**Court File No. 39084**

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

B E T W E E N:

**JOAQUIN ALFREDO CORTES RIVERA**

Appellant (Appellant)

- and -

**HER MAJESTY THE QUEEN**

Respondent (Respondent)

- and -

**THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO**

Intervener

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# FACTUM OF THE INTERVENER THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

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

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## PARTS I AND II: OVERVIEW AND POSITION ON QUESTIONS ON APPEAL

1. This appeal offers the Court an opportunity to define the limits of the appellate power to cure errors under s. 686(1)(b)(iii) of the *Criminal Code*. The CLA asks the Court to find that improperly limiting an accused's ability to test the Crown's case is always a "substantial wrong or miscarriage of justice," regardless of whether the evidentiary record at trial supports a conviction or discloses a path to acquittal. In such cases, a new trial is required.

2. The CLA takes no position on the facts. With respect to the issues on appeal, the CLA asks the Court to articulate a test that limits appellate courts' application of the s. 686(1)(b)(iii) curative *proviso* in cases where the legal error deprives the defendant of a procedural benefit and therefore has a real but unknown impact on the conduct of the defence and the way the case unfolded. The argument has three parts:

a. The *proviso* cannot apply if there is a realistic possibility that the error influenced the conduct of the defence, and thereby the record or reasoning underlying the verdict.

b. When a trial court improperly limits defence cross-examination, the *proviso* can only apply if the 'missing' answers appear elsewhere in the record, in an admissible and equally probative form.

c. Appellate courts' statutory powers under s. 683 of the *Criminal Code* do not permit them to create fresh evidence to cure gaps in the trial record created by the trial judge's deliberate and erroneous decision to exclude evidence.

## PART III: STATEMENT OF ARGUMENT

### A. A new test is required: the *proviso* cannot apply if there is a realistic possibility that the error influenced the defence, and thereby the record or the trier of fact's reasoning

3. The CLA asks the Court to formally recognize that the s. 686(1)(b)(iii) curative *proviso* cannot apply where there is a realistic possibility that the error influenced the conduct of the defence, and thereby the record or reasoning underlying the verdict. In these circumstances, while the exact effect of the error on the record or reasoning is unknown, a new trial is required because the error is not harmless; it undermines public confidence in the administration of justice.

4. Guidance from this Court is required on how and when the *proviso* ought to apply in cases where the legal error deprives the accused of a procedural benefit to which he is entitled, but which has a necessarily unknowable effect on the defence, the record, and the trier of fact's reasoning. Appellate courts have divided on the question of when a procedural deprivation justifies displacing a verdict under s. 686(1)(b)(iii).[1] The standard test for applying the *proviso* – asking whether the legal error was harmless or the evidence overwhelming – does not explicitly give appellate courts permission to set aside verdicts that appear inevitable on the record and are supported by sound reasoning.[2] There are, however, cases of this type in which appellate courts have ordered new trials: where the trial judge wrongly admitted unconstitutionally-obtained evidence;[3] where trial counsel provided ineffective assistance;[4] where the defendant was deprived of an opportunity to respond to the Crown's case;[5] and where an irregularity tainted the actual fairness of the trial or prejudiced the appearance of the due administration of justice.[6] In each of these examples, the verdict was unsafe not because the trier of fact's reasoning or the result was wrong, but because the *entire process* was tainted by the improper denial of a procedural benefit.

5. The CLA asks this Court to endorse the approach and appellate outcomes from these cases. The proposed 'realistic possibility test' provides a consistent, workable mechanism by which appellate courts can evaluate the applicability of the *proviso* in appeals where the trial judge's legal

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[1] See e.g. *R v SH*, 2019 ONCA 669, 377 CCC (3d) 335 (2:1), aff'd 2020 SCC 3, 442 DLR (4th) 181 (3:2); *R v RV*, 2019 SCC 41, 378 CCC (3d) 193 (5:2) [*RV*], rev'g 2018 ONCA 547, 362 CCC (3d) 434 (3:0); *R v Delmas*, 2020 ABCA 152, 65 CR (7th) 71 (2:1), notice of appeal filed May 14, 2020 (CFN: 39163, to be heard December 2, 2020).

