

**ONTARIO SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL
(Toronto Region)**

IN THE MATTER of an Application for leave to intervene pursuant to Rule 27.10 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7.

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

MUSTAFA URURYAR

Appellant

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Intervener

- and -

BARBRA SCHLIFER COMMEMORATIVE CLINIC

**Applicant
(Proposed Intervener)**

**APPLICATION RECORD OF THE PROPOSED INTERVENER
BARBRA SCHLIFER COMMEMORATIVE CLINIC**

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**AND TO: THE REGISTRAR
SUPERIOR COURT OF JUSTICE**

361 University Avenue
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SCA 69/16

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BARBRA SCHLIFER COMMEMORATIVE CLINIC

Applicant (Proposed Intervener)

NOTICE OF APPLICATION FOR LEAVE TO INTERVENE

TAKE NOTICE that the Barbra Schlifer Commemorative Clinic ("Schlifer Clinic" or "Applicant") will bring an application before a judge on February 28, 2017 at 9:30 a.m. at the Superior Court of Justice, 361 University Avenue, Toronto, Ontario, for:

1. an order granting the Schlifer Clinic leave to intervene in the within appeal;
 2. an order permitting the Schlifer Clinic to file a factum on the appeal;
 3. an order permitting the Schlifer Clinic to make oral argument at the hearing of the appeal;
- and

4. such further and other relief as counsel may advise and the Judge hearing this motion may permit.

AND FURTHER TAKE NOTICE that the following documents will be relied on in support of this motion:

1. the Affidavit of Amanda Dale, Executive Director of the Schlifer Clinic, sworn February 23, 2017; and
2. such other material as counsel may advise and the Judge hearing this motion may permit.

AND FURTHER TAKE NOTICE that this motion shall be made on the following grounds:

1. This appeal raises the important question of whether and in what circumstances a Court may make a restitution order under s. 738(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, including in respect of legal fees a complainant has incurred to support her through, and protect her dignity and equality rights in, a criminal sexual assault proceeding;
2. The Schlifer Clinic has expertise in the issue raised in this appeal and has relevant submissions to make that will be useful to the Court and different from those of other parties. In particular, the Schlifer Clinic will provide useful submissions on the experience of complainants participating in criminal sexual assault proceedings and the adequacy of state supports available to them;
3. This issue is of great importance to the Schlifer Clinic and the clients it serves;
4. The Schlifer Clinic's submissions would provide a measure of representational balance on the appeal; and,
5. The Schlifer Clinic's intervention will not prejudice any party by way of delay.

DATED at Toronto, Ontario this 24th day of February, 2017.



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AND TO: **The Registrar**
Superior Court of Justice
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BARBRA SCHLIFER COMMEMORATIVE CLINIC

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AFFIDAVIT OF AMANDA DALE

I, Amanda Dale, of the City of Toronto, in the Province of Ontario, MAKE OATH AND
SAY:

1. I am the Executive Director of the Barbra Schlifer Commemorative Clinic (the "Schlifer Clinic" or the "Clinic"). As such, I have personal knowledge of the matters to which I depose in

this affidavit. To the extent that any information contained herein is based on information and belief, I have stated the source of that information and I believe such information to be true.

2. I have been the executive director of the Clinic since May 2010. I have 30 years experience as a manager, program developer, communications expert, policy analyst and law reform advocate on behalf of women's equality and women victims of violence. I have a long history of working in the field of violence against women. I hold an Honours B.A. in Political Science and Women's Studies from the University of Toronto, a Master's Degree in Social and Political Thought from the University of Sussex, and a Master's Degree in International Human Rights Law, with a specialization in Women's Human Rights, from the University of Oxford. In addition to my full-time position as Executive Director of the Clinic, I am a PhD student at Osgoode Hall Law School. My doctoral work addresses the relationship between international standards for intersectional discrimination and the Canadian constitution. My curriculum vitae is attached as **Exhibit "A"**.

A. The Schlifer Clinic

i. Background

3. The Schlifer Clinic was established in 1985 to commemorate the life and work of Barbra Schlifer, an Osgoode Hall law student who was sexually assaulted and murdered on the night of her call to the Bar.

4. The Schlifer Clinic is, first and foremost, a multi-disciplinary, front-line service provider to women who have experienced violence, including sexual violence. It provides legal representation, professional counselling, and language interpretation services to women from a

broad cross-section of racial, ethno-cultural, and socio-economic backgrounds. As such, the Clinic has a deep and integrated understanding of the intersecting and multiple inequalities which exist in women's lives and the impact that sexual offences have on women. The Clinic's objective is to support women who have experienced violence by, among other things, offering avenues for redressing the harms they have suffered.

5. The Clinic also engages in various public advocacy initiatives, including public legal education, professional development for legal professionals, clinical education for law students, and law reform. The breadth of services and activities engaged in by the Clinic is unique in Canada amongst social service organizations.

6. As will be discussed further below, in 2016, the Province of Ontario selected the Clinic as a pilot site for the introduction of a program for independent legal advice to sexual assault survivors. In addition, the Province contracted the Clinic to train the private bar lawyers whom the province is funding to provide this advice on a voucher system.

7. Further in 2015 and 2016, the Clinic was one of the key organizations consulted by the Minister's Task Force on the Prevention of Sexual Abuse of Patients under the *Regulated Health Professions Act*, 1991. In this regard, the Task Force recognized the Clinic's "experience and expertise in providing summary advice to patients who have been sexually abused by regulated health professionals." ¹

¹ *To Zero: Independent Report of the Minister's Task Force on Sexual Abuse of Patients*
http://www.health.gov.on.ca/en/common/ministry/publications/reports/sexual_health/taskforce_prevention_of_sexual_abuse_independent_report.pdf (September 2016)

8. The Clinic sits on the Premiere's Roundtable on Violence Against Women and was one of the key participants in the development, and now implementation, of the Province of Ontario's March 2015 *Sexual Violence and Harassment Action Plan* ("SVHAP").

ii. Mandate and Organizational Structure

9. The Clinic's institutional objectives are captured by its Mission Statement:

The Barbra Schlifer Clinic offers legal representation, professional counseling and multilingual interpretation to women who have experienced violence. Our diverse, skilled and compassionate staff accompany women through personal and practical transformation, helping them to build lives free from violence.

We are a centre by, for and about women. We amplify women's voices, and cultivate their skills and resilience. Together with our donors and volunteers, we are active in changing the conditions that threaten women's safety, dignity and equality.

10. The Clinic's Vision, Value and Belief Statements are attached as **Exhibit "B"**.

11. The Clinic is overseen by a volunteer Board of Directors consisting of 13 members, and employs 37 full time staff members. The legal department of the Clinic has a staff of eleven full-time employees, comprised of the Director of Legal Services, three lawyers, one articling student, one intake counsellor, two administrative staff and three Family Court Support Workers. The Clinic has also retained three independent consultant lawyers to support the ILA for sexual assault survivors programme. The Court Support Workers facilitate women survivors' greater participation in the family law system and advocate on behalf of clients to other justice system professionals, including the Victim Witness Assistance Program, Crown Attorneys and the police.

