File Number: 37769

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

BETWEEN:

BRADLEY DAVID BARTON

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, ABORIGINAL LEGAL SERVICES, ASSEMBLY OF FIRST NATIONS, THE WOMEN OF THE MÉTIS NATION / LES FEMMES MICHIF OTIPEMISIWAK, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, THE CRIMINAL TRIAL LAWYERS`ASSOCIATION (ALBERTA), CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, AD IDEM / CANADIAN MEDIA LAWYERS ASSOCIATION, THE INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN AND THE WOMEN`S LEGAL EDUCATION AND ACTION FUND INC. (JOINTLY), THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, VANCOUVER RAPE RELIEF SOCIETY, LA CONCERTATION DES LUTTES CONTRE LÈXPLOITATION SEXUELLE (La CLES), AWCEP 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 (CEASE) (JOINTLY)

INTERVENERS

FACTUM OF INTERVENER, THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS

(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS
500 – 1138 Melville Street
Vancouver, BC V6E 4S3

Christa Big Canoe (Commission Counsel)
Fanny Wylde (Commission Counsel)
Tel: (416) 268-4133
Fax: (604) 775-5009
Email: c.bigcanoe@mmiwg-ffada.ca
f.wylde@mmiwg-ffada.ca
Counsel for the Intervener, The National Inquiry into Missing and Murdered Indigenous Women and Girls

NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS
300 – 222 Queen Street
Ottawa, ON K1P 5V9

Meredith Porter (Commission Counsel)
Tel: (613) 222-5951
Fax: (613) 943-5760
Email: m.porter@mmiwg-ffada.ca
Ottawa Agent for Counsel for the Intervener, The National Inquiry into Missing and Murdered Indigenous Women and Girls

ORIGINAL TO: SUPREME COURT OF CANADA
The Registrar
301 Wellington Street
Ottawa, ON K1A 0J1

AND COPIES TO:

BOTTOS LAW GROUP
4th Floor, 10226 104 Street, NW
Edmonton, AB T5J 1B8

Dino Bottos
Peter Sankoff
Tel: (780) 421-7001
Fax: (780) 421-7031
Email: dbottos@bottoslaw.ca
psankoff@bottoslaw.ca
Counsel for the Appellant

SUPREME ADVOCAY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: emeeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca
Ottawa agent for Counsel for the Appellant

ALBERTA JUSTICE
Appeals Branch
3rd Floor, 9833-109gina St. N.W.
Edmonton, AB T5K 2E8
Joanne B. Dartana
Tel: (780) 422-5402
Fax: (780) 422-1106
Email: joanne.dartana@gov.ab.ca
Counsel for the Respondent

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin St
Ottawa, ON K1P 1C3
D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com
Ottawa agent for Counsel for the Respondent

AND COPIES TO:

ATTORNEY GENERAL OF CANADA
Department of Justice
50 O'Connor Street
Suite 500
Ottawa, ON K1A 0H8

Christopher Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca
Counsel for the Intervener,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice
50 O'Connor Street
Suite 500, Room 556
Ottawa, ON K1P 6L2

Robert J. Frater, Q.C.
Tel: (613) 670-6289
Fax: (613) 954-1920
Email: Robert.frater@justice.gc.ca
Ottawa agent for Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Criminal
10th Floor – 720 Bay Street
Toronto, ON M7A 2S9

Christine Bartlett-Hughes
Benita Wassenaar
Jessica Wolfe
Tel: (416) 326-2351
Fax: (416) 326-4656
Email: Christine.bartletthughes@ontario.ca
Counsel for the Intervener,
Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com
Ottawa Agent for Counsel
for the Intervener,
Attorney General of Ontario

ATTORNEY GENERAL OF MANITOBA
510 - 405 Broadway
Winnipeg, MB R3C 3L6

Renée Lagimodière
Jennifer Mann
Tel: (204) 945-5778
Fax: (204) 945-1260
Email: renee.lagimodiere2@gov.mb.ca
Counsel for the Intervener
Attorney General of Manitoba

GOWLING WLG (Canada) LLP
2600 – 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com
Ottawa agent for Counsel
for the Intervener,
Attorney General of
Manitoba

ATTORNEY GENERAL OF BRITISH COLUMBIA
940 Blanshard Street, 3rd Floor
Victoria, BC V8W 3E6

Lesley A. Ruzicka
Tel: (250) 387-4218
Fax: (250) 387-4262
Email: Lesley.ruzicka@gov.bc.ca
Counsel for the Intervener, Attorney General of British Columbia

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin St
Ottawa, ON K1P 1C3

Robert E. Houston, Q.C.
Tel: (613) 783-8817
Fax: (613) 788-3500
Email: Robert.houston@gowlingwlg.com
Ottawa agent for Counsel for the Intervener, Attorney General of British Columbia

DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS
Complexe Jules-Dallaire
2828, boulevard Laurier,
Tour 1, bureau 500
Québec, PQ G1V 0B9

Andrej Skoko
Tel : (418) 643-9059 Ext :21404
Fax : (418) 644-3428
Email : andrej.skoko@dpcp.gouv.gc.ca
Counsel for the Intervener, Director of Criminal and Penal Prosecutions

DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC
17, rue Laurier
bureau 1.230
Gatineau, PQ J8X 4C1