[2] *R v Sarrazin*, 2011 SCC 54, [2011] 3 SCR 505 at para 25; *R v Van*, 2009 SCC 22, [2009] 1 SCR 716 at paras 34-36.

[3] *R v Elshaw*, [1991] 3 SCR 24, 67 CCC (3d) 97 at para 55; *R v Burlingham*, [1995] 2 SCR 206, 97 CCC (3d) 385 at paras 52-54.

[4] See e.g. *R v Joanisse* (1995), 102 CCC (3d) 35 (Ont CA) at para 77.

[5] *RV*, *supra* note 1 at para 86; *R v Lyttle*, 2004 SCC 5, [2004] 1 SCR 193 at paras 68-72; *R v Anandmalik* (1984), 6 OAC 143 (CA), 1984 CarswellOnt 1299 at para 8; *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33 at para 151; *R v Crosby*, [1995] 2 SCR 912, 98 CCC (3d) 225 at para 20; *R v Osolin*, [1993] 4 SCR 595, 86 CCC (3d) 481 at para 48.

[6] *R v Khan*, 2001 SCC 86, [2001] 3 SCR 823 at para 27; *R v Klymchuk* (2005), 203 CCC (3d) 341 (Ont CA), 2005 CarswellOnt 6874, at para 48; *R v Walker*, 2019 ONCA 765, 381 CCC (3d) 259 at paras 122-127; *R v McDonald*, 2018 ONCA 369, 360 CCC (3d) 494 at paras 50-55; *R v Olusoga*, 2019 ONCA 565, 377 CCC (3d) 143 at para 16; *R v E(FE)*, 2011 ONCA 783, 282 CCC (3d) 552 at paras 33-34.

error deprives the defendant of a procedural opportunity, but the record and reasoning support the verdict.

6. First, the proposed test is consistent with the purpose and limits of the s. 686(1)(b)(iii) *proviso* as articulated by Parliament and explained by this Court in *Elshaw*, *Burlingham*, and *Khan*. Through the language of the *proviso*, Parliament indicated that only a new trial could cure a substantial wrong or a miscarriage of justice. In *Khan*, this Court affirmed that a legal error about a procedural matter can be a miscarriage of justice and, if so, a new trial is required.[7] In *Elshaw* and *Burlingham*, this Court drew a parallel between the judicial act of admitting unconstitutionally obtained evidence under s. 24(2) and the judicial act of dismissing an appeal under s. 686(1)(b)(iii). In both cases, the Court cautioned against the use of 'curative' law in circumstances where glossing over an error would put a judicial stamp of approval on fundamentally unfair state conduct.[8] In such cases, as the *Burlingham* Court noted, an incurable "substantial wrong" may be a wrong against both the individual defendant and the administration of justice.[9]

7. It flows inevitably from this jurisprudence, and this Court should formally recognize, that a substantial wrong or miscarriage may arise *either* where the error renders the verdict unreliable *or* where, despite the apparently overwhelming nature of the case and the soundness of the reasoning, curing the error would endorse a fundamentally unfair process and thereby bring the administration of justice into disrepute. The realistic possibility test is a way of measuring whether a procedural error meets this second threshold. It would unfairly reverse the Crown's burden to cure an error because the record discloses no apparent path to acquittal if the error by its nature calls into question how the defence was conducted, how the case unfolded and how the trier of fact reached its verdict. In such cases, the miscarriage of justice stems from the fact that the defendant has not been dealt with fairly. The impact of the error is necessarily unknown, but the harm to the administration of justice is real, and a new trial is required.

8. Second, the proposed test strikes a workable balance, discouraging baseless speculation about how the trial might have unfolded while protecting the accused's right to fair process. The requirement that the procedural error influence the 'conduct of the defence' ensures that the

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[7] *Khan*, *ibid* at paras 26-27.
[8] *Elshaw*, *supra* note 3 at paras 54-55; *Burlingham*, *supra* note 3 at paras 52-53.
[9] *Burlingham*, *ibid* at para 52.

