

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

B E T W E E N:

HIS MAJESTY THE KING

APPELLANT
(Respondent)

-and-

A.M.

RESPONDENT
(Appellant)

-and-

M.P.

RESPONDENT
(Appellant)

-and-

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(Pursuant to Rule 45 of the *Rules of the Supreme Court of Canada*)
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Outline of the Respondent A.M.

- **The starting point:** In *R. v. Barton*, Moldaver J. held that s. 276 should be broadly interpreted; however, he recognized limitations on its scope. The regime applies where “an offence listed in s. 276(1) has some connection to the offence charged”. He contemplated a case-by-case approach to determine the presence of the requisite connection to a listed offence.

Tab 5: *R. v. Barton*, 2019 SCC 33, 376 CCC (3d) 1, pp. 1-4, 25-34.

- **The purpose of s. 276:** While the twin myths can arise in proceedings for non-listed offences, s. 276 targets the historical prevalence of the twin myths in proceedings involving its listed offences. The first myth—that a complainant’s sexual history makes it more likely he or she consented—reflects the centrality of the absence of consent to the *actus reus* of assault. The second myth—that a complainant’s sexual history makes them less credible—can arise in any proceeding; however, Parliament singled out the offences listed in s. 276 as those most likely to be contaminated by this myth.

Tab 6: *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577, 66 CCC (3d) 321, pp. 321-326, 381, 386-387, 392-402; 406-411.

Tab 7: *R. v. Kruk*, 2024 SCC 7, 433 CCC (3d) 301, pp. 301-305; 333.

- **The purpose of commercial sex trade offences:** The modern commercial sex trade offences were created with sex workers’ vulnerability in mind. Parliament protected sex workers by extending the third-party records regime to these offences but declined to do so for s. 276, a distinction maintained by the records screening regime. This distinction aligns with the targeted nature of s. 276. Commercial sex trade offences focus on the relationship between the sex worker and the accused, whether it involves exploitation or coercion. The procedural safeguards of s. 276 are less relevant to these offences because consent is not one of their elements, and the proceedings inherently raise the spectre of other sexual activity.

Tab 8: *PCEPA*, S.C. 2014, c. 25, preamble

Tab 9: Chart of Legislative History of ss. 276, 278.2 and 278.92.

Tab 10: *R. v. Mills*, [1999] 3 SCR 668, 139 CCC (3d) 321, pp. 321-327, 380.

Tab 11: *R. v. J.J.*, 2022 SCC 28, 415 CCC (3d) 285, pp. 285-291, 354-355.

Tab 12: *R. v. Ochrym*, 2021 ONCA 48, 400 CCC (3d) 358, pp. 358-359, 364-368.

Tab 13: *R. v. Williams*, 2020 ONSC 6347, 396 CCC (3d) 267, pp. 267-268, 281-291.

- **The case-by-case approach:** Where a proceeding, in substance, implicates a listed offence, the twin myths are more likely to be engaged and s. 276 applies. A proceeding implicates a listed offence where a listed offence (1) is the predicate offence (e.g. *Barton*) (2) the defence wishes to question a complainant about conduct amounting to a listed

offence (e.g. asking a complainant about prior sex work when they were a child) or (3) where, having regard to the charges, the evidence the Crown proposes to lead, and the evidence the defence proposes to lead, the proceedings implicate a listed offence. Requiring a connection to a listed offence advances the goals of s. 276, is consistent with *Barton* and does not expand the scope of s. 276 beyond what Parliament intended.

Tab 14: Reasons of the Court of Appeal, *R. v. A.M.*, 2024 ONCA 661, at paras. 89-92.

- **The categorical approach:** The categorical approach would expand the scope of s. 276 to any offence of a sexual nature. Applying *Barton* and the modern approach to statutory interpretation leads to the conclusion that Parliament did not intend this. The phrase “in respect of” is broad, but not unlimited. Had Parliament intended for s. 276 to apply categorically to commercial sex trade offences, it would have listed them.

Tab 15: Reasons of the Court of Appeal, *R. v. A.M.*, 2024 ONCA 661, at paras. 74-87.

Tab 16: *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 SCR 921, at paras. 19-24.

Tab 17: *Kosicki v. Toronto (City)*, 2025 SCC 28, at paras. 33, 37, 39, 41-43, 50-51, 72-73.

- **Response to the Appellant’s criticisms of the case-by-case approach:** Section 276 is a complex procedure. The categorical approach, unlike the case-by-case approach, would see it applied unnecessarily. Where s. 276 does not apply, trial judges can and should intervene to prevent irrelevant questioning based on stereotypes about sex workers.

Tab 18: *R. v. Kruk*, 2024 SCC 7, 433 CCC (3d) 301, pp. 334-335.

- **The proposed expansion of the common law:** Adding offences to s. 276’s listed offences would represent a significant expansion of the common law contrary to Parliament’s intent. There is no “gap” to fill: the case-by-case approach requires pre-screening where a listed offence is implicated; trial judges will otherwise gatekeep myth and stereotype-based evidence. Parliament is the proper forum for the policy-based arguments advanced by the Appellant.