12. The Clinic's Director of Legal Services, Staff Lawyers and consultant lawyers have extensive experience providing services to women survivors of violence who are from highly marginalized communities. The regular duties of the lawyers at the Clinic include providing general legal information and advice, as well as representation in family and immigration law matters, to women who have been or are being sexually assaulted or abused.

B. The Schlifer Clinic's Clients and Expertise in Service Delivery

13. In 2015-2016, the Clinic's legal department assisted 1,360 clients, the counselling department assisted 1,616 women, and the Language Interpretation Service assisted 1,358 clients. Since 1985, the Clinic has provided services to over 60,000 women in the Greater Toronto area.

14. In 2015-2016, and in particular following the media attention to the *R. v. Ghomeshi* trials, the Clinic experienced a 100% increase in calls from sexual assault survivors seeking counselling and/or legal information and advice.

15. The Clinic serves women from diverse backgrounds and highly marginalized communities who experience multiple social inequalities, including poverty, homelessness, racism, and discrimination on the basis of mental health or disability. They frequently have a heightened involvement with immigration authorities, child welfare agencies, the police and other service providers, as a result of current or historical abuse.

16. The Schlifer Clinic provides legal representation and advocacy services in the areas of refugee protection and immigration, family, criminal and administrative law. These services are

designed to assist women in seeking meaningful legal remedies and ensuring their access to justice in order to acquire legal protections and redress from violence.

17. The women who seek the Clinic's assistance rely on the Clinic to advise them about legal processes and how they can obtain redress for incidents of violence they have suffered, including sexual violence. Clients often ask the Clinic's legal intake workers and lawyers about the consequences of contacting the police, including: what the likelihood of a charge or prosecution is in the circumstances; what the likelihood is of them being believed by the actors in the criminal justice process; what personal information about them will be made available to the accused; whether they will have to testify in a criminal proceeding; how traumatizing the questioning by lawyers in the proceeding may be; whether and how the criminal law and procedure can protect them from invasive questions and discriminatory assumptions; and whether the criminal justice system can protect them from offenders in the future.

18. In addition to the legal services delivered, the Clinic provides a variety of group-based and individual counselling programs. The Clinic also offers language interpretation service, which provides language interpreters, in 200 languages, to social service agencies and hospitals that deliver services to women survivors of violence, as well as the four Domestic Violence Courts serving Toronto.

C. The Schlifer Clinic's Expertise in Sexual Assault Complainants' Interactions with the Criminal Justice System

19. The Clinic's regular and direct contact with women survivors of sexual violence has given it significant knowledge and a uniquely-informed perspective about how women survivors of sexual violence perceive and interact with the justice system.

20. There is little doubt that women who have experienced sexual assault and abuse tend not to report such crimes to the police. Based on the Clinic's over 30 years of experience, there are a variety of factors that cause or contribute to the underreporting of sexual violence. These include:

- (a) the highly invasive and personal nature of the alleged crime;
- (b) social stigmas that are imposed on victims of sexual crime;
- (c) perceptions that the crime, even if reported, will not result in a conviction;
- (d) fear of further victimization through engagement with the criminal justice system;
- (e) concern that prior sexual violence, psychiatric history or other private information contained in records will be disclosed to the accused and potentially used to undermine their credibility; and
- (f) a fear of retribution.

21. The Schlifer Clinic's mandate and the individual services it provides to its clients are designed, among other things, to address the need for legal protection for women vulnerable to violence, the systemic problem of underreporting of sexual violence against women, the ineffectiveness of systemic responses to survivors of sexual violence, and the social exclusion of already marginalized women.

22. Both before and after the official launch of the *Independent Legal Advice* for sexual assault survivors programme, the Clinic has worked with hundreds and hundreds of women who are either considering reporting sexual assault to the police or who have sought assistance and

support (legal and/or counselling) as criminal charges for sexual assault proceed to a preliminary hearing and/or trial. The Clinic's clients frequently experience the criminal justice process as traumatizing, which trauma is often experienced as a direct extension of the sexual assault itself. The Clinic is an expert in how legal services for sexual assault survivors may address the systemic under-reporting of sexual assault and women's reluctance to enter or continue their participation in, the criminal justice process.

23. The Clinic also works with women who have been charged with domestic violence offences, sometimes including sexual assault.

D. The Schlifer Clinic's Expertise in Advocacy

24. The Schlifer Clinic is routinely consulted by the provincial and federal government on proposed legislation and initiatives related to sexual violence. The Clinic has made representations on issues related to sexual violence and gender equality to the Senate and House of Commons Standing Committees, as well as to the Quebec General Assembly. The Clinic is also currently a member of the Ontario Premier's Permanent Round Table on Violence Against Women, which consults on the implementation of the Province's Sexual Violence and Harassment Action Plan.

25. The Clinic has significant experience intervening in legal proceedings. In 1988 and 1991, following the enactment of the *Charter of Rights and Freedoms* ("*Charter*"), the Schlifer Clinic participated in two landmark constitutional cases concerning the *Charter* rights and interests of sexual assault survivors. The Schlifer Clinic was a member of a coalition of interested organizations that intervened at the Supreme Court in *Canadian Newspapers Co v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 and *R v. Seaboyer; R v. Gayme*, [1991] 2. S.C.R. 577.

26. Since that time, the Clinic has been granted standing as an intervener and has participated in numerous proceedings in the federal and Ontario courts and at the Supreme Court of Canada, including:

- (a) As an intervener in *Kanthasamy v. Minister of Citizenship and Immigration*, 2015 SCC 61, where the Supreme Court granted leave to make oral and written submissions on the disproportionate impact of changes to the *Immigration and Refugee Protection Act* on vulnerable and marginalized individuals and communities, including survivors of gender-based violence.
- (b) As an intervener in *R. v. Quesnelle*, 2014 SCC 46, where the Supreme Court granted leave to make written and oral submission on the privacy rights and interests of sexual assault complainants, particularly those most heavily documented as a result of their marginalization and multiple experiences of inequality;
- (c) As an intervener in *R. v. N.S.*, 2012 SCC 72, where the Supreme Court granted leave to make oral and written submissions on the barriers to access to justice faced by sexual assault survivors who wear the niqab;
- (d) As the test case applicant in *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140 (CanLII), a *Charter* application to strike down amendments to the *Criminal Code* and *Firearms Act* (eradicating the long-gun registry), submitting that women's rights to security and gender equality are violated by destroying the registry and that changes to gun-control laws would increase the risk to women in situations of domestic violence;

- (e) As an intervener, in coalition with Women Against Violence Against Women, in the *Matter of an Inquiry Pursuant to s.63(1) of the Judges Act Regarding the Honourable Justice Robin Camp* on the impacts of Justice Camp's conduct and comments in *R. v. Wagar* on sexual assault survivors, and in particular the underreporting of sexual assault.

27. On behalf of the Clinic, I also swore an Affidavit in the Federal Court in support of the application in *YZ and the Canadian Association of Refugee Lawyers v. Minister of Citizenship and Immigration* (Court File IMM-3700-13). In that Affidavit, I described my personal and the Clinic's expertise, experiences and concerns, with respect to the impact of the "Designated Countries of Origin" regime on women survivors of violence.