*proviso* is only unavailable to cure errors that actually bring the administration of justice into disrepute. It encourages courts to allow appeals where the defence was denied the opportunity to complete the record or advance its position and dismiss appeals where it is obvious the defence was able to do so.[10] By way of illustration: it will almost always undermine public confidence to prohibit a defendant from cross-examining an eyewitness about whether she was intoxicated, or wearing her glasses, at a relevant time. The impact on public confidence will be negligible, however, if the defendant, having examined the witness about her five recent perjury convictions, is improperly denied the opportunity to ask about her historic diverted shoplifting charge. In the former case, it would be speculative to assume that the witness will give answers that are unhelpful to the defence. In the latter case, it would be speculative to assume that the witness' answers, *whatever they might be,* could influence the conduct of the defence; nothing she could say about her history of shoplifting could affect the trajectory of the cross-examination, or the force of the defence argument that she is dishonest and therefore untrustworthy.

9. Ultimately, courts must confront the reality that, in many cases, neither party will be able to prove what would have happened in an error-free trial. The fact that the Crown may sometimes be unable to disprove the 'realistic possibility' that the error influenced the conduct of the defence is not a sign that the proposed test is unfairly weighted against the state, but rather an acknowledgement of jurisprudential reality: legal errors are presumptively harmful to both a defendant and the administration of justice, and the *proviso* is a blunt tool aimed at conserving resources, not a delicate instrument equipping appeal courts to determine whether the trial, despite its errors, was rightly decided.[11] It would be antithetical to the policy underlying the *proviso* for an appellate court to bless an unsafe verdict simply by confirming that it 'matches' the record and the trial judge's reasoning.

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[10] See e.g. *R v Watson* (1996), 30 OR (3d) 161 (CA), 108 CCC (3d) 310 at paras 53-58; *R v Emms*, 2010 ONCA 817, 264 CCC (3d) 402 at paras 29-34; *R v C(WB)* (2000), 142 CCC (3d) 490 (Ont CA), 130 OAC 1 at paras 69-76 [*C(WB)*], aff'd 2001 SCC 17, [2001] 1 SCR 530.
[11] *Sarrazin*, *supra* note 2 at para 28.

**B. Appellate courts cannot use inadmissible material to fill evidentiary gaps resulting from the trial court's error**

10. Appellate courts assessing the impact of wrongfully excluded defence evidence under s. 686(1)(b)(iii) must consider the applicability of the *proviso* "with regard to the entirety of the evidence, that [excluded] evidence having been included, and in the light of the effect the excluded evidence could, within reason, possibly have had on the evidence that did go to the jury."[12] This analysis permits appellate courts to consider whether specific pieces of excluded evidence could have made a difference to the outcome, and in particular, whether other evidence at trial 'fills' the evidentiary gap and makes the error harmless. The analysis does not permit appellate courts to rely on inadmissible evidence to cure gaps in the trial record caused by the trial judge's deliberate but wrong decision to prohibit the introduction of evidence. Nor does it permit appellate courts to speculate about what the evidence would have been if the defence had been allowed to adduce it.

11. For this reason, this Court and others have recognized that it will generally be impossible to apply the *proviso* to cure errors that improperly curtail defence cross-examination.[13] Where cross-examination is wrongly limited, the appellate court is unlikely to know what the evidence at trial would have been if the cross-examination occurred. As a result, it cannot assess the impact of the error and the Crown cannot prove it is harmless. The CLA asks this Court to clarify that errors of this type can be cured only where the evidence sought to be adduced in cross-examination is adduced completely in another admissible and equally probative form. The missing evidence cannot be manufactured out of whole cloth from inadmissible material that happens to be part of the record.[14]

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[12] *R v Wildman*, [1984] 2 SCR 311, 14 CCC (3d) 321 at para 44.
[13] *RV*, *supra* note 1 at para 86; *Shearing*, *supra* note 5 at para 151; *Crosby*, *supra* note 5 at para 20; *Osolin*, *supra* note 5 at para 48.
[14] For example, in *Watson*, the fact that a witness told defence counsel (who thereafter told the trial judge) that he did not make an important statement sought to be adduced by the defence was not sufficient to conclude that, if called as a witness, he would deny making the statement: *Watson*, *supra* note 10 at paras 53-57.

