused her to suffer an extra layer of prejudice in *Barton.* This will solidify the work that has been done in chapters one and two, towards establishing a foundation for appreciating the dynamics of the *Barton* case and the impacts of the feminist interventions preceding it.

CHAPTER THREE

INDIGENOUS WOMEN, FEMINIST ADVOCACY AND THE CRIMINAL JUSTICE SYSTEM

3.0 "NOVEMBER 13, 1971 WAS COLD AND MISERABLE"

"November 13, 1971 was cold and miserable," were the opening words of White journalist, Lisa Priest's 1989 book titled, "Conspiracy of Silence." Priest's book, which has been described as "sympathetic and problematic,"[1] details a true-life story of the gruesome murder of Helen Betty Osbourne, an Indigenous girl by four White boys in Manitoba's community known as "The Pas."[2] Probably more worrisome than the manner in which Helen was murdered, is the fact that beneath her death and indeed, many acts of violence against Indigenous women and girls, lies a deep-seated societal structure, rooted in history; a structure which made it "okay," in the mind of the perpetrators to do to Helen what they did. In the words of the Manitoba Justice Inquiry,

> Her attackers seemed to be operating on the assumption that Aboriginal women were promiscuous and open to enticement through alcohol or violence. It is evident that the men who abducted Osborne believed that young Aboriginal women were objects with no human value beyond sexual gratification.[3]

In many ways, the above statement fits perfectly within the frame of the conversation in this thesis, the most striking resemblance being the Indigeneity of both Helen and Cindy Gladue, who died following sexually assault by Barton.[4] It is thus, imperative that some time is dedicated to analysing the bases for the (false) assumptions which encourage sexual violence against Indigenous women. An equally important consideration is how actors within the criminal justice system have responded to these assumptions, as well as the relationship that feminist organisations have had with the justice system in the same regard.

This chapter will therefore be two-pronged. Part A will attempt a brief historical analysis of the experiences of Indigenous women like Helen and Cindy within the Canadian society and the justice system up until present time; and in Part B, I will explore feminist influence on legal

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[1] Amnesty International, "Canada Stolen Sisters: A Human Right Response to Discrimination and Violence against Indigenous Women in Canada" (2004) at 2, online (pdf) : < https://www.amnesty.ca/sites/default/files/amr200032004enstolensisters.pdf > [perma.cc/S9FU-M4UD] [Amnesty International, "Canada Stolen Sisters"].

[2] *Ibid.*

[3] *Ibid*, at 17. AJIM, "The Death of Helen Betty Osborne" online: < http://www.ajic.mb.ca/volumell/chapter5.html > [perma.cc/XU4Z-HE5X].

[4] 2019 SCC 33 [*Barton*].

and policy change through intervention at the SCC with respect to sexual assault against women, and particularly Indigenous women. The overall aim is to cement the contexts that have been established in chapters one and two, for better understanding of the dynamics of the *Barton* decision to be discussed in the following chapters.

PART A

3.1 INDIGENOUS WOMEN AND THE CRIMINAL JUSTICE SYSTEM

> **[**T]heir bodies carry a symbolic load because they have been conflated with the land and are thus contaminating to a white, settler social order.[5]

A 2004 Amnesty International report emphasized that for Indigenous women in Canada, violence often takes place in a context shaped by the power that the dominant society has wielded "over every aspect of their lives, from the way they are educated and the way they can earn a living to the way they are governed."[6] In the same vein, Bourgeois has stated that making sense of contemporary phenomena affecting Indigenous women [like sexual violence and prejudices within the Criminal Justice System] in Canada requires "a theoretical understanding of settler colonialism as a dominant system of oppression that has long organized, and continues to organize life in Canadian society."[7] Appreciating Amnesty and Bourgeois' statements in relation to present occurrences requires first, that I engage in a brief historical analysis of colonialism as the root of violence and stereotypical assumptions against Indigenous women.

3.1.2 THE GENESIS: COLONIALISM AND COLONIAL POLICIES

> The roots of sexual violence in Canada are as deep as colonialism itself.[8]

No examination of violence against Indigenous women or encounters between Indigenous women and the criminal justice system can be made without first positioning

[5] Jaskiran Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing," (2015) 4(2) Decolonization: Indigeneity, Education & Society at 10 [Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing"].
[6] Amnesty International, "Canada Stolen Sisters," *supra* note 1 at 8.
[7] Robyn Bourgeois, "Generations of Genocide: The Historical and Sociological Context of Missing and Murdered Indigenous Women and Girls" in Campbell et al., *Keetsahnak/Our Missing and Murdered Indigenous* (Alberta: University of Alberta Press, 2018) at 66 [Bourgeois, "Generations of Genocide"].
[8] Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing", *supra* note 5 at 9.

colonisation at the centre of such analysis.[9] Bourgeois has described colonisation or in the case of Canada, "settler colonialism," as involving the domination of Indigenous lands and peoples by non-Indigenous peoples (and predominantly those racialized as white).[10] According to Razack,

> A white settler society is one established by Europeans on non-European soil. Its origins lie in the dispossession and near extermination of Indigenous populations by the conquering Europeans. As it evolves, a white settler society continues to be structured by a racial hierarchy. In the national mythologies of such societies, it is believed that white people came first and it is they who principally developed the land; Aboriginal peoples are presumed to be mostly dead or assimilated. European settlers thus become the original inhabitants and the group most entitled to the fruits of citizenship.[11]

While it is widely documented that violence against Indigenous women in Canada is disproportionately higher than that against non-Indigenous women,[12] this disproportionality is often not considered through the lens of Indigenous peoples' experiences with colonization and racism.[13] Through policies imposed without their consent, Indigenous peoples in Canada "have had to deal with dispossession of their traditional territories, disassociation with their traditional roles and responsibilities, disassociation with participation in political and social decisions in their communities, [and] disassociation of their culture and tradition."[14] The colonial structure's profound negative effects on Indigenous communities, had specific impacts on Indigenous women, pushing them to the margins of their own cultures;[15] and setting up laws, policies, practices and institutions that targeted them in ways that were knowingly discriminatory.[16] In this regard, colonialism has served as a tool of gendered oppression and continues to be foundational to the persistent susceptibility of Indigenous women and girls to the risk of sexual

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[9] Jamie Cooper & Tanisha Salomons, "Addressing Violence against Aboriginal Women" (2009/2010) at 31, online (pdf): *Battered Women's Support Services* < https://www.bwss.org/wp-content/uploads/2010/05/addressingviolenceagainstaboriginalwomen.pdf > [perma.cc/9MJE-NK5A] [Cooper & Salomons, "Addressing Violence against Aboriginal Women"]; Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing", *supra* note 5 at 5.
[10] Bourgeois, "Generations of Genocide", *supra* note 7 at 66.
[11] *Ibid* at 67.
[12] Jennifer Fraser, *Claims-Making in Context: Forty Years of Canadian Feminist Activism on Violence Against Women (PhD Thesis, University of Ottawa, 2014)* at 62.
[13] *Ibid.*
[14] Amnesty International, "Canada Stolen Sisters", *supra* note 1 at 8.
[15] *Ibid.*
[16] "Reclaiming Power and Place" (2019) The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls Vol. 1a at 231 [NIMMIWG, "Reclaiming Power and Place"].

violence, as well as harmful prejudices within the Canadian society and the criminal justice system.[17]

While the scope of this thesis does not permit for an in-depth historical analysis of these issues, some significant laws and policies need to be highlighted because of their profound and lasting impacts on the marginalization of, violence against, and myths surrounding Indigenous women within the Canadian society and the justice system.

3.1.2.1 The Indian Act

The Indian Act is arguably the most oppressive invention of the colonial government on the lives of Indigenous people and particularly, women. Enacted in 1876, the Act has been described as having been "conceived and implemented in part as an attack on Indian nationhood and individual identity,"[18] but more specifically, the Act, in many ways, was prejudicial to Indigenous women, perpetuating European patriarchal ideals of gender inequality.[19]

For instance, amongst other discriminatory provisions, Indigenous women were, by the Act, denied the right to possess land and marital property; a widow could not inherit her husband's personal property after his death, and even after an 1884 amendment allowed men to will their properties to their wives, there was the qualification that the woman would only lay claim to the property if an Indian agent[20] adjudged her to be of "good moral character."[21] In addition, the Act completely excluded Indigenous women from participation in politics. Band governments were created, but only men could become chiefs and band councillors. Women, who were previously key decision-makers and advisors in Indigenous communities, were completely relegated to the background, unable to partake in community decision making.

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[17] *Ibid* at 229.
[18] Amnesty International, "Canada Stolen Sisters", *supra* note 1.
[19] Eric Hanson, "A Brief History of the Marginalization of Aboriginal Women in Canada" online: *First Nation and Indigenous Studies Program, UBC* <https://Indigenousfoundations.arts.ubc.ca/marginalization_of_aboriginal_women/ > [perma.cc/2HM4-YGRJ] [Hanson, "A Brief History of the Marginalization of Aboriginal Women in Canada"].
[20] Indian Agents were government officials, employed by the Department of Indian Affairs, today called Indigenous and Northern Affairs Canada. They were mandated by the Indian Act of 1876 to implement federal Indian policy and to manage those people whom the government considered Indians within their respective districts. See Kiinawin Kawindomowin Story Nations, "Indian Agent" online: < https://storynations.utoronto.ca/index.php/indian-agent-2/ > [perma.cc/L5WP-HMQP].
[21] Hanson, "A Brief History of the Marginalization of Aboriginal Women in Canada", *supra* note 19.

Women were also not allowed to vote in band elections until 1951, and it was not until 1960 that they were granted the right to vote in federal elections.[22]

All these policies not just placed Indigenous women in dangerous situations,[23] but reinforced the colonial patriarchal beliefs that women—and their bodies—were subordinate to, lesser than and owned by men; men like the four "The Pas" boys. Audra Simpson describes the situation perfectly when she says that Indigenous girls' bodies have historically been rendered less valuable because of what they are taken to represent: land, reproduction, kinship and governance, an alternative to heteronormative and Victorian rules of descent. In her words, "[T]heir bodies carry a symbolic load because they have been conflated with the land and are thus contaminating to a white, settler social order."[24]

3.1.2.2 Marriage and Identity

Another tool which the colonists, through the Indian Act, oppressed and prejudiced Indigenous women was marriage.[25] The "disenfranchisement provisions" of the Act, for instance, ensured that Indigenous women who married non-status "Indian" men under the Act, were evicted with their kids from their community. In essence, these women were compelled to commute or sell off their rights, for their husbands' lack of Indian status. If Indigenous women decided to leave their communities to marry "outsiders", their annuities for life were commuted to a one time fifty-dollar payment. In addition to the loss of their identities and annuities, they also lost all rights to their share of community lands and resources.[26]

The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls drew the correlation between these oppressive colonial policies on marriage and present experiences of Indigenous women who are compelled to leave their communities without resources and endure lives of economic and social marginalization. This marginalization, in turn,

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[22] *Ibid.*
[23] NIMMIWG, "Reclaiming Power and Place", *supra* note 16 at 251.
[24] Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing", *supra* note 5 at 10.
[25] Sylvia van Kirk, "From "Marrying-In" to "Marrying-Out": Changing Patterns of Aboriginal/Non-Aboriginal Marriage in Colonial Canada" (2002) 23(3) Journal of Women Studies at 1, (online) pdf: < https://www-jstor-org.uml.idm.oclc.org/stable/pdf/3347329.pdf?refreqid=excelsior%3A67190968617c0de263a07c48cb13bd65 > [perma.cc/J9KV-RDVG].
[26] NIMMIWG, "Reclaiming Power and Place", *supra* note 16 at 251.

leads to dependence— dependence on occupations which potentially endanger their lives and expose them to violence, as they try to make ends meet.[27]

3.1.2.3 Sexual Policing of Indigenous Women

A vital part of the European settlement in Canada was the patriarchal value system that women should remain chaste and virtuous. These values were imposed on Indigenous women, with the Europeans holding on to the mythical archetype of the "virtuous" Indian princess willing to reject her people and culture for Christian civilization.[28] If a woman could not be "virtuous" by strict Victorian standards, she was deemed unworthy of respect. This concept of chastity was written into the Indian Act, affording certain rights to women who were determined by the Indian agent to be of "good moral character."[29] The Indian Act gave enforcing agents the power to imprison and punish in other ways, Indigenous women who did not conform to the standards of chastity and monogamy thus, regulating their sexual lives.[30] Other legislation like the Juvenile Delinquents Act and Training School Act of the 1950s were enacted with the objective of training young Indigenous women away from perceived "promiscuity" and into domesticity; if Indigenous women did not recognize or obey European patriarchal roles, they could be severely punished.[31] These policies reinforced the belief that Indigenous women lacked autonomy over their bodies and sexual lives—a belief that continues to play out structurally today. We shall see later in this chapter, for instance, that decades after colonialism, the police in Canada still 'police' the bodies of Indigenous women, asking sexual assault complainants questions about their sexual histories, blaming them for their own victimization, and acting in other manners to suggest that they lack autonomy over their bodies.

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[27] *Ibid.*

[28] Hanson, "A Brief History of the Marginalization of Aboriginal Women in Canada," *supra,* note 19; Mary-Ellen Kelm & Lorne Townsend, *In the Days of Our Grandmothers- A Reader in Aboriginal Women's History in Canada (*Toronto: University of Toronto Press, 2006).

[29] Hanson, "A Brief History of the Marginalization of Aboriginal Women in Canada", *supra,* note 19.

[30] *Ibid;* Bonita Lawrence "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18(2) Hypatia Journal (online) pdf: < https://muse.jhu.edu/article/44188/pdf > [perma.cc/2R9C-CXYD].

[31] *Juvenile Delinquents Act*, R.S.C. 1952, c. 160; *Ontario Training School Act* R.S.O. 1960, c. 404; Hanson, "A Brief History of the Marginalization of Aboriginal Women in Canada," *supra,* note 19; Karli Robertson, "Indigenous Women's Experiences of the Canadian Residential School System" (2018) *Journal of Multidisiplinary Research at Tent* at 46 [Robertson, "Indigenous Women's Experiences of the Canadian Residential School System"].