Tab 19: *R. v. Kinamore*, 2025 SCC 19, 448 CCC (3d) 427, [full case]

Tab 20: *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 SCR 842, at para. 42.

OUTLINE OF THE ORAL ARGUMENT OF THE RESPONDENT, M.P.

1. The trial judge erred in ruling that s. 276 precluded the Respondents from cross-examining A.K. about her prior work in the sex trade.

- i. The trial judge ruled that the evidence of A.K.'s prior work in the sex trade, including who she worked with and her posting of advertisements, was irrelevant and prohibited by s. 276(1).

Respondents' Condensed Book, S. 276 Ruling, paras. 22 – 23, 27 – 29
 Respondents' Condensed Book, *R. v. A.M. and M.P.* 2024 ONCA 661 at paras. 36 – 45

- ii. The Court of Appeal held that the trial judge erred in his ruling both as to the relevance of the evidence sought to be adduced through cross-examination and to whether this evidence engaged the twin myth reasoning prohibited by s. 276(1).

Respondents' Condensed Book, *R. v. A.M. and M.P.* 2024 ONCA 661 at paras. 7, 116 – 122

2. The evidence sought to be adduced through cross-examination was relevant.

- i. In general, how a person acted in the past can be relevant to how they acted in similar circumstances in the present whether this evidence is characterised by being character evidence, evidence of habit or evidence of custom and practice.

Respondents' Condensed Book, *R. v. Hussein* 2026 SCC 2 at paras. 30 – 35

- ii. The evidence was relevant to the relationship between A.K. and each of the Respondents. The nature of the relationship between the parties is relevant to sexual service offences of receiving material benefits and exercising control, direction or influence over movement. Prior experience in the sex trade is relevant to understanding this.

Respondents' Condensed Book, Section 286.2, *Material Benefit*, ss. (4), (5), (6)
 Respondents' Condensed Book, *R. v. Ochrym* 2021 ONCA 48 at para. 30.
 Respondents' Condensed Book, *R. v. A.M. and M.P.* 2024 ONCA 661 at paras. 117 – 119

- iii. A.K.'s history of posting advertisements by herself was relevant to rebut her testimony that she needed help from the Respondents in wording the ads and in dealing with the technical difficulties in posting the ads.

Respondents' Condensed Book, Testimony of A.K. A.R. Vol. VII, pages, Vol. VIII pages

- iv. This court has recognized that pattern of conduct evidence can be relevant for its non-sexual features in the s. 276 context.

Respondents' Condensed Book, *R. v. Goldfinch* 2019 SCC 38 at paras. 46, 65

3. The evidence sought to be adduced did not engage the twin myths and the inference sought was not “by reason of the sexual nature of that activity.”

- i. The Respondents were not seeking to adduce direct evidence of A.K.'s sexual activities nor to argue that she was less worthy of belief because of her prior work in the sex trade.

Respondents' Condensed Book, *R. v. A.M. and M.P.* 2024 ONCA 661 at paras. 117 – 119

- ii. Consent was not a live issue at trial. The Respondents were not relying on an inference from her prior sex work that she was more likely to have consented to the sexual activity that formed the subject matter of the charge.

Respondents' Condensed Book, *R. v. A.M. and M.P.* 2024 ONCA 661 at paras. 69, 95 – 98, 120 – 121

- iii. The inference sought was not “by reason of the sexual nature of that activity.”

Respondents' Condensed Book, *R. v. A.M. and M.P.* 2024 ONCA 661 at para. 122

Respondents' Condensed Book, *R. v. Darrach*, 2000 SCC 46 at para. 35

4. The restrictions on cross-examination and the redactions from A.K.'s preliminary hearing testimony denied the Respondents' right to make full answer and defence.

Respondents' Condensed Book, *R. v. A.M. and M.P.* 2024 ONCA 661 at para. 129 – 133

Respondents' Condensed Book, *R. v. R.V.* 2019 SCC 41 at para. 86

DATE: 20191218

SUPERIOR COURT OF JUSTICE

HEARD: October 18, 2019

Pursuant to s. 278.95(1)(a) and (b) of the *Criminal Code*, the identity of the complainant, the contents of the application record, and the evidence taken and submissions at the hearing of this matter may not be published. Pursuant to s. 278.95(1)(c) of the *Criminal Code* this Ruling may be published in a legal publication or report (online or print).

[1] The defendants in this action are charged with a variety of offences. These include trafficking in persons, contrary to s. 279.01 of the *Criminal Code*, receiving a material benefit from trafficking, contrary to s. 279.02, advertising sexual services, contrary to s.