E. The Schlifer Clinic's Proposed Intervention

i. The Criminal Lawyers' Association Has Been Granted Leave to Intervene

28. This Court has already granted the Criminal Lawyers' Association (Ontario) ("CLA") leave to intervene in this appeal to address the restitution order made by the Ontario Court of Justice in its sentencing decision. As set out in the Affidavit of Daniel Brown, the CLA sought leave to intervene on the basis that the restitution order "could affect the interests of many its members, their clients, and impact negatively on the administration of justice" and that the "broader issue of the propriety of ordering an accused person to pay a complainant's legal costs as part of a criminal restitution order is one that transcends the immediate parties to this

litigation.”² The CLA indicated to the Court that it intends to take the position that it is “never appropriate to order restitution for a complainant’s legal fees.”³

29. The Clinic similarly seeks leave to intervene to address the narrow issue of the restitution order made by Ontario Court of Justice and will otherwise take no position on the merits of the appeal. The Clinic agrees with the CLA that the Appellant’s appeal of the restitution order transcends the interests of the immediate parties. Particularly having regard to the intervention by the CLA, the Clinic seeks leave to intervene to provide much-needed balance to, and a systemic survivor-perspective on, the legal arguments made with respect to the appropriateness of a restitution order for legal fees, and the (positive) impacts of such an order in advancing the interests and administration of justice.

30. As noted above, the Clinic has intervened on numerous occasions in cases involving important issues related to sexual violence. The Clinic has a distinct perspective that flows from its work in assisting women who been sexually assaulted and its familiarity with the experience of complainants participating in criminal proceedings. If granted intervener status, the Clinic’s submissions will reflect this expertise and the lived experiences of the Clinic’s clients. It is respectfully submitted that the Clinic’s perspective and expertise will be of assistance to the Court.

31. If granted leave to intervene, the Clinic anticipates making the following submissions:

ii. Paragraph 738(1)(b) of the *Criminal Code* grants judges broad discretion to order restitution

² Affidavit of Daniel Brown at paras. 10 and 17, Schlifer Clinic Application Record, Tab 3.

³ Affidavit of Daniel Brown, at para. 11, Schlifer Clinic Application Record, Tab 3.

32. In the decision under appeal, the Ontario Court of Justice made a restitution order pursuant to s. 738(1)(b) of the *Criminal Code*, requiring the appellant to pay the complainant \$8,000 towards the legal fees she incurred to participate in the criminal proceedings. This provision reads:

Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows ...

(b) in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable;

33. The text, context and purpose of s. 738(1)(b), demonstrate that Parliament intended to give courts broad discretion to make restitution orders. This discretion permits courts, in appropriate circumstances, to make an order for restitution of legal fees a complainant incurred in relation to her participation in the criminal prosecution of the person ultimately found guilty of sexually assaulting her.

34. A plain reading of the provision shows it permits restitution for “all pecuniary damages incurred as a result of” “bodily or psychological harm” caused by “the commission of the offence or the arrest or attempted arrest of the offender”, so long as “the amount is readily ascertainable” [emphasis added]. The examples of “loss of income or support” included in s. 738(1)(b) are illustrative, rather than exhaustive, of the type of pecuniary damages that are properly captured by this provision. This broad language, on its face, clearly permits a court to order restitution for legal fees incurred by sexual assault victims, as in this case.

35. The context in which the provision was introduced also favours a broad interpretation. Prior to 1996, the *Criminal Code* provided for “compensation orders” concerning only “satisfaction or compensation for loss of or damage to property suffered by that person as a result of the commission of the offence.”⁴ On September 3, 1996, the “compensation orders” provisions of the *Criminal Code* were replaced by the “restitution order” scheme in s. 738(1). The restitution provisions expanded the circumstances in which an offender could be ordered to make a payment to a victim, including by allowing for such orders to be made “in the case of bodily harm”, rather than only in relation to property.⁵ Replacing the pre-existing scheme with this broader scheme recognizes the pecuniary losses that flow from non-property-related offences; permits victims to recover those losses; and gives courts discretion to determine the nature and extent of those losses, as well as whether restitution should be ordered in respect of them. The wide discretion afforded to sentencing courts under s. 738(1)(b), and the order made by the Ontario Court of Justice in this case, is consistent with and furthers Parliament’s intent to broaden the scope of potential restitution orders.

36. Parliament’s purposes in enacting s. 738(1)(b) are both remedial and punitive. This reflects and is consistent with the principles of sentencing set out in s. 718(e) (“to provide reparations for harm done to victims or to the community”) and s. 718(f) (“to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community”) of the *Criminal Code*. These purposes also favour a broad reading of s. 738(1)(b).

⁴ Section 725(1) of the *Criminal Code*, as it read immediately prior to September 3, 1996; see *R. v. Devgan*, [1999] O.J. No. 1825 at paras. 2-3 (C.A.) (“*Devgan*”).

⁵ While s. 738(1)(b) permitted restitution only “in the case of bodily harm” at the time of its enactment, it was subsequently amended to permit restitution “in the case of bodily or psychological harm”: *An Act to amend the Criminal Code (trafficking in persons)*, S.C. 2005, c. 43, s. 7.

37. That courts in numerous cases have recognized their jurisdiction to order restitution for legal fees under s. 738 lends further support to the submission that Parliament intended s. 738(1)(b) to be read broadly.⁶

38. To the extent that there is any ambiguity in s. 738(1)(b) (which the Clinic denies), that ambiguity should be resolved in favour of a broader reading – rather than a narrowed-down reading the CLA has indicated it will advocate – as such a reading is more consistent with the purpose of the section⁷: to permit victims to recoup the pecuniary losses incurred as a result of the bodily and psychological harm caused by crime.

39. Further, the CLA’s stated concerns that such a reading would create “a potential for unlimited liability” or “raise the spectre of accused persons being routinely ordered to pay...the legal fees of the complainant”⁸ are unfounded; relevant judicial guidance on the application of restitution provisions is clear that such orders should be made with restraint and caution.⁹ It cannot be simultaneously argued that the restitution order in this case is a matter of “first instance” (after over twenty years of jurisprudence under s.738(1)(b)) and that a single order made by a single judge on the facts before him, suddenly portends future judges “routinely” exercising their discretion in a similar fashion.

40. Finally, the Clinic will also submit that absent legislation expressly abridging solicitor-client privilege, the type of “full docket breakdown of how [a] retainer was used” by

⁶ See, e.g., *R. v. West*, 2012 SKPC 145 at paras. 64-71 (Sask. Prov. Ct.); *R. v. Dennis*, 2003 BCSC 2017 at paras. 9-17; *R. v. Rothel*, [1998] O.J. No. 5626 (Ct. J. (Gen. Div.)); *R. v. Kwaw*, 2011 ONCJ 29 at para. 33.

⁷ *R. v. Paré*, [1987] 2 S.C.R. 618 at 629-633; *R. v. Lightfoot*, [1981] 1 S.C.R. 566 at 575.

⁸ Affidavit of Daniel Brown at paras. 10 and 19, Schlifer Clinic Application Record, Tab 3.