3.1.2.4 The Residential School System

In 1884, the Indian Act was amended to compel all Indigenous children aged four to sixteen to attend what were called residential schools.[32] The implementation of this new law saw children, being forcibly ripped off their unwilling parents by the "Indian agents," to see each other again sometimes after years, and other times, never at all.[33] The goal was to "kill the 'Indian' in the child" and create "white" citizens out of them;[34] to, in the words of the Flood Davin, the proponent of the system, remove Indigenous children from "the influence of the wigwam" and keep them "constantly within the circle of civilized conditions."[35] Between the mid-nineteenth century to the end of the twentieth century, over 150,000 Indigenous children attended residential schools; and while the terrors that ensued during that period— low quality education, inhuman living conditions, ban on speaking Indigenous languages, harsh punishments sanctioned by the school authority, amongst others[36]— were founded on racial discrimination, the intersection of their gender within a patriarchal society worsened the experiences of the female Indigenous students.[37]

Robertson narrates how the priests, nurses and nuns would, for instance, keep close track of the girls' menstrual cycles and question them monthly about their periods to ensure that they were not pregnant—this was an expression of the myth that Indigenous girls were impure; slaves to their passions; sexually polluted.[38] Probably even worse, was the virginity testing often conducted by school officials who would stick small instruments up the girls' vaginas to check if their hymens were still intact.[39] In event that the hymens were found not to be "intact", then without considering the possibility that they might have been raped by someone in the school, the young girls were shamed by the entire school population for their impurity; after all, how

[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid* at 47; Aboriginal Healing Foundation, *A Healing Journey: Final Report Summary Points* (Ottawa: The Aboriginal Healing Foundation, 2006) at 10.
[35] Amnesty International, "Canada Stolen Sisters", *supra* note 1 at 9.
[36] *Ibid.*
[37] Robertson, "Indigenous Women's Experiences of the Canadian Residential School System", *supra* note 31 at 45.
[38] *Ibid* at 49.
[39] *Ibid.*

could girls of the "inferior" race be anything other than "loose, dirty squaws," incapable of resisting temptation?[40]

The 2012 report of the Truth and Reconciliation Commission reported that over eighty percent of the children experienced some form of physical mental, sexual or spiritual abuse;[41] and another report showed that eighty-five percent of the abused female students were assaulted mainly by school officials.[42] Unfortunately, these abuses did not end with the girls' exits from these schools; the traumas left long-lasting effects on their sense of identities, and just as terrible, it reinforced the colonialist belief that Indigenous women are inferior to men in a male-dominated society and created a cycle of abuse that continues in many Indigenous communities and the larger Canadian society.[43]

3.1.3 THE CRIMINAL JUSTICE SYSTEM: CONTINUING THE CYCLE OF ABUSE

> In assessing relevancy, we find Indigenous women's lives have become irrelevant, once by the people who harmed them, and again through their erasure by the judiciary.[44]

Linking past and present occurrences brings to the surface how "sexual violence, and the concomitant disempowerment of Indigenous women and girls, was an integral part of nineteenth-century strategies of domination and carries forward to the present day through the foundational violence of the state and the state's complicity in sanctioning the invisibility of gender violence against Indigenous women and girls."[45] For Indigenous women in Canada, the risk of being sexually assaulted based on their identity is compounded by overlapping inequalities and systemic patterns of discrimination which persist despite the 'end' of colonialism.[46] The residential school system and some other colonial policies which perpetuated violence and negative stereotypes against Indigenous women may have been relegated to the background, but

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[40] *Ibid* at 50.
[41] *Ibid* at 51.
[42] *Ibid* at 51.
[43] *Ibid* at 50.
[44] Tracy Lindberg et al, "Indigenous Women and Sexual Assault in Canada" in Elizabeth Sheehy, *Sexual Assault in Canada* (Ottawa: University of Ottawa Press, 2012) at 108 [Lindberg, "Indigenous Women and Sexual Assault in Canada"].
[45] Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing", *supra* note 5 at 9.
[46] Alana Prochuk, "Women's Experiences of the Barriers to Reporting Sexual Assault" (November 2018) at 11, online: *West Coast LEAF* < http://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf > [perma.cc/4ES7-A747] [Prochuk, "Women's Experiences of the Barriers to Reporting Sexual Assault"].

their effects persist within the criminal justice system. For instance, the colonialism-rooted assumption that Indigenous women are hypersexual[47] has since remained a tool of discrimination and prejudice in the hands of actors within the justice system. Sexual stereotypes against Indigenous women are used to naturalize violence socially and legally, such that these women are blamed for their own victimization and as a result, sexual violence against them is not taken seriously— *she's Indigenous; Indigenous women are loose and hypersexual and so she definitely wanted it.*[48] These biases and discriminatory stereotypes reveal themselves from the police system to the courts. Some studies and reports have in fact, identified being Indigenous as a specific barrier to justice for sexual assault victims.[49]

In 2013, a Human Rights Watch report titled, *Those Who Take Us Away* dissected the relationship between Royal Canadian Mounted Police (RCMP) and Indigenous women and girls in ten towns across Northern British Columbia. The chilling but unsurprising results of the report revealed not just how Indigenous women and girls are under-protected by the police but also, how they have been subjected to gross levels of state violence through the dispatching of colonial power vis-à-vis the institution of policing— including reports of physical and sexual abuse by the police as well as the unsympathetic responses of the police when the women summoned up the courage to report.[50] Just a year earlier, a leaked video had surfaced online of a West Kelowna RCMP officer interrogating a seventeen-year-old Indigenous sexual assault complainant; not only did he question her without an adult or a lawyer being present, he asked questions and had a demeanour which reeked of stereotypical assumptions and prejudice— questions like whether she enjoyed it, whether it hurt or not, and why she did not struggle with

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[47] Patricia Barkaskas & Sarah Hunt, "Access to Justice for Indigenous Adult Victims of Sexual Assault" (October 2017) at 13, online: *Department of Justice Canada* < https://thekoop.ca/wp-content/uploads/2019/10/Access_to_Justice_for_Indigenous_Adult_V.pdf> [perma.cc/H2JW-2W63] [Barkaskas & Hunt, "Access to Justice for Indigenous Adult Victims of Sexual Assault"].

[48] *Ibid* at 14.

[49] *Ibid* at 7; Prochuk, "Women's Experiences of the Barriers to Reporting Sexual Assault", *supra*, note 46 at 6; See also Kathryn Penwill, "Reality Check: How Rape Mythology in the Legal System Undermines the Equality Rights of Women Who Are Sexual Assault Survivors" (2008) at 40, online (pdf*): Action Ontarienne Contre la Violence Faite aux Femmes* < https://aocvf.ca/wp-content/uploads/2018/03/Ressources-publications-une-veritable-course-a-obstacle-ENG.pdf > [perma.cc/U58X-859P].

[50] Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing", *supra* note 5 at 12; See also Meghan Rhoad , "Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada" *Human Rights Watch* (13 February 2013), online: < https://www.hrw.org/node/256405/printable/print > [perma.cc/63MZ-DAPP] [Rhoad, "Those Who Take Us Away"].

the assailant.[51] One of the girls interviewed by Human Rights Watch in 2013 stated her experience with the RCMP after they showed up to a field where gang members were chasing her thus,

> I was yelling at them saying: "I was the one who called for help. Why are you guys chasing me?" And they didn't say anything else… They roughed me up. They handcuffed me and put me in the back of the police car and would not allow my mother to come and see me… One of them came and said [through the police car window], "keep kicking and see what happens"… He punched me in the face more than six times. Half of his body was in the police car. Both my mom and sister saw him punch me. Then they came over and saw my face swollen up. I said, "Look what they did to me!" [52]

More recently, in a 2017 submission to the Government of Canada, Human Rights Watch reported that in Saskatchewan, as with practically every other province, Indigenous women do not call the police to report violence against them for fear that amongst other reasons, the police may harass them.[53] The 2019 report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (NIMMIWG) revealed that Indigenous women generally have a distrust for the criminal justice system because even when they report their violation, the police invoke racist stereotypes, dismissing their complaints and outrightly discriminating against them.[54] As mentioned in the previous chapter, some of the racist stereotypes identified by the Indigenous women interviewed by the NIMMIWG include, that Indigenous women and girls are drunks; runaways out partying; and prostitutes unworthy of follow-up.[55]

The courts are not left out and the case of *R v Rhodes*[56] is a perfect example. In *Rhodes,* the trial judge who ought to protect the process against inferences supporting myths and stereotypes was the one who introduced these prejudicial inferences into the process, when he

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[51] Hannah Jackson, "RCMP Respond to Outrage Over Sexual Assault Complainant Asked if She was 'Turned on'", *Global News* (17 May 2019), online: < https://globalnews.ca/news/5281967/rcmp-sexual-assault-interview-Indigenous-youth/ > [perma.cc/SS7L-FAYT].

[52] Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing", *supra* note 5 at 12; Rhoad, "Those Who Take Us Away", *supra* note 50.

[53] "Submission to the Government of Canada on Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence" *Human Rights Watch* (17 June 2017), online: < https://www.hrw.org/news/2017/06/19/submission-government-canada-police-abuse-Indigenous-women-saskatchewan-and-failures > [perma.cc/4PU2-6AXY] [Human Rights Watch, "Submission to the Government of Canada"].

[54] NIMMIWG, "Reclaiming Power and Place", *supra* note 16 at 650.

[55] *Ibid* at 648.

[56] *R. v. Rhodes* (Man. C.A.) (Motion for Leave to Intervene Nov. 3, 2011).

minimized the complainant's assault for the reason that "sex was in the air" because her behaviour and appearance, as well as that of her friend, were provocative and enticing to the accused, who was a merely a 'clumsy Don Juan' who "misread signals" and engaged in "inconsiderate behaviour."[57] These statements invoke discriminatory beliefs about sexual assault complainants, and particularly Indigenous women, including that they fantasize about rape and are to blame for their assaults by the way they dress, for being intoxicated or in a bar, or if they engage in what is perceived to be "risky" behaviour. One wonders if Justice Dewar would have made the "sex was in the air" comment if the complainant was White and not Indigenous; and how many other cases there are where trial judges and juries have made decisions that could possibly have been fueled by a mix of gendered and racist prejudices. Unfortunately, in sexual assault cases, it is usually difficult for one to tell the race of a complainant just by reading court judgments. We only know the *Rhodes* complainant was Indigenous because it was stated in media reports and the sentencing report mentioned the Crown counsel's reference to the complainant's *"kokum,"* that is, grandmother in Cree language;[58] and in *Barton,* we know because of the peculiar circumstance— the constant reference to Gladue as a "Native prostitute." In this regard, Professor Busby has observed that while complainants' and defendants' genders are always apparent in reasons for decision, other aspects of parties' identities or social locations such as race, Indigeneity, sexual orientation or class are rarely apparent in written reasons.[59] Even where Indigeneity has been apparent, the courts have often ignored that aspect of complainants' identities. The *R v O'Connor* case,[60] for instance, concerned disclosure of counselling records and Indian residential school records of four Indigenous women but the court did not consider it relevant to examine the facts and circumstances of the case through an intersectional lens; the SCC, in fact, completely ignored the issue of the Indian residential school records being sought, in its decision. Not long after *O'Connor,* Busby noted in her article on

[57] Justice Dewar's inference fuelled the myth that women are at fault for their sexual assaults; See Karen Busby, "Sex Was in the Air': Pernicious Myths and Other Problems with Sexual Violence Prosecutions" in Elizabeth Comack, *Locating Law: Race/Class/Gender/Sexuality Connections* (Halifax: Fernwood Publications, 2014) at 284 [Busby, "Sex was in the Air"]; LEAF, "R. v. Rhodes (Man. C.A.) (Motion for Leave to Intervene Nov. 3, 2011)" < https://www.leaf.ca/news/r-v-rhodes-2/ >
[58] *Ibid,* at 260.
[59] *Ibid.*
[60] [1995] 4 S.C.R. 411.

third party records, how courts tend to omit the mentioning or consideration of complainants' race, Indigenous status or ethnicities in the reasons for their decisions.[61]

Sherene Razack narrates the story of Pamela George, a woman of Saulteaux (Ojibway) nation and a mother of two children. Pamela was brutally murdered in Regina by two white men, following sexual assault. Amongst other problematic occurrences during the trial, both Crown and defence counsel maintained that Pamela's occupation as a sex worker was relevant in the case and the trial judge instructed the jury to bear this in mind in their deliberations.[62] The two men were convicted of manslaughter, sparking objections from the Indigenous community, who believed that the trial judge acted improperly to have directed the jury to a finding of manslaughter instead of at least, second degree murder.[63] Razack notes that the diminished culpability accorded to the convicted persons stemmed from a number of factors, chief of which was her Indigeneity. In her words,

> [B]ecause Pamela George was considered to belong to a space in which violence routinely occurs, and to have a body that is routinely violated, while her killers were presumed to be far removed from this zone, the enormity of what was done to her remained largely unacknowledged. My argument is in the first instance an argument about race, space, and the law. I deliberately write against those who would agree that this case is about an injustice but who would de-race the violence and the law's response to it and label it more generically as patriarchal violence against women, violence that the law routinely minimizes. While it is certainly patriarchy that produces men whose sense of identity is achieved through the brutalizing of a woman, the men's and the court's capacity to dehumanize Pamela George derived from their understanding of her as the (gendered) racial Other whose degradation confirmed their own identities as white - that is, as men entitled to the land and the full benefits of citizenship.[64]

The totality of the above speak to the statements made in the introductory paragraph of this section— the Canadian State, represented by the justice system, condones the invisibility of sexual assault and gender-based violence against Indigenous women and girls, and this condoned invisibility works in concert with individual acts of male violence and reinscribes a dehumanized

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[61] Karen Busby, "Third Party Records Cases since R. v. O'Connor" (2000) 27(3) Man LJ 355 at 367.
[62] Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15(2) *Canadian Journal of Law and Society* at 91-92, (online) pdf: < https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/article/gendered-racial-violence-and-spatialized-justice-the-murder-pamela-george/60CD51273DB3FA9851D7522FE3168787 > [Razack, "The Murder of Pamela George"].
[63] *Ibid.*
[64] *Ibid* at 93.

and racialized Indigenous woman who can be violated at will with minimal or no consequences.[65] The condoned invisibility is also what makes the importance of the *Barton* decision to sexual violence and Indigenous jurisprudence even more appreciated. The truth is that all components of the justice system, from the police to the courts, contribute uniquely to the treatment of Indigenous women as well as the perceptions by Canadians of their value, their place in society, and the respect that should be accorded their sexual and other rights.[66] If the so-called preservers of justice perpetuate myths, stereotypes and other discriminatory attitudes against Indigenous women, the broader society will naturally follow suit.

PART B

3.2 FEMINIST INTERVENTION AS A TOOL FOR LEGAL AND POLICY CHANGE

The role that the Women's Legal Education Action Fund (LEAF) and the Institute for the Advancement of Aboriginal Women (IAAW), amongst other feminist/Indigenous organisations played in *Barton* necessitates a conversation around the relationship that feminist organisations have had with the SCC overtime, particularly within the context of sexual assault and more specifically, sexual assault against Indigenous women.

3.2.1 FEMINIST INTERVENTION AT THE SUPREME COURT OF CANADA (SCC)

Feminist interventions at the SCC and superior courts in Canada generally dates to the 1974 case of *Lavell v Canada*,[67] which interestingly, involved equality rights of Indigenous women. In *Lavell*, the SCC considered the issue of whether it was discriminatory on the basis of sex under the Canadian Bill of Rights,[68] to deprive Indigenous women and children of "Indian status" if they married non-status men, as opposed to Indigenous men who retained their status if they married non-status women.[69] While the interventions in *Lavell* were unsuccessful in persuading the court on the sex discrimination issue, it at least, set a precedent for feminist

[65] Dhillon, "Indigenous Girls and the Violence of Settler Colonial Policing", *supra* note 5 at 9.
[66] Native Women's Association of Canada, "Aboriginal Women and the Legal Justice System in Canada" (2007) Issue Paper prepared for the National Aboriginal Women's Summit at 1 , online (pdf): < https://www.nwac.ca/wp-content/uploads/2015/05/2007-NWAC-Aboriginal-Women-and-the-Legal-Justice-System-in-Canada-Issue-Paper.pdf > [perma.cc/FXN2-KZAQ] [Native Women's Association of Canada, "Aboriginal Women and the Legal Justice System in Canada"].
[67] [1974] SCR 1349.
[68] Canadian Bill of Rights, S.C. 1960, c. 44.
[69] Elizabeth Sheehy & Julia Tolmie, "Feminist Interventions: Learning from Canada," (2019) 3 NZ Women's LJ at 218 [Sheehy & Tolmie, "Feminist Interventions: Learning from Canada"].

advocacy in the superior courts of Canada. It did not take long before the precedent was followed, as about a year later, a women's group[70] was amongst five other interveners, granted leave to intervene in the case of *Morgentaler v The Queen*,[71] where they argued that the criminal prohibition on abortion at the time, denied women of their right to equality under the Bill of Rights. The policies which followed— the entrenchment of Canada's *Charter* in 1982;[72] the extension of the Federal Court Challenges Program (CCP) to include funding for interveners in equality rights *Charter* litigation in 1985;[73] and the court's liberalisation of its rules governing interveners in 1987[74]—popularized intervention and consequently, increased feminist interventions at the SCC.

