July 6, 2017

**Via Fax: 780-422-4127 / Original to Follow**

The Honourable Chief Justice Catherine Fraser

Law Courts

1A Sir Winston Churchill Square

Edmonton, AB T5J 0R2

Dear Chief Justice Fraser:

**Re: R v Barton, 2017 ABCA 216**

I am writing to you for two reasons. First, I respectfully request that the Court correct three errors in its Reasons for Judgement concerning my submissions in this matter. Second, to seek your permission to obtain a transcript of the oral hearing of this appeal which took place on September 6 and 7, 2016.

With respect, I note the following errors related to my submissions before the Court:

(1) At paragraph 260 the Court referred to my having said, “What’s a man to do” in the context of the Court describing an erroneous belief by some that “all women in Canada, single, married or in an intimate relationship, are walking around this country … in a state of continuous consent to sexual activity unless and until they say “no”. The reference to my having said, “What’s a man to do,” in this context, and in furtherance of this erroneous belief, was completely inaccurate, and grossly unfair to me.

A review of the audio recording or transcript will undoubtedly illustrate that I made that comment during my submissions in answer to a question from the panel concerning what reasonable steps Bradley Barton had taken to ascertain Cindy Gladue’s consent to the sexual activity in question. I responded that Mr. Barton had taken numerous reasonable steps in the circumstances known to him at the time and then listed them for the panel. They included a reference to not only that Ms. Gladue had consented to very similar sexual activity from the night before for a negotiated price of $60.00, but that on the night in question he observed:

1. Ms. Gladue agreed to see Mr. Barton once again on the evening of June 22nd;
2. Ms. Gladue met Mr. Barton in the hotel bar and stayed with him as he visited with a co-worker;
3. The parties walked back to Mr. Barton’s hotel room after being in the bar;
4. The parties discussed a price for sexual services, the same as the night before;
5. After the parties had a short conversation and a beer together Mr. Barton said, “Cindy let’s get at this” which prompted Ms. Gladue to go into the bathroom and, after a few minutes, emerge fully naked; and
6. Ms. Gladue then sat on the corner of the bed, and after further discussion between them to check that she was “good to go and ready,” Mr. Barton walked up to her and she pulled his penis into her mouth while he commenced inserting his fingers, one at a time and progressively, into her vagina until part of his hand was inside her vagina.

A review of the transcript of Mr. Barton’s testimony at pages 1121/6 through to 1124/28 bears out that Mr. Barton did in fact refer to these steps. Mr. Barton did not resile this position in cross examination (See 1269/1 to 1269/16). Although I am uncertain as to whether I provided an exhaustive list at the time, I am absolutely sure that I listed all or most of these steps in reply to the

Court’s question, and then stated, “What’s a man to do?” as a rhetorical question to argue that Mr. Barton clearly had taken reasonable steps to ascertain Ms. Gladue’s consent.

Thus, to suggest in your Reasons that I had made the rhetorical remark toward a much wider and different context, particularly to suggest that men might feel licenced to sexually touch a woman until the woman has indicated “No” was absolutely wrong. Indeed, it portrayed me as someone whose conduct is unbecoming of a barrister and solicitor. The gravity of the error was exacerbated because the specific quote was repeated in Paula Simons’ column concerning the case that was published in the Edmonton Journal on July 3rd. Please have this error acknowledged and corrected as soon as possible.

(2) On the issue of whether the trial judge erred in law in charging the jury on after the fact conduct, the Court held at paragraph 55:

“Crown and defence acknowledged at the hearing of this appeal that the trial judge erred in law in his treatment of this nuanced subject. But counsel disagreed about the significance of that error.”

At paragraph 56 the Court went on to say that this was an “admitted error”.

This topic was first raised by the panel on September 6th and the Court asked for my reply when we returned for September 7th. On September 7th my submission was that the trial judge’s charge was similar or identical to a model jury charge with the exception of one single sentence. I also submitted that, in any event, it was balanced off with additional comments the trial judge made to the jury on this point, and that there was no reviewable error. That is not the same as my having admitted that the trial judge erred in law on this issue. Again, I request that the Reasons reflect that.

(3) At paragraph 303 the Court states that it “received no assistance from counsel” on whether the Court should follow the Ontario approach in ***Zhao*** on the particular question of whether consent should be vitiated for policy reasons based only on subjective foreseeability of the risk of bodily harm in circumstances where death results from sexual activity, or instead hold that liability can be founded on mere objective foreseeability.