12. The CLA agrees generally with the Appellant that this Court should correct the Alberta Court of Appeal's interpretation and application of the *proviso*.[15] The test for whether the *proviso* applies is not whether there was *sufficient* inculpatory evidence for *this* trial judge to convict, but whether there was *so much* inculpatory evidence that *any* trial judge would convict.[16] The CLA further asks this Court to identify and correct two additional errors in the majority's interpretation of the *proviso*. Leaving these errors uncorrected will create confusion among lower courts and promote inconsistent applications of this Court's recent jurisprudence respecting the curability of cross-examination-related errors.

13. First, the Court should correct the majority's incorrect holding that it is "not essential" to the *proviso* analysis to determine whether the record includes answers to wrongly prohibited cross-examination questions.[17] Post-*R.V.*, this is an essential part of the *proviso* analysis. An appellate court can only cure an improper denial of the right to cross-examine if the defendant is able to "adequately test" the complainant's evidence on the topic in question.[18] The CLA asks this Court to explicitly direct appellate courts considering the *proviso* to consider whether the trial record reveals answers to prohibited questions, and if so, the source of those answers. The Court may also wish to clarify that 'adequate testing' is only established by the witness him- or herself answering the prohibited questions, either spontaneously or as a result of questioning that effectively breaches the (incorrectly issued) prohibition. Anything else is not testing at all, let alone adequate.

14. The Respondent suggests the Court may take guidance from the 'lost evidence' framework in determining whether the trial record satisfactorily fills the evidentiary gap left by a prohibition on cross-examination. The Court should reject this invitation. The lost evidence framework is an inapt tool for assessing the applicability of the *proviso* to the improper exclusion of defence evidence. This is because the two analyses aim to right different wrongs. Lost evidence claims seek a remedy for a violation of an accused's fair trial right, which generally requires the accused to establish "actual prejudice" to this right to obtain a remedy.[19] Applying the *proviso*, in contrast,

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[15] Factum of the Appellant at paras 74-80.
[16] *R v S(PL)*, [1991] 1 SCR 909, 64 CCC (3d) 193 at paras 42-46 per Sopinka J; *R v Trochym*, 2007 SCC 6, [2007] 1 SCR 239 at paras 81-82; *Sarrazin*, *supra* note 2 at paras 22, 24, 27.
[17] *R v Cortes* Rivera, 2020 ABCA 76, 2020 CarswellAlta 330 ["ABCA Reasons"] at para 29.
[18] *RV*, *supra* note 1 at paras 90-97.
[19] *R v Carosella*, [1997] 1 SCR 80, 112 CCC (3d) 289 at para 37; *R v La*, [1997] 2 SCR 680, 116 CCC (3d) 97 at paras 27-28; *R v Bjelland*, 2009 SCC 38, [2009] 2 SCR 651 at paras 21, 30.

does not ask the court to determine whether the trial was *Charter* compliant, but whether the verdict could have been different; *any* impact upon the verdict, regardless of degree, leads to a new trial. Considering the *proviso* through a lost evidence lens risks lowering the Crown's burden of demonstrating that the verdict would necessarily have been the same.

15. Second, and relatedly, the CLA asks the Court to caution appellate courts engaged in an "adequate testing" analysis to avoid using inadmissible material to generate substitute 'answers' to wrongly prohibited questions. This issue is squarely before the Court: a majority of the Alberta Court of Appeal in this case noted and relied on the fact that it was "highly unlikely that cross-examination would have revealed that JT had anal intercourse within the five day period…given… [her] completion of the form on which she checked 'no' to the question on whether she had had anal intercourse during the prior three days."[20] Reasoning of this sort is legally impermissible. The adequate testing analysis permits appellate courts to consider *admissible evidence* tending to show what the complainant's answers to prohibited questions would have been. It does not permit appellate courts to use inadmissible material to draw inferences about what those answers would have been.