It has been said that no group has been more active in using litigation than organised feminists.[75] In fact, feminists were the first to form a United States-style litigation organization—The Women's Legal Education and Action Fund (LEAF)— in 1985 with the objective of using "test cases" to pursue "systematic litigation" strategies for attaining women's equality under the *Charter*.[76] Morton and Allen report that feminists generally and LEAF in particular, are the most visible and most studied of new rights advocacy organisations.[77] LEAF has been described as one of the "most prolific interveners at the Supreme Court,"[78] with many of its interventions, like *Barton,* raising intersectional issues which cut across racism, poverty, disability, nationality, sexuality, amongst others, and are critical to women's substantive equality.[79] The organisation has been credited for substantively improving the law in several areas including sexual orientation, reproductive rights and the development of the concept of substantive equality

[70] *Ibid.*
[71] [1976] 1 SCR 616.
[72] Sheehy & Tolmie, "Feminist Interventions: Learning from Canada", *supra* note 69 at 220.
[73] *Ibid;* Shannon Salter "Rights without Remedies: The Court Party Theory and the Demise of the Court Challenges Program" (LLM Thesis, University of Toronto, 2011**)** at I.
[74] *Ibid*; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 UT Fac L Rev 151 at 161-162.
[75] F.L. Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada Feminists and the Courts" (2001) 34(1) Canadian Journal of Political Science at 56 [Morton & Allen, "Feminists and the Courts"].
[76] *Ibid,* at 56; Dana Phillips, "Ishaq v Canada: "Social Science Facts" in Feminist Interventions," (2018) Windsor YB Access to Just at 106.
[77] Morton & Allen, "Feminists and the Courts", *supra* note 75 at 56.
[78] Sheehy & Tolmie, "Feminist Interventions: Learning from Canada", *supra* note 69 at 223.
[79] *Ibid* at 224.

through its interventions at the SCC.[80] Between the period of 1986 and 1996, LEAF intervened in twenty-three cases before the SCC, and the court's decision aligned with its submissions in seventeen out of those cases.[81] Manfredi finds that out of thirty-six cases in which LEAF intervened at the SCC between 1988 and 2000, it was on the winning side in over eighty-three percent; and of those thirty-six cases, the court cited LEAF's sources in its decisions in twenty-three, and of those twenty-three, the court made six comments on LEAF's arguments.[82] In a 2017 article, McGill and Gilbert highlighted the unique role that LEAF and its feminist equality advocacy has played in shaping the SCC's jurisprudence at each stage of section 15 of the *Charter's* life.[83] LEAF's record of success in the outcomes of court decisions, they argue, is evidenced by both its contribution to jurisprudence in particular areas of law and in individual cases.[84] Sheehy and Tolmie, in exploring the potential of third-party interventions by feminist lawyers in Canada and New Zealand, interestingly, reference the case of *R v Barton*, highlighting how the unanimous SCC substantially adopted the position of LEAF and the Institute for the Advancement of Aboriginal Women (IAAW), and cited sources offered in their factums.[85]

3.2.2 FEMINIST INTERVENTION IN SEXUAL ASSAULT CASES

Narrowing the conversation to sexual assault cases, existing jurisprudence show the significant role that feminist organisations have played in advancing Canadian sexual assault laws through a feminist and equality lens, intervening in almost every precedent-setting SCC case to ensure that the court gave full protection to complainants' rights to equality, privacy, and dignity;[86] and *Barton* might well be the most recent on the list. I will now proceed to summarize some of the said jurisprudence.

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[80] *Ibid* at 226.
[81] *Ibid*; Radha Jhappan, "Introduction" in Radha Jhappan (ed) *Women Legal Strategies in Canada* (University of Toronto Press, Toronto, 2002) at 3.
[82] *Ibid*; Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Womens Legal Education and Action Fund* (UBC Press, Vancouver, 2004) in (2004) 14 L & Pol Book Rev 861 at 863.
[83] Jena McGill & Daphne Gilbert, "Of Promise and Peril: The Court and Equality Rights" (2017) 78 S.C.L.R. (2d) at 236 [McGill & Gilbert, "Of Promise and Peril"].
[84] *Ibid* at 235.
[85] Sheehy & Tolmie, "Feminist Interventions: Learning from Canada", *supra* note 69 at 225.
[86] LEAF, "Sexual Assault and Consent Law" (2020) < https://www.leaf.ca/issue-area/sexual-assault-and-consent-law/ > [perma.cc/8B8T-HFKL].

3.2.2.1 R v Seaboyer and R v Gayme (1991);[87] R v Darrach (2000)[88]

Seaboyer, very much like *Barton,* involved questions about admitting complainants' sexual history evidence. At the Ontario court of appeal, LEAF argued that the *Criminal Code* provision prohibiting the introduction of sexual history evidence was constitutional and had no violating impacts on ss. 7 or 11(d) of the *Charter*. By the time the case got to the SCC, feminist Rape Crisis and Treatment Centres intervened jointly with LEAF to argue that even if there were a *Charter* violation, such violation would be justified under section 1 of the *Charter* because of the role the provisions played in protecting the rights of women against prejudice and unequal protection and benefit of the law.[89] The decision of the SCC was to uphold the provisions which did not allow sexual history evidence to be introduced to either undermine or support the complainant's credibility, while striking down the other rape shield provision which limited sexual history evidence as a violation of the accused's sections 7 and 11(d) *Charter* rights.[90]

While the decision did not go entirely in the feminist interveners' favour, it was the steps the interveners took after that truly made the difference and changed the laws on sexual history evidence till date. As part of a coalition of women's organizations, LEAF consulted with Canada's Minister of Justice to ensure that the new rape shield provisions in section 276 of the *Criminal Code*,[91] addressed women's equality concerns.[92] Furthermore, when the constitutionality of the new rape shield provisions was challenged in *Darrach* both at the Ontario court of appeal and the SCC, the feminist coalition of LEAF, Canadian Association of Sexual Assault Centres, Disabled Women's Network Canada and the National Action Committee on the Status of Women intervened to argue (and the SCC agreed) that the rape shield provisions were constitutional.[93]

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[87] [1991] 2 S.C.R. 577.
[88] [2000] 2 SCR 443.
[89] LEAF, "R v Seaboyer and R v Gayme" (2020) < https://www.leaf.ca/case_summary/r-v-seaboyer-and-r-v-gayme-1987-1991/ > [perma.cc/ST67-SKHQ] [LEAF, "R v Seaboyer and R v Gayme"].
[90] *Ibid.*
[91] The current version of the *Criminal Code*, RSC 1985, c C-46; S. 276 was enacted in the 1992 amendment [*Criminal Code*].
[92] LEAF, "R v Seaboyer and R v Gayme," *supra*, note 90.
[93] LEAF "R. v. Darrach (1998, 2000)" (2020) < https://www.leaf.ca/case_summary/r-v-darrach-1998-2000/ > [perma.cc/2W8U-C2S9].

3.2.2.2 R v O'Connor (1994, 1995);[94] A.(L.L.) v B.(A.) (1995)[95]

This issue in *R v O'Connor* and for which feminists intervened, was the disclosure of complainants' counselling and Indian residential school records to defendants in sexual assault cases. Interestingly, the four complainants in this case were Indigenous women who O'Connor had sexually assaulted while they worked under his supervision at the same residential school they previously attended as students. O'Connor was a priest in principle at the residential school and ultimately became a bishop in the territory. The feminist coalition of LEAF, the Aboriginal Women's Council, Disabled Women's Network of Canada (DAWN) and the Canadian Association of Sexual Assault Centres argued, amongst other things, that disclosure rules which made mental health or medical records routinely accessible would: reinforce rape myths, re-victimize survivors, deter future reporting, and disproportionately and negatively impact women with disabilities, Indigenous women, and racialized women.[96] The court established a two-part test for determining whether records in the hands of a third party should be disclosed to the defence. It is important to note, however, that the SCC made no comment on the fact that Indian residential school records were being sought. In this regard, it is difficult to say that the victory was a complete one.

A similar set of facts arose in *A.(L.L.) v B.(A.)*, involving counselling records of an indecently assaulted Indigenous girl. The argument of the feminist coalition was same as the argument put forward in *O'Connor*, and so was the decision; the SCC held that the trial judge failed to follow the proper procedure for requesting counselling records as enumerated in *O'Connor.*

Just as with *Seaboyer*, LEAF's advocacy did not end with these cases; the organisation consulted with the Department of Justice to develop Bill C-46 which amended the *Criminal Code* to establish a procedure for the disclosure of personal records in all sexual assault cases – one which recognized the equality rights of women and children.[97]

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[94] [1995] 4 S.C.R. 411.
[95] [1995] 4 S.C.R. 536.
[96] LEAF "R. v. O'Connor (1994, 1995)" (2020) < https://www.leaf.ca/case_summary/oconnor-1994-1995/ > [perma.cc/KXR7-6TTJ].
[97] *Ibid.*

3.2.2.3 Jane Doe v Metropolitan Toronto Commissioners of Police (1998)[98]

In this famous Jane Doe case, LEAF sponsored Jane's lawsuit against the Metropolitan Toronto Police, arguing that the police were negligent to not warn the public of a serial rapist who ended up sexually assaulting Jane Doe. Awarding damages to Jane, the judge found that the police conduct in the investigation was informed by myths and stereotypes about sexual assault, women, and women who were sexually assaulted.[99]

3.2.2.4 R v Ewanchuk 1999;[100] R v J.A. (2011)[101]

In what has come to be a major reference point on the law of consent in sexual assault trials, LEAF and DAWN argued in *Ewanchuk,* and the SCC agreed (a) that the trial judge's definition of consent undermined women's constitutional rights to equal protection and benefit of the law, meaningful security of the person, and equal access to justice; (b) that consent required the communication of a freely exercised, capable, and deliberate agreement to the sexual activity in question; and (c) that "Implied consent" created a default that required complainants to protest, rather than placing the responsibility on men to obtain full and express consent. The SCC clearly stated that there is no defence of implied consent in Canadian law.

The consent discourse came up again in *J.A* where LEAF intervened to argue that there could be no consent to sexual activity when a woman was unconscious and unable to say "no." Accepting "advance consent" would re-introduce the discredited notion of "implied" consent into Canadian law. In alignment with LEAF's position, a majority of the Supreme Court held that a person could not give advance consent to acts committed while they were unconscious.

3.3 MEASURING SUCCESS: WHAT INTERVENTION FOR INDIGENOUS COMPLAINANTS?

The success of feminist advocacy in contributing to the development of Canadian sexual assault laws and gender equality more broadly, is obvious, regardless of the mode by which

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[98] 1998 CanLII 14826.
[99] LEAF "Jane Doe v. Metropolitan Toronto Commissioners of Police (1998)" (2020) < https://www.leaf.ca/case_summary/jane-doe-v-metropolitan-toronto-commissioners-of-police-1998/ > [perma.cc/9R3U-YRMX].
[100] [1999] 1 SCR 330.
[101] 2011 SCC 28.

success is assessed—whether measured by outcome ("who wins"); or the effect of the case on the policy status quo (PSQ) and the creation of precedents.[102]

Judging by outcome, for instance, a 2001 study revealed that feminist claims had prevailed in seventy-two percent of the cases in which they intervened. In 1994, Lauri Hausseger studied fourteen SCC cases, concluding that LEAF's factums exerted at least some influence on the SCC's reasoning in all fourteen cases.[103] The 2001 study found that as per the PSQ optics, even in the cases where feminist claims had not prevailed, those losses (thirteen) were insignificant, since only three of the thirteen changed the PSQ in a direction opposed by feminists. In total, there were seventeen cases that changed the PSQ in a direction desired by feminists.[104] Of course, between 2001 and now, there have been even more sexual assault cases where feminist organisations have intervened and the SCC's position has aligned with theirs, although most of those cases have circled around previously established precedents like those discussed in the previous section.

The conversation takes a different turn, however, when we narrow the conversation to Indigenous sexual assault complainants. Of all the sexual assault cases considered under section 3.1 above where feminist organisations have intervened, we only know that two had Indigenous complainants— *R v O'Connor* and *A.(L.L.) v B.(A.),* and even in those cases, the focus of the SCC was squarely on the privacy rights of the complainants; and none of the judges seemed to consider whether and how the complainants' Indigeneity might have played a role in the dynamics of both cases. There is also the consideration that besides *O'Connor* and *B.(A.),* it is possible that other cases had Indigenous complainants, and this is where Professor Busby's observations become instructive again: "while complainant's and defendant's gender are always apparent in reasons for decision, other aspects of parties' identity or social location such as race, Indigeneity, disability, sexual orientation or class are rarely apparent in written reasons."[105] We just do not know. In this regard, it is difficult, if not impossible, to measure the success of feminist legal and policy advocacy within the narrower context of intersectionality in sexual assault cases, particularly those involving Indigenous complainants.

[102] Morton & Allen, "Feminists and the Courts", *supra* note 75 at 57.
[103] *Ibid.*
[104] *Ibid.*
[105] See Busby, "Sex was in the Air", *supra* note 57 at 260.

It all boils down, again, to reiterating the importance of the *Barton* decision for sexual assault jurisprudence as it concerns Indigeneity and intersectionality. For the first time in Canada's legal history, the SCC expressly acknowledged that while myths and stereotypes pervade the justice system against sexual assault complainants, those myths and stereotypes become compounded when the complainant in question is Indigenous, more so an Indigenous sex worker.[106] In acknowledging this reality, the SCC recognized the inseparability of the issues from colonial oppression, and as we shall discuss in the following chapters, these acknowledgments might not have occurred but for the intervention of feminist advocates;[107] who knows how many more years it might have taken to get to this point?

3.4 CONCLUSION

To summarize the take outs from this chapter, I have attempted to establish (a) that sexual violence against Indigenous women and the accompanying prejudicial stereotypes are largely rooted in colonial history; (b) that both the violence and the stereotypes persist till date in Canadian society, and more specifically within the criminal justice system; (c) that while feminist advocacy has greatly influenced the development of sexual assault laws and policy, that influence has not visibly manifested itself where Indigenous sexual assault complainants are concerned; and this is why the *Barton* decision represents a beacon of hope.

In the next chapter, I will focus specifically on the *Barton* facts, decision, feminist interventions and the controversies which ensued. As we progress, all the contexts which have been established in the first three chapters will come together to make perfect sense. Chapter four will set the tone for the final chapter, where I discuss the results of my interview with five lawyers who acted as counsel for interveners in *Barton*, in a bid to draw conclusions on the subject matter of this thesis.

[106] *Barton, supra* note 4 at para 1.
[107] *Ibid.*

CHAPTER FOUR

WHERE THE STORY BEGINS

4.0 INTRODUCTION

This chapter will be descriptive in nature. The aim here is to narrate the facts of *Barton* and the relevant events which occurred from the trial level to the Supreme Court of Canada (SCC). Understanding these events will be crucial to the appreciation of the conclusions which will be drawn in chapter five. It will also be crucial to contextualising the conversations which have been had in previous chapters—conversations like Indigeneity and colonial oppression; sexual history and gender-based myths and stereotypes; and the intersection between race, gender, and other layers of identity. Especially because of how the ensuing narration ties together pertinent issues which have already been discussed in previous chapters, it may be instructive to begin by refreshing our memories.