286, as well as trafficking in certain drugs, contrary to s. 5 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

- [2] The defendants have brought an application under s. 276 of the *Criminal Code* in advance of trial to obtain an order permitting them to cross-examine the complainant on her history of working in the sex trade. Submissions on this application were received not only from the applicants and the Crown but also from legal counsel for the complainant.
- [3] Originally, the trial was to be heard before a jury. However, the defendants subsequently re-elected and the case is now scheduled to be tried by judge alone.
- [4] The complainant has previously given evidence to the police by way of statements and has been examined at a preliminary inquiry. This evidence suggests that the complainant entered the sex trade between approximately [redacted for publication] years of age. She has worked both independently and for others.
- [5] The events leading up to the current charges started with a meeting at a club where the complainant was introduced by a friend to the defendant, A.M., and another person who I shall refer to as “D”. The evidence of the complainant was that she was then working in the escort industry for a company and was planning to work independently. Her girlfriend introduced her to D. and the defendant A.M. Initially, the complainant travelled to [redacted for publication] to work for D. as an escort. However, that relationship ended quickly as she was caught stealing drugs from him.
- [6] After her return to Ontario in [redacted for publication] 2015, the complainant followed up with A.M. and according to the evidence of the complainant, she began to work for the defendant, A.M., by providing sexual services to clients in the [redacted for publication] area. Subsequently, the complainant started working with both defendants in the sex trade. However, there was a period of time when the complainant terminated the relationship she had with the defendants and decided to work independently. Subsequently, however, she came back to work for the defendants. According to the allegations contained in the indictment, the working relationship between the complainant and the defendants occurred between [redacted for publication] 2015 and [redacted for publication] 2017.
- [7] For purposes of the s. 276 application, the applicants rely principally on the charge of human trafficking. Section 279.01(1) of the *Criminal Code* defines trafficking in persons as follows:

Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence.

[8] Section 279.04(1) defines exploitation for purposes of this section. It states that,

A person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

[9] Section 279.04(2) provides that in determining whether an accused exploits another person under subsection (1), the court may consider whether the accused: (a) used or threatened to use force or another form of coercion; (b) used deception; or (c) abused a position of trust, power or authority.

[10] The Crown's theory is that the defendants used their position as drug suppliers to the complainant to control her and to work in the sex trade for them. The Crown asserts that the defendants were in a position of trust vis-à-vis the complainant.

[11] In summary, therefore, the Crown alleges that the defendants used the supply of drugs to get the complainant to perform sex work and later, to coax her back into sex work after she decided to leave them and work independently.

[12] The position of the defendants is that there was no position of trust between them and the complainant. They note that based on the complainant's evidence, she was escorting and addicted to drugs well before she met them and also continued to escort independently and use drugs in the time frame after she initially left them and her subsequent return to work for them.

[13] The applicants have sought an order under s. 276 to cross-examine the complainant on the following areas:

- (a) That the complainant had worked previously in the sex trade;
- (b) The details regarding how the complainant entered the sex trade;
- (c) How often/how long the complainant worked in the sex trade;
- (d) That the complainant had previously posted ads on backpage.com including copies of advertisements previously posted by the complainant;
- (e) Who the complainant worked with in the past (agency work and independent work);
- (f) What the money split was during her previous work experiences;
- (g) That the complainant could make more money independently;

- (h) That the complainant was open with her family about her work for safety reasons;
- (i) The meeting with D. and arrangements to work with D.;
- (j) The complainant's independent work during the time of the allegations; and
- (k) That the complainant worked as a sex worker after the time frame for the allegations.

[14] As noted at paragraph 48 of the applicants' factum, the rationale for introducing the above-noted evidence is stated as follows:

Thus, the Applicants submit that the evidence that is sought to be adduced is to be used to prove that there is no evidence of any dependency on them, no evidence of any exploitation and as such, no evidence of Human Trafficking.

The Principles Applicable to a s. 276 Application

- [15] It is significant to note at the outset that the application of s. 276 has recently been the subject of two important Supreme Court of Canada decisions. These decisions are *R. v. Barton*, 2019 SCC 33, and *R. v. Goldfinch*, 2019 SCC 38.
- [16] Section 276 is stated to apply to proceedings in respect of an offence under certain sections of the *Criminal Code*. None of the charges involving the defendants in this case would specifically fall under those sections. The application by the defendants was, however, brought under s. 276. I have concluded that s. 276 is applicable in the present circumstances. In the *Barton* decision, the court noted at para. 76 that the s. 276 regime applies to any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document.
- [17] In the present case, the charges in the indictment would strike at the heart of the necessary consent for the complainant to engage in the sexual services provided by her at the request of the defendants. As a result, the sexual assault provisions contained in s. 271 of the *Criminal Code* are engaged. I therefore agree that the provisions of s. 276 are applicable in this case.
- [18] Section 276 requires a two-stage approach. At the initial stage, the court must consider whether the evidence:
- (a) is of specific instances of sexual activity;
 - (b) is relevant to an issue at trial; and

- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[19] At stage two, if a court determines that the criteria under the first stage have been met, the court is required to consider whether the evidence is admissible taking into account the following criteria:

- (a) the interests of justice including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge of justice considers relevant.