Sandra Bonanno
Tel : (819) 776-8111 Ext. 60446
Fax : (819) 772-3986
Email : sandra.bonanno@dpcp.gouv.gc.ca
Ottawa agent for Counsel for the Intervener, Director of Criminal and Penal Prosecutions

ABORIGINAL LEGAL SERVICES
211 Yonge Street, Suite 500
Toronto, ON M5B 1M4

Emily Hill
Jonathan Rudin
Tel: (416) 408-4041 Ext. 224
Fax: (416) 408-1568
Email: e_hill@lao.onca
Counsel for the Intervener, Aboriginal Legal Services

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com
Ottawa Agent for Counsel for the Intervener, Aboriginal Legal Services

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

Stuart Wuttke

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Julie McGregor
Tel: (613) 241-6789 Ext: 228
Fax: (613) 241-5808
Email: swuttke@afn.ca
Counsel for the Intervener,
The Assembly of First Nations

THE WOMEN OF THE MÉTIS NATION / LES FEMMES MICHIF OTIPEMISIWAK
Jean Teillet Personal Law Corporation
861 East 11th Avenue
Vancouver, BC V5T 3ET

Jean Teillet
Tel: (604) 787-3978
Fax: (416) 916-3726
Email: jteillet@pstlaw.ca
Counsel for the Intervener,
The Women of the Métis Nation / Les femmes Michif Otipemisiwak

THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
University of Toronto
39 Queen's Park Cres. East
Toronto, ON M5S 2C3

Cheryl Milne
Tel: (416) 978-0092
Fax: (416) 978-8894
Email: Cheryl.milne@utoronto.ca
Counsel for the Intervener,
The David Asper Centre for Constitutional Rights

THE CRIMINAL TRIAL LAWYERS' ASSOCIATION (ALBERTA)
Hurley O'Keeffe Millsap
300 MacLean Block
10110 – 107 Street
Edmonton, AB T5J 1J4

Nathan J. Whitling
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca
Ottawa agent for Counsel for the Intervener, The Assembly of First Nations

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca
Ottawa agent for Counsel for the Intervener, The Women of the Métis Nation / Les femmes Michif Otipemisiwak

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street
Suite 1500
Ottawa, ON K1P 1A4

Matthew J. Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
Email:
matthew.halpin@nortonrosefulbright.com
Ottawa agent for Counsel for the Intervener, The David Asper Centre for Constitutional Rights

SUPREME ADVOCAY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Aloneissi O'Neill
Tel: (780) 421-4766
Fax: (780) 429-0346
Email: whitling@libertylaw.ca
Counsel for the Intervener, The Criminal Trial Lawyers' Association (Alberta)

Ottawa agent for Counsel for the Intervener, The Criminal Trial Lawyers' Association (Alberta)

CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO
Addario Law Group
171 John Street, Suite 101
Toronto, ON M5T 1X3

Megan Savard
Samara Secter
Tel: (416) 979-6446
Fax: (866) 714-1196
Email: msavard@addario.co
Counsel for the Intervener, Criminal Lawyers' Association of Ontario

GOLDBLATT PARTNERS LLP
500 – 30 Metcalfe, St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com
Ottawa Agent for Counsel for the Intervener, Criminal Lawyers' Association of Ontario

INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY
Sprake Song & Konye
1720 – 355 Burrard Street
Vancouver, BC V6C 2G8

Daniel J. Song
Matthew A. Nathanson
Tel: (604) 669-7447
Fax: (604) 687-7089
Email: djsong@sprakesongkonye.com
Counsel for the Intervener, Independent Criminal Defence Advocacy Society

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca
Ottawa agent for Counsel for the Intervener, Independent Criminal Defence Advocacy Society

AD IDEM / CANADIAN MEDIA LAWYERS ASSOCIATION
Fasken Martineau DuMoulin LLP
Bureau 3700, C.P. 242
800, Place Victoria
Montréal, PQ H4Z 1E9

Christian Leblanc

FASKEN MARTINEAU DuMOULIN LLP
55 rue Metcalfe
Bureau 1300
Ottawa, ON K1P 6L5

Sophie Arseneault
Tel: (613) 236-3882

Tess Layton
Tel : (514) 397-7545
Fax : (514) 397-7600
Email : cleblanc@fasken.com
Counsel for the Intervener, Ad Idem / Canadian Media Lawyers Association

THE INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN and THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (Jointly)
Weber Law
10209 – 97 Street
Edmonton, AB T5J 0L6

Lisa Weber
Shaun O'Brien
Tel: (780) 758-6365
Fax: (780) 429-2615
Email: lisa@weberlaw.ca
Counsel for the Interveners, The Institute for the Advancement of Aboriginal Women and the Women's Legal Education and Action Fund Inc. (Jointly)

VANCOUVER RAPE RELIEF SOCIETY
Foy Allison Law Group
207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison
Janine Benedet
Tel: (604) 922-9282
Fax: (604) 922-9283
Email: Gwendoline.allison@foyallison.com
Counsel for the Intervener, Vancouver Rape Relief Society

La CONCERTATION DES LUTTES CONTRE L'EXPLOITATION SEXUELLE (La CLES), AWCEP ASIAN WOMEN FOR EQUALITY SOCIETY, ABORIGINAL WOMEN'S ACTION

Fax: (613) 230-6423
Email: sarseneault@fasken.com
Ottawa agent for Counsel for the Intervener, Ad Idem / Canadian Media Lawyers Association