In chapter one, I discussed the practice of intervention at the SCC and the courts of appeal, highlighting the purpose that interventions serve and the point at which the line between intervention and interference with appeal processes should be drawn. I continued the discourse on intervention in chapter three but narrowed it down to feminist intervention at the SCC. The literature and cases considered in chapter three revealed that no group has been more active in using litigation than organised feminists,[1] with the Women's Legal Education and Action Fund (LEAF) appearing to be the most "successful" in that regard.

Chapter two was a review of relevant literature on Canadian sexual assault laws and more specifically, section 276 of the *Criminal Code*. I discussed the policy behind section 276—preventing the permeation of myths and stereotypes stemming from complainants' sexual histories into trial processes. I also considered the origin of the feminist theory of intersectionality, what it means and how it applies in practice; and in chapter three, I related intersectionality to the particular circumstances of Indigenous women and the prejudices which operate against them within the criminal justice system, as rooted in colonial oppression.

Some questions to be kept in mind as we navigate through this chapter are why section 276 of the *Criminal Code* was critical in *Barton,* whether there are any similarities between the interveners' position and the courts' decision, and whether the interveners' role should be

[1] F.L. Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada Feminists and the Courts" (2001) 34(1) Canadian Journal of Political Science at 56 [Morton & Allen, "Feminists and the Courts"].

characterized as intervention or interference with the appeal process. While the answers to these questions will more appropriately be addressed in chapter five, having them in mind will trigger a deeper appreciation of the conversations and issues which characterised the *Barton* decision.

In all these, it is noteworthy that beyond the SCC, Barton has now been retried on charges of manslaughter and has been found guilty by the jury. As mentioned earlier, a post-script will follow chapter five, detailing the current state of events in *Barton* as at the time of completion of this thesis.

4.1 R v. BARTON: FACTS ON FIRST TRIAL

Cindy Gladue (Gladue/ the Complainant), a 36-year-old Cree-Métis woman and mother of three was contracted for sex by the accused, Bradley Barton (Barton*)* for two nights. By the second night, Gladue was found dead in the bathtub in a hotel room occupied by Barton. The cause of death was determined to be a loss of blood due to an 11cm wound in her vaginal wall. Barton was charged with first degree murder in the death of Gladue. Because the alleged murder occurred during sexual activities between Barton and Gladue, it was important that there be a finding of sexual assault in relation to the first-degree murder charge. In this sense, sexual assault was an included offence in the larger charge of first-degree murder.[2] This position is reinforced by section 231(5) of the *Criminal Code,* which provides that murder is first degree murder when the death is caused by committing or attempting to commit any form of sexual assault.[3]

4.1.1 The Crown's Theory

The Crown's theory was that on the evening of June 21, 2011, Barton had cut the inside of Gladue's vaginal wall with a sharp object during sexual activities, hence the loss of blood, which resulted in her death. The Crown argued based on medical evidence that Gladue was at the time, incapacitated because her blood alcohol level was 340 milligrams. When Gladue began to bleed heavily, the Crown argued, Barton carried her to the bathroom and put her into the bathtub. Alternatively, the Crown argued that even if the jury had a reasonable

[2] The offence of first degree murder is provided for under section 231of the *Criminal Code.* Pursuant to section 231(2), murder is first degree murder when it is planned and deliberate. The current version of the *Criminal Code*, RSC 1985, c C-46; S. 276 was enacted in the 1992 amendment [*Criminal Code*].
[3] *Ibid,* s 231(5) (b) to (d).

doubt whether Barton cut Gladue's vaginal wall with a sharp object, Barton would nevertheless, still be guilty of unlawful act manslaughter on the basis that he caused Gladue's death in the course of sexual assault.[4]

4.1.2 The Defence's Theory

The defence contended that while Barton tore Gladue's vaginal wall and caused her death, this was a non-culpable act of homicide. Barton testified that he and Gladue had engaged in sexual relations on June 20 2011 and again, the night of June 21 before she died in the early hours of June 22. Barton admitted that he caused Gladue's death, but he claimed that it was an "accident" from consensual sexual activity and should not result in criminal liability.[5]

4.1.3 Errors and Prejudice

During the trial, in a bid to posit that the sexual activities between Gladue and Barton were consensual, the defence counsel, through Barton's lengthy testimony, introduced evidence of the previous night's sexual activities between Barton and Gladue. This came after the Crown had in its opening address, mentioned that Gladue was a "Native prostitute" who struck a "working relationship" with the accused.[6] The said evidence was introduced without any application to adduce it under section 276 of the *Criminal Code*,[7] and without any objection by the Crown or intervention by the trial judge. In other words, there was no *voir dire* to consider the admissibility and permissible uses of the evidence.[8] The likely effect of all these, it was argued, was to create biases in the minds of the jury—If this **Woman** had consensual sex with Barton the previous night and **even worse**, is a **Prostitute**, then surely, she must have consented to the material night's sexual activities; and if she or anyone else claims she did not consent, then surely, that has to be a lie. After all, **unchaste** women have never been known to tell the truth. To compound it all, Gladue's racial origin was repeatedly highlighted by both counsel, with neither of them stating whether or why that information was

[4] 2017 ABCA 216 at paras 2-3 [ABCA *Barton*].
[5] *Ibid* at para 4.
[6] "Native" could have negative connotations for Indigenous people and is widely considered as outdated. The term can also be problematic in certain contexts, as some non-Indigenous peoples born in a settler state may argue that they, too, are "native." Also, because it is a very general, overarching term, it does not account for any distinctiveness between various Aboriginal groups. See Indigenous Foundations, "Terminology" (2021) online: < https://indigenousfoundations.arts.ubc.ca/terminology/ > [https://perma.cc/5T36-HSWS].
[7] *Criminal Code*, *supra* note 2.
[8] 2019 SCC 33 [SCC *Barton*] at paras 2-8.

relevant to the trial. The trial judge was completely mute on this issue and did not address it either with counsel or with the jury. Gladue was an Indigenous woman with links to her Cree and Métis communities;[9] and counsel on both sides did not miss an opportunity to mention that fact, referring to her as a "Native prostitute" twenty-six times throughout the trial process.[10]

4.1.4 The Trial Court's Decision

The totality of the above resulted in a 'not guilty' finding by the jury and Barton's consequent acquittal.

4.2 ON APPEAL: FEMINIST INTERVENTIONS

On appeal to the Alberta court of appeal (ABCA) and subsequently, the SCC, several trial and jury charge errors were considered by the court, each error being serious in scope and significant in impact. For instance, there were considerations as to the trial judge's erroneous instructions on what use the jury could make of Barton's after-the-fact conduct; the trial judge's misleading instructions on motive; the trial judge's failure to instruct the jury properly on the law of sexual assault relating to "consent;" and the trial judge's failure to instruct the jury properly on dangerousness and manslaughter. We are, however, here concerned with the interaction of what I have classified as three issues:[11]

a. the trial judge's non-compliance with section 276 of the *Criminal Code* limiting the admissibility of prior sexual conduct evidence;
b. the trial judge's failure to adequately warn the jury about improper reliance on sexual conduct evidence; and
c. the permeation of racist stereotypes into the trial by virtue of the unnecessary repeated references to Gladue's Indigeneity.

It is pertinent to note that of these three issues, only the first was raised or mentioned by the Crown on appeal; the third was not even considered at all until the joint interveners, LEAF and IAAW raised it at the ABCA. But for the feminist interveners, no one might have thought to approach the issues through an intersectional lens, both at the ABCA and the SCC.

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[9] *R v Barton* 2019 SCC 33 (Factum of the Interveners, Institute for the Advancement of Aboriginal Women and Women's Legal Education and Action Fund INC.) at para 1 [IAAW and LEAF Factum].
[10] SCC *Barton, supra* note 8 at para 223.
[11] ABCA *Barton, supra* note 4 at para 45.

4.2.1 The Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund Inc. (LEAF)

The IAAW and LEAF were the only interveners to make submissions both at the ABCA and the SCC. In their factum to the SCC, the joint interveners referenced the *Nehiyawak* (Cree) if and Métis doctrine of *Wahkohtowin.*[12] The doctrine refers to the "responsibilities and reciprocal obligations" we hold in relation to one another.[13] That inter-relatedness, they argued, requires that the criminal justice system acknowledges and addresses the discrimination and other injustices that Indigenous people and particularly, Indigenous women face in their daily realities—violent victimization, threats to their humanity, dignity and bodily autonomy— as well as the unjust way in which the criminal justice system has responded.[14] They argued that the trial judge allowed racism and prejudice to permeate the process and exacerbate those prejudices which had already been introduced by the admission of unscrutinised sexual history evidence.

Section 276 of the *Criminal Code* was enacted specifically to eliminate myths and stereotypes against complainants—majority of which are women—in sexual assault trials. The joint effect of the reference to prior sexual activities between Barton and Gladue; and the constant characterization of Gladue as a "prostitute" was to engage significant risks of prohibited myths[15] entering the reasoning process. Prior to the introduction of any sexual history evidence, the trial judge ought to have considered the relevance of such evidence and weigh its probative value and prejudicial risk. [16] Exacerbating these myths, was the racist stereotypes which came into play upon the consistent description of Gladue as "Native," as though that was somehow relevant to the trial. To quote paragraph 7 of IAAW and LEAF's ABCA factum,

> Gladue's identity as an Indigenous woman was also emphasized throughout the trial, using the non-preferred term of "Native". Gladue was described as

[12] Gladue was of Cree and Métis origin.
[13] IAAW and LEAF Factum, *supra* note 9 at para 4.
[14] *Ibid* at para 5.
[15] Recall the twin myths stated in chapter two—that an 'unchaste' woman was (a) more likely to have consented to the sexual activity in question; or (b) less worthy of belief. Karen Busby, "Sex Was in the Air': Pernicious Myths and Other Problems with Sexual Violence Prosecutions" in Elizabeth Comack, *Locating Law: Race/Class/Gender/Sexuality Connections* (Halifax: Fernwood Publications, 2014) at 280-281 [Busby, "Sex was in the Air"].
[16] ABCA *Barton*, *supra* note 4 at para 124.

> "Native" in appearance, and was frequently referred to by both counsel and witnesses as "the Native woman", and "the Native girl" rather than by name. (Transcript: pp 143,764, I77,178,I79,323,130I,1302, L303, 1305, 1308, 1314, 1317, 1321, 1322). Neither party explained why this emphasis on Gladue's Indigenous identity was relevant to the material issues at trial.[17]

It is at this point that we see intersectionality play out in the interveners' submissions. The interplay between Gladue's race, gender and occupation is clearly identified:

> In this case, there is a significant risk that evidence of Gladue's sexual activity with the Respondent on the night before her death, coupled with the stigma and myths evoked through repeated characterizations of Gladue as a "prostitute" and a "Native girl" or "Native woman", invited the jury to draw the prohibited inference that she was "more likely to have consented to the sexual activity that forms the subject-matter of the charge" (s. 276(1)(a)).[18]

The interveners' position was the same at the SCC. "Where sexual history evidence is introduced without judicial inquiry and attention to the factors listed in s. 276(3) and the complainant is Indigenous," they argued, "the risk that discriminatory beliefs or bias may infuse the trial process becomes acute." To support the argument as to why racism cannot be disregarded, reference was made to the SCC's decision in *R v Williams*,[19] where the SCC took judicial notice of how racism can shape jurors' reception of information during trials, stating that "the link between prejudice and verdict" is "clearest when there is an "interracial element" to the crime."[20]

From the human rights and substantive equality perspective, the interveners argued that the admission of the unscrutinised sexual history evidence, as well as the continuous reference to Gladue as a "Native" prostitute thus, infusing further stereotypes into the process, constituted a breach of Gladue's section 7 and section 15 *Charter* rights.[21]

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[17] *R v Barton* 2017 ABCA 216 (Factum of the Interveners, Institute for the Advancement of Aboriginal Women and Women's Legal Education and Action Fund INC.) at para 7 [ABCA, IAAW and LEAF Factum].
[18] *Ibid* at para 23.
[19] [1998] 1 SCR 1128.
[20] IAAW and LEAF Factum *supra* note 9 at para 28.
[21] Section 7 of the Charter provides that, "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;" and pursuant to section 15(1) of the Charter, Indigenous women and sex workers are equal with others before the law and have the right not to be discriminated against based on their race, ethnic origin, colour or sex.

Lastly, they argued that "if, at any point in a trial, evidence that has the potential to engage racist and gendered myths and stereotypes is aired, the trial judge has a duty to give detailed and specific instructions to guard against the risk that a jury will engage in impermissible reasoning."[22]

4.2.2 The Women's Equality and Liberty Coalition

The Women's Equality and Liberty Coalition intervention at the SCC was brought jointly on behalf of six organizations with front-line expertise on men's prostitution and commercial sexual exploitation of women, as well as other forms of male violence.[23]

The Coalition argued that the facts of the case mirror several objectifying stereotypes which operate against women, and particularly Indigenous women, including (a) that indoor prostitution is safe; (b) that women in prostitution enjoy what is being done to them including violence; and (c) that commercial sexual exploitation is a function of mutual sexual pleasure as opposed to the sexual gratification of men. The trial transcripts in fact, show that Barton maintained all through that Gladue enjoyed the manual penetration and in that regard, she consented to the sexual activities which led to her death.[24]

From an intersectional perspective, stereotypical assumptions about Indigenous sex workers, including (a) that Indigenous women "invite, enjoy and deserve the harms that men inflict on them;" and (b) that "Indigenous women are available for men's sexual gratification," exacerbated the already stated myths.[25] Thus, while Barton killed Gladue in the course of pursuing his own sexual gratification, her Indigeneity fueled his apparent belief that it was acceptable to be sexually violent towards her.

Stating the well-known policy behind section 276 as enunciated in *R v Darrach* – to prevent irrelevant evidence and discredited stereotypical reasoning from distorting the trial

[22] IAAW and LEAF Factum, *supra* note 9 at para 5.
[23] The organizations include the Vancouver Rape Relief Society, La Concertation des Luttes Contre L'Exploitation Sexuelle (La CLES); Asian Women for Equality Society; Aboriginal Women's Action Network (AWAN); Formerly Exploited Voices Now Educating (EVE); and CEASE: Centre to End All Sexual Exploitation. *R v Barton* 2019 SCC 33 (Factum of the Interveners, The Women's Equality and Liberty Coalition Factum) at para 1 [The Coalition Factum].
[24] *Ibid* at para 5.
[25] *Ibid* at para 6.

process,[26] they argued that in the instant case, introducing evidence that the complainant was a "prostitute," as well as evidence of her previous sexual activities with the accused had the effect of introducing inferences of one of the "twin myths," that Gladue was more likely to have consented to the sexual activity which led to her death.[27] The unscreened evidence also invoked the sexist inferences that "prostitutes cannot be raped" and that "women with low morals are more likely to lie." To worsen matters, the emphasis on Gladue's Indigeneity further invoked the racist stereotype that Indigenous women are hypersexual, loose and would give men unrestricted access to their bodies to get money for alcohol or drugs.[28] This false construction of Indigenous women as loose "prostitutes", they argued, is informed by what they referred to as "sexualized colonialism."