⁹ See, e.g., *R. v. Zelensky*, [1978] 2 S.C.R. 940 at 961; *Devgan* at para. 26, citing *Zelensky*.

complainant's counsel, as requested by the defendant in this case, cannot be required in order to merit a restitution order in relation to those fees.¹⁰

iii. Parliaments and the courts have recognized the unique barriers faced by sexual assault survivors

41. The unique barriers and burdens faced by sexual assault complainants in the criminal justice system have long been recognized by the federal and provincial governments and by the Supreme Court of Canada.¹¹ Most recently, the Government of Ontario, as part of its *Sexual Violence and Harassment Action Plan*, acknowledged the trauma experienced by sexual assault survivors in the criminal justice system and committed to a range of policy responses to address this concern. In considering the jurisdiction of, and exercise of discretion by, the Court below to order restitution for legal fees to a sexual assault survivor, the Clinic will submit that the Court should be attentive to this context, and to the particular needs of sexual assault survivors who reach out to legal counsel (as well as possibly counsellors and health professionals), to support them following a decision to report to police.

iv. Resources available to complainants in criminal proceedings are not – nor are they intended to be – sufficient to address the challenges complainants face

42. The Clinic will address the lived-experience of sexual assault survivors as they navigate the criminal justice system. It is simply incorrect, as asserted by the CLA in its leave to intervene materials, that the Crown or the Victim Witness Assistance Program (“VWAP”) “serve” complainants in the criminal trial. In fact, VWAP will not discuss the evidence with the complainants (the Ministry of the Attorney General pamphlet and website on VWAP specifically

¹⁰ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 2.

¹¹ See, e.g., *To Zero: Independent Report of the Minister's Task Force on Sexual Abuse of Patients* (2016); *SVHAP* (March 2015); preamble, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30; *R v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Quesnelle* 2014 SCC 46, and in particular paras. 34 and 36.

states: “the program cannot receive or discuss your evidence”¹²). VWAP is mandated to provide more limited support in terms of communicating dates, providing referrals to other social service agencies, and orientating the complainant to the Court. Courts have also recognized the impartial role of Crown attorneys in criminal prosecutions.¹³ The Crown attorney will only meet the complainant in the presence of the investigating police officer, which many complainants experience as intimidating and, in any event, is not a meaningful opportunity for the complainant to ask questions or express her fears.

43. The Clinic will make submissions on the support provided by legal counsel to sexual assault survivors, which support is otherwise unavailable to survivors from any other person or entity in the criminal justice system. The Clinic will further argue that compensation for the costs of legal support may be a direct consequence of the harm of the sexual assault and properly subject of a restitution order.

v. Apples and oranges: the issue on appeal is restitution to be made by an offender that has been found guilty, not systemic issues relating to accused who have been acquitted

44. Finally, the Clinic will argue that access to justice issues for accused persons, which the Clinic is also extremely concerned about, is a separate and distinct issue from the interpretation of s.738(1)(b) of the *Code*. When Parliament enacted s.738, it was aware that costs awards against the Crown do not flow from acquittals, yet Parliament did not see fit to exclude restitution for legal fees from the provision. Broad policy concerns with respect to underfunding of legal aid and/or representation for accused persons must not be conflated with the interpretation of s.738 as it applies to convicted offenders.

¹² <https://www.attorneygeneral.jus.gov.on.ca/english/ovss/VWAP-English.html>.

¹³ See, e.g., *Boucher v. The Queen*, [1955] S.C.R. 16.

F. Assistance To Be Provided

45. If the Schlifer Clinic is granted leave to intervene, it will work with counsel for the Crown to ensure that our respective submissions are not duplicative.

46. The Clinic seeks to assist this Court with the legal principles at issue; it will take no position on the facts except to the extent that it is necessary to refer to the facts to contextualize the legal issues. The Clinic will take no position on the proper disposition of this appeal.

47. On the basis of the above, the Clinic respectfully requests that it be granted leave to intervene on the issue of restitution in this summary conviction appeal.

SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario on
February 23rd, 2017



Commissioner for Taking Affidavits
(or as the case may be)



AMANDA DALE

THIS IS EXHIBIT "A" TO THE AFFIDAVIT OF AMANDA DALE
SWORN BEFORE ME THIS 23RD DAY OF FEBRUARY, 2017



Joanna Birenbaum

CAREER HIGHLIGHTS

- International Human Rights scholar, with specialization in women's human rights
- Recognized spokesperson and expert in women's rights and violence against women
- Inspiring leader of staff teams and multi-sector collaborations
- Multi-sector consensus-builder
- Advanced practitioner and trainer in cultural competency
- Results-oriented strategic planner, evaluator and organizational developer
- Innovative and experienced women's program developer, in international, multicultural, urban and remote contexts
- Leader in research and development of policy reform related to violence against women
- Skilled manager of successful complex projects, community and funder partnerships

ACADEMIC BACKGROUND

- Teaching Assistant, Ethical Lawyering in a Global Context JD class at Osgoode Hall Law School
- PhD student in International Human Rights Law/Women's Rights, Osgoode Hall Law School, expected completion, 2018
- Guest lecturer, University of Toronto Faculty of Law, Women's International Human Rights and Violence Against Women (2013, 2014, 2015)
- Masters of International Human Rights Law, *with Distinction, First in Class*, University of Oxford, UK, 2009-2011. [Dissertation Title: "Does the Convention to End All Forms of Discrimination Against Women (CEDAW) require women to choose between gender protection and cultural belonging?"]
- Postgraduate certificate, *with Distinction*, Humber School of Writers, 2007
- Master of Arts, *with Distinction*, Social and Political Thought, University of Sussex, UK, 1991 [Dissertation title: "Hannah Arendt for Feminism? A Speculative Re-Reading"]
- Honours BA, *with High Distinction*, Joint Specialist, Political Science and Women's Studies, University of Toronto, 1988

AWARDS

- Joseph-Armand Bombardier Canada Graduate Scholarship, Social Sciences and Humanities Research Council of Canada, 2016
- Helena Orton Memorial Scholarship, 2015
- Association of Transnational Law Schools (ATLAS), Agora selection recipient, for June 2015
- Fellow, Nathanson Centre on Transnational Human Rights, Crime and Security, 2014
- Judge Hallet Scholarship, Osgoode, 2014

- YWCA Woman of Distinction, Social Justice, 2013
- Morris Law Prize, University of Oxford, 2012
- YWCA Canada Award for Advocacy, 2004 - 2005
- Caring Hands Extended Award, for outstanding patient care, St. Joseph's Women's Health Centre, 1996
- Commonwealth Scholarship, United Kingdom, 1989 - 1991
- City of Toronto, Women's Studies Undergraduate Scholarship, for graduating student most likely to contribute to improving the status of women, 1987 - 1988

PUBLICATIONS/PRESENTATIONS-SELECTED

Peer-reviewed

"Seeking Justice Through Section 15: Reflections of the Applicant on Barbra Schlifer Commemorative Clinic v. Canada", (2017, forthcoming) JLE.

Shaun O'Brien, Nadia Lambek and Amanda Dale, "Accounting for Deprivation: The Intersection of Sections 7 and 15 of the Charter in the Context of Marginalized Groups" (2016) 35:153 NJCL 1.

