TOP FIVE 2019

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R v LE, 2019 SCC 34 (CANLII), 375 CCC (3D) 431

Date released: May 31, 2019

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17804/index.do

Facts

Late one evening, three police officers entered a fenced backyard of a townhouse and approached five young men without a warrant or their permission. The townhouse was in a subsidized housing complex in downtown Toronto that had a reputation as a place for drugs and gang activity.

The officers were looking for a man named N.D.-J.[1] The police had a tip that N.D.-J was in the general area and who was accused of violent crimes. As they approached the housing complex, they asked a security guard there if he recognized a photo of N.D.-J. The security guard told the officers that he had not seen this person, but that a different wanted individual, J.J., had been seen in L.D.'s backyard with members of a local gang. The security guard also said he suspected drug trafficking in that backyard.

The officers followed the small footpath that led to a number of properties, including L.D.'s backyard.

The officers saw five young men talking and relaxing while sitting on couches in an area that was enclosed by a two-foot fence, outside of which was a footpath which led to a common area. Each of the young men belonged to a racialized minority.

The officers did not know what J.J. looked like, so even when they could see all five men, they were unable to determine if J.J. was present. Without seeking a warrant or permission to enter, two of the three officers entered into the backyard through an opening in the fence. The third hopped over the fence.

The officers greeted the five men and began questioning them. They flashed their badges and two of the officers took adversarial tactical positions.

[1] The court uses initials for people whose names cannot lawfully be published, including cases involving people under the age of 18.

Mr. Le was Asian-Canadian and 20 years old. He had been invited to the townhouse by his friend, L.D., then 17 years old, who lived there with his mother. Mr. Le began angling his body in a way to conceal something. The police officers began giving orders, patrolling the perimeter, and blocking possible exits.

Mr. Le was asked for his identification, and responded that he did not have any. Mr. Le was then questioned about the contents in his bag. He decided to run. The officers pursued and caught up to him. This led to a physical struggle between Mr. Le and one of the officers. During the struggle, Mr. Le attempted to reach into his bag, which contained a loaded handgun. The officer prevented him from getting the gun and subdued and arrested Mr. Le with the assistance of the other officers. Subsequent searches revealed that Mr. Le was in possession of cash and cocaine, in addition to the gun. Mr. Le was arrested and charged with offenses related to weapons and possession and trafficking of illegal drugs.

Mr. Le applied at trial to exclude the evidence of the firearm, drugs and cash under section 24(2) of the *Canadian Charter of Rights and Freedoms* ("the Charter"). He argued at trial that the police had no right to be in the backyard and that the police should have knocked on the front door in order to ask whether it would be possible to speak with the five men. He argued that the police conduct breached his right to a reasonable expectation of privacy under s. 8 of the Charter. He also argued that during the interaction that followed, he was unlawfully detained by police, in violation of s. 9 of the Charter. He argued that the evidence should be excluded because, in the circumstances of this police conduct, admitting the evidence would bring the administration of justice into disrepute.

Issues

1. Did the encounter between Mr. Le and the police infringe his s. 9 Charter right to be free from arbitrary detention? If so, at what point in this interaction was Mr. Le detained? Were Mr. Le's s. 8 rights breached?
2. If Mr. Le's s. 9 Charter rights were breached, should the evidence be excluded under s. 24(2)?

Procedural History

The trial court found that the evidence should be admitted and convicted Mr. Le. A majority of the Court of Appeal dismissed his appeal. However, since the Court of Appeal decision included a dissenting opinion, Mr. Le had an automatic right to appeal to the Supreme Court of Canada ("SCC"), and he did.

Decision

The majority of the SCC judges held that Mr. Le's s. 9 Charter right against arbitrary detention was breached when the police entered the backyard and made contact with the young men. On an analysis under s. 24(2) of the Charter, the evidence of drugs, guns and cash were deemed inadmissible. Since the s. 9 finding was enough to show that Mr. Le's rights were infringed, the SCC did not need to consider his claims with respect to s. 8 of the Charter.