I do not know how I could have been understood as having provided “no assistance” when, in fact, a significant portion of my oral submissions were specifically directed toward why the Court should indeed follow the Ontario Court of Appeal’s approach which holds that there should be no route to liability akin to the ***Jobidon*** pathway unless the accused subjectively intended or foresaw bodily harm.

To that point, I recall Mr. Justice Watson indicating that perhaps the Ontario Court of Appeal had somehow lost its way and perhaps this Court should not follow suit. Again, I responded that ***Jobidon*** and ***Paice***, which created a new pathway to manslaughter since 1991, was limited to establishing liability for bodily harm intended and caused, not intended or caused, and therefore the prudent approach was that of the Ontario Court of Appeal’s.

In short, simply because this Court may not agree with my submissions on ***Jobidon***, ***Paice***, and ***Zhao***, it does not follow that I was somehow of “no assistance” to the Court. It is not only factually wrong, but demeaning to me as a professional and counsel with duties to the court; duties that I take very seriously. Again, I would respectfully ask this to be corrected in the Court’s reasons.

Aside from these errors concerning my submissions, there is a fourth area of concern that needs addressing: the Court’s handing of the Crown’s second ground of appeal. During the hearing I recall very well that the Crown only sought a new trial on first degree murder with respect to its fourth ground of appeal, that being motive. Further, when the panel asked Crown counsel whether it was seeking a new trial on first degree murder on any of the other grounds, Crown counsel confirmed that it was not. As such, I provided no submissions with respect to why Mr. Barton should not be re-tried on first degree murder with respect to the remaining grounds, which went to manslaughter only. Given now that the Court ordered a new trial on first degree murder on the Crown’s second ground of appeal, which concerned the s. 276 Criminal Code issue, it is my position that Mr. Barton was prejudiced by having been given no notice that the second ground of appeal could lead to a new trial for first degree murder. I realize that the Court also ordered a re-trial on first degree murder on motive, and as well, the Court’s own ground of appeal concerning after the fact conduct. However, I now seek to show on a contemplated leave application to the Supreme Court of Canada that the second ground of appeal was not fairly addressed, yet was ruled upon by the panel. As such, the handling of the s. 276 issue will be a discreet ground of appeal on the Leave Application.

Given these errors and rulings, it will also be critical to obtain a transcript of the oral hearing to illustrate to the Supreme Court of Canada in the Leave Application that the Court of Appeal erred in several ways. I expect the transcript will show, first, that defence counsel did not admit that the trial judge erred in law on his charge on post offence conduct. Second, that the Crown confirmed that only the fourth ground of appeal could lead to a new trial on first degree murder and, as a result, I did not argue that any of the other grounds could not lead to a re-trial on first degree murder. Third, the transcript will assist in proving to all legal observers that I did not advocate during the hearing – even for one moment – that a woman is in a perpetual state of sexual consent until she says, “No”, or that men are somehow bewildered by the notion that this is not so. My remark was confined to making the point that Mr. Barton believed he had Ms. Gladue’s consent *because* he had taken reasonable steps. Fourth, I wish to show all legal observers that I did not fail in my duties to the Court to provide assistance when called upon to do so.

I have reviewed this Court’s decision in ***McDonald******v Brookfield Asset Management***, 2016 ABCA 375 wherein the panel denied a request to produce a transcript of oral argument when asked to do so by the appellant concerning the confirmation of a ruling on the admissibility of evidence and to clarify the “discussions surrounding” certain issues during oral argument with a view to determining whether the reasons for the decision overlooked or incorrectly applied some of the relative statutory wording or evidence. My request is not based on either of these issues. Rather, my request for the transcript is to show what both counsel actually submitted in oral argument to this Court, and the reasons thereof, and to correct and address the associated errors and rulings currently in the judgement.

As counsel for Mr. Barton, like all counsel that appear before this honourable Court, I am at the mercy of the Court when it chooses in its judgements to describe the conduct and submissions of counsel because transcripts of proceedings before the Court are not made available to the public. When the Court erroneously describes those submissions or conduct, counsel must have recourse to the record to remedy the error and the adverse impact on one’s professional reputation. Similarly, counsel must also have access to the transcripts to illustrate procedural unfairness in leaves and appeals to the Supreme Court of Canada.

Should you have any questions or concerns before addressing my requests I would be pleased to discuss the matter with you either in person or in writing.

Yours truly,

BOTTOS LAW GROUP

PER:

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DB/sh

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