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com
Ottawa Agent for Counsel for the Intervener, The Institute for the Advancement of Aboriginal Women and the Women's Legal Education and Action Fund Inc. (Jointly)

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street,
Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
Tel: (613) 241-2701
Fax: (613) 241-2599
Email: albertos@vdg.ca
Ottawa Agent for Counsel for The Intervener, Vancouver Rape Relief Society

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street,
Suite 400
Ottawa, ON K1N 7E4

NETWORK (AWAN), FORMERLY EXPLOITED VOICES NOW EDUCATING (EVE) AND CEASE : CENTRE TO END ALL SEXUAL EXPLOITATION (CEASE) (JOINTLY)
Foy Allisson Law Group
207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison
Janine Benedet
Tel: (604) 922-9282
Fax: (604) 922-9283
Email: Gwendoline.allison@foyallison.com
Counsel for the Intervener,
La Concertation des luttes contre l'exploitation sexuelle (La CLES), AWCEP Asian Women for Equality Society, Aboriginal Women's Action Network (AWAN), formerly Exploited Voice now Educating (EVE) and CEASE : Centre to End All Sexual Exploitation (CEASE) (Jointly)

Albertos Polizogopoulos
Tel: (613) 241-2701
Fax: (613) 241-2599
Email: albertos@vdg.ca
Ottawa Agent for Counsel for The Intervener,
La Concertation des luttes contre l'exploitation sexuelle (La CLES), AWCEP Asian Women for Equality Society, Aboriginal Women's Action Network (AWAN), formerly Exploited Voice now Educating (EVE) and CEASE : Centre to End All Sexual Exploitation (CEASE) (Jointly)

SCC File No. 37769

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

B E T W E E N:

BRADLEY DAVID BARTON

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, ABORIGINAL LEGAL SERVICES, ASSEMBLY OF FIRST NATIONS, THE WOMEN OF THE MÉTIS NATION / LES FEMMES MICHIF OTIPEMISIWAK, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, THE CRIMINAL TRIAL LAWYERS`ASSOCIATION (ALBERTA), CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, AD IDEM / CANADIAN MEDIA LAWYERS ASSOCIATION, THE INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN AND THE WOMEN`S LEGAL EDUCATION AND ACTION FUND INC. (JOINTLY), THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, VANCOUVER RAPE RELIEF SOCIETY, LA CONCERTATION DES LUTTES CONTRE LÈXPLOITATION SEXUELLE (La CLES), AWCEP ASIAN WOMEN FOR EQUALITY SOCIETY, ABORIGINAL WOMEN`S ACTION NETWORK (AWAN), FORMERLY EXPLOITED VOICES NOW EDUCATING (EVE) and (CEASE): THE CENTRE TO END ALL SEXUAL EXPLOITATION (CEASE) (JOINTLY)

INTERVENERS

FACTUM OF THE INTERVENER
THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS

Table of Contents

"*To those who know the legacy of violence that impacts us as Indigenous women, there is no confusion. We know this fear, we know this dehumanization and we know the impact that it does not seem to have on the mindset of many, many Canadians*."[1]

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Cindy Ivy Gladue was a Métis women. She was born July 23, 1974, in Athabasca, a northern Alberta town. She lived in Edmonton from the time she was nine years old. Cindy was small in stature[2] and was only 36 years old when she met Bradley Barton and came to her death.[3] She was the mother of three daughters. She had struggles in life with addictions and poverty but we recall her strength and dignity now, because the trial in relation to her death failed to do so.
2. In his opening paragraph, the Appellant addresses how much attention the death of Cindy Gladue is receiving, "at a time in history when concerns about this type of offending have perhaps never been more pronounced." The issue of missing and murdered Indigenous women and girls (MMIWG) are now in the consciousness of more Canadians, but knowledge of MMIWG and violence towards Indigenous women has been in academic literature and reports for decades. Readily available documentation, inquiries, and reporting have long described the sexual victimization of Indigenous women as part of Canada's colonial legacy and that high numbers of victimization continue to occur[4].
3. The high victimization rates of Indigenous women, girls and two spirited people and the racism they experience is so notorious that the federal government of Canada has evoked the

---

[1] Tracy Lindberg, Violence Against Indigenous women and the case of Cindy Gladue. *Canadian Dimension.* April 6. [initially published on March 30, rabble.ca], online: Canadian Dimension https://canadiandimension.com/articles/view/violence-against-indigenouswomen-and-the-case-of-cindy-gladue

[2] RJR at para 28 [AR, Vol I, Tab 2 at 18]

[3] Trial Transcript, Vol 1, 14/15 **[Tab 22 Appellant's Record (A.R.)];**

[4] *Report of the Aboriginal Justice Inquiry of Manitoba (AJI)*, vol 1 (Winnipeg, Man: Public Inquiry into the Administration of Justice and Aboriginal People,1991); *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities(RCAP)*, vol 2 and vol 4 (Ottawa: Supply and Services Canada, 1996); *Forsaken: The Report of the Missing Women Commission of Inquiry, Nobodies: How and Why We Failed the Missing and Murdered Women(Forsaken) Part 1 and 2*, vol IIA ; *See also Part 3, 4 and 5*, vol IIB; vol III (British Columbia: Library and Archives Canada Cataloguing in Publication, November 2012); *The Final Report of the Truth and Reconciliation Commission of Canada (TRC Report), Canada's Residential Schools: The Legacy*, vol 5 (Montreal & Kingston: McGill-Queen's University Press, 2015)

Inquiries Act to address the issues. The opening preamble of Federal PC 2016-0736 recognizes that "… the high number of deaths and disappearances of Indigenous women and girls in Canada is an ongoing national tragedy that must be brought to an end;" Additionally, new evidence is not required to demonstrate the truth that Indigenous women face increased harm simply because they are Indigenous.