Ratio

Just because police interact with some communities more often than others, that doesn't mean they can enter a private residence in those communities without a warrant or permission. The larger social context of relationships between police and racialized communities must be considered when deciding whether and how a person's s. 9 Charter rights have been breached.

Reasons

The SCC considered the question of when, during his interaction with the police, Mr. Le was "detained". Under the law, detention can be either physical or psychological. Psychological detention by the police occurs when (1) a person is legally required to comply with demands by the police, or (2) a reasonable person in the subject's position would feel obligated to comply with police demands and think that they were not free to leave.

The Court held that in applying this test, it was important to consider all the circumstances of the police encounter. Here, important factors included that coming over the fence to enter a private residence conveys a show of force. The tactic of three uniformed officers suddenly occupying the backyard would seem coercive and intimidating to a reasonable person. In addition, the fact that individuals from marginalized groups have different experiences and relationships with the police must be taken into consideration, because it has an impact on the perceptions of a reasonable person in Mr. Le's shoes.

Mr. Le was a member of a racialized community. He was also living in a low-income area. Somebody in Mr. Le's situation was more likely to have had negative interactions with the police. An ordinary person who had been stopped by the police many times before would think they had to do what the police said. The SCC also found that elements of the police conduct, such as the tone of their questions and the way they positioned themselves physically suggested that police were asserting legal

authority in the interaction. For these reasons, the majority said that Mr. Le was detained the moment the officers entered the backyard.

The SCC then held that Mr. Le's detention was arbitrary, and infringed s. 9 of the Charter, because the police were not authorized to enter the residence and detain him. This was because they did not have reasonable grounds to suspect that Mr. Le was committing or had recently committed a crime. Mr. Le's presence in a so-called "high crime" area could not, without something more specific, give rise to a reasonable suspicion of criminal activity.

S. 24(2) of the Charter is for deciding whether evidence that was obtained in a manner that infringes a person's Charter rights should be admitted. The majority held that the evidence against Mr. Le (the gun, drugs, and cash) should be excluded. First, it was obtained through serious police misconduct. The majority noted that the officers came in without warning and obtained their evidence by walking into somebody's private residence. If this were allowed by law to happen in some neighbourhoods, because they were racialized and lower-income, but not others, people would lose their faith in the justice system.

This decision was not unanimous. Two of the five judges who decided this case dissented, meaning they disagreed with the majority. They agreed that Mr. Le's detention was arbitrary but would have admitted the evidence against him under s. 24(2) of the Charter. They found that the police officers' conduct in this case was not egregious, because it was inadvertent and committed in the course of performing legitimate investigative duties. They also found that, on balance, the gravity of the social harms that drugs and gun violence have on communities outweighed the seriousness of the illegal actions taken by the police. They noted in particular that the police found a fully loaded, semi-automatic handgun on Mr. Le that could have ended the life of an innocent bystander or one of the police officers. The dissenting judges would have upheld the decisions of the lower courts and admitted the evidence against Mr. Le in trial.

DISCUSSION

1. What are the main Charter arguments raised in this case?

2. Why are there limits on what police officers can do when they are looking for evidence?

3. Do you agree with the SCC majority that the police did not have reasonable grounds to suspect that Mr. Le was committing or had recently committed a crime?

4. Do you think the evidence found on Le was serious enough that it should have been admitted into evidence?

5. How might police intervention affect somebody who had been stopped by the police 10 times versus somebody who had never been stopped?

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R v BOUDREAULT, 2018 SCC 58 (CANLII)

Date released: December 14, 2018

https://www.canlii.org/en/ca/scc/doc/2018/2018scc58/2018scc58.html

Facts

Under section 737 of the *Criminal Code of Canada* ("The Code"), everyone who is guilty of a crime has to pay a mandatory victim surcharge (a fine). This case addresses whether this surcharge is constitutional or whether it is a "cruel and unusual punishment" under s. 12 of the Charter.