"A New Chapter in Feminist Organizing: The Sexual Assault Audit Steering Committee", with Beverly Bain and Jane Doe, *CJWS [Women Resisting Rape: Feminist Law, Practice, Activism]* (Fall 2009/Winter 2010) Volume 28, No 1, 6-15

Research reports, specialty publications and journalism

"Seeing no Evil", with Jane Doe, Opinion Editorial (Police Responses to Sexual Assault), *Toronto Star*, February 24, 2011

"Shelter from the Storm: barrier-free women's housing offers healing spaces, safe places", *Cross Currents: The Journal of Addiction and Mental Health*, Centre for Addiction and Mental Health (Winter 2010/11) Volume 12, No 2, 11

"Honouring Aboriginal Grandmothers to Promote Safety and Healing", *Cross Currents: The Journal of Addiction and Mental Health*, Centre for Addiction and Mental Health (Autumn 2010) Volume 14, No 1, 3

"Our Men Have Lost Their Place: Aboriginal men's shelter guides men on healing path", *Cross Currents: The Journal of Addiction and Mental Health*, Centre for Addiction and Mental Health (Summer 2010) Volume 13, No 4, 10-12

'No More Running in Circles': best practices and policy initiatives to address violence against women in Canada, Policy Discussion Paper, YWCA Canada, March 2008

'Bad Date' (an article exploring the Federal government's cuts to Status of Women Canada) With Ellen Russell, *This Magazine*, May/June 2007

Beyond Shelter Walls: system change, Best practices and policy initiatives to address violence against women in Canada. Literature Review, YWCA Canada, November 2007

"No Place like Home" (an article exploring successful organizing women's housing advocacy in Ontario) *Women & Environments*, Spring/Summer 2004

"New Perspectives on Shelter for Women", Fred Victor Centre, Toronto, 1996

'A National Test of Will' (political reporting from Sudan)
Maclean's Magazine, April 1986

EMPLOYMENT EXPERIENCE

Executive Director, Barbra Schlifer Commemorative Clinic

May 2011 to current

Leader of multi-service legal clinic improving access to justice and freedom from violence for 4,000 women annually; 40 staff and a 3.7 million budget; 14-member Board of Directors.

Leadership Highlights

- Support revitalization and creative engagement with staff, board and community
 - Increase organization's media coverage dramatically
Increase funding by 70%
Lead organization through complex strategic re-direction and Theory of Change process
 - Lead staff and board to identify test cases and garner pro bona legal representation in women's rights cases
 - o *R v. NS [sexual assault and the niqab]*;
 - o *R v. Quenelle [sexual assault records case]*;
 - o *Schlifer v. AG [Gun Registry]*;
 - o *Jeyakannan Kanthasamy v. Minister of Citizenship and Immigration [immigration/permanent residency]*
- Canadian lead in partnership with Sudanese Organization for Research and Development (SORD) to establish women's representation through Shari'a personal law legal clinics in Khartoum, Sudan
- Leader in development of women's rights sector capacity building with government, funders, public policy-makers, legal clinics, media, women's organizations and other stakeholders
- o Member, Permanent Round Table on Violence Against Women;
 - o Administrative Lead, Trauma-informed Women's Mental Health and Addiction Network;

- o Member, Violence Against Women and Children's Welfare Protocol Steering Committee;
- o Chair, Premier's Roundtable with the VAW Sector and Cabinet;
- o Consultant, Select Committee on Sexual Violence and Harassment;
- o Frequent media commentator on women's rights and violence against women

Consulting

October 2009 to May 2010

Communications leadership and member-engagement; program design, evaluation, development and delivery; staff leadership; public legal education innovation; research; team leadership

Clients

- YWCA Canada (Northern [arctic] Extension Project and Northern Ontario Women's Services Enhancement Project)
- Community Legal Education Ontario (Review and Implementation of Public Legal Education)
- YWCA Hamilton (Strategic Communications and Member Engagement)
- Costa Leclerc Design (Media Relations)
- Shelternet (Acting Executive Director)

Director, Advocacy and Communications, YWCA Toronto

September 2001 - September 2009

Initiated, staffed and led YWCA Toronto department advancing strategic growth, community collaboration, communications, public policy and association-wide recognition for excellence in women's rights advocacy and policy development

Leadership highlights

- Leader in successful law reform to Ontario Arbitration Act and four other areas of Ontario law, protecting universal access to women's rights/protection from violence in family law
- Chair, Family Law Education for Women provincial public legal education campaign, reaching out to multicultural women at risk of GBV/DV
- Regular on-air contributor as women's issues expert, CIUT FM, University of Toronto Radio
- Consultant to City of Toronto (Jane Doe) Audit, recommendations and implementation of police response to sexual assault following *Jane Doe v. Metropolitan Police*

Seconded to YWCA Canada to lead

International partnership on violence against women prevention, The Gender Centre, Sudan (2006)

Partnership development, research and policy, writing *Beyond Shelter Walls: System Change, Best practices and policy initiatives to address violence against women in Canada* (2007)

- Abantu Centre for Development, Women in Governance/Freedom from Violence project, Ghana (2008/09)
- Qimaavik Women's Shelter, capacity-building in indigenous and isolated communities, Iqaluit, Nunavut (2008/09)

Manager, St. Joseph's Women's Health Centre, St. Joseph's Health Centre

January 1999 - July 2001

Leader, multi-stakeholder community health centre, specializing in violence against women service response, multi-cultural and poverty health, with 22 direct reports and annual budget of \$ 1M; maintaining relations with a wide range of hospital administration, funders and policy makers, regarding women's health and VAW services.

Leadership highlights

Oversaw successful national research on parenting practices across cultures

- Developed program to train and support universal screening protocol for violence against women in all hospital intakes

Manager of Social Action and Education, YWCA Toronto

June 1997 - January 1999

Coordinated all aspects of social action/public policy for the YWCA across 22 programs with a total of 300 staff; led education and policy development

Project Co-ordinator, St. Joseph's Women's Health Centre, St. Joseph's Health Centre

July 1994 - January 1999

Developed collaborative framework for outreach; delivered direct service to marginalized women; community relations and program development; wrote hospital-wide protocol for cases of elder woman abuse

Project Co-ordinator, Sistering Drop In and St. Joseph's Women's Health Centre

August 1993 - July 1994

Piloted, delivered and promoted women's service model for multi-cultural homeless sexual abuse survivors

Group Facilitator and Volunteer Co-ordinator, Opportunity for Advancement

January 1992 - July 1993

Facilitation and program design for multi-stressed women

Collective Member, Nellie's Emergency Hostel For Women

1985 - 1990, relief; 1990 - 1992, collective member

Co-managed violence against women and homeless women's shelter

Women's Projects Liaison, Band Aid U.K., Khartoum, Sudan

1985 - 1986

Lead on women's projects to emerging international aid organization during Ethiopian and Darfur famine

PRIVATE CONSULTATION – SELECTED

- Course Curriculum Developer, Non-Profit Communications, Bachelor's in Public Relations and Corporate Communications Centennial College, Toronto, 2011
Training, communications and strategic planning YWCA Yellowknife, NWT, 2007
Creating cultural competency in the response to violence against women, RCMP Yellowknife, YWCA Yellowknife, NWT, 2007
- Workshop facilitator, 'Developing a Women's Housing Agenda for the United Nations Meetings' WAIRO, United Nations World Urban Forum, Grassroots Academy, Vancouver, 2006
Toronto Police Services Board, Community Review of Sexual Assault Training, Opportunities for Improvement, 2006
The Auditor General's Follow-up Review of the 1999 Report entitled "Review of the Investigation of Sexual Assaults – Toronto Police Service", 2005
- Strategic plan, re-branding, repositioning and communications planning, Education Wife Assault/Springtide Resources, Ontario, 2004-2005
- Creating cultural competency, Ministry of the Attorney General, Death Review Committee, Coroner's Office, Ontario, 2004
- (Consultant to) "Review of the Investigation of Sexual Assaults Toronto Police Service – Report by the City of Toronto Auditor General", 1999
- Workplace diversity, cross cultural communications and cultural competency, New Directions, Toronto, 1997-2003