16. This case provides the Court with an opportunity to remind appellate courts about the limited usefulness of medical records in sexual offence prosecutions. In particular, it should reject the practice of inferring what a witness' evidence would be from statements recorded in a SART ("Sexual Assault Response Team") report, the Ontario equivalent (Sexual Assault Evidence Kit or "SAEK"), or other similar medical record. This is an important and necessary clarification. A complainant's statements to a medical practitioner commonly makes their way into evidence as part of a medical record admitted to prove injury, or as source material underlying an expert opinion. In the absence of a specific application to introduce hearsay evidence, such records cannot prove either the fact or the truth of the statements contained therein. Clinical notes about *non-medical* observations are not admissible business or medical records.[21] Statements captured in this

[20] ABCA reasons at para 29.

[21] *Ares v Venner*, [1970] SCR 608, 14 DLR (3d) 4 at para 26; *Canada Evidence Act*, RSC 1985, c C-5, ss 30(1), 30(10)(a)(i). Business records are reliable and admissible because the data in them is entered routinely, repeatedly and habitually. Records are unreliable if they are potentially

form will almost always be additionally inadmissible as double-hearsay, oath-helping, or records prepared in the course of investigation under s. 30(10)(a)(i) of the *Canada Evidence Act*. Appellate courts, like trial courts, cannot use them to fill evidentiary gaps in the witness' testimony.

17. Ideally, the trial judge will explicitly limit the statement's use at the time of admission. If she does not, the appellate court should nonetheless caution itself about the limited value of that statement, to avoid improperly relying on it for the truth of its contents.

**C. Section 683 cannot fill evidentiary gaps created by intentional but erroneous trial rulings**

18. The CLA submits that Slatter JA's reliance upon s. 683 of the *Criminal Code* as a substitute for adequate testing of the complainant's evidence was wrong. It pushes s. 683 past its justified limits and transforms the appellate court into a trial court. This Court ought to explicitly disavow his approach.

19. Appellate courts can only use s. 683 of the *Criminal Code* to cure defects in the trial record when those defects were caused by inadvertent errors related to uncontroversial evidence. In these circumstances, s. 683 "corrects an oversight which would invariably have been corrected had it been addressed at trial."[22] Its limited scope makes sense because the further evidence received does not alter the nature of the case on appeal so the parties are not prejudiced by its receipt.[23] However, s. 683 must be used with "great care" and only in "exceptional cases".[24] Taschereau J in *Kissick* highlighted the dangers associated with extending s. 683 past this limit:

> A too liberal exercise of this power would undoubtedly conflict with the economy of our criminal law, would in certain instances give the Crown a second chance to make a case which it has failed to make at trial, and could possibly also invest a court of appeal with powers exclusively within the province of the jury.[25]

20. The exceptional use of s. 683 to cure defects in the trial record on appeal is apparent when one considers the circumstances in which appellate court have applied and, importantly, rejected

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'coloured' by external factors: *R v Dunn*, 2011 ONSC 2752, [2011] OJ No 2221 at paras 15-19; *R. v Schertzer* (2008), 232 CCC (3d) 218, [2008] OJ No 226 at para 15 (Ont Sup Ct).

[22] *R v Boles*, 1984 ABCA 224, 57 AR 232 at para 31.
[23] *R v Cheung* (1990), 56 CCC (3d) 381 (BCCA), 1990 CarswellBC 643 at para 22.
[24] *R v Kissick*, [1952] 1 SCR 343, 102 CCC 129 at para 22 per Taschereau J.
[25] *Kissick, ibid* at para 22.

it. For example, s. 683 has been applied: to permit an appellate court to hear *viva voce* evidence of drug analysts when the drug analyst certificates adduced at trial were inadvertently admitted and the defence did not object;[26] to permit a police officer to testify on appeal regarding his express consent to an intercepted communication in circumstances where that precondition to admissibility was not canvassed in evidence;[27] and where a formal precondition for the reading in of transcript evidence was inadvertently not considered.[28] On the other hand, the British Columbia Court of Appeal in *Cheung* refused the Crown's application to substitute the correct audiotapes on appeal for those that were inadvertently filed at trial since the court was not satisfied that the trial would necessarily have proceeded the same way if the error had been dealt with in the context of a reopening.[29]