4. Despite the Appellant's argument that the appellate court ignored critical due process norms, lost in the public discourse of this case, we submit that the characterization of Ms. Gladue as a "Native" and "Native prostitute" demonstrates systemic racism and that the Trial Court's indifference towards her led to the errors that admitted otherwise impermissible sexual conduct evidence.
5. The Intervener, the National Inquiry into Missing and Murdered Indigenous Women and Girls ("the National Inquiry") adopts the facts as detailed by the Respondent Her Majesty the Queen, in paragraphs 5 to 20 of their factum dated July 24, 2018.

PART II – INTERVENER'S POSITION ON APPEAL

6. The Alberta Court of Appeal (ABCA) did not err in its assessment of the failure of the Trial Court to comply with s. 276 of the *Criminal Code of Canada*; the treatment of the prior sexual activity evidence; nor the failure to properly warn the jury of prejudicial evidence. Specifically the National Inquiry will address:

    (i) Limiting the admissibility of prior sexual conduct evidence is required when the prejudicial effect outweighs the probative value;

    (ii) That failing to adequately warn the jury about improper reliance on sexual conduct evidence and racial bias can have a significant impact and cause a real risk of prejudice in determining issues of consent.

7. The ABCA provided sufficient reasons why the errors in the lower decision might reasonably be thought to have had a material bearing on the acquittal, specifically as it relates to the issues of non-compliance with s. 276 *CC*. The failure of duties and obligations of the Crown, Defence and the Judge, in the omission of the s. 276 process resulted in errors of law. Failure to hold a hearing caused prejudice.

8. We submit that a *voir dire* under s. 276 *CC* into the admissibility of prior sexual conduct and past sexual activity or history should also consider the prejudicial effects of relying on characterizations of race and occupation if they evoke racial or classist bias and assumptions.
9. The use of the term "Native*" does* apply to evidence led by the Crown and used by all actors of the Court. False assumptions on gendered, racial or classist characterizations like those used to describe Ms. Gladue during the trial are prejudicial to Indigenous women and girls. The ABCA was correct in finding that "those references implicitly invited the jury to bring to the fact-finding process discriminatory beliefs or biases about the sexual availability of Indigenous women and especially those who engage in sexual activity for payment."[5]

PART III – ARGUMENT

Judicial notice and why it matters

10. The doctrine of judicial notice is the starting point in our argument because it is important in our analysis of the omission of the s. 276 *voir dire*; the common law test of admissibility of prior sexual activity; and, the use of the term "Native". Had judicial notice been taken at the trial about racial bias and Indigenous women's victimization, more care and thought may have been put into what was admissible and what safeguards would be necessary.
11. Judicial notice occurs when a Judge accepts something as fact thereby exempting the requirement to present evidence:

> Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not to be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.[6]

12. In *R* v *Williams*, this Court determined that: "It may not be necessary to duplicate this investment in time and resources at the stage of establishing racial prejudice in the

---

[5] *R* v *Barton*, 2017 ABCA 216, para. 128

[6] *R* v *Williams* [1998] 1 SCR 1128, at para.54; See also *R* v *Potts*, (1982), 66 CCC (2d) 219 (On CA); J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 1055; *R* v *Find*, 2001 SCC 32, [2001] 1 SCR 863 at para. 48; *R* v *Spence*, 2005 SCC 71, [2005] 3 SCR 458 at para. 53

community in all subsequent cases." Recognizing two ways facts can be established at a trial, they state: "The first is by evidence. The second is by judicial notice."[7]

13. This Court has acknowledged the impact of widespread racism against Indigenous peoples in Canada and how this has translated into systemic racism within the criminal justice system.[8] The fact that the victim in this case was continuously referenced by her ancestry and appearance instead of her name demonstrates systemic racism or at minimum, indifference that these references would have prejudicial impacts.

14. In *R* v *Williams*, this Court took judicial notice of the impact that racial prejudice and racist stereotypes may have on jurors' assessment of evidence, and noted that "jurors harbouring racial prejudices may consider those of the accused's race less worthy". Ms. Gladue was not an accused. However, discrimination and racial bias towards Indigenous women, especially Indigenous sex workers leads to them being seen less than worthy victims:

> …[I]ndigenous women are placed at the bottom of a brutal race and class hierarchy within prostitution itself. Aboriginality, in this instance, constitutes the contested battlefield of meanings that can only be won when society recognizes its complicity in reproducing neo-colonial systems of valuation that position Aboriginal women in the lowest rungs of the social order, thereby making them expendable and invisible, if not disposable. Similarly, and intersecting with Aboriginal status, sex work also needs to be recuperated from the dominant gaze that sees it simply as a degenerate trade characteristic of deviant bodies confined to the realms of disorder and criminality [9]

15. In explaining why Courts must consider unique factors of Aboriginal offenders under s. 718(2)(e) of the *Criminal Code***,** *Cory and Iacobucci JJ*, stated that:

> … that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by [A]boriginal peoples with the criminal justice system. The provision reflects the reality that many [A]boriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.[10]

---

[7] *Ibid*. at para. 54

[8] *Williams*, at para 54 and 58; *R* v *Gladue* [1999] SCR 688 at para 65; *R* v *lpeelee*, 2012 SCC 13 at paras 59, 60, 71

[9] Yasmin Jiwani and Mary Lynn Young, "Missing and murdered women: Reproducing marginality in news discourse" (2006) 31 Cdn. J. of Comm. at 912, As cited in Maryanne Pearce, (Waterloo), M.A. (Western) Thesis submitted in 2013 for Doctorate in Laws, "An Awkward Silence: Missing and Murdered Vulnerable Women and the Canadian Justice System", page 201.