VOLUNTEER AND COMMUNITY LEADERSHIP- SELECTED

- Member of the Board of Directors (member of the Executive and Co-Chair Fundraising Committee) of Inter Pares (Canadian Feminist and Global Justice Organization), 2008 – ongoing
Member, Program Advisory Committee, Centennial College, Corporate Communications Program, 2007-ongoing
- Convocation Speaker, University of Toronto Woodsworth College Graduation, 2014
- Member of the Board of Directors, Woman Abuse Council of Toronto, 2009 - 2014

- Member of the Community Advisory Panel for Women's College Hospital, 2007 - 2010
- Chair, Women's Housing Advocacy Group (WHAG), 2002 - 2007
- Member of the Board of Directors, Woman Abuse Council of Toronto, 2001 - 2006
- Presenter, Integrating on-line and print media, Federated Press, 2005
- Guest lecturer, Centennial College, Corporate Communications postgraduate program, "Non-Profit Communications and Communicating for Social Change", 2002 - 2004
- YWCA representative on the Community Voices of Support Advocacy Campaign, Advisory Group, Community Social Planning Council, 1997 - 1999
- Chair, West End Elder Abuse Network, 1994 - 1997
- Board member and Program Committee Chair, Sistering, 1996 - 1997
- Coalition member, Multicultural Inter Agency Access Group, Peel 1992 - 1993
- Advisory Board Member, Hostel Outreach Programme, 1990 - 1992

LANGUAGES

Fluent in English (first language); Intermediate skills in French; basic skills in Spanish and German; rudimentary Arabic.

THIS IS EXHIBIT "B" TO THE AFFIDAVIT OF AMANDA DALE
SWORN BEFORE ME THIS 23RD DAY OF FEBRUARY, 2017



Joanna Birenbaum

Barbra Schlifer

Commemorative Clinic

F r e e d o m F r o m V i o l e n c e .

Mission, Values and Strategic Priorities

Mission

The Barbra Schlifer Clinic offers legal representation, professional counselling and multilingual interpretation to women who have experienced violence. Our diverse, skilled and compassionate staff accompany women through personal and practical transformation, helping them to build lives free from violence.

We are a centre by, for and about women. We amplify women's voices, and cultivate their skills and resilience. Together with our donors and volunteers, we are active in changing the conditions that threaten women's safety, dignity and equality.

Vision Statement

We envision a world where diverse women:

- Build lives free from violence.
- Work together to create a more just world.
- Live their own lives in respectful communities that provide meaning and belonging.

Belief Statements

We believe:

1. Violence against women means any act of violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering (including financial, structural, institutional or spiritual) to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
2. Violence against women happens in all cultures. It is based on abuse of power, results in inequality, and affects all relationships through the generations.

3. Women in every culture in the world have ways of working together to stop violence, and our work will honour and value these diverse strengths.
4. Respectful relations and positive social change are possible when women and men work toward them. Each woman who comes to the Clinic and each woman who contributes to the Clinic is participating in that change.

Value Statements

We value:

Feminism and Anti-Oppression

Joyfully, we root our work in the strengths and achievements of feminism and various women's movements, including successes against colonialism, racism and other forms of oppression.

Compassion and Self-Awareness

We are committed to staying rooted in compassion, viewing the world from multiple perspectives.

A Reflective Awareness of Power

We reflect on and learn from shifting power relations. We understand and acknowledge our own power and the change we invite in ourselves, the women we work with and the world we live in.

Community and Connection

We work in community and partnership with local, national and international movements to end violence against women, knowing that individual experience is embedded in systems and structures.

Autonomy and Self-Determination

We respect and broaden women's choices to determine their own lives according to their values, hopes and positive self-regard.

Our Strategic Priorities

1. Increase our effectiveness in underserved communities through service evolution and innovation
2. Broaden our sphere of influence
3. Strengthen our organization

SCA#69/16

**ONTARIO
SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL
(Toronto Region)**

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

MUSTAFA URURYAR

Appellant

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Applicant (Proposed Intervener)

AFFIDAVIT OF DANIEL BROWN

I, DANIEL BROWN, Barrister and Solicitor, of the City of Toronto in the Province of Ontario, **SOLEMNLY AFFIRM** as follows:

1. I am a barrister and solicitor and a member in good standing of the Law Society of Upper Canada. I manage a law firm, Daniel Brown Law, that focuses exclusively on the practise of criminal and constitutional law. I am a member of the Interventions Committee of the Criminal Lawyers' Association (Ontario) (the "CLA"). As such I have knowledge of the matters to which I herein depose.

2. The CLA has retained Lance C. Beechener of the law firm, Lockyer, Campbell Posner, Criminal Trials and Appeals, to commence a motion for leave to intervene in this appeal. Mr. Beechener works in the areas of criminal trial and appeal litigation and has appeared numerous times before the Ontario Court of Appeal and the Superior Court of Justice on trial and summary conviction appeal matters, as well as before the Supreme Court of Canada and lower courts throughout Ontario. The CLA has been aware of the matter of *Her Majesty the Queen v. Mustafa Ururyar* for some time, given the extensive media attention that it has attracted. In early December, 2016, the Interventions Committee decided that it would be appropriate to apply to intervene and took immediate steps to find a lawyer to prepare and argue the Application, and file the necessary materials. Before making a final decision, Mr. Beechener decided to await the filing of the Appellant's factum for review to confirm that that was an appropriate case in which to apply for intervener status. This is the reason why an abridgment of the time ordinarily required for service and filing of this Application is requested.

3. For the reasons that follow, I believe the CLA can assist the Court in dealing with the matters in issue in the appeal, which are of substantial importance to the CLA and the criminal defence bar in general.

I. THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

A. Background

4. The CLA is a non-profit organization founded in 1971. One of the largest specialty legal organizations in Canada, the CLA comprises over 1000 criminal defence lawyers practising in the Province of Ontario. The objects of the CLA are to educate,

promote and represent the membership on issues relating to criminal and constitutional law. The CLA is considered the voice of the criminal defence bar.

5. The CLA presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Program. The CLA also produces a newsletter titled "For the Defence", which is published five times per year and circulated across Canada. It includes editorials, the President's report, feature articles, regular columns, book reviews and case commentaries, all of which are directed to highlighting current developments in criminal and constitutional law.

6. The CLA is routinely consulted and invited by both Houses of Parliament and its Committees to offer submissions on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the CLA is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, Legal Aid and various other concerns that involve the administration of criminal justice in the Province of Ontario.