[20] In the present case, due to time constraints, counsel made argument on both the stage one and stage two analysis. It was agreed that I would then deliver my Reasons dealing with the argument on both stage one and stage two issues. No evidence was called by any of the parties on the *voir dire*.

Is the evidence admissible that the complainant has worked previously in the sex trade?

[21] At paragraph 54 of the applicants' factum it asserts that,

Without permitting the Applicants to put forward evidence to the contrary and to question the complainant on her engagement in the sex trade prior to meeting the Applicants and independently while also working with the Applicants, would put before the courts a skewed interpretation of the nature of the relationship between the complainant and the Applicants.

[22] Both the Crown and the complainant take the position that the complainant's prior sex trade work is not relevant to what took place between the complainant and the

defendants. I agree with this submission. The applicants' position appears to be that because the complainant was already a sex trade worker, she was less likely to be coerced or exploited to perform the specific sex trade work that forms the basis of the charges before the court. In my view, this falls into one of the twin myths set out in s. 276(1) which states that evidence that the complainant has engaged in some other sexual activity is not admissible to support an inference that, by reasons of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or is less worthy of belief. At para. 1 in the *Barton* decision, the Supreme Court notes that we live in a time where myths and sexual violence against women — particularly indigenous women and sex workers are tragically common.

- [23] The fact that the complainant was a sex trade worker and was addicted to drugs previously does not have any relevance to the charges faced by the accused. I have therefore concluded that this proposed area of cross-examination is not relevant to an issue at trial and is therefore inadmissible without any stage two analysis.
- [24] I reach the same conclusion for the same reasons with respect to items (b) and (c) of the proposed areas for cross-examination.

Should the defendants be entitled to cross-examine the complainant about her previously posted ads on backpage.com and the defendants' request to introduce previous ads posted by the complainant unrelated to her relationship with the defendants?

- [25] On the charge under s. 286.4 of the *Criminal Code*, the Crown must prove that the defendants knowingly advertised and offered to provide sexual services for consideration. The defendants' position is that the complainant could have posted the backpage.com advertisements which are the subject matter of the allegations against the defendants. They seek to rely on prior ads that the complainant previously posted on the backpage.com website.
- [26] During argument, the Crown advised that it would agree that the photographs and wording used in the advertisements which are the subject matter of the charge were provided to the defendants by the complainant. They will also agree to the fact that the complainant knew how to post advertisements on the internet.
- [27] In light of the Crown's position, I am of the view that the proposed cross-examination is not relevant. The fact that the complainant may have posted ads in the past adds nothing to the question of who was responsible for posting ads during the time it is alleged that the complainant was working for the defendants. I would note, however, that this issue can be re-visited in the event that the complainant in her evidence makes any suggestion that she was not aware of how to post an ad on the internet. This decision is without prejudice to the right of the defendants to cross-examine the complainant about her knowledge of how to post an ad on the internet.

Can the defendants cross-examine the complainant about her work in the past with agencies and/or independent work?

- [28] This proposed area of cross-examination once again appears to rely on the proposition that the complainant is more likely to have consensually worked for the defendants based on her prior work in the sex trade. This proposed area of examination would therefore appear to violate one of the twin myths which is that the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge based on her prior history of sexual activity. For this reason, I conclude that this evidence is not relevant to an issue at trial and therefore does not require any stage two analysis.
- [29] Similarly, there will not appear to be any relevance to the issue of how the complainant split the money during her previous work experiences and whether she could make more money independently. I also do not see any relevance to the issue of whether the complainant was open with her family about her work in the sex trade.

Should the defendants be able to cross-examine the complainant about her meeting with D. and her arrangements to work with D.?

- [30] The Crown during argument conceded that this evidence was relevant to issues before the court. The Crown wishes to introduce evidence about D. as the meeting with D. is interwoven into the evidence as to how the complainant came to know the defendant A.M. The complainant acknowledges that the discussion at this meeting might be relevant but argues that the evidence about the complainant's working in the sex trade at the time should be excluded based on a balancing of the factors set out in s. 276(3).
- [31] I agree that the evidence of the meeting with D. and the defendant A.M. is relevant and does not engage the twin myths as set out in s. 276(1). This evidence would be relevant to issues at trial including the complainant's motive for approaching the defendant A.M. as well as the negotiations which took place in relation to the alleged proposal to work for D. and the defendant A.M. These discussions would also appear to be relevant to the allegation that the complainant was coerced into working with either D. and/or the defendant A.M.
- [32] I am further satisfied that in determining whether the evidence is properly admissible under the stage two analysis and the balancing of factors under s. 276(3), the balance favours the admission of this evidence at trial. To deny the defence the right to cross-examine on the discussions which took place at the commencement of the relationship would significantly impair the right of the accused to make a full answer and defence. It also appears there is reason to believe the evidence will assist in arriving at a just determination in this case. As this case is not being tried by a jury, there is no basis to believe that the evidence may unduly allow sentiments of prejudice, sympathy or hostility in a jury. With respect to the potential prejudice of the complainant's personal dignity and right of privacy, I have concluded that this potential prejudice has been minimized given that the focus of this evidence will be limited to the circumstances surrounding the discussion with the complainant at the beginning of the relationship. The evidence will not extend to the complainant's previous work in the sex trade.