[10] *Gladue* at para 89

16. Again, Ms. Gladue was not the accused but judicial notice should be taken that her reality as an Indigenous victim is that she is alienated and estranged[11] from the criminal justice system. In *R* v *Ipeelee*, this Court found that "Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally."[12] The decision in *Ipeelee* further explained:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[13]

17. It follows that judicial notice can be employed to recognize that the history of colonialism translates into higher rates of victimization, racial bias, stereotypes and assumptions that result in Indigenous women being viewed as less than worthy victims or less believable. Indigenous women suffer the same racism, prejudice and systemic bias within the criminal justice system as a victim as do Indigenous people accused of offences.

18. In *R* v *Murphy*[14], Justice Gower reviews the case law on judicial notice of racism against Aboriginal persons. Justice Gower notes that racial prejudice is well documented.[15] He discusses *R* v *Find* and *R* v *Spence* but relies on paragraph 54 of *Williams*.[16] He disagrees with the Crown position that, "…the problem of Aboriginal overrepresentation in the jails across Canada is distinct from the problem of bias against Aboriginal people" and states: "it would be rather naïve to think that we [the people of the Yukon] are somehow immune from the insidious and corrosive effect of prejudice towards Aboriginal peoples across the country."[17] He relies on statistical information and the *Truth and Reconciliation Commission's Report* as sources for judicial notice under the second branch of the test in *Williams.*

---

[11] *Gladue* at para 61-63
[12] Ipeelee at para 59
[13] *Ipeelee* at para 60
[14] *R*. v. *Murphy*, 2016 YKSC 23
[15] *Murphy* at para. 36
[16] *Ibid* at paras. 23, 24 and 26.
[17] *Ibid* at para 37 and 38

19. We submit that the *Report of the Aboriginal Justice Inquiry of Manitoba* (AJI) is an example of one such readily accessible source of indisputable accuracy to establish judicial notice. The report's chapter on Aboriginal women states, "Aboriginal women and their children suffer tremendously as victims in contemporary Canadian society. They are the victims of racism, of sexism and of unconscionable levels of domestic violence. The justice system has done little to protect them from any of these assaults."[18]
20. The AJI discusses stereotypical assumptions about Aboriginal women and the impact those stereotypes have:

> The segregation of Aboriginal women, both from wider society and from their traditional role as equal and strong members of tribal society, continues to the present day. This is due partly to the fact that the effects of past discrimination have resulted in the poor socio-economic situation applicable to most Aboriginal women, but it is also attributable to the demeaning image of Aboriginal women that has developed over the years. North American society has adopted a destructive and stereotypical view of Aboriginal women.[19]

21. The AJI was released in 1991. The AJI found that Aboriginal women "suffer double discrimination: as women and as Aboriginal people." And that, "The victimization of Aboriginal women has not only been manifested in their abuse, but also in the manner in which Aboriginal female victims are treated. Women victims often suffer unsympathetic treatment from those who should be there to help them."[20] Since the AJI released many other reports have made similar findings that could be relied on to take judicial notice.[21]
22. We submit that Courts must take judicial notice of the systemic bias and racism Indigenous women experience as victims. We further submit, that during a s.276 *CC voir dire* the Judge must be alert to the racial prejudices that exist against Indigenous women complainants when the weighing prejudicial effects against probative value.

---

[18] AJI, Chapter 13
[19] AJI, Chapter 13
[20] *Ibid*
[21] *RCAP*, vol 2, *supra* note 4; Canada, Parliament, House of Commons, Report of the Special Committee on Violence Against Indigenous Women, *Invisible Women: A Call to Action – A Report on Missing and Murdered Indigenous Women in Canada*, 41st Parl, 2nd Sess, (March 2014); Native Women's Association of Canada, *What Their Stories Tell Us: Research findings from the Sisters In Spirit initiative* (2010); *Forsaken, supra* note 4.

Non-compliance with section 276 of the Criminal Code of Canada

(i) *Limiting the admissibility of prior sexual conduct evidence*

23. Section 276(l) creates a categorical prohibition on the admission of prior sexual activity evidence to support one of the twin myths, regardless of which party seeks to introduce that evidence. The inferences prohibited by s. 276(l) are always improper, the Ontario court of Appeal held that: "the 'twin myths' are prohibited not only as a matter of social policy but also as a matter of 'false logic'."[22]
24. A trial judge is required by s. 276(3)(d) *CC* to take into account the need to remove from the fact finding process any discriminatory belief or bias. They are also required by s. 276(3)(e) *CC* to take into account the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury and they are required by s. 276(3)(f) *CC* to take into account the potential prejudice to the complainant's personal dignity and right of privacy. The trial judge did not meet these statutory requirements.
25. As the Court in *Seaboyer* stated, "The common law has always viewed victims of sexual assault with suspicion and distrust."[23] It is possible that the jury would bring to the fact-finding process discriminatory beliefs, misconceptions, or biases about the sexual accessibility of Indigenous women and girls. The lawyers' and judge's indifference to the s. 276 requirements and the specific prejudicial effects of allowing basest characterizations of Ms. Gladue into the record is also an indication of systemic racism.
26. The ABCA correctly determined that, "Calling someone a prostitute is a form of sexual conduct evidence caught by s. 276…" and that "Since it is not evidence of a specific instance of sexual activity as required under s. 276(2)(a), it is, by itself, inadmissible."[24] Yet various actors and witnesses of the court referred to Ms. Gladue as a prostitute or sex worker.