Gladue should not have been labeled a prostitute, a sex worker, or any other "politically correct" version of the status, talk less of adding "Native" as a suffix. The trial judge should have instructed the jury on the gendered and racialized nature of sexual assault and commercial sexual exploitation because "erasing sexism, colonialism and racism from consideration leads to distortions rather than objectivity."[29]

The Coalition thus, urged the SCC to through its decision, make emphatic statements rejecting these damaging and discriminatory stereotypical assumptions, and acknowledging the extreme risks that sex workers and particularly, Indigenous sex workers have faced since colonialism.[30]

4.2.3 Women of the Métis Nation/ Les Femmes Michif Otipemisiwak (WMN/LFMO)

The Women of the Métis Nation/Les Femmes Michif Otipemisiwak ("WMN/LFMO") is the national body which advocates on behalf of the women of the Métis Nation.[31] Their argument was based on the premise that the way the case was handled mirrored a disregard for Gladue's Métis culture, history, laws and values. Indigenous women are much more susceptible to gender-based violence, victimization and death than non-Indigenous women. In

[26] *Ibid* at para 25; *R v Darrach*, [2000] 2 SCR 443 at paras 445 & 469.
[27] The Coalition Factum, *supra* note 24 at para 28.
[28] *Ibid* at para 29.
[29] *Ibid* at para 32; *R. v. R.D.S.,* [1997] 3 S.C.R. 484 at paras 46-47.
[30] The Coalition Factum, *supra* note 23 at para 3.
[31] *R v Barton* 2019 SCC 33 (Factum of the Interveners, Women of The Métis Nation/ Les Femmes Michif Otipemisiwak) [WMN/LFMO Factum].

fact, being "a visibly Indigenous woman" in Canada is in itself, a risk factor for gender-based violence; and so, when the criminal justice system— in this case, the court— ignores these risks, as in *Barton,* the result is the re-victimization of Indigenous women.

According to them, gender-based violence against Indigenous women, although committed by individuals, is a broad social problem which requires comprehensive institutional and systemic responses. It thus, becomes ironic when the institutions which ought to provide these responses like the court, become enablers of violence against Indigenous women. In this case, the trial judge enabled the victimization and revictimization of Gladue by:

1. Failing to admonish both counsel for referring to her as "Native;" and
2. Having failed to do the above, also failing to give corrective instructions to the jury about the risks of prejudice that might have arisen from the "Native" reference.[32]

The interveners further argued that the admission of Gladue's sexual history evidence contrary to the process set out in section 276, defeated the purpose of the section which is to protect the substantive equality of [Indigenous] women. That substantive equality protection cannot be achieved if section 276 is not interpreted from an intersectional perspective, recognizing that the risk of myths permeating the trial process becomes heightened when the woman in question is Indigenous. There are groundless myths, stereotypes and false logics which arise from irrelevant evidence about a woman's sexual past; then there are groundless myths, stereotypes and false logics which arise from irrelevant evidence about a woman's Indigeneity. When these two situations intersect, as they do in *Barton,* the propensity for myths, stereotypes and false logics to prevail multiplies.[33] The only way these intersectional issues could have been avoided in this case would have been to follow the process set out in section 276.1 to 276.4 of the *Criminal Code*.[34]

They submitted that the trial judge should not have permitted either counsel to refer to Gladue as a prostitute; should not have permitted evidence with respect to Gladue's Indigeneity; and having made the error of permitting the evidence, the trial judge should have

[32] *Ibid* at paras 12 and 30.
[33] *Ibid* at para 25.
[34] *Ibid* at para 26.

removed such evidence from the fact-finding process. At minimum, he should have cautioned the jury about discriminatory beliefs or bias that might arise with respect to evidence that referred to the victim's Indigeneity and her status as a "prostitute." The trial judge's failure to do this was sufficient to give a semblance of miscarriage of justice.[35]

Importantly, the interveners identified the high rate of sexual violence against Indigenous women as a systemic problem, encouraged and enabled by the State's institutions – including the courts – and stressed the urgent need to take steps within the criminal justice system to eliminate anything that enables the violence, victimization and re-victimization of Indigenous women.[36]

4.3 DID THE INTERVENERS GET THEIR INTERSECTIONAL ANALYSIS RIGHT?

Before proceeding to state the courts' decision and the ensuing controversy, it is important to examine the intervener submissions in light of intersectionality which obviously formed the theoretical bases for their arguments.[37] A comprehensive intersectional analysis would in my view, address all the layers of discrimination that Gladue possibly encountered throughout the trial process. Being a female Indigenous sex worker, such analysis, should consider Gladue's gender, race, occupation, and class.

The IAAW and LEAF factums soundly highlighted the disregard for section 276 and how the interaction between Gladue's Indigeneity and sex work might have played a huge role in, amongst other things, exacerbating that disregard for section 276. It is difficult to say that they did not hit the nail on the head. However, their intersectional analysis might have been more properly rounded if they had in addition, established a link between Gladue's occupation as a sex worker and her social strata, and placed that link within the context of colonialism. One wonders if any discourse on the prejudices against Indigenous women or Indigenous people generally within the justice system can be complete without centering such analysis within the location of colonialism. There was no mention of how Gladue's class in society might have also compounded the already existing issues, nor was there a consideration

[35] *Ibid* at paras 30 & 31. See also *R v Mallory* 2007 ONCA 46.
[36] *Ibid* at para 8.
[37] Intersectionality has already been discussed in Sections 2.3 and 2.4 of chapter Two.

of the possibility that the outlook of the entire case might have been different if Gladue was an Indigenous lawyer, professor or anything other than a sex worker, and sitting comfortably in the upper class of society. One wonders how many Indigenous women are even allowed that 'privilege.'[38]

The Coalition, on the other hand, appear to have put forward a more comprehensive argument, analysing the intersection between Gladue's occupation/class, her race and her femininity. I particularly think it was important that the Coalition emphasized the role that colonialism continues to play in the stereotypes and racialized discrimination that Indigenous women have to deal with within the criminal justice system and the society in general; it has, after all, been said that "no examination of violence against Indigenous women can be made without first positioning colonisation at the centre of such analysis."[39] History is vital to understand the dynamics that manifest in current events.

As with the IAAW and LEAF factum, the WMN/LMFO argument made no reference to the role that colonialism and Gladue's societal class played in the outcome of the trial process. Its intersectional analysis rather—and also importantly— focused solely on how Gladue's Indigeneity worked as an extra barrier against her justice, as well as the systemic nature of discrimination against Indigenous women. It is arguable though, that the colonialism discourse is implicit in the identification of the prejudices in *Barton* as a systemic issue.

The reason I consider Gladue's class to be an important part of the discussion on intersectionality, is the fact that her class could be considered as inextricably linked to her Indigeneity. According to the Native Women's Association of Canada (NWAC), Indigenous women and girls are severely over-represented in prostitution and sexual exploitation in

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[38] To be clear, when I speak of "class" within this context, I speak in terms of the poor socio-economic circumstances of Indigenous women which results in their sexual exploitation—all being a function of colonialism and colonial oppression. "Sexual Exploitation and Trafficking of Aboriginal Women and Girls: Literature Review and Key Informant Interviews" (October 2014) The Final Report of the Native Women's Association of Canada for the Canadian Women's Foundation Task Force on Trafficking of Women and Girls in Canada at 8 , online (pdf): < https://www.nwac.ca/wp-content/uploads/2015/05/2014_NWAC_Human_Trafficking_and_Sexual_Exploitation_Report.pdf > [perma.cc/NRF4-3823] [The Final Report of the Native Women's Association of Canada].

[39] Jamie Cooper & Tanisha Salomons, "Addressing Violence against Aboriginal Women" (2009/2010) at 31, online (pdf): *Battered Women's Support Services* < https://www.bwss.org/wp-content/uploads/2010/05/addressingviolenceagainstaboriginalwomen.pdf > [perma.cc/9MJE-NK5A] [Cooper & Salomons, "Addressing Violence against Aboriginal Women"].

comparison to the general Canadian population;[40] and the root cause of this overrepresentation is—as discussed in chapter three—the inter-generational effects of colonialism, including poverty, homelessness, lack of basic survival necessities, race and gender-based discrimination, and lack of education.[41] If Gladue was not Indigenous, and had the same opportunities as many non-Indigenous women, she and many other Indigenous women, would probably not have to endanger their lives by engaging in sex work, and risking getting exploited and violated, in a bid to make ends meet. In any case, I think that the beauty of having several interventions lies in the different approaches taken; one makes up for the loopholes of another and the divergent perspectives round up into one comprehensive argument.

4.4 THE APPELLATE COURTS' DECISION

While the outcome of the ABCA's decision and that of the SCC were different in terms of what charges Barton should be retried on, the reasoning processes relevant to this thesis were substantially the same. Both the ABCA and the SCC ordered a retrial, but while the ABCA ordered a retrial on a charge of 1st degree murder, the SCC ruled that Barton should be retried on a charge of manslaughter.

Affirming the ABCA's ruling, the SCC held that by failing to conduct a *voir dire* to determine the admissibility and permissible uses of the previous sexual activity evidence tendered by the defence, as clearly required by section 276 of the *Criminal Code*, the trial judge made a grave error. The admitted sexual history evidence not only tainted the jury's perception of Gladue's character and conduct but also fundamentally affected the factual foundation upon which their deliberations were based, the fairness of the trial and the entire truth-seeking process.[42] Had the offending evidence not been admitted, Barton would have been unable to rely on the defence of honest but mistaken belief in communicated consent (upon which he was erroneously acquitted), making statements like, "[s]he's a prostitute, and she's consenting to the sex"; there were "[n]o groans of disagreement, in fact, only groans of agreement"; and "there [were] no signs that she was in disagreement."[43] Also, the jury would

[40] The Final Report of the Native Women's Association of Canada, *supra* note 38.
[41] *Ibid* at 11.
[42] SCC *Barton*, *supra* note 8 at para 235.
[43] *Ibid* at para 117.

not have made an error of law, believing that Gladue's status as a sex worker and her previous sexual relations with Barton increased the likeliness of her consenting to the sexual activity in question – a discriminatory myth, the inference of which contravenes the policy behind section 276.[44] It behoved the trial judge as the gatekeeper of the trial process, to ensure that the offending evidence sought to be admitted passed through the fire of the *voir dire* process.

The SCC further acknowledged that the prejudicial effect of disregarding section 276 was compounded by Gladue's Indigeneity. The court took judicial notice of the fact that Indigenous women, girls and sex workers have for too long, endured injustices both in the social context and within the criminal justice system; and that these injustices are rooted in colonial structures. In Justice Moldaver's words,

> Trials do not take place in a historical, cultural, or social vacuum. Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous people — and in particular Indigenous women, girls, and sex workers — have endured serious injustices, including high rates of sexual violence against women.[45]

Once Gladue's Indigeneity was brought into the field of play by the "Native prostitute" reference, the trial judge should have been proactive to specifically instruct the jury against racial biases, prejudices and stereotypes which may have been lurking beneath the surface. In cases like *Barton,* general directions to act impartially will not suffice to effectively counter racial prejudices.

Justice Moldaver explained that while jurors are instructed and ideally expected to be neutral and impartial, it would be naïve to believe that this ideal is what obtains in reality.[46] In this regard, the court referenced the SCC case of *R. v. Williams*,[47] where Justice McLachlin emphasized that "[t]o suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it."[48]

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[44] *Ibid* at para 118.
[45] *Ibid* at para 198.
[46] SCC *Barton, supra* note 8 at para 195.
[47] [1998] 1 S.C.R. 1128 para 21.
[48] SCC *Barton, supra* note 8 at para 197.

Further, the SCC acknowledged the systemic nature of the issues and the need for the Canadian criminal justice system to address these systemic biases, prejudices, and stereotypes against Indigenous women and sex workers, head-on.[49]

The expectation from trial judges as "gatekeepers" of trial processes is thus, to amongst other things,

a. guard against the permeation of prejudicial myths and stereotypes against women, by adhering to the section 276 guidelines; and
b. guard against the permeation of prejudicial myths and stereotypes against Indigenous women and sex workers by expressly instructing the jury to reason without prejudice when Indigenous women are the complainants.[50]

In the latter case, the instruction to the jury could involve express directives that Indigenous women and girls (a) are entitled to the same protections that the criminal justice system promises other Canadians; (b) are deserving of respect, humanity, and dignity; (c) are not sexual objects for male gratification; (d) need to give consent to sexual activity; (e) are not "available for the taking"; and (f) are not any less credible than other people.[51]

Giving these instructions, the SCC stated, will ultimately accord respect to the core *Charter* rights of Indigenous women and girls, including their substantive equality rights[52] and their rights to trial fairness — hence an impartial jury — pursuant to sections 7 and 11(*d*) of the *Charter*.[53]

As an aside, one issue which the SCC appeared to ignore was the fact that Gladue's body parts, including her dissected pelvis region was physically presented as evidence in court, as the expert witnesses demonstrated their theories and opinions in front of the jury. Of the intervening factums considered in this chapter, the WMN/LFMO was the only organisation to condemn the trial judge's grant of permission for Gladue's dismembered body to be brought into court as evidence to demonstrate to the jury the injury the Crown alleges

[49] *Ibid* at para 200.
[50] *Ibid.*
[51] *Ibid,* at para 201.
[52] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 [*Charter*].
[53] SCC *Barton, supra* note 8 at para 202.

caused her death.[54] Even worse, the trial judge gave no corrective instruction to the jury about the prejudice that might arise from the admission of her body as evidence.[55] They submitted that not only was the dismembered body evidence inflammatory conduct,[56] but it objectified Gladue as a woman,[57] and was in fact, "a shocking assault by the state on Indigenous women."[58] As stated earlier, the SCC made no remarks on this submission and the reason for its silence remains a subject of curiosity.

The SCC ordered a retrial on charges of manslaughter. Barton has now been retried and found guilty of manslaughter.[59] A post-script will follow chapter five, detailing the current state of events as at the time of completion of this thesis

4.5 THE CONTROVERSY: WHOSE DECISION WAS IT REALLY?

A comparative analysis of the intervener arguments and both courts' decisions will reveal several similarities, particularly with respect to intersectionality and the role that Gladue's Indigeneity played at the trial—a conversation that was nowhere to be found in either the Crown or the defence's factums on appeal. In fact, it was Crown counsel who first referred to Gladue as a "Native" prostitute during the trial. The implication of this is that issues surrounding the intersection between race, sex work and section 276 of the *Criminal Code* would probably not have come up at all, but for the intervener submissions. As we shall see in the next chapter, one lawyer I interviewed observed that during oral arguments at the SCC, Gladue's race was only mentioned for the first time when feminist interveners began to present their submissions. The criticism that the feminist interveners unduly interfered with the appeal process, especially at the ABCA level, was, therefore, not surprising. Put as a simple question, whose decision was it really? If the ABCA and the SCC patterned the parts of their decisions relevant to this thesis according to intervener submissions, notwithstanding the actual parties' silence in that regard, then does that amount to interveners raising new issues and thus, interfering with the appeal process? Why does the answer to this question even matter? Is the *Barton* decision as important as we are making it out to be? If so, how,

[54] WMN/LFMO Factum, *supra* note 31 at para 3.
[55] *Ibid.*
[56] *Ibid* at para 13.
[57] *Ibid* at para 36.
[58] *Ibid* at para 38.
[59] *R v Barton*, 2021 ABQB 603.

why and for whom is the decision important? The answers to these questions constitute the main objective of this thesis and the focal point of chapter five.

CHAPTER FIVE

FINDING ANSWERS

5.0 RECAP

In chapter one of this thesis, I set out four research questions relevant to achieving my thesis objectives:

1. How did we get here— where the SCC takes judicial notice of the prejudices associated with being a female Indigenous sexual assault complainant?
2. To what extent did the intersectional analysis of the feminist organisations influence the decision of the SCC?
3. Did these organisations even get their analysis on intersectionality right?
4. How might the *Barton* decision influence future sexual assault trials?