B. Experience as an Intervener

7. The CLA has been granted leave to intervene in numerous cases before the Supreme Court of Canada including, in recent years: *R. v. Lloyd*, 2016 SCC 13; *R. v. Villaroman*, [2016] S.C.J. No. 33; *R. v. K.R.J.*, [2016] S.C.J. No. 31; *R. v. Jordan*, [2016] S.C.J. No. 27; *R. v. Saeed*, [2016] S.C.J. No. 24; *Canada (National Revenue) v Thompson*, [2016] S.C.J. No. 21; *World Bank Group v Wallace*, [2016] S.C.J. No. 15; *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14; *R. v. Williamson*, [2016] S.C.J. No. 28; *R. v. Borowiec*, [2016] S.C.J. No. 11; *R. v. St-Cloud*, [2015] 2 S.C.R. 328; *MM v. United*

States of America, [2015] 3 S.C.R. 973; *R. v. Smith*, [2015] 2 S.C.R. 602; *R. v. Tatton*, [2015] S.C.R. 574; *R. v. Fearon*, 2014 SCC 77; *R. v. Conception*, 2014 SCC 60; *R. v. Hart*, 2014 SCC 52; *R. v. Sipos*, 2014 SCC 47; *R. v. Quesnelle*, 2014 SCC 46; *R. v. Spencer*, 2014 SCC 43; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37; *R. v. Summers*, 2014 SCC 26; *R. v. Carvery*, 2014 SCC 27; *Wood v. Schaeffer*, [2013] 3 S.C.R. 1053; *R. v. Vu*, [2013] 3 S.C.R. 657; *R. v. Youvarajah*, [2013] 2 S.C.R. 720; *R. v. Levkovic*, [2013] 2 S.C.R. 204; *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125; *R. v. Pham*, [2013] 1 S.C.R. 739; *R. v. Named Person B*, [2013] 1 S.C.R. 405; *R. v. Ryan*, [2013] 1 S.C.R. 14; *R. v. Yumnu*, [2012] 3 S.C.R. 777; *R. v. Davey*, [2012] 3 S.C.R. 828; *R. v. Emms*, [2012] 3 S.C.R. 810; *R. v. N.S.*, [2012] 3 S.C.R. 726; *R. v. Nedelcu*, [2012] 3 S.C.R. 311; *R. v. St-Onge Lamoureux*, [2012] 3 S.C.R. 187; *R. v. Cole*, [2012] 3 S.C.R. 34; *R. v. Prokofiew*, [2012] 2 S.C.R. 639; *R. v. D.C.*, [2012] 2 S.C.R. 626; *R. v. Mabior*, [2012] 2 S.C.R. 584; *R. v. Walle*, [2012] 2 S.C.R. 438; *R. v. Tse*, [2012] 1 S.C.R. 531; and *R. v. D.A.I.*, [2012] 1 S.C.R. 149. The CLA was recently the respondent in *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 S.C.R. 3.

8. The CLA has also been granted leave to intervene in numerous appeals in the Ontario Court of Appeal, including: *R. v. Jackson*, unreported judgment of Strathy C.J.O.; *R. v. Jones*, [2016] O.J. No. 3737; *Trinity Western University v. Law Society of Upper Canada*, [2016] O.J. No. 3472; *Groia v. Law Society of Upper Canada*, [2016] O.J. No. 3094; *R. v. Fearon*, [2013] O.J. No. 704 (C.A.); *R. v. Puddicombe* (2013), 299 C.C.C. (3d) 543 (Ont. C.A.); *R. v. Summers* (2013), 114 O.R. (3d) 641 (C.A.); *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (C.A.); *R. v. C.S.* (2011), 269 C.C.C. (3d) 461 (C.A.); *R. v.*

Imona-Russel, [2011] O.J. No. 1792 (C.A.); *R. v. N.S.* (2010), 102 O.R. (3d) 161 (C.A.); and *R. v. Chapman* – decision released 2005-10-20.

9. Mr. Beechener has recently acted for the CLA in a previous summary conviction appellate matter: *R. v. Vandergunst*, 2016 ONSC 940. In that case, the issue was the appropriate rate for transcripts that had already been prepared by the transcriptionist. As the determination of that issue could impact other stakeholders, Templeton J. granted the CLA intervenor status to make oral submissions.

II. THE CLA'S POSITION

10. The issue that arises in this case concerns the spectre of accused persons being routinely ordered to pay, as part of a restitution order, the legal fees of the complainant. This issue raises significant concerns for the CLA. It could affect the interests of many of its members, their clients, and impact negatively on the administration of justice. As far as the CLA is aware, this is a matter of first impression on the question of whether it is appropriate to order restitution for legal fees.

11. If granted intervener status, the CLA will make the following submissions: (a) s. 738 of the *Criminal Code* is a comprehensive legislative scheme for the imposition of restitution orders and does not explicitly authorize restitution for legal fees; (b) to the extent that s. 738 of the *Criminal Code* is ambiguous, any statutory interpretation should bear in mind issues of policy and fairness and (c) mechanisms are already in place for complainants and witnesses to be offered assistance with navigating the criminal justice system. For those reasons, it is the CLA's position that it is never appropriate to order restitution for a complainant's legal fees.

A. Background: Proceedings at Trial

12. The Appellant was convicted of sexual assault by Zuker J. on July 21, 2016. He was sentenced to 18 months on September 14, 2016. In her victim impact statement,¹ the complainant requested *"full compensation for the legal costs I have absorbed as a result of the sexual assault"* and advised that she had *"hired independent legal counsel"* who had *"provided extensive information and guidance about the court process"*. Her chosen counsel, Mr. David Butt, had also, *"due to the ongoing and discriminatory cross-examination resulting in emotional distress"*, written a letter to both Crown counsel and defence counsel at trial to remind defence counsel *"of courtroom ethics and the law in sexual assault cases"*. The complainant concluded this portion of her victim impact statement as follows:

Victims should not be required to pay (emotionally or financially) for the failure of the courts to respect the ethics and legal protections of victim/witnesses.

13. Attached to the victim impact statement was a letter from Mr. Butt indicating that he had acted for her on a third party records application (for which he had been remunerated through Legal Aid Ontario). The letter also indicated that he had billed her a *"total fee for all private services"* of \$9,500 plus HST for a total of \$10,735.00, which covered *"all aspects of my representation of you, except for the third party record application to which I responded on your behalf"*. More specifically, the block fee included *"all communications and advice to you, all communications with the parties to the litigation unrelated to the third party records application, review of all transcript*

¹ Victim Impact Statement, Tab 5, Application Record re Application to Intervene

materials, legal research as necessary, and all trial preparation and discussions about the trial”.

14. At the sentencing hearing on September 14, 2016, the Crown sought a restitution order under s. 738(1)(b) of the *Criminal Code* “*for the amount of Mr. Butt’s bill*”.² The defence opposed such an order, submitting that s. 738(1)(b) of the *Code* did not include costs for legal fees. She said:

Ms. Gray chose to have counsel. She had access to the Crown, Ms. Lofft, and other members of the Crown’s office. And as I understand, Ms. Gray was quite happy with Ms. Lofft being a nice Crown to deal with and had been very informative with her. Victim Services, another organization that is provided by the court, was also readily accessible to Ms. Gray to prepare her to testify, answer any questions that she had about the court process.