(ii) *Failing to adequately warn the jury*

27. Failing to adequately warn the jury about improper reliance on sexual conduct evidence; including failing to instruct the jury properly on the law of sexual assault relating to consent,

---

[22] *R* v *Boone* 2016 ONCA 227 at para 37; See Also *Seaboyer*, at 605.
[23] *R* v *Seaboyer*, page 665
[24] *R*.v Barton para 119

the sexual activity in question and mistaken belief in consent meant that the jury was left to potential prejudices, stereotypes and false assumptions.

28. The trial judge had a responsibility to take special care to ensure that, "in the exceptional case where circumstances demand that such evidence be permitted, the jury is fully and properly instructed as to its appropriate use. The jurors must be cautioned that they should not draw impermissible inferences from evidence of previous sexual activity."[25] A warning to the jurors was required so that the past sexual activity in evidence could not lead them to the view that Ms. Gladue is less worthy of belief, or was more likely to have consented because she is a sex worker.

29. We submit that even a careful and sensitive charge in relation to prior sexual activity or sexual conduct evidence likely would not have remediated the error. This is because of widespread racial bias against Indigenous people. Specific and detailed instructions were required beyond the generic caution provided to ensure the jurors acted fairly and impartially.[26]

30. The characterizations of Ms. Gladue as "native" and/or "native prostitute" increased prejudicial effects because of the possible conflation of both the twin myth stereotypes and the racial bias that exists against Indigenous people. The Court in *Williams* explains the invasiveness of racial prejudice:

> Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice.[27]

All actors of the Court are responsible for compliance with Section 276 of the Criminal Code

31. In *Seaboyer*, McLachlin J characterized processes that prohibit reliance on the twin myths as a specific "application of the general rules of evidence governing relevance and the reception of evidence". Only relevant evidence may be admitted at a trial.[28] It does not matter if it was the Crown that introduced sexual history evidence. The Judge had positive obligations to make determinations of admissibility within law.

---

[25] *R.*v *Seaboyer*, page 634
[26] *R* v Barton, 2017 ABCA 216 at para 118
[27] *Williams* at para. 22
[28] *Seaboyer* at 609; *R* v *White*, 2011 SCC 13, at para 54; *R* v *MT*, 2012 ONCA 511 at para 53

32. The Court in *Seaboyer* " …hoped that a sensitive and responsive exercise of discretion by the judiciary would reduce and even eliminate the concerns which provoked legislation such as s 276 *CC*." They further stated that, "…the judge, as gatekeeper, is always required to comply with the statutory procedures, including providing reasons and articulating permissible and impermissible uses of any evidence admitted."[29] This did not occur at the trial level.

The use of the term "Native" and its prejudicial effects

33. Ms. Gladue was described as "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. Neither party explained why Ms. Gladue's Indigenous identity was relevant to the material issues at trial.
34. The fact that Ms. Gladue was Indigenous was irrelevant to the material question of whether Ms. Gladue consented to every sexual act that occurred during her encounter with Mr. Barton that resulted in her death. It clearly cannot be the intention of Parliament and the common law to allow those connotations into evidence, especially if they do not connect to material issues. It follows that s. 276(2) should be a positive obligation on all courtroom actors.
35. The ABCA recognizes in paragraphs 116-129 of their decision how these characterizations are specifically harmful to Indigenous women because they are false assumptions and an invitation to the jury to make gendered, racial, and classist assumptions. The Court stated:

> Add to this the likely risk that because Gladue was labelled a "Native" prostitute – who was significantly intoxicated – the jury would believe she was even more likely to have consented to whatever Barton did and was even less worthy of the law's protection.[30]

36. Ms. Gladue was referred to as a prostitute at least 25 times during the trial.[31] In the closing argument defence counsel stated: "Looks to me like things went well for night number one," Mr. Bottos, Mr. Barton's lawyer, said, "And by the way, she's a prostitute. She's there for a good time, not a long time…"[32] It is these types of inadmissible characterizations that allow

[29] *R.*v Barton para 112
[30] *R.*v Barton para 128
[31] *Ibid* para 123

prejudicial beliefs to guide decisions on whether or not Ms. Gladue consented to specific sexual activities.

37. The lack of compliance with the s. 276 and/ or the reference to Ms. Gladue as "Native" and "Native prostitute" reinforces Indigenous peoples' lack of confidence in the justice system. We submit that the lack of compliance with s. 276 and/or admitting evidence and these references to Ms. Gladue brings the administration of justice into disrepute.