- [33] Both the Crown and the defence, will, therefore, be entitled to canvass evidence with respect to the initial meeting during the course of the evidence at trial.
- [34] During argument on the Application, the complainant asked that if evidence of any discussions with D. is permitted, that a pseudonym for D. be used and that his name not be referred to in the evidence. This request is based on personal security concerns of the complainant. During the course of argument, both the defence and the Crown agreed that at trial, D. will be referred to by a pseudonym without prejudice to the right of any party to call him as a witness in which event his proper name would become known.

Can the complainant be examined about the independent work she did during the time period of the allegations?

- [35] The Crown concedes that the independent sex trade work the complainant engaged in during the time of the allegations is relevant. The complainant does not agree with the Crown's position in this regard. The complainant takes the position that whether the complainant was working independently as a sex trade worker during the time frame of the allegations, cannot, on its own, have any bearing on whether the complainant was likely to have consented to performing commercial sexual activity at the behest of the defendants in an exploitive or coercive manner.
- [36] I have concluded that this evidence is relevant and does not engage one of the twin myths. The fact that the complainant left the defendants during the time period of the allegations and subsequently returned to work for the defendants is relevant to the question of whether the complainant's work for the defendants was as a result of their alleged coercive or exploitive behaviour. Depending on the evidence adduced at trial, the evidence of the complainant about her independent work during the time of the allegations may have the potential to weaken the Crown's case that the complainant was exploited in the alleged employment by the defendants.
- [37] In considering the factors set out in s. 276(3) I have concluded that the interests of justice, including the right of the accused to make a full answer and defence is engaged and there is a reasonable prospect that this evidence will assist in arriving at a just determination in the case. With respect to the potential prejudice to the complainant's personal dignity and right of privacy, the narrow focus for this evidence should minimize that potential prejudice. In addition, I agree with the Crown that questions in this area ought to be very general in terms of the type and amount of work done by the complainant in this time period. There is no need to go into the details of the sexual activities performed, and in fact, during their argument, the defence indicated they had no intention to delve into these types of details. I therefore conclude that this area of examination and cross-examination is admissible pursuant to s. 276.

Should the defendants be entitled to cross-examine the complainant about her work in the sex trade after the time period of the allegations?

- [38] The Crown position which is adopted by the complainant is that this issue is not relevant.

- [39] There may be certain cases where a complainant's actions following the alleged sexual activities are relevant. For example, in *R. v. L.S.*, 2017 ONCA 685, the Ontario Court of Appeal dealt with an appeal where the defence sought to introduce evidence of a continuing sexual relationship with the complainant after the alleged assault. In that case, the complainant and the accused cohabited and continued with a sexual relationship after the alleged assault. The trial judge dismissed an application by the defendant to introduce evidence of continued sexual activity after the alleged assault. On appeal, Justice Doherty found that the evidence was relevant. He stated at para. 88 that the evidence of the relationship carrying on as it had before the alleged assault was in fact relevant to whether the assault occurred. In that case, the defence could argue that evidence of a continuing sexual relationship could support the defence position that nothing had happened because nothing had in fact happened. The evidence in this case is quite different. The evidence relating to the complainant's continued involvement in the sex trade is in no way related to the alleged involvement of the defendants. The inference the defence is attempting to assert is that the complainant's return to the sex trade is evidence that the defendants' alleged coercion had no bearing on the complainant's earlier decision to engage in the sex trade. However, this argument would appear to engage one of the twin myths that the complainant was more likely to have consented to the sexual activity that forms the subject matter of the charge because of her sexual activity subsequently. For this reason I have concluded that this evidence is not relevant to an issue at trial and is not properly admissible evidence.

Should the defence be entitled to cross-examine the complainant about inconsistencies in her evidence about the time when she started working in the sex trade?

- [40] The defendants have referred to the evidence of the complainant during the statement she gave to the police that she first engaged in sex work with an agency called [redacted for publication] when she was [redacted for publication] years old. However, during the preliminary hearing, the complainant testified that she first became a sex worker [redacted for publication] at the age of [redacted for publication]. The complainant further testified that she first worked at an agency by the name of [redacted for publication] and/or [redacted for publication] in [redacted for publication] for approximately six months.
- [41] It is apparent in reviewing the inconsistencies that they are relatively minor and relate to a period well before the alleged offences. Under s. 276(2), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than that which forms the subject matter of the charge unless the evidence, "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice".
- [42] As noted in the Supreme Court of Canada decision in *R. v. Darrach*, [2000] 2 S.C.R. 443, the requirement of "significant probative value" serves to exclude evidence of trifling relevance which, even though it is not being used to support the two forbidden inferences, will still endanger the proper administration of justice.