Question one has been answered in the course of previous chapters, where we undertook historical analyses of Canadian sexual assault laws, section 276 of the *Criminal Code*, the theory of intersectionality and Indigenous women's mistreatment within the Canadian justice system, as rooted in colonialism. We have seen that the relevant events in history formed the basis of the intersectional arguments put forward by the feminist interveners in *Barton*, and ultimately, the decision of the court, where the SCC took "judicial notice of the prejudices associated with being a female Indigenous sexual assault complainant."

I also addressed question three in the previous chapter where I concluded that while all the feminist interveners hit the nail on its head with their intersectional analysis, the Women of the Métis Nation/Les Femmes Michif Otipemisiwak ("WMN/LFMO") and the coalition of the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund Inc. (LEAF) might have put forward more complete arguments if they had situated their intersectional analysis within the context of colonialism, as it relates to Gladue's societal class.

On close analysis, you will observe that questions two and four, encapsulate the thoughts which were left hanging in chapter four. They also constitute the crux of my objective in this thesis— to identify the extent of influence (if any) that feminist organisations had on the *Barton* decision at the appeal courts, vis-à-vis the possible impacts the SCC's "intersectional" decision could have for sexual assault trials, particularly those involving Indigenous complainants, going forward—and will thus, determine the conclusions to be drawn in this thesis. The subjective nature of the answers they require necessitated that I went beyond doctrinal research methods, to seek the opinions of professionals who experienced the dynamics of the *Barton* appeal process from a close vantage point.

This chapter will, therefore, be comprised of the findings from interviews I had with five (5) lawyers who acted for different interveners in *Barton* at the Supreme Court of Canada (SCC). I will, thereafter, draw from those findings and all the information gathered until this point, to make relevant conclusions on research questions two and four, as I walk towards achieving my thesis objectives.

5.1 THE INTERVIEWS

I invited a total of twenty-eight (28) lawyers to be interviewed, all of whom represented the fifteen (15) intervening organisations in *R v Barton*. Of the twenty-eight (28) invitees, seven (7) agreed to be interviewed and of the seven (7) prospective interviewees, five (5) saw the process through.

My intention, going into the interviews was to seek answers to the following **questions**:

1. Did the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund (LEAF) influence the courts' decision at the appellate levels and what was the extent of the influence?
2. If the answer to question 1 is in the affirmative, did the feminist interveners cross the line between intervention and interference, such that the intervention made the appeal process unfair?
3. Will the *Barton* decision have any impacts, going forward? What is the breadth of such impacts, if any?
4. Do participants believe section 276 of the *Criminal Code* is sufficient to protect racialized sexual assault complainants from the intersectional challenges that arise from the multiple layers of their identities? If not, does section 15 of the *Charter* fill that gap?

5.1.1 Ethics

To protect participants' identities, I have assigned pseudonyms to the participants who I will refer to as Katy, Major, Erin, Joanna and Bertha. I will also avoid using gendered pronouns in reference to them. All five participants represented intervening organisations as counsel in *Barton* at the SCC and confirmed their familiarity with the facts and circumstances surrounding the case. All five participants are, in addition, experienced legal practitioners, having between over a decade to over four decades of practice experience in either criminal law or constitutional law, or both. They are thus, not strangers to how intervention works at the court of appeal and the SCC; and have many times, as in the present case, acted for interveners themselves.

5.1.2 Method and Results

A total of five (5) participants were interviewed. Prior approval was obtained from the University of Manitoba's Joint Faculty Research Ethics Board. All five (5) participants gave written consent to their participation in the interviews and were assured of the security of their identities and statements. The interviews were conducted over zoom video calls and lasted between twenty to forty minutes each. A summary of the results, following the interviews, was sent to all participants prior to this publication. All participants who responded to the summary of results were satisfied with the results.

In interpreting the results of the interviews, I conflate my conversations with the participants into seven broad questions. Representing the viewpoints of the participants as accurately as possible will many times, necessitate verbatim quoting of the participants.

5.1.2.1 Did the feminist interveners influence the decision of the appellate courts such that it changed the dynamics of the appeal? Why so?

Three participants answered the question in the affirmative; one participant thought there was feminist influence but was undecided on whether the influence changed the dynamics of the appeal; and the fifth participant answered the question in the negative.

I. The Majority Position

While all four of Katy, Erin, Major and Joanna agreed that the feminist interveners influenced the decision of the appellate courts, Joanna was skeptical as to whether "influence" translated to "changing the dynamics of the appeal." So, while Joanna recognised that the feminist interveners had an important voice to bring to the table on appeal and there was real legitimate value in the broader perspective that they brought before the courts on the purpose and applicability of section 276 of the *Criminal Code*, Joanna had doubts as to whether that role changed the dynamics of the appeal; "it probably did," was Joanna's conclusion.

Katy, Erin and Major took a much firmer position, however, with Major specifically saying, "I think that they played a very major role and I think that the dynamics of the appeal were changed quite significantly by those interventions." Major made an observation which suggested that Justice Moldaver's instructions on race and intersectionality were very much influenced by the interveners:

> …if you watch the Supreme Court hearing, it is striking to me that no one talked about race…You would not have known that Gladue was an Indigenous person until the [feminist] interveners spoke near the end. Justice Moldaver, I think at one point sort of mentioned it, but otherwise, no one mentioned…[T]he feminist issues and the 276 issues [on the other hand] were there right from the beginning.

All three of them believed that the importance of the feminist interveners is strengthened by the fact that the interveners provided a fresh perspective; a perspective that was sorely missing at the trial and which, but for the intervention of the feminist organisations, would not have necessarily come to light in the same way. That perspective, as I understood, was the perspective of the complainant. In Katy's words,

> the Crown is there for the state, and not necessarily to protect the victim…the defence is there for the defence… And so, certainly at the appeal level, when you have an intervener in these kinds of cases, the perspective of the victim or women in these circumstances, can be presented in a much more objective way and more strongly than what a Crown might feel comfortable saying.

Erin thought that beyond pointing out the errors that were made at trial—errors regarding section 276 of the *Criminal Code* and references to Cindy Gladue's Indigeneity— IAAW, LEAF and the other feminist interveners at the SCC highlighted what the cost of those errors were for women, for complainants and for sexual assault trials. That role, Erin said, was really important, because no one could have spoken on those issues like they did; "they didn't have to explain themselves in the way that the other parties who, frankly, in my view…were somewhat compromised, because of the role that they had played, [had to]."

II. The Minority Position

Bertha took the contrary view that the feminist interveners did not influence the decisions of either the ABCA or the SCC. "I don't think that it changed the dynamics," Bertha said. "I think at the end of the day, the facts in *Barton* and even the position that the Crown was taking on appeal still remained in the forefront, in that the court of appeal would have intervened even without that the intervention of those two organisations."

5.1.2.2 What purpose are interveners meant to serve in appeal processes and at what point should we draw the line between intervention and interference with the appeal?

Participants were generally on the same page regarding the purpose interveners serve and the fact that there is or at least, ought to be, a clear line between intervention and interference with the process.

I. Purpose of Intervention

To quote a few of their statements which were really the same, only put differently, "[t]he purpose of intervention," Erin said, is "to make sure that there are multiple points of view available to the court… especially when making decisions that will affect people differently." According to Major, the purpose of intervention is to bring to the court's attention, a perspective that the parties cannot bring, which is relevant to either the specific decision that is being considered, or more broadly, to the principles that arise from the decision which might not otherwise be considered. In Joanna's words, "particularly when the court is looking at broad social or legal principles, it's important to have different perspectives" because the parties are so focused on the case, that they may not pay attention to the bigger picture principles that can arise from the case in a real meaningful way. So, besides the fresh perspectives interveners bring, the practice of intervention allows for broader societal representation. Bertha also added that those perspectives are important in terms of the overall assessment that the court needs to engage in when making decisions.

II. Limits

On the line between intervention and interference, the participants were also on the same page, except for Joanna's dissent on the popular view that interveners ought to stick to submissions with respect to the law and not necessarily the facts or evidentiary issues. Joanna was hesitant to agree with the argument that interveners are not allowed to talk about the facts, as was argued in *Barton. "*I think an intervener might need to talk a bit about the facts of the case, to put their intervention in a context and to illustrate some of their points," Joanna said, noting though, that it would be best to avoid doing so wherever possible.

Other identified limits include:

a. Interveners are not supposed to take a position on the case;
b. Interveners ought not to suggest what the end result should be;

c. Interveners ought not to introduce new issues; and
d. In criminal trials, interveners ought not to act like second prosecutors or second accused persons, depending on the perspective from which they are intervening.

III. Theory versus Practice

While there was a consensus that ideally, there needs to be a clear line such that ultimately, the court's decision relates to the accused, the conversation took an interesting turn with some of the participants who spoke further on whether the stated limits of intervention are respected by interveners and appellate courts in practice. Major had a lot to say on this issue:

> So, as I've thought about this, I think that what has developed is a difference between what happens in practice, and what happens in theory in terms of appellate interventions. My experience at the appellate levels in the provinces [is that] there's a fair amount of more leeway given to that sort of activity and those sorts of arguments at provincial courts of appeal, as opposed to the Supreme Court of Canada. So… when I've been in Supreme Court, I have occasionally been admonished about not weighing in on, for example, not suggesting what the result should be, but I don't get the same pushback… at provincial appellate court levels. So, I think what's happened without it ever being explicitly stated, is that often, provincial appellate courts grant more leeway to interveners; and when an intervener is thought to have a level of expertise that perhaps the parties don't have, provincial courts of appeal are more willing to hear that than they are at the Supreme Court.

Major thought that a key reason for the difference between how much interveners are allowed to cross certain boundaries at the provincial courts of appeal and the SCC is that at the SCC, the issues are narrower, and counsel are dealing with a much more constrained time period—about five minutes, while at provincial appellate court levels, there is generally more flexibility.

Katy also suggested that there is a gray zone between intervention and interference, and it is a bit artificial to say that interveners do not usually have a position on the appeal; they should not, but in practice, they do. A frequent intervener herself, Katy mentioned how (s)he approaches the issue, saying, "a line that I often use in the intervener factums that I file is that "while we don't take a position on the appeal, we ask the court to rule in line with the arguments that we are putting forward," which is basically the same thing."

Erin had a totally contrary view, opining that because interveners show up at appellate courts, they are less likely to interfere with that role in terms of the evidence and the facts that are found. "I think people are pretty aware of their rights," Erin said, "especially in a criminal trial and the need to protect the balance of the adversarial system."

5.1.2.3 More specifically, did IAAW, LEAF and other feminist organisations cross that line between intervention and interference such that their role in the process was unfair?

This question was asked to participants within the context of the answers to the questions enunciated above; and because defence counsel took the position before the ABCA that the intervention was unfair. Answering this question required participants to first determine in their minds whether the feminist interveners raised new issues, or took a position on the appeal, or otherwise crossed the bounds of intervention. The responses were particularly interesting because while some participants believed that the interveners neither raised new issues nor took a position on the appeal, others made statements to suggest they raised new issues while maintaining that regardless, the line was not crossed and the consequent influence on the appeal, was not unfair.

The unanimous opinion generally was that the role feminist interveners played in *Barton* was not unfair, either because the line between intervention and interference was not crossed at all, or because even if it was crossed, it was either not the sole basis on which the appellate courts reached their decision, or they were justified in crossing it. In this regard, I will expatiate on my discussions with the participants individually.

I. Major

Major's position was that the feminist intervention occurred in a way that was fair. There was a failure by everybody in the system at first instance—the trial judge, the Crown and the defence, "so, when everybody fails, and those same people except for the judge are both involved in the appeal…how [else] is that issue going to arise?" Major pointed out that both at the ABCA and the SCC, the Alberta Crown never acknowledged its failings with respect to section 276 and the "Native prostitute" references, and so it was crucial that LEAF and IAAW "raised these issues, because there was no one else to raise them;" why would either of the parties raise an issue when it made them look bad? My question to Major at this point was, if we have already established earlier that interveners ought not to raise new issues, and now, we are saying that LEAF and IAAW raised new issues, does

that not mean that the limit of intervention was crossed, and the overall influence of the interveners was unfair? In response, Major said:

> I think this speaks to that earlier point as well about the distinction between what you can do at a provincial court of appeal and what you can do at the Supreme Court…So, at the provincial courts of appeal…everyone will say that you're not to raise issues but I think in fact…when those issues are directly relevant to the particular case and raise broader issues, there will not be the same objection. So, while in theory, you could say, well, this is a new issue, the court of appeal will not say that."

On the other hand, Major considered a perspective that was popular with all other participants—that the arguments advanced by the interveners were not necessarily novel when we consider that all they were saying was, "this is what the law says [as it relates to the already existing issues], and nobody used it in the proper form."

In any case, Major's conclusion was that the feminist intervention/influence was not unfair in any way as the issues that they raised or broadened—whichever view one chooses to take—just had to be before the appellate courts. "When you look at cases like *Barton* that have wider implications, we can't let the continued failure of the system replicate the injustices that are done, in this case to women and specifically to Indigenous women and pretend that that's okay."

II. Katy

In Katy's view, the position that the feminist interveners took on the appeal cannot be characterized as taking a position with respect to the facts or evidence and for that reason, they were well within the bounds of intervention. The fairness of their influence on the appeal stemmed, Katy seemed to suggest, from the legitimacy of the intervention in the sense that they commented strictly on legal and policy issues. What the interveners did was in Katy's opinion, take a position with respect to the conduct of the trial. So, they were not commenting on the credibility of witnesses, what weight should be given to evidence or how courts should rule on those issues. Rather, they were commenting on how the legal system operated with respect to the trial and was working to the detriment of victims in the position that Gladue was in; as well as legal arguments around the *Criminal Code* provisions and how they should be interpreted.

A unique point Katy raised was that if the courts took the feminists' position completely as the basis for their decision, then they would have ruled on the appropriateness of the evidence of Cindy

Gladue's physical person. Some of the feminist interveners raised the issue at the SCC and, "that in itself didn't influence the court because the court never ruled on the appropriateness of that."

III. Erin

Erin thought that the feminist interveners broadened the issues in a healthy way, especially because there is a danger in criminal law to become too narrow or too technical and forget the societal consequences of decisions that are made. When I asked whether the 'broadening' of the issues translated to unfair influence, Erin answered in the negative:

> I don't think that it was an unfair influence…the intervention, again, just raised the consequences of the errors so that the court of appeal could consider them, and the court of appeal didn't need to agree. The court of appeal could have said, "thank you, you know, IAAW and LEAF, you have given us information, and we're not concerned; we don't think that the continued pejorative use of these language and dehumanizing language had any influence on the fairness."

In addition, Erin believed that "unfair," would have been allowing *Barton* to benefit from sexism and mistakes that were made relying on myths and stereotypes; and so, while accused persons should know the case they have to meet, "there is no protection that should be afforded to anybody in the legal system by relying on myths or stereotypes or discrimination."

IV. Bertha

Bertha opined that while the feminist interventions largely related to the issues before the court, they did raise some new areas. The new areas raised, however, did not affect the dynamics of the appeal because ultimately, the decision that was made was based primarily not on those new issues, but on how everything happened in the jury trial from beginning to end including all the language that was used. In Bertha's words, "I don't think that if you look at what the decision was at the end of the day, it was solely based on or wouldn't have occurred if the interveners hadn't been there." This answered the same question I asked Major—"if you already established that interveners ought not to raise new issues, and now you are saying that LEAF and IAAW raised new issues, does that not mean that the limit of intervention was crossed and the overall influence of the interveners was unfair?"