21. As can be seen, s. 683 exists to correct inadvertent errors related to uncontroversial evidence and which could not have affected the course of the trial. It ought not to be expanded to permit appellate courts to engage in a search for fresh evidence simply because of an erroneous evidentiary ruling by a trial judge. First, reliance upon s. 683 in circumstances such as the case at bar risks permitting the Crown to split its case, a key factor motivating that provision's limited scope. The Crown could argue against the admissibility of evidence at the trial and, when the exclusion of evidence is found to be wrong on appeal, ask for the evidence to be heard and a conviction sustained (with the accused having no right to reply to the newly admitted evidence).

22. Second, s. 683 is an inadequate substitute for "adequate testing" of a witness' evidence at trial. Cross-examination is not so much a series of questions but a process of questioning. Nobody can predict the outcome of a cross-examination unless and until it has occurred. Unexpected responses can direct the cross-examiner immediately to other areas not envisioned. Directing a fresh evidence inquiry on only *one* aspect of a witness' evidence risks depriving an accused of the ability to properly challenge the *whole* of that witness' evidence. Indeed, in *Cheung*, a dispute regarding the appropriate scope of the fresh evidence sought under s. 683 contributed to a new trial being ordered.[30]

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[26] *Kissick*, *ibid*.
[27] *R v Dubois* (1986), 27 CCC (3d) 325 (Ont CA), 13 OAC 342.
[28] *R v Huluszkiw* (1962), [1963] 1 OR 157 (CA), 133 CCC 244.
[29] *Cheung*, *supra* note 23 at paras 21-22.
[30] *Cheung*, *ibid*.

23. Third, using s. 683 to hear controversial evidence on appeal in isolation deprives the accused of the opportunity to have his evidence, and that of the complainant, assessed under *W(D)* in the context of the evidence as a whole. Credibility assessments are not "purely intellectual"[31] and as a result it is difficult to know exactly how a missing piece of evidence would affect the original credibility assessment.

24. Fourth, expanding the scope of s. 683 will leave appellate counsel attempting to answer the sometimes-difficult question 'how would the trial have been different?' with little choice but to proactively call evidence to counter the Crown argument that *nothing* would have been different. Such an approach would create appellate delay and fairness concerns as the reviewing court navigates questions of admissibility and privilege (should trial counsel be called upon to testify). Such an outcome is practically unworkable and ought to be discouraged.

25. The parties in this case agree that Slatter JA's use of s. 683 to decide the applicability of the curative *proviso* is, at the very least, problematic.[32] The Respondent suggests that this issue might be better left to another day.[33] The CLA disagrees. This Court ought to explicitly disavow the approach adopted by Slatter JA – a speculative fresh evidence exercise by a judicial actor other than the trier of fact, aimed at filling evidentiary gaps that the trial judge deliberately created and which would otherwise prohibit application of the *proviso*.

## PART IV AND V: COSTS AND ORDER SOUGHT

26. The CLA takes no position on the disposition of this appeal. The CLA does not seek costs and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at Toronto, Ontario this 23rd day of November 2020.

per

**Megan Savard and Ian B. Kasper**
Counsel to the Intervener, Criminal Lawyers' Association of Ontario

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[31] *R v REM*, 2008 SCC 51, [2008] 3 SCR 3 at paras 48-49. See also *R v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621 at para 20 (per Bastarache and Abella JJ); *R v WH*, 2013 SCC 22, [2013] 2 SCR 180 at para 39.
[32] Factum of the Appellant at paras 93-101; Factum of the Respondent at paras 56, 101, 110-119.
[33] Factum of the Respondent at para 56.

## PART VI: SUBMISSIONS ON CASE SENSITIVITY

Not applicable.

## PART VII: TABLE OF AUTHORITIES

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