The victim surcharge was introduced in 1988 to help fund programs and services for victims of crimes. At that time, judges could choose not to impose the surcharge if an offender could not afford to pay it. In 2013, the federal government passed the *Increasing Offenders' Accountability for Victims Act*, which made the surcharge mandatory and doubled the cost. The surcharge was 30% of any other fine imposed, or where no fine was imposed, $100 for every summary conviction and $200 for every indictable conviction. Under this legislation, the surcharge amount could not be waived or decreased by the sentencing judge or appealed by the offender. It had to be paid.

Many people involved in the criminal justice system are low-income, live with addiction and other mental health issues, or are otherwise disadvantaged or marginalized. If they could not pay the surcharge, a criminal conviction for even a relatively minor offense could result in them being imprisoned, prevented from seeking a pardon, and targeted by collection agencies.

Seven individuals challenged the constitutionality of the surcharge, arguing that it violated the *Canadian Charter of Rights and Freedoms* in that it amounted to cruel and unusual punishment (s. 12 of the Charter), or that the surcharge infringed on the individual's right to liberty and security (s. 7 of the Charter). In each case, the offenders said they could not afford to pay the surcharge. All of them lived in poverty, and struggled with various barriers, including homelessness,

addiction, unemployment, and health issues. One of the offenders had only $136 each month after they had paid for food and housing. Sentencing judges even made comments on the record saying that they suspected the offenders could not afford to pay the surcharge, but that they were still bound by law to impose it.

Issues

1. Does the mandatory victim surcharge set out in s. 737 of the Code violate s. 12 of the Charter?
2. Does the mandatory victim surcharge set out in s. 737 of the Code violate s. 7 of the Charter?
3. If either s. 12 or s. 7 of the Charter is violated, is the surcharge justified under s. 1 of the Charter?
4. If the surcharge is not justified, what is the appropriate remedy?

Procedural History

The Quebec and Ontario Courts of Appeal both held that the surcharge did not breach sections 7 and 12 of the Charter and was therefore constitutional. The applicants appealed to the Supreme Court of Canada (SCC).

Decision

A majority of the SCC ruled that the imposition and enforcement of the surcharge amounted to cruel and unusual punishment. This s. 12 breach was not justified under s. 1 of the Charter. Since s. 12 was breached, the SCC stated that it was not necessary to consider whether the surcharge also violated s. 7 of the Charter.

Ratio

The surcharge constituted a punishment because it flowed directly and automatically from conviction. It constituted a "cruel and unusual" punishment, in violation of s. 12 of Charter, because having a surcharge created circumstances for offenders who live in serious poverty that are grossly disproportionate, outrage the standards of decency, and are abhorrent and intolerable.

Reasons

For a punishment to be cruel and unusual, it must be so excessive as to outrage standards of decency, so much that society could not tolerate it.

The SCC also found that the surcharge, in practice, posed a constant, indirect threat of imprisonment or detention for marginalized offenders. Many of the people involved in the criminal justice system are low-income, live with addiction and other mental health issues, and are otherwise disadvantaged or marginalized. As a result, if they could not pay the mandatory victim surcharge, a criminal conviction for even a relatively minor offense could result in many harmful real life impacts.

The harmful effects of the surcharge included deeply disproportionate financial consequences, the threat of prison for failure to pay, being targeted by private collection agencies, and being prevented from seeking a record suspension. The surcharge also ignored the rule that sentences should be made for the individual, because it did not allow judges to consider an individual's circumstances, or the best way to help them back into society.

The surcharge did have the objectives of raising funds for victim support services, as well as helping offenders give back to individual victims and the general community. However, in the case of marginalized offenders, these objectives were unlikely to be met. At the time of sentencing, Mr. Boudreault was homeless, unemployed, and addicted to marijuana. The other applicants shared similar circumstances. They all were in serious poverty, precarious housing situations, and struggling with addiction. Since they had no way to pay the surcharge, the goals of the surcharge would not be met.