- [43] I have concluded that the inconsistencies in this case do not have significant probative value, but instead are of trifling relevance even though they are not being used to support the two forbidden inferences. Any probative value is substantially outweighed by the danger of prejudice to the proper administration of justice. I conclude, therefore, that this evidence is not admissible at trial.

Summary

- [44] As noted previously, this application has been decided based on the information available prior to trial. The decisions I have made are without prejudice to the defendants renewing their application if so advised, based on additional evidence which may arise at trial.

Justice M. McKelvey

Released: December 18, 2019

CITATION: R. v. A.M., 2019 ONSC 7293

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

A.M. and M.P.

Defendants/Applicants

RULING RE: SECTION 276 APPLICATION

Justice M. McKelvey

Released: December 18, 2019

R. v. A.M.

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[Indexed as: **R. v. A.M.**]

His Majesty the King (Respondent) and A.M. (Appellant)

His Majesty the King (Respondent) and M.P. (Appellant)

Ontario Court of Appeal

Docket: CA C68920, C68957

2024 ONCA 661

K. van Rensburg, J. George, L. Favreau JJ.A.

Heard: December 19, 2023

Judgment: September 6, 2024

Jeffery Couse, for Appellant, A.M.

Jack Gemmell, for Appellant, M.P.

Vallery Bayly, for Respondent

Evidence — Character evidence — Sexual conduct of complainant — M and P charged with human trafficking and sexual services offences in relation to complainant — M and P alleged to have acted as her pimps, advertising services, screening clients and taking fifty-percent share of earnings — At preliminary inquiry, complainant cross-examined on history of employment in sex trade — During judicial pre-trial, trial judge told accused that cross-examination on complainant's prior employment in sex trade required application under s. 276 of Criminal Code — Trial judge dismissed s. 276 application, ruled prior employment not relevant, restricted cross-examination, directed transcript of complainant's evidence at preliminary inquiry be redacted — Trial judge acquitted both accused of human trafficking offences, convicted of sexual service offences — Both accused appealed — Appeal allowed, new trial ordered — Section 276 does not apply to all proceedings where the accused is charged with human trafficking or sexual service offences — Whether s. 276 applies must be determined on case-by-case basis — Trial judge erred in applying s. 276 to these proceedings — Failure to permit cross-examination impacted accused's right to make full answer and defence — Criminal Code, s. 276.

[See *Ewaschuk, Criminal Pleadings & Practice*: 21:311]

M and P were charged with offences related to sexual services provided by the complainant. Both were alleged to have acted as the complainant's pimps, posting ads for her services, making arrangements with clients, taking a share of the money she earned, and exploiting her drug dependency as a means of controlling and influencing her involvement in the sex trade. The complainant was in a romantic relationship with M, who used his cellphone number in advertisements for her services; P occasionally drove the complainant to hotels and clients'

homes. Eventually, the complainant began working out of a rented home where she lived with M and P. After an altercation, the complainant made a statement to police and M and P were charged with human trafficking and sexual services offences. M was charged with uttering threats and assault, and both were charged with trafficking in MDMA, cocaine and cannabis. During the preliminary inquiry, the complainant testified that she worked in the sex trade before she met the accused, working with agencies and independently. She testified that she preferred to work with an agency because it offered greater safety precautions, including client screening.

During a judicial pre-trial, the accused were advised that they were required to bring an application under s. 276 of the *Criminal Code* to cross-examine the complainant on her work in the sex trade, despite the fact that none of the human trafficking or sexual service offences are listed under s. 276 of the *Code*. The accused brought the application, which was dismissed. The trial judge found that the complainant's previous work in the sex trade was not relevant to the issues at trial, but that the accused could cross-examine about the complainant's independent sex work during the time period of the allegations. The transcript of the complainant's testimony at the preliminary inquiry was redacted to conform to the ruling.

The trial judge ultimately acquitted both accused the human trafficking offences and trafficking in cocaine and cannabis. M was acquitted of uttering threats and assault. In doing so, the trial judge noted serious discrepancies between the complainant's testimony at trial, statement to police and testimony at the preliminary inquiry. The trial judge found that the accused had not exploited the complainant's drug dependency or otherwise coerced her to sell sexual services and that her motivation for doing so was financial. The trial judge convicted both accused of the sexual services offences. The trial judge found that while the complainant was at liberty to overrule the decision of the accused in arranging meetings with and screening clients, their acts constituted influence over the complainant and were intentional. M was also convicted of trafficking MDMA based on the trial judge's acceptance of the complainant's testimony and confirmatory messages on her cellphone. Both accused appealed from conviction.

Held: The appeals were allowed in part and new trials ordered on the sexual services offences.