In reiterating why the feminist interventions or the way the interventions occurred was not unfair, Bertha added that:

> … I think that there was an issue that needed to be addressed, and although it was raised by the interveners, I don't think that it was unfair to the accused, because it wasn't inaccurate, or unrelated to the ultimate issue that the court had to decide. And so, I think that it was important information to be put before the court, and that it wasn't unfair.

V. Joanna

Joanna did not consider the interveners' pointing out the "Native prostitute" reference or the discussion on why section 276 exists and how problematic it can be when parties do not comply with the section, as new issues that were raised. Joanna added:

> I don't think the influence was unfair. Actually, I think it was entirely warranted. The fact of the matter is that the perspective brought by some of the interveners was that of a disadvantaged group in our society, and that is, of course, Indigenous women who also are engaged in the sex trade, who are sexually exploited... I don't see how it would have been properly heard if there hadn't been that intervention, and those issues pointed out… Justice Moldaver, in his decision really called upon trial courts and the justice system to do better, and how does that happen unless there is an ability for interveners to bring that important voice of the of marginalized groups to the table?

Joanna's perspective, like most of the other participants, clearly tilted towards the argument that the feminist interventions were not unfair and in fact, the issues raised by the feminists were extensions of already existing issues.

5.1.2.4 Did the SCC's failure to recognize feminist interveners in its written decision negate the conversation on influence?

The consensus answer to this question was simply "no." Participants believed that the fact that the SCC did not reference the feminist interveners in their judgment does not mean that the interventions did not have the influence that they did; the influence was obvious. All five participants agreed on two things:

Firstly, it is rare for the SCC to credit interveners in their judgments. Katy noted, for instance, "at the Supreme Court of Canada level, it's not that usual for the Supreme Court to actually comment on the interveners' submissions. The Supreme Court does their own thing a lot with the factums, and it's kind of like they put it into a blender and what comes out is their judgments and oftentimes with a new twist." According to Bertha, "if you look at other criminal law cases, it's pretty rare when they attribute specific arguments to specific interveners"—that happens more in constitutional matters—

and Major did not think that the Supreme Court is required to acknowledge the work of interveners at all.

The second thing all participants agreed on was that the lack of acknowledgment in fact, strengthened the SCC's decision. Quoting Joanna,

> I think it's so important that the Supreme Court endorse it as their own, and that's how I read the decision— "this isn't coming from one intervener or another; this is how the law is and this is how it should be."

Joanna added that the SCC acknowledging the interveners would have taken away from the court's voice. Putting it conversely, Erin noted that attributing certain statements to feminist interveners might have created a situation where the decision is siloed as just "a feminist perspective;" pigeon-holed as just "what feminists or women think," as opposed to, "No, this is the law, and everyone must follow!"

Major and Bertha stated that ultimately, what is most important is that the right thing is done. In Bertha's words, "when you look at more general, overarching principles that should be applied in sexual assault law… it's not about what organisation or what lawyer made these arguments, it's about getting it right." Similarly, Major stated, "the Supreme Court actually has ruled that it is not plagiarism for the court to take something from a factum and say it's theirs,[1] so I don't care; I don't want acknowledgement… What will be great is if you actually incorporate what we're saying."

5.1.2.5 Should Trial Judges give instructions on race once a complainant is seen to be a visible minority or should such instructions be given only when the complainant's race is explicitly referred to, as in *Barton*?

While all participants agreed that instructions must be given by trial judges once there are explicit and even worse, repeated references to complainants' race as in *Barton,* the varying opinions arose within the context of whether instructions are necessary even without those explicit references and if so, at what point.

Katy and Bertha believed that there needs to be some boiler plate instructions on race once it is obvious that the complainant is racialized. Interestingly, they both gave the same reason for their position, which is the controversial issue of unconscious biases. Expatiating, Katy said:

[1] 2013 SCC 30.

> I do think that having some kind of statement to remind people to have their objectivity and the need to be objective…and to be aware of those kinds of unconscious biases that happen. I think we now recognize that we all have unconscious biases and the only way to address them is to be explicit about it.

They both acknowledged though—and this seeps into the position of the other three participants—that sometimes, more has to be done. In Bertha's words, "I feel like there's something very vague in the boiler plate jury instructions that trial judges do use, but I'm not sure off the top of my head. I do think though, that there will be cases where more is needed."

Those cases where more is needed, all participants thought, are cases like *Barton* where the complainant's race is unnecessarily referred to. In this regard, Joanna suggested that whether instructions are necessary or not should be on a case-by-case basis, depending on the necessity, especially because there are cases where race might be relevant. Major added that "to refer the victim by their race suggests that there is something about their race that is significant and that is what plays into people's stereotypes." In this sense, Major thought there should probably be "boiler plate instructions" to counsel, more so than the jury; and then jury instructions should come in where witnesses (whose statements the trial judge cannot control) are the ones who raise these concerns by identifying the complainant by their race, rather than their names.

Another popular option, considered by three of the participants is that a way of dealing with issues of racial bias and prejudices might be to address them at the point of challenges for cause. Katy said, for instance, that we need to beef up challenges for cause in terms of jurors, to try and weed out people who might make decisions that are prejudicial, both for the complainants and the accused persons. Major suggested that Crowns can at this stage, ask questions about potential racial bias of jurors regarding the race of the complainant. That might pass across the message at the earliest stage, reducing the need for the judge to comment on the irrelevance of racial considerations. Speaking lengthily on this, Erin said:

> …that's the opportunity to have a conversation ahead of time about whether there are potential stereotypes or biases that could come into the courtroom, because as the court said, we can't be naïve; we can't pretend that everyone leaves all their biases at the door. We all live in a society that is full of bias, racism, sexism, and not just against Indigenous people… I think [a lot] will depend on who is the complainant, who is the accused and what are the facts? Because I think in this case, you know, the intersection of the fact that

> it was a female, that she was a sex worker that she was Indigenous; the fact that he was white, the fact that he was a sex worker customer—those are the particular facts that matter, in terms of playing into stereotypes that have in my mind improperly infected the trial process. And so, I don't think there's a one size fits all answer to that. I think it's something that should be thought about by the parties before the jury is even empaneled… so that people are thoughtful about it, going in. [It] also, would make sure that the lawyers check their own language and check their own approach and are respectful to all the players.

5.1.2.6 Will Barton have any impacts going forward? If so, in what ways?

All five participants thought that the *Barton* decision will have some impacts going forward; what those impacts and their extents might be is where opinions differed.

I. Awareness on Myths, Stereotypes and section 276

One major impact all the participants identified is the awareness that the decision has brought across the board on myths, stereotypes and how section 276 of the *Criminal Code* should be applied. Bertha stated that it would be unusual for a judge or a defence lawyer or Crown attorney who practices sexual assault law to not be aware of the *Barton* case. Joanna thought the same, even though Joanna thought that the impact on section 276 and its awareness stemmed less from the "novelty" of the issues and more from the manner in which the court addressed them. In Joanna's words:

> The interesting thing about *Barton* is, on the one hand, a lot of what they said under 276, and even… honest but mistaken belief in communicated consent, really, was a reaffirmation of existing legal principles, in my view. It really was. And so, I didn't see a lot of novel things in what they said, but what they did so beautifully was set it all out in a nice, clear way, and address some more controversial issues… things like what happens when the Crown doesn't object. Those sorts of issues have never really been dealt with or have been dealt with sort of in an ad hoc, unprincipled way.

Major, who also highlighted that the decision will certainly change the way trials involving women who have been involved in sex trade are done, brought an interesting perspective to the section 276 awareness discourse. Major referenced that the importance of the *Barton* decision becomes clearer when we consider how many actors within the system who would ordinarily be expected to know, are ignorant. Major said:

> I was discussing *Barton*, with some people who are probably experienced counsel and this idea that… the issue that someone was a sex trade worker might raise a 276 issue. That was new to them…so, I think *Barton* clarifies

> an area that seemed not to require clarification. So, you would think it's fairly obvious, but I don't think it was obvious.

II. Crown, Defence and Trial Judges' Roles

The last three lines of Joanna's statement quoted in II above lead us to the second area identified where the *Barton* decision might have impacts going forward—the role that defence, Crown counsel and trial judges must play in trial processes. Katy opined that the *Barton* decision will make people, especially Crown counsel, stop and think about the language they use when they are conducting themselves during trials. In Erin's words, "[i]t put Crowns on notice that they have a responsibility to be thinking about this in every case, and they can't be falling down on that; and more importantly, trial judges— the trial judges can't just rely on Crowns to be protecting the interests of the complainant or the public interest, but… if Crowns are… failing in their duty, then they have to step up." Erin also thought that the decision settled the pre-existing argument on whether 276 applications apply to Crown evidence.

For defence counsel, Katy stated that being who they are, they will continue to push the boundaries of the interpretation of the law to defend their clients, but at least, the courts' decision will help draw certain boundaries and curtail the language that they use so that subtle racism and sexism are not incorporated into how lawyers practice law.

For trial judges, Katy believes that despite the *Barton* decision, there will still be a few dinosaurs in the system who are going to say things that they should not be saying, but overall, trial judges will be more mindful of myths that could pervade the trial process based on sexist and racist stereotypes, especially with the appointment of a more diverse bench just starting to happen.

III. Racial Prejudices within the Justice System

All participants agreed that another major impact the *Barton* decision might have is what the decision says about how the justice system should treat issues of race, particularly for Indigenous sexual assault victims and the courts' efforts to recognize Indigenous backgrounds in cases like this.

Bertha thought that while *Barton* will help take some steps towards acknowledging that Indigenous complainants should not be treated any differently than any other complainants in the course of examination or even jury deliberations, the impact here will be slower than the overall impact in terms of sexual assault. Joanna, on the other hand, appeared a little more optimistic, cautioning

however, that there are times where it may be appropriate to bring up someone's cultural or racial background; a good example is where there is an issue like identification, for instance, "describe who assaulted you." So, Justice Moldaver's instructions have to be understood and applied in context.

IV. Victim Rights

Joanna stated that the recognition that victims have rights under the *Criminal Code* which ought to be protected is a crucial part of the *Barton* decision, noting that it has in fact, already began to have impacts even in other areas of sexual assault. Joanna pointed out the case of *JJ* going up to the SCC and the constitutional challenge to the notice provision under 278.92 of the *Criminal Code*. The decision could in this regard have a ripple effect on fostering the understanding that the victim has distinct rights and that their *Charter* rights could be implicated in cases like this. "I think you're going to see *Barton* used in many ways like that," she said, "that we can be doing better."

5.1.2.7 Is Section 276 Enough to protect racialized sexual assault complainants; and if not, does the *Charter* equality provision fill that gap?

On the need for specific provisions in the *Criminal Code*, three participants—Erin, Major and Joanna— acknowledged the need for more protection for racialized complainants but were unsure about whether an additional section like section 276 is needed. Erin's words captured their position:

> I don't know if the answer is something like 276 but 276 was very controversial and had to go to the Supreme Court twice… but I do agree with you that it's important to have thoughtful, frank conversations about the way that discrimination and stereotypes may be interfering with proper findings of fact and proper applications of the law.

Their uncertainty stemmed largely from not knowing exactly how an additional provision in the *Criminal Code* addressing racial biases would work. Joanna's concern was the amount of delay or work that another section 276-type provision would require; there are already enough delays in sexual assault trials as it is, from the section 276 *voir dire* process to the potential applications that now arise from constitutional challenges to the novel section 278.92 provisions. "I would be worried about adding another layer," Joanna said, "…and then we are into delay issues under *Jordan*… so there's a real harm there." Major's concerns bordered more on nuances that might exist, for instance, if such a provision were to be enshrined in the *Code,* would it apply to protect Indigenous or racialized accused persons too? "It's something to think about," Major said, "but it has lots of implications."

On very opposite ends of the spectrum were Bertha and Katy, with Bertha opining that there is no need for extra provisions because there are already existing tools in criminal law to ensure that myths and stereotypes do not operate against women and racialized women generally within the context of sexual assault. In Bertha's view,

> …while section 276 is specific to other sexual activity, one of the factors that courts are required to consider is specific to myths and stereotypes; and the *Code* doesn't limit it to myths and stereotypes about sexual activity, but myths and stereotypes generally [including about race]…so if you're dealing with a sexual assault matter where there's already a 276 application, I think that myths and stereotypes related to race is something that falls under that, and [should] go into the balancing that has to happen by the trial judge before they determine if that evidence is admissible.

Katy on the other hand, opined that unless we have a kind of section that specifically instructs how you handle some of these things, there is no one there really representing the victim from that perspective of equality; and this leads into the conversation on whether in the absence of specific provisions protecting against race-based myths and stereotypes, the section 15 *Charter* equality provision suffices. Katy did not think so:

> I don't think just simply relying on section 15 of the *Charter* is sufficient…for a couple of reasons—one, our criminal justice system has not really embraced equality as a principle in the way it ought to…but we're starting to see the courts being more open to equality arguments in criminal trials. Furthermore, unless you have a kind of section that specifically instructs how you handle some of these things, there's no one there really representing the victim from that perspective of equality; and so that's why you need to actually put it in there because… complaints don't have standing in criminal trials, so they can't assert their equality rights. So, there needs to be something put in there to make sure that that is buttressed and protected."

Erin equally took the view that the *Charter* equality rights are not enough; section 15 is a very hard right to access—it is very complicated and most complainants or people who are involved in the criminal justice system are not going to have the resources, even with good counsel to bring that up. Erin thought, however, that a more flexible solution to the issues would be trial judges heeding to the direction of the SCC that it is the responsibility of the trial judge to address those kinds of biases as they come up. This is especially since judges have the ability to control the process in their own courtrooms and make sure that it is being equitable and respectful to everybody.

5.2 LOOKING FORWARD

The interviews proved very useful to answering the questions key to my thesis objectives. The interview results show that most of the participants consider the submissions of the IAAW, LEAF and other feminist interveners to have influenced the ABCA and SCC decisions in *Barton* so much that their interventions, in fact, changed the dynamics of the appeal. The majority opinion was not surprising. Even though one participant was skeptical, it is truly doubtful whether the SCC would have taken an intersectional approach to the parts of the decision relevant to this thesis, had the interveners not set that tone.

Curiously, some participants like Major were willing to concede that the interveners might have crossed certain lines when they brought up the issue of the repeated references to Gladue's Indigeneity, but there was still a consensus that the interveners' role was not unfair. In other words, even if the line between intervention and interference was crossed, it was crossed fairly and necessarily, because "someone had to start the conversation" on the intersection between Gladue's Indigeneity, section 276 and the attending prejudices; that is the only way justice would have been served.

Looking forward, I share the optimism of participants on the impacts that *Barton* might have for the trial judges' and counsel's consciousness of intersectionality within sexual assault trials, the construction and application of section 276 of the *Criminal Code,* and more broadly, the responsibilities which lie on the shoulders of judges and counsel during trials. I particularly think that the *Barton* decision could have a ripple effect for other minority women, who are also not strangers to prejudices within the Canadian justice system.