Even after a Charter breach has been established, the state can still argue that the breach was justified by a pressing and substantial objective under s. 1 of the Charter. This means that the government respondents could have argued that even though the surcharge is a cruel and unusual punishment, it should still be allowed for a very important reason. However, the government respondents did not put forward any argument or evidence under s. 1, so the SCC held that that the surcharge was not justified.

The SCC held that the appropriate remedy was to declare s. 737 of the Code to be invalid, effective immediately. This meant that the surcharges of the seven offenders who challenged the law were invalidated. The SCC also stated that it was open to other offenders with surcharges to go to court and seek a remedy. It was also open to the government and Parliament to make changes to resolve the Charter concerns that the SCC had identified, for example by making changes to the Code.

DISCUSSION

1. What kinds of services might victims of crime need access to?

2. What did the applicants say was cruel and unusual about the surcharge?

3. Should judges be able to choose whether or not to impose a surcharge?

4. Instead of charging offenders, can you think of other ways to raise funds for victims of crime?

5. What changes could be made to the Code to resolve the SCC's Charter concerns?

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REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT, 2019 ONCA 544 (CANLII): CARBON TAX REFERENCE[2]

Date released: June 28, 2019

https://www.canlii.org/en/on/onca/doc/2019/2019onca544/2019onca544.html

Facts

Gasses that trap heat in the atmosphere are called greenhouse gasses.
The increase of greenhouse gasses, and the resulting rise in global temperatures, are some of the primary contributors to climate change and its associated impacts (for example, extreme weather events such as droughts and wildfires, rising sea levels, and species loss and extinction).

The *Greenhouse Gas Pollution Pricing Act* ("the Act") was passed by the federal government on June 21, 2018. The purpose of the Act was to reduce greenhouse gas emissions in Canada by establishing a "charge" on carbon-based fuels. This charge applies to a lot of different producers, distributors, and emitters of carbon and other greenhouse gases. The Act also created a trading system for large industrial emitters of greenhouse gases. This system gives credits to those who remain within a certain limit of emissions, and charges those who go above that limit. The rates will increase annually by $10 per tonne, up to $50 per tonne in 2022.

The Act serves as "backstop" legislation for provinces that have not enacted their own carbon pricing programs.

In July 2018, Ontario withdrew from Canada's national carbon pricing program under the Act. Ontario released its own environmental plan to reduce greenhouse gas emissions in November 2018.

[2] A reference case is when the federal government or provincial government, through their Attorney General, asks the court for advice on a legal question. It is different from a civil case, where a lawsuit is brought by a plaintiff against a defendant, or a criminal case, where the Crown prosecutes a charge against the accused.

Procedural History

Ontario referred to the Court of Appeal the question of whether the Act was constitutional. The hearing was held from April 15 to 18, 2019. Eighteen interveners participated in the hearing, including the provinces of New Brunswick, British Columbia and Saskatchewan and a range of organizations such as the Assembly of First Nations, the Canadian Public Health Association, and the David Suzuki Foundation.

Issues

1. Is the Act within the power of the federal government?
2. Are the charges imposed by the Act unlawful taxes contrary to s. 53 of the *Constitution Act, 1867*?

Decision

A majority of the Court of Appeal held that the Act is within the power of the federal government to legislate in relation to matters of "national concern" under the "Peace, Order and Good Government ("POGG") power in s. 91 of the *Constitution Act, 1867*. In addition, the charges imposed by the Act are valid regulatory charges and are not unconstitutional taxes.

Ratio

The Act's purpose is to create minimum national standards to reduce greenhouse gas emissions. The need for a collective approach to this issue, and the risk of non-participation by one or more provinces, permits Canada to enact this legislation under the national concern branch of the POGG power.