38. In their concluding paragraph, the ABCA in *R* v *Barton* stated, "We live in a society where every individual's life, liberty and security of the person have equal value and where every individual's autonomy has meaning. It is a society where the criminal law must reflect and respect each individual's rights and dignity." Ms. Gladue's dignity was not respected. The Court did not employ or apply appropriate measures such as judicial notice, procedural safeguards or common law properly. This case is emblematic of how justice does not avail itself to Indigenous women because of well-known and widespread systemic racism and how there is failure to protect Indigenous complaints/victims within justice system:

> ...we have to begin to address publicly the reality that many of us have shared privately: Indigenous women are being erased not just by the peoples who kill us, but also by the systems that endorse that violence through silence or complicity[33]

PART IV - ORDER SOUGHT

39. The National Inquiry takes no position on the order sought.

PART V – ORAL ARGUMENT

40. In accordance with the Order of Rowe J. dated August 2, 2018, The National Inquiry will present oral argument not exceeding five (5) minutes at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario, this 7th day of September, 2018.

Christa Big Canoe, (LSUC #53203N)

---

[33] Tracy Lindberg, *supra* note 1

PART VI – TABLE OF AUTHORITIES

Authorities	**Cited at Paragraph No.**
R v *Barton*, 2017 ABCA 216 (CanLII)	9, 27, 30, 31, 34, 35, 37
R v *Boone*, 2016 ONCA 227 (CanLII)	22
R v *Find*, 2001 SCC 32, [2001] 1 SCR 863	11, 18
R v *Gladue*, [1999] SCR 688	13, 15, 16
R v *Ipeelee*, 2012 SCC 13	13, 16
R v *MT*, 2012 ONCA 511 (CanLII)	29
R v *Murphy*, 2016 YKSC 23 (CanLII)	18
R v *Potts*, (1982), 66 CCC (2d) 219 (On CA) (CanLII)	11
R v *Seaboyer*, [1991] SCR No 577	22, 24, 26, 29, 30
R v *Spence*, 2005 SCC 71, [2005] 3 SCR 458	11, 18
R v *White*, 2011 SCC 13	29
R v *Williams*, [1998] 1 SCR 1128	11, 12, 14, 18, 28
Legislation	**Cited at Paragraph No.**
Criminal Code, RSC 1985 c C-46, s 276 *Code Criminel*, LRC 1985, ch C-46, s 276	6, 7, 10, 23, 24, 30, 31, 36
Criminal Code, RSC 1985 c C-46, s 276(1) *Code Criminel*, LRC 1985, ch C-46, s 276(1)	22
Criminal Code, RSC 1985 c C-46, s 276(2) *Code Criminel*, LRC 1985, ch C-46, s 276(2)	31, 33
Criminal Code, RSC 1985 c C-46, s 276(3); 276(3)(d); 276(3)(e); 276(3)(f) *Code Criminel*, LRC 1985, ch C-46, s 276(3); 276(3)(d); 276(3)(e); 276(3)(f)	23
Criminal Code, RSC 1985 c C-46, s 718(2)(e) *Code Criminel*, LRC 1985, ch C-46, s 718(2)(e)	15
Federal PC 2016-0736	3
Inquiries Act, RSC 1985 c I-11; Loi sur les enquete, LRC (1985) ch. I-11	3

OTHER MATERIALS	**Cited at Paragraph No.**
Canada, Parliament, House of Commons, Report of the Special Committee on Violence Against Indigenous Women, *Invisible*	21

Women: A Call to Action – A Report on Missing and Murdered Indigenous Women in Canada, 41st Parl, 2nd Sess, (March 2014) https://www.ourcommons.ca/DocumentViewer/en/41-2/IWFA/report-1/	
Canada, Federal PC 2016-0736: Terms of Reference http://www.mmiwg-ffada.ca/files/terms-of-reference.pdf	3
Forsaken: The Report of the Missing Women Commission of Inquiry, Nobodies: How and Why We Failed the Missing and Murdered Women(Forsaken) Part 1 and 2, vol IIA ; *See also Part 3, 4 and 5*, vol IIB; vol III (British Columbia: Library and Archives Canada Cataloguing in Publication, November 2012); http://www.missingwomeninquiry.ca/obtain-report/	2, 21
J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999)	11
Native Women's Association of Canada, *What Their Stories Tell Us: Research findings from the Sisters In Spirit initiative* (2010) https://nwac.ca/wp-content/uploads/2015/07/2010-What-Their-Stories-Tell-Us-Research-Findings-SIS-Initiative.pdf	21
Report of the Aboriginal Justice Inquiry of Manitoba, vol 1 (Winnipeg, Man: Public Inquiry into the Administration of Justice and Aboriginal People,1991) http://www.ajic.mb.ca/volumel/chapter13.html#17	2, 19, 20
Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, vol. 4 (Ottawa: Supply and Services Canada, 1996) http://data2.archives.ca/e/e448/e011188230-04.pdf	2, 21
The Final Report of the Truth and Reconciliation Commission of Canada, Canada's Residential Schools: The Legacy, vol 5 (Montreal & Kingston: McGill-Queen's University Press, 2015) http://nctr.ca/assets/reports/Final%20Reports/Volume_5_Legacy_English_Web.pdf	2, 18
Tracy Lindberg, Violence Against Indigenous women and the case of Cindy Gladue. *Canadian Dimension.* April 6. [initially published on March 30, rabble.ca]. https://canadiandimension.com/articles/view/violence-against-indigenouswomen-and-the-case-of-cindy-gladue	Quote: Page 1 and Page 10
Yasmin Jiwani and Mary Lynn Young, "Missing and murdered women: Reproducing marginality in news discourse" (2006) 31 Cdn. J. of Comm. at 912 As cited in Maryanne Pearce, (Waterloo), M.A. (Western) Thesis submitted in 2013 for Doctorate in Laws , "An Awkward Silence: Missing and Murdered Vulnerable Women and the Canadian Justice System", page 201. https://ruor.uottawa.ca/handle/10393/26299	14