Case law already point towards the carefulness of trial judges with the construction of section 276, following *Barton.* In *R v Baker,* for instance,[2] the Provincial Court of Nova Scotia, in denying the Crown's section 276 application to introduce evidence of prior sexual activity between the accused and the complainant whom he had allegedly assaulted sexually, stated that though the evidence sought to be admitted was of a specific sexual activity as required by section 276 (1), the accused had failed to provide a clear link between the prior sexual activity and any defence he put forward. Notably, the trial judge expressed the fact that the decision in *Barton* gave great clarity to trial judges like him who

[2] 2019 NSPC 25.

frequently deal with section 276 applications.[3] In *R v Boyle*,[4] before proceeding to state his reasons for granting the defence's application, Justice Doody of the Ontario Court of Justice, emphasized that he was heeding to the SCC's advice in *Barton* by ensuring that the sexual activity evidence sought to be introduced passed through the *voir dire* process;[5] here, it was Justice Doody himself who raised the issue of the Crown counsel's offending line of questioning, including questions as to why the accused continued to have sex with the complainant even though the marriage had ended years before the alleged incident.

The issue becomes tricky where intersectionality is brought into the mix. In this regard, I subscribe to some of the participants' opinions that there should be some boiler plate instructions on race once it is obvious that the complainant is Indigenous. Race will often be discernible from in-person appearances—skin colour, accent, word usage, place of residence. It will, therefore, usually be apparent to the jury without anything ever really having been said or referenced on the transcript directly. Unfortunately, there is no written law or precedent which requires those "boiler plate instructions" of trial judges. Findings of the interview already show that section 15 of the *Charter* is insufficient to protect racialized sexual assault complainants like Gladue, but whether Parliament will ever consider it necessary to include a "section 276-like" provision to protect racialized complainants is yet to be seen. Such an attempt, like participants observed, will however, necessitate a deep consideration of a lot of nuances.

While whether and what impacts the SCC's decision in *Barton* will have for Indigenous complainants in sexual assault trials remains to be seen, one certainty is that it did have a major impact on how the retrial of Barton on charges of manslaughter was conducted. In an in-class discussion with one of the journalists present during Barton's retrial, she mentioned that on retrial, a *voir dire* was conducted to determine the admissibility of sexual history evidence and while the evidence in question was found relevant and admitted, the trial judge warned the jury to refrain from jumping into conclusions about Gladue's sex work. The trial judge also cautioned the jury about racial prejudices and in her words, "there was such a difference in the way everyone was respectful during the second trial." Barton was found guilty of manslaughter by the jury. Maybe he will appeal; maybe not. In any

[3] *Ibid* at para 18.
[4] 2019 ONCJ 516.
[5] *Ibid* at para 11, referring to *Barton, supra* note 1 at para 80 and *Goldfinch, supra* note 21 at para 75.

case, the SCC has placed the limelight on conversations critical to sexual assault trials, the criminal justice system, and Canada's efforts at reconciliation with Indigenous people. Judges, the Crown and defence counsel can and must do better.

POST-SCRIPT:
NOW THAT BARTON HAS BEEN FOUND GUILTY

The aftermath of the SCC's decision was Barton's month-long retrial on charges of manslaughter at the Alberta Court of Queen's Bench (ACQB). On February 19, 2021, the jury gave its verdict—Bradley Barton had been found guilty of manslaughter. Given the contexts within which we have discussed the SCC's decision, the question that naturally follows is, what was different at the second trial? Particularly,

1. Were there still prejudicial remarks about Gladue's occupation, race, gender or the intersection between these different layers of her identity?
2. Were there any section 276 pre-trial motions and what were the rulings on those motions?
3. Was there any attempt to use Gladue's body parts as evidence in the second trial?
4. Did new information or evidence not present during the first trial, come up during the second?
5. What sentence was accorded to Barton following the finding of guilty?

Finding answers to the first three questions was not an easy task, especially because a publication ban was implemented by the court, preventing the media from reporting on certain occurrences inside the courtroom.[1] The fourth question is in the affirmative; and the answer to the fifth question, as I shall soon explain, might be dependent on even more controversy, stemming from possible jury misconduct.

Prejudicial Remarks

In a statement by the Institute for the Advancement of Aboriginal Women (IAAW) following the verdict, reference was made to an observation made by Lisa Weber, legal counsel for Gladue's mother thus,

> [W]hile the re-trial proceedings seem to have eliminated [the legal consideration of] direct references to derogatory, sexist and racist myths and stereotypes against Indigenous women, it is disappointing to have observed

[1] APTN National News, "Pretrial hearing for trucker in Cindy Gladue manslaughter case underway in Edmonton", *APTN National News* (3 February 2021), online: < https://www.aptnnews.ca/national-news/pretrial-hearing-for-trucker-in-cindy-gladue-manslaughter-case-underway-in-edmonton/ > [perma.cc/9MH7-HSKF].

> instances where some of the same, and similarly inappropriate myths and stereotypes crept into the process at various points and in indirect ways.[2]

Two things are clear from Weber's statement. Firstly, there were no direct references to Gladue's Indigeneity or other sexist stereotypes in the second trial. So, we know that Gladue was not referred to as a "Native prostitute" by either counsel the second time around. The second take-out from Weber's statement is that while the "Native prostitute" statement was eliminated, myths and stereotypes still crept into the process indirectly. What those myths and stereotypes were, and how they crept into the process, are questions that only a conversation with Weber or some other persons present at the trial might reveal. Janice Johnston, a journalist who had spoken in a class I attended did not appear to have observed these indirect myths and stereotypes that Weber speaks of. In fact, she had said, "there was such a difference in the way everyone was respectful during the second trial." While we remain pensive on Weber's statement, we do know from media reports that the jury was instructed to be "fair, open and attentive" while hearing evidence. "You may find the evidence graphic and unsettling," the trial judge said, "[and] we must remain objective and approach our duties without any sympathy or prejudice whatsoever."[3]

Section 276 and Physical Evidence

On section 276 motions, we know from Janice Johnston, the journalist who had spoken in a class I attended, that *voir dires* were conducted for certain pieces of evidence. Specifically, there was a *voir dire* to admit Gladue's sexual history evidence—that is, evidence of sexual activities between Gladue and Barton on the night preceding her death. There was also another *voir dire* in November to discuss the test that should be applied for consent. The section 276 *voir dire* resulted in the said evidence being admitted. While we do not have access to the ruling to know the reasons for the admission of the evidence, Johnston stated the general reason as, "it was relevant because it formed part of the narrative."

On whether there were any attempts, as with the first trial, to use Gladue's body parts as evidence again, the safe inference is "no." From media reports, we can tell that exhibit photos were provided to the jury, showing the bathtub and shower curtain covered in a thick

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[2] IAAW, "February 18, 2021, Edmonton – Ontario Man Finally Found Guilty for killing Cindy Gladue, Mother of Three" *Institute for the Advancement of Aboriginal Women*, (18 February 2021), online: < https://iaaw.ca/2021-02-18-ontario-man-found-guilty/ > [perma.cc/Q25B-6W3G].

[3] Janice Johnston, "Bradley Barton's seven-week manslaughter trial begins in Edmonton courtroom" *CBC News* (11 January 2021), online: < https://www.cbc.ca/news/canada/edmonton/cindy-gladue-bradley-*Barton*-manslaughter-trial-1.5869181 > [perma.cc/2LAQ-AAK5].

accumulation of blood.[4] Reports also reveal that the pathologist who conducted an autopsy on Gladue testified on his observations following the autopsy. [5] No reports speak of Gladue's body parts being tendered as physical evidence.

New Information: Web Search History

A new piece of information which did not come up during Barton's first trial was his internet search history few days preceding Gladue's death. Media reports state that Barton admitted to searching for terms such as "girl.get.ram.huge.objects.rip.open," on pornography sites, as well as images of vaginas being "stretched."[6] The Crown argued, based on this new evidence, that Barton was interested in "the concept of ripping and tearing vaginas."[7] Barton insisted, however, that his sexual activity with Gladue was consensual and that he never sought to act out his pornography searches.

A Controversy before Sentencing

The usual order of criminal trials is that after a conviction, follows a sentence. Having been convicted of manslaughter, Barton's sentencing was slated for June 1 to 4, 2021. That sentencing was put on hold, however, due to an interesting chain of events involving two jurors. A few weeks to sentencing, the defence, via a formal application *ex post facto,* requested postponement of sentencing in order to seek a ruling to investigate concerns of possible jury misconduct depending on the court's assessment of its jurisdiction.[8]

As part of the opening instructions, all fourteen jurors were advised, among several matters, that jurors may discuss the case when all together but must keep an open mind and remain cautious in expressing any views, with no conclusions until the end. Mid-trial, the court also cautioned the jury against jumping into conclusions based on racial and sexual prejudice. During an adjournment before completion of final instructions, however, the jury officer advised the court that an issue had been brought to his attention by Juror #9. Citing Juror #2 as witness, Juror #9 expressed concern that Juror #1 had made negative statements or disparaging remarks

[4] Jonny Wakefield, "Bradley Barton trial: wound that killed Cindy Gladue would require 'considerable' force, pathologist testifies", *Edmonton Journal* (12 January 2021) online: < https://edmontonjournal.com/news/local-news/bradley-*Barton*-trial-wound-that-killed-cindy-gladue-would-require-considerable-force-pathologist-testifies > [perma.cc/PK23-ML78].
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid*
[8] *R v Barton*, 2021 ABQB 442 at para 2.

about sex workers and prostitution. Juror #1's alleged statement appears to have gone along the lines of, "if not for prostitution, none of this would have taken place." The court consulted with both counsel in the absence of the jury, after which it concluded that Jurors #1 and #9 should be excused. About two weeks before sentencing, the defence then received an anonymous letter concerning the same issue of jury misconduct, but this time, in relation to Barton and the presumption of innocence. The defence relied on this anonymous letter as the basis for its *ex post facto* application where it suggested two alternate remedies:[9]

a) If the court was not *functus officio* to consider a mistrial, it should reconvene the trial for the purpose of inquiring of each of the 13 former jurors whether the allegations made were true and accurate, and as such, whether any of them had misconducted themselves in failing to presume Mr. Barton innocent throughout the proceedings and caused others to do the same. If it appeared any of the jurors had done so, a reasonable apprehension of bias in the other jury members should be presumed to have existed, and a mistrial would be the only effective remedy to prevent a miscarriage of justice; or

b) If the court declared itself functus officio to consider a mistrial, it should nevertheless reconvene the trial to inquire of each of the 13 jurors the same questions, so that a timely and reliable record may be preserved for the purpose of assisting the court of appeal as to whether Mr. Barton's conviction should be overturned due to a miscarriage of justice for juror misconduct.

In response, the Crown contended that the law does not support either remedy. The court, it argued, has no jurisdiction to order a mistrial after the jury renders its verdict and is discharged; and the common law does not support the power of the trial judge to recall the jury to conduct an inquiry on matters which are intrinsic to jury deliberations including allegations of apprehended bias. Alternately, if the court found that it did have jurisdiction to order an inquiry, the Crown pled that the court should decline to do so in these circumstances.[10]

In delivering its ruling, the court refused to disclose the content of the anonymous letter, to protect jury secrecy. It however, refused both remedies sought by the defence.

[9] *Ibid* at para 3.
[10] *Ibid* at paras 4-5.

On the first remedy, the trial judge held that he lacked jurisdiction to investigate the alleged basis for a mistrial. The court held that the anonymous letter meant little because "courts attribute little credence to unsolicited comments of an author who is unwilling to self-identify in an apparent effort to be immunized from ever being asked to explain those comments." There was thus, no evidentiary foundation of the allegation and in any case, the integrity of the jury and the administration of justice remained intact.[11]

On the second remedy suggested, the trial judge held that he did not have jurisdiction to order a post-discharge inquiry into the contents of the letter received by defence. The court listed six factors which support its decision against convening a further inquiry by the trial judge, including,[12] (a) the risk of a potential bias was raised and addressed directly in the Transcript after Jurors #1 and #9 were excused, with the remaining jurors affirming that what they had heard would not jeopardize their ability to fulfill their oath; (b) the jurors were polled after the verdict was rendered, as was explained to them in advance; (c) the letter cannot support re-opening the February 18 questioning issue at this stage: it is an anonymous communication and was delivered to the defence 12 days after the verdict; (d) if the letter was prepared by Juror #1 (a matter of speculation), her perspective written post-verdict is difficult to isolate from her strongly expressed views which led to her discharge; at least three of the five points raised are irrelevant and the others are unsupported generalizations; (e) the Transcript questioning discloses the conflict between Juror #1 and #9, not with other jurors. The Transcript is available for review by the court of appeal, along with the letter if they so order; and (f) since the time of their discharge, the eleven jurors have been entitled to access media coverage and views of non-participants; equally they remain at liberty to compartmentalize the whole experience as best meets their personal needs.

In addition, the court held that it was difficult to anticipate the risk of a proposed inquiry some months after the verdict and the discharge of the jury, as such inquiry may impact the coping skills that these former jurors have set in place to get on with their lives.[13]

[11] *Ibid* at paras 40-43.
[12] *Ibid* at paras 51-53.
[13] *Ibid* at para 52.

Sentencing

It is expected that the defence will appeal the trial court's verdict, both on the conviction and on the formal *ex facto* application prior to sentencing. Pending any such appeal, however, Barton's three-day sentencing hearing began on June 28, 2021. Press reports reveal that the Crown recommended Barton be sentenced to eight to twenty years in prison while the defence argued for a five to nine years prison term.[14] The trial judge, Justice Stephen Hillier's sentencing verdict was delivered on July 27, 2021,[15] and Barton was sentenced to serve a period of 12 ½ years of incarceration, less the credit for time spent in Interim Custody.[16] The remainder of Barton's sentence from the date of sentencing is 11 years and 204 days.

In reaching its sentencing verdict, the court considered the impacts of Gladue's death on her family members,[17] the need for the sentence to be proportional to the crime committed,[18] and the need to discourage the serious risks of exploitation in sex for money transactions.[19] The court also considered other aggravating factors like the inference that *Barton* was aware of the risks of his actions, his "callous" failure to initiate any measures to obtain immediate assistance as soon as Gladue's bleeding commenced, as well as the litany of lies that he told police officers to deflect personal responsibility.[20] Mitigating factors like the Barton's status as a first-time offender, the financial impacts that the trial has had on his family, and the public humiliation that Barton has faced, were also considered.[21]

More Journeys to the SCC?

We might not have seen the end of *Barton*. Whether the defence will appeal either or both of the mistrial application and the sentencing verdict, is yet to be seen. In any case, for present purposes, it is comforting to know that jurors were instructed on the implications that sexist and racist remarks can have on complainants and the trial process. The controversy between Jurors #1 and #9 involving the alleged sexist comments, whether those allegations were

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[14] Matthew Black, "Bradley Barton's defence argues for sentence as short as 5 years for 2011 Edmonton hotel killing" *CTV News Edmonton,* (29 June 2021), online: < https://edmonton.ctvnews.ca/bradley-barton-s-defence-argues-for-sentence-as-short-as-5-years-for-2011-edmonton-hotel-killing-1.5490240 > [https://perma.cc/4RU6-HLDX].
[15] *R v Barton,* 2021 ABQB 603.
[16] *Ibid* at para 129.
[17] *Ibid* at paras 35-38.
[18] *Ibid* at paras 66-67.
[19] *Ibid* at paras 68-78
[20] *Ibid* at para 88.
[21] *Ibid* at paras 93-107.

true or false, may be considered an indication that the lessons from the SCC's decision preceding the retrial did not go unlearned. The elimination of direct references to prejudicial remarks against Gladue during the second trial is also indicative of lessons learnt. If Weber's comments are anything to go by, however, we must remain concerned and alert that these myths, stereotypes and prejudices may still seep through trial processes in indirect ways.