Reasons

First, the Court of Appeal held that the purpose of the Act was to establish minimum national standards to reduce greenhouse gas emissions.

Then, the Court needed to determine which government was responsible for legislating (or "making laws") that protect the environment. By looking first at the *Constitution Act, 1867*, then at the case law, the Court determined that the Act fell within Canada's jurisdiction to legislate in relation to a single, distinct and indivisible matter of national concern under the POGG power.

The source of the POGG power is section 91 of the *Constitution Act, 1867*. This section authorizes the federal government to "make laws for the peace, order, and good government of Canada", in relation to certain kinds of issues or political matters that are not specifically within the control of provincial legislatures.

This means that in certain circumstances where the Constitution does not assign either level of government responsibility over a certain area, power (or "jurisdiction") over that area can be assumed by the federal government.

The Court declared that the protection of the environment from harmful greenhouse gasses is a single, distinct and indivisible matter of national concern. The main reason was that greenhouse gasses are not limited by provincial or national boundaries and can cause potentially catastrophic effects everywhere, so laws passed by one province in relation to greenhouse gases cannot, on their own, reduce Canada's net emissions. Since the efforts of one province can be undermined by the action or inaction of other provinces, the reduction of greenhouse gas emissions cannot be dealt with by the provinces individually. The Court also noted that the Act did not radically disrupt the constitutional balance between federal and provincial powers, because it left room for provinces to regulate other aspects of greenhouse gas emissions within their boundaries.

The Court also held that the charges imposed by the Act were valid regulatory charges instead of unconstitutional taxes. This was because the charges advanced the purposes of the Act. They created a financial incentive for businesses and individuals to change their behavior in order to reduce greenhouse gas emissions.

Additional Note

In a parallel reference (the Saskatchewan Carbon Tax Reference) the carbon tax was also upheld by a 3-2 majority of the Court of Appeal for Saskatchewan.

DISCUSSION

1. What is the purpose of the *Greenhouse Gas Pollution Pricing Act*?

2. Do you agree that protecting the environment is a national concern?

3. Should a province be allowed to "opt out" of the national plan if they don't have their own plan?

4. The POGG power isn't used very often by the government. What was the SCC's main reason for ruling that environmental legislation is a national concern rather than just a provincial matter?

5. Is giving credits to groups who limit their carbon-based fuels emissions a good way to fight climate change?

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FRANK v CANADA (ATTORNEY GENERAL), 2019 SCC 1 (CANLII)

Date released: January 11, 2019
https://www.canlii.org/en/ca/scc/doc/2019/2019scc1/2019scc1.html

Facts

The right to vote is a fundamental political right and an important part of Canadian democracy. It is protected by section 3 of the Canadian Charter of Rights and Freedoms ("the Charter"). The Canada Elections Act ("The Act") sets out the rules for federal elections in Canada. It states that Canadian citizens who have lived outside of Canada for 5 years or more cannot vote in a federal election (sections 11(d) and 222(1) of the Act).

More than one million Canadian citizens have lived outside of Canada for 5 or more years and cannot vote in federal elections under the Act. Dr. Gillian Frank and Mr. Jamie Duong are Canadian citizens who challenged this law. They were both denied the right to vote in the May 2011 Canadian federal election because they have lived outside of Canada for more than 5 years. Dr. Frank and Mr. Duong claimed that the law unjustifiably violates their rights to vote under s. 3 of the Charter.

Procedural History

The Ontario Superior Court of Justice decided that the sections of the Act that denied non-residents the right to vote infringed s. 3 of the Charter and could not be justified under s. 1.

A majority of the Ontario Court of Appeal reversed that decision and allowed the appeal. Mr. Duong and Dr. Frank appealed to the Supreme Court of Canada ("the SCC").

Issues

1. Do sections 11(d) and 222 (1) of the Canada Elections Act violate section 3 of the Charter?
2. If they do violate the Charter, can they be justified under section 1 of the Charter?