Section 276 does not apply categorically to all proceedings where the accused is charged with a human trafficking or sexual services offence. Section 276 lists 14 specific offences and states that it applies to proceedings in respect of those offences. Sexual services and human trafficking offences are not listed. The application of s. 276 to proceedings involving sexual services and human trafficking offences must be determined on a case-by-case basis. For s. 276 to be engaged, the commission of a listed offence must arise on the facts, such that it is implicated in the particular proceeding. The focus must be on the individual proceed-

ing and not the category of offence. On a case-by-case basis, the court must consider the evidence the Crown proposes to lead, and whether the defence intends to elicit evidence of a listed offence.

The trial judge erred in applying s. 276 to these proceedings. None of the listed offences was an included offence to the charges in this case, not was such an offence implicated in the facts advanced by the Crown. Sexual assault is not an included offence to procuring, even when it is alleged that the accused has exercised control over the complainant's movements. The requirement that the accused exercised control is not the same as saying the complainant did not consent to the act. In this case, there was no evidence that the complainant did not consent to the sexual services provided, was sexually assaulted, or forced to work in the sex trade. The trial judge erred in redacting the complainant's preliminary inquiry evidence and precluding the accused from certain lines of questioning in their cross-examinations, preventing the accused from making full answer and defence. This was not an appropriate case in which to apply the proviso.

The Crown's alternative argument, that a "Seaboyer-type" application ought to be required in all sexual services and human trafficking proceedings, was rejected. Applying the *Seaboyer* framework would represent a dramatic shift in the common law, extending it to an entirely new category of offences, circumventing Parliament's choice to not to include sexual offences in s. 276. There was no legislative gap for the common law to fill.

M's conviction for trafficking in MDMA was not unreasonable. The nature of a substance can be proven by circumstantial evidence in the absence of a seizure.

Cases considered by *K. van Rensburg J.A.*:

- Canadian Alliance for Sex Work Law Reform v. Attorney General* (2023), 2023 ONSC 5197, 2023 CarswellOnt 14464, 535 C.R.R. (2d) 40 (Ont. S.C.J.) — referred to
- Her Majesty the Queen v. Terrell Ochrym* (2021), 2021 CarswellOnt 10305, 2021 CarswellOnt 10306, [2021] S.C.C.A. No. 106 (S.C.C.) — referred to
- N.S. v. His Majesty the King* (2023), 2023 CarswellOnt 261, 2023 CarswellOnt 262, [2022] S.C.C.A. No. 281 (S.C.C.) — referred to
- R. v. A.M.* (2021), 2021 ONCJ 266, 2021 CarswellOnt 6690 (Ont. C.J.) — followed
- R. v. A.M.* (2019), 2019 ONSC 7293, 2019 CarswellOnt 24148 (Ont. S.C.J.) — referred to
- R. v. Barton* (2019), 2019 SCC 33, 2019 CSC 33, 2019 CarswellAlta 985, 2019 CarswellAlta 986, 86 Alta. L.R. (6th) 1, [2019] S.C.J. No. 33, [2019] 7 W.W.R. 191, 54 C.R. (7th) 231, 435 D.L.R. (4th) 191, 376 C.C.C. (3d) 1, [2019] A.C.S. No. 33, [2019] 4 C.N.L.R. 161, [2019] 2 S.C.R. 579, [2019] 2 R.C.S. 579 (S.C.C.) — followed