THE LAW OF EVIDENCE IN CANADA

Second Edition

John Sopinka
Late Justice of the Supreme Court of Canada

Sidney N. Lederman
Justice of the Superior Court of Justice for Ontario

Alan W. Bryant
Professor of Law, University of Western Ontario
and Counsel to McCarthy Tetrault

Butterworths
Toronto and Vancouver

The Law of Evidence in Canada

June 1999

The Butterworth Group of Companies

Canada:
75 Clegg Road, MARKHAM, Ontario L6G 1A1
and
1732-808 Nelson St., Box 12148, VANCOUVER, B.C. V6Z 2H2
Australia:
Butterworths Pty Ltd., SYDNEY
Ireland:
Butterworth (Ireland) Ltd., DUBLIN
Malaysia:
Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand:
Butterworths of New Zealand Ltd., WELLINGTON
Singapore:
Butterworths Asia, SINGAPORE
South Africa:
Butterworth Publishers (Pty.) Ltd., DURBAN
United Kingdom:
Butterworth & Co. (Publishers) Ltd., LONDON
United States:
Michie, CHARLOTTESVILLE, Virginia

Canadian Cataloguing in Publication Data

Sopinka, John, 1933-1997
The law of evidence in Canada

2nd ed.
Includes bibliographical references and index.
ISBN 0-433-39823-X (bound) ISBN 0-433398-24-8 (pbk.)

1. Evidence (Law) – Canada. I. Lederman, Sidney, N., 1943-
II. Bryant, Alan W., 1943- III. Title.

KE8440.S66 1998 347.71'06 C98-932289-0
KF8935.ZA2S66 1998

Reprint #1, 2001.
Reprint #2, 2003.

Printed and bound in Canada.

§19.12 There is also scope for the admission of facts at common law. An accused can admit the voluntariness of a confession and, therefore, dispense with a *voir dire*.[41] Facts can also be admitted at a preliminary inquiry.[42]

II. JUDICIAL NOTICE

§19.13 Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.[43] The practice of taking judicial notice of facts is justified. It expedites the process of the courts, creates uniformity in decision-making and keeps the courts receptive to societal change. Furthermore, the tacit judicial notice that surely occurs in every hearing is indispensable to the normal reasoning process.

A. Notorious Facts

§19.14 In *Reference re Alberta Statutes*,[44] Duff C.J. said: "It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally; . . . In the simplest terms, the court may and should notice without proof that which 'everybody knows'".[45] The matter need only be common knowledge in the particular community in which the judge is sitting.[46] Also, what facts are judicially noticeable may change over time.[47]

---

41 *R. v. Dietrich*, *supra*, note 34; *Park v. R.*, [1981] 2 S.C.R. 64, 122 D.L.R. (3d) 1, 37 N.R. 501, 59 C.C.C. (2d) 385, 21 C.R. (3d) 182, 26 C.R. (3d) 164 (Fr.).

42 *R. v. Ulrich*, [1978] 1 W.W.R. 422, 38 C.C.C. (2d) 1 (Alta. T.D.).

43 *R. v. Williams*, [1998] 1 S.C.R. 1128, 107 B.C.A.C. 1, 159 D.L.R. (4th) 493, 226 N.R. 162, 124 C.C.C. (3d) 481, at 501-02, [1998] 3 C.N.L.R. 257, 15 C.R. (5th) 227; *R. v. Parel*, [1998] N.B.J. No. 126, at 19 (C.A.); *R. v. Oliver (E.M.)* (1997), 156 Nfld. & P.E.I.R. 301 (Nfld. C.A.); *R. v. Porter* (1961), 130 C.C.C. 116, at 118 (N.S.S.C.); *R. v. Uvery* (1968), 66 W.W.R. 27, 1 D.L.R. (3d) 29, at 34-35, 5 C.R.N.S. 43 (Sask. Q.B.); *R. v. Potts* (1982), 36 O.R. (2d) 195, 134 D.L.R. (3d) 227, 66 C.C.C. (2d) 219, 26 C.R. (3d) 252 (C.A.); leave to appeal to S.C.C. refused [1982] 1 S.C.R. xi, 134 D.L.R. (3d) 227*n*, 43 N.R. 270*n*, 66 C.C.C. (2d) 219*n*; and see G.D. Nokes, "The Limits of Judicial Notice" (1958), 74 L.Q.R. 59.

44 [1938] S.C.R. 100, at 128.

45 *Per* Irving J.A. in *Schnell v. B.C. Electric Rly. Co.* (1910), 15 B.C.R. 378, 14 W.L.R. 586 (C.A.). See also *Moge v. Moge*, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, at 496, 145 N.R. 1, 43 R.F.L. (3d) 345.

46 *R. v. Potts*, *supra*, note 43.

47 See the example in C. Tapper, *Cross and Tapper on Evidence*, 8th ed. (London: Butterworths, 1995), at 70-71.