Decision

Appeal allowed. A majority of the SCC held that the Act's residency requirement violated section 3 of the Charter and was not justified under section 1 of the Charter.

Ratio

The Act's infringement of section 3 of the Charter was not justified under section 1 of the Charter. This is because, although the Act's residency requirement was trying to achieve the important goal of maintaining fairness in elections for Canadian residents, the negative effects of the law on non-residents were serious and not proportionate to that goal.

Reasons

The Attorney General of Canada conceded that the Act breached s. 3 of the Charter. However, she took the position that this breach was justified under section 1 of the Charter.

For a breach to be justified under section 1, the law has to have an important purpose, called a 'pressing and substantial objective'. In this case, the SCC stated that the goal of maintaining fairness in elections for Canadian residences was important enough to be a pressing and substantial objective.

To pass the next step of s. 1, the law has to be "proportionate". To be proportionate, the law must first be "rationally connected" to its purpose. This means that there must be a connection between what the law is trying to do and what the law actually does. Second, the law has to be carefully tailored so that it has as small an impact on the Charter right as possible. Third, its overall effects have to be proportionate, meaning the bad effects of the law on Charter rights cannot outweigh its benefits.

This is where the Act ran into a problem. The SCC stated that the law did not appear to be rationally connected to the goal of maintaining fairness in elections, because the Attorney General of Canada had not provided any evidence that when non-residents voted in Canadian elections, this could harm residents or compromise the fairness of elections (for example, nobody had ever lodged a complaint of unfairness). The SCC also said that the law was not carefully tailored. If the reason for the law was to prevent people from voting who did not have a strong connection to Canada, it did not make sense that non-residents who continued to have strong ties to Canada, including family and cultural bonds, would be denied the right to vote. In addition, many Canadian citizens who live outside of Canada are impacted by Canadian laws. For example,

they may pay taxes to Canada or collect social benefits. It was not fair for these non-residents to be unable to vote or have a say in government policies or decisions that could impact them and disrupt their lives. The law's bad effects on non-residents were serious and outweighed its "speculative" benefits for election fairness.

DISCUSSION

1. How did the Act violate Canadians' right to vote?

2. The court said that Parliament cannot limit the right to vote easily. Why is it so important to protect the right to vote?

3. Should there be any limit on the amount of time somebody can live outside of Canada and still be allowed to vote? 20 years? What about 30?

4. Each court noted that fairness in elections is a "pressing and substantial objective". Can you think of any real threats to election fairness in Canada?

5. What else could the government do to help make sure elections are fair in Canada?

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R v BARTON, 2019 SCC 33 (CANLII)

Date released: May 24, 2019
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17800/index.do

Disclaimer: This case includes graphic sexual content and describes sexual violence against an Indigenous woman.

Facts

This appeal is about the death of Cindy Gladue and the role Bradley Barton played in it. Ms. Gladue was an Indigenous woman and a sex worker who was found dead in the bathroom of Mr. Barton's Edmonton hotel room. Mr. Barton was charged with first-degree murder. The cause of death was determined to be loss of blood due to an 11 cm wound in her vaginal wall. The Crown's theory was that during the accused and the deceased's sexual activity, while the deceased was incapacitated by alcohol, the accused cut the inside of her vagina with a sharp object with intent to seriously harm or kill her. The Crown also took the position that if the accused did not murder the deceased, he committed unlawful act manslaughter (this is when someone causes another person to die without specifically intending to kill them, by actions that are dangerous or illegal that they should have known might cause serious harm).

Although Mr. Barton admitted that he caused Ms. Gladue's death, he said that it was an accident. At his trial, he testified that he had hired Ms. Gladue to have sex two nights in a row. On the first night, he said, he put his hand in her vagina and thrust a few minutes before having sex. On the second night, he did the same thing, but thrust deeper and harder. On the second time, there was blood, so Ms. Gladue went to the bathroom to clean up, and Mr. Barton claimed he fell asleep before finding her dead the next morning. Mr. Barton denied using a sharp object and asserted that the deceased consented to the sexual activities in question, or at least that he honestly believed that she did. What Mr. Barton honestly believed is important to the case, because in sexual assault cases, if the accused honestly believed there was consent, this can be a defence in some circumstances.