In the event that the Court was inclined to impose a restitution order, defence counsel requested a “*full docket breakdown of how that retainer was used ... rather than a blanket statement that was provided by Mr. Butt*”.³

15. In his oral reasons for sentence, issued immediately following the submissions of counsel, the trial judge addressed the proposed restitution order. He said:

There is a restitution order that is being sought. Ms. Bristow has raised the spectre of the quantum perhaps more than, because I believe with respect, that s. 738(1)(b) does indirectly allow for a restitution order for legal fees that have been incurred. Certainly there is always the question of reasonableness of fees that and that has been raised by Ms. Bristow. Without delaying the imposition of sentence

² Transcript of Sentencing Hearing, Tab 3, Application Record Re Leave to Intervene at p. 38.

³ Transcript of Sentencing Hearing, Tab 3, Application Record Re Leave to Intervene at pp. 43-44.

being today, the court will fix legal fees at \$8000 inclusive of HST and that will be part of a stand-alone restitution order ...⁴

16. One of the grounds of appeal raised by the Appellant, and listed in the Appellant's Factum, is that the "*trial judge erred in imposing restitution for the complainant's legal fees*". At para. 40 of the Factum, the Appellant submits that s. 738 "*appears to contain a closed list of when restitution can be ordered*" which does not include legal fees.

17. The CLA seeks leave to intervene on this issue. The Appellant appears to raise this ground of appeal in support of an overall argument about a reasonable apprehension of bias, but the CLA takes the position that the broader issue of the propriety of ordering an accused person to pay a complainant's legal costs as part of a criminal restitution order is one that transcends the immediate parties to this litigation. The CLA seeks leave to make submissions on that issue.

B. The Statutory Scheme

18. Section 738(1)(b) of the *Criminal Code* states:

738 (1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:

...

(b) in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable ...

⁴ Transcript of Sentencing Hearing, Tab 3, Application Record Re Leave to Intervene at p. 95.

19. The phrase "*pecuniary damages incurred a result of the harm*" is potentially capable of expansive interpretation. It could cover anything even tangentially related to the harm suffered. For that reason, it is the CLA's position that the section must be interpreted to compensate victims only for those damages that are sufficiently proximate to the harm. Otherwise, there is a potential for unlimited liability. The section itself provides support for a more modest scope of interpretation by providing examples of such damages – "*including loss of income or support*". These losses are more directly connected, and proximate, to the harm, and were apparently the types of damages that Parliament contemplated in crafting this legislative scheme.

C. Statutory Interpretation: Policy and Fairness

20. A further reason to adopt a more limited view of the phrase "*pecuniary damages incurred as a result of the harm*" relate to policy and fairness – matters which must form part of any analysis of statutory interpretation. Victims, as well as accused persons (and even convicted persons seeking redress on appeal), choose to hire lawyers.⁵ Subject to few exceptions,⁶ everyone retains the right to represent themselves in every aspect of the criminal litigation process. To the extent that a person elects to retain counsel to assist them in a criminal case, the generally operative policy is that he or she must bear their own costs. In *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, Lamer C.J. said, at para. 97:

⁵ In fact, to some extent, the "choice" of whether to retain a lawyer for an accused person, whose liberty is at stake and who is facing experienced and skilled Crown counsel assisted by police investigators, is perhaps a more illusory one.

⁶ See, for e.g., s. 486.3 of the *Criminal Code* (appointment of counsel for cross-examination).

.... the prevailing convention of criminal practice is that whether the criminal defendant is successful or unsuccessful on the merits of the case, he or she is generally not entitled to costs.

21. The *Criminal Code* also contains no mechanism by which an accused person's legal fees can be compensated by the Crown where they successfully defend criminal charges. This not only includes cases in which the accused has been acquitted after trial, but also cases where there has been a withdrawal of the charges for absence of "reasonable prospect of conviction" or a discharge after a preliminary inquiry for absence of any evidence upon which a reasonable jury could convict. The prospect of a statutory regime by which victims can recover their legal fees following a successful prosecution, but not accused persons following an unsuccessful prosecution, is inconsistent and unfair. The general policy that an accused person bears his or her own costs, regardless of the outcome of the litigation, should also apply to a victim who chooses to avail himself or herself of counsel.

22. Finally, it is significant that the complainant in this case sought restitution of her legal fees, at least in part, as a result of alleged improper tactics by defence counsel, including "*ongoing and discriminatory cross-examination resulting in emotional distress*" which required her lawyer to bill her for time spent preparing a written admonishment to counsel about "*courtroom ethics and the law in sexual assault cases*". It is unclear whether these allegations played any role in the trial judge's decision to impose this restitution order because he did not give any meaningful reasons in this regard. Certainly, nothing has been brought to my attention to suggest that defence counsel's conduct in this case was improper. It is the CLA's position that ordering

restitution on this basis would be inappropriate as it could have a chilling effect on legitimate tactics and strategy. If accused persons could be effectively punished for the trial strategy adopted by their counsel through a restitution order, it could have a serious impact on the services that criminal lawyers render on a daily basis.

C. Victim Services

23. Finally, there already exists a mechanism by which victims can be assisted through every step of the court process. The Victim/Witness Assistance Program (V/WAP) was created for this very purpose. In assessing whether it is ever appropriate to order restitution of legal fees incurred to assist with navigating the criminal justice system, the CLA would submit that it is relevant that state resources have already been allocated towards this objective. If an individual complainant determines that this publicly funded institution is insufficient, then he or she is entitled to pursue private options. However, the existence of a publicly funded alternative may bear upon the issue of whether it was appropriate to effectively require the Appellant to subsidize the complainant's decision to privately retain a lawyer.

III. ASSISTANCE TO BE PROVIDED

24. The CLA seeks leave to develop these submissions and present further authorities and case law, which may be of assistance to the court in resolving this question of statutory interpretation. If the CLA is granted leave to intervene, it will work with counsel for the Appellant and counsel for the other interveners (if any) to ensure that its submissions are not duplicative.

25. The CLA does not seek leave to file any new evidence or otherwise augment the record on the appeal. The materials referred to in this affidavit are only intended to assist the Court in determining whether to grant leave to intervene, and in placing the submissions and perspective of the CLA in their proper context. The CLA will attempt to assist this Court with respect to the legal principles at issue and will take no position on the facts except to the extent that reference to the facts is necessary to contextualize the legal issues. The CLA would take no position on the proper disposition of the appeal and seeks no costs and would ask that no costs be awarded against it.

26. The CLA therefore respectfully requests that it be granted leave to intervene in this matter, with the right to oral argument of such length as the Court deems appropriate.

AFFIRMED before me at the City
of Toronto in the Province of Ontario,
this day of February, 2017.

A Commissioner for Oaths, etc.

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DANIEL BROWN

(sworn copy to be filed before hearing)

ONTARIO
SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL COURT
(Toronto Region)

BETWEEN:

HER MAJESTY THE QUEEN
Respondent

-and-

MUSTAFA URURYAR
Appellant

-and-

CRIMINAL LAWYERS' ASSOCIATION
Applicant (Proposed Intervener)

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CRIMINAL LAWYERS' ASSOCIATION (Intervener) and **BARBRA SCHLIFER COMMEMORATIVE CLINIC** (Proposed Intervener)

**ONTARIO SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL
TORONTO REGION**

**APPLICATION RECORD OF THE PROPOSED INTERVENER
BARBRA SCHLIFER COMMEMORATIVE CLINIC**

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