Procedural History

The jury at the Court of Queens Bench of Alberta found Mr. Barton not guilty. The Crown claimed the judge made mistakes, and appealed, seeking a new trial. The Court of Appeal ordered a new trial. Mr. Barton then appealed to the Supreme Court of Canada (SCC), seeking to have the original verdict of not guilty affirmed.

Issues

1. Did the trial judge err in not instructing the jury properly and allowing the evidence of the deceased's prior sexual conduct to be introduced by the accused?
2. If the trial judge did make those errors should the accused be tried again for both first degree murder and man-slaughter?

Decision

All the judges at the Supreme Court agreed that the trial judge made errors in allowing the evidence of the deceased's prior sexual conduct and in failing to properly instruct the jury on the defence of honest but mistaken belief in communicated consent. The majority held that these errors warranted a new trial on unlawful act manslaughter but not first degree murder. The dissenting judges held that the trial judge's errors tainted the whole trial and would have ordered Mr. Barton to face a second trial for first degree murder.

Ratio

It was an error for the trial judge not to determine whether the evidence of Ms. Gladue's past sexual activity was inadmissible because it was based on myths about women and sexual consent. The criminal justice system should take steps to address systemic biases, prejudices, and stereotypes against Indigenous women and sex workers.

Reasons

The SCC held that by relying on the complainant's prior sexual activities at trial, and allowing the jury to hear that evidence without any instructions, the fairness of the trial was compromised.

The *Criminal Code of Canada* ("The Code") requires certain procedures to be followed before any evidence of the complainant's prior sexual activity is allowed into evidence. Judges must consider whether evidence of a complainant's prior sexual activities is inadmissible because it relies on two myths about women and sexual consent. The first myth is that women are more likely to have consented to the sexual activity in question because of

past sexual activity. The second myth is that because of previous sexual activity the complainant is less worthy of belief. In other words, if Ms. Gladue had consented the first time this does not mean she consented the second time and even if someone has willingly engaged in a sexual activity in the past, this does not mean that their complaint about engaging non-consensually in the same activity is any less serious or believable under the law.

In this case, the required procedures were not followed. The trial judge did not decide whether this evidence was admissible and did not give any instructions to the jury on how the evidence should be used.

At trial, the accused relied on the defence of "honest but mistaken belief in communicated consent". This means that he claimed that he believed Ms. Gladue had consented to the sexual activity even though she had not. The SCC held that Mr. Barton made a **mistake of law** by thinking that Ms. Gladue had consented to the sexual activity on the second night based on her activity on the first night, not a **mistake of fact**. A mistake of law cannot be used as a defence. The trial judge erred by failing to instruct the jury about this, leaving the jurors without the legal tools to do a proper analysis.

This case is extremely important because it acknowledges prejudices against Indigenous women and sex workers like Ms. Gladue. The SCC held that the criminal justice system needs to take steps to address systemic biases, prejudices, and stereotypes against Indigenous women and sex workers. In sexual assault cases where the complainant is an Indigenous women or girl, trial judges should provide a specific instruction aimed at countering prejudice against Indigenous women and girls.

DISCUSSION

1. Why were Mr. Barton's beliefs about what happened so important to the outcome of the case?

2. What is the difference between a mistake of law and a mistake of fact?

3. Why is it so important that the judge gives instructions to the jury before they consider evidence? Aren't they the ones deciding on the case?

4. What makes myths and stereotypes about people so problematic when it comes to the legal issue of sexual consent?

5. The SCC acknowledged that the criminal justice system is guilty of systemic biases, prejudices, and stereotypes against Indigenous women and sex workers. How can the law help to confront these issues?