- R. v. Darrach* (2000), 2000 SCC 46, 2000 CarswellOnt 3321, 2000 CarswellOnt 3322, 49 O.R. (3d) 735 (headnote only), 36 C.R. (5th) 223, 148 C.C.C. (3d) 97, 259 N.R. 336, 191 D.L.R. (4th) 539, 78 C.R.R. (2d) 53, 137 O.A.C. 91, [2000] 2 S.C.R. 443, [2000] S.C.J. No. 46, REJB 2000-20352 (S.C.C.) — followed
- R. v. Europe* (2023), 2023 ONSC 5322, 2023 CarswellOnt 14707 (Ont. S.C.J.) — referred to
- R. v. Floyd* (2019), 2019 ONSC 7006, 2019 CarswellOnt 19947 (Ont. S.C.J.) — referred to
- R. v. Fryza* (2012), 2012 MBCA 47, 2012 CarswellMan 258, [2012] M.J. No. 185, 280 Man. R. (2d) 134, 548 W.A.C. 134 (Man. C.A. [In Chambers]) — referred to
- R. v. G.F.* (2021), 2021 SCC 20, 2021 CSC 20, 2021 CarswellOnt 6892, 2021 CarswellOnt 6893, [2021] S.C.J. No. 20, 71 C.R. (7th) 1, 459 D.L.R. (4th) 375, 404 C.C.C. (3d) 1, 163 O.R. (3d) 480 (note), [2021] 1 S.C.R. 801, [2021] 1 R.C.S. 801 (S.C.C.) — referred to
- R. v. Gallone* (2019), 2019 ONCA 663, 2019 CarswellOnt 13146, 56 C.R. (7th) 288, 147 O.R. (3d) 225, 379 C.C.C. (3d) 1, [2019] O.J. No. 4247 (Ont. C.A.) — referred to
- R. v. Goldfinch* (2019), 2019 SCC 38, 2019 CSC 38, 2019 CarswellAlta 1285, 2019 CarswellAlta 1286, [2019] 8 W.W.R. 1, 435 D.L.R. (4th) 1, 89 Alta. L.R. (6th) 1, 55 C.R. (7th) 215, [2019] S.C.J. No. 38, 380 C.C.C. (3d) 1, 442 C.R.R. (2d) 118, [2019] 3 S.C.R. 3, [2019] 3 R.C.S. 3 (S.C.C.) — referred to
- R. v. J.C. and D.B.* (2023), 2023 ONSC 6093, 2023 CarswellOnt 21432 (Ont. S.C.J.) — referred to
- R. v. J.J.* (2022), 2022 SCC 28, 2022 CSC 28, 2022 CarswellBC 1719, 2022 CarswellBC 1720, 81 C.R. (7th) 1, 471 D.L.R. (4th) 577, 415 C.C.C. (3d) 285, 510 C.R.R. (2d) 1, [2022] S.C.J. No. 28 (S.C.C.) — referred to
- R. v. Langford* (2021), 2021 ONSC 4307, 2021 CarswellOnt 9586, 74 C.R. (7th) 147 (Ont. S.C.J.) — followed
- R. v. Lees* (2023), 2023 ONSC 124, 2023 CarswellOnt 116 (Ont. S.C.J.) — referred to
- R. v. Levy* (1991), 62 C.C.C. (3d) 97, 44 O.A.C. 5, 3 C.R. (4th) 393, 1991 CarswellOnt 81, [1991] O.J. No. 198 (Ont. C.A.) — referred to
- R. v. M.D.* (2020), 2020 ONSC 951, 2020 CarswellOnt 1808 (Ont. S.C.J.) — not followed
- R. v. MacMillan* (2021), 2021 ONSC 3952 (Ont. S.C.J.) — referred to
- R. v. Maldonado Vallejos* (2022), 2022 ONSC 2753, 2022 CarswellOnt 7065 (Ont. S.C.J.) — referred to
- R. v. N.G.* (2023), 2023 ONSC 792, 2023 CarswellOnt 5757 (Ont. S.C.J.) — referred to

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- R. v. N.S.* (2022), 2022 ONCA 160, 2022 CarswellOnt 2400, 78 C.R. (7th) 1, (sub nom. *R. v. S. (N.)*) 169 O.R. (3d) 401, 413 C.C.C. (3d) 5, 504 C.R.R. (2d) 47 (Ont. C.A.) — referred to
- R. v. Ochrym* (2021), 2021 ONCA 48, 2021 CarswellOnt 871, 69 C.R. (7th) 285, 400 C.C.C. (3d) 358, [2021] O.J. No. 352 (Ont. C.A.) — considered
- R. v. Pearle* (2016), 2016 ONCA 954, 2016 CarswellOnt 19725, [2016] O.J. No. 6505 (Ont. C.A.) — referred to
- R. v. Powell* (2021), 2021 ONCJ 708, 2021 CarswellOnt 20684 (Ont. C.J.) — referred to
- R. v. R.V.* (2019), 2019 SCC 41, 2019 CSC 41, 2019 CarswellOnt 12413, 2019 CarswellOnt 12414, 55 C.R. (7th) 297, 436 D.L.R. (4th) 265, 378 C.C.C. (3d) 193, [2019] S.C.J. No. 41, 440 C.R.R. (2d) 159, 155 O.R. (3d) 543 (note), [2019] 3 S.C.R. 237, [2019] 3 R.C.S. 237 (S.C.C.) — followed
- R. v. Ryckman* (2022), 2022 ONSC 20 (Ont. S.C.J.) — referred to
- R. v. Samaniego* (2022), 2022 SCC 9, 2022 CSC 9, 2022 CarswellOnt 3617, 2022 CarswellOnt 3618, 466 D.L.R. (4th) 581, 78 C.R. (7th) 231, 412 C.C.C. (3d) 7, [2022] S.C.J. No. 9, 165 O.R. (3d) 320 (note) (S.C.C.) — referred to
- R. v. Seaboyer* (1991), 7 C.R. (4th) 117, 128 N.R. 81, 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 48 O.A.C. 81, 4 O.R. (3d) 383 (headnote only), 1991 CarswellOnt 1022, 1991 CarswellOnt 109, [1991] S.C.J. No. 62, EYB 1991-67624 (S.C.C.) — considered
- R. v. Starr* (2000), 2000 SCC 40, 2000 CarswellMan 449, 2000 CarswellMan 450, [2000] S.C.J. No. 40, 36 C.R. (5th) 1, 147 C.C.C. (3d) 449, 190 D.L.R. (4th) 591, [2000] 11 W.W.R. 1, 148 Man. R. (2d) 161, 224 W.A.C. 161, 258 N.R. 250, [2000] 2 S.C.R. 144, [1998] S.C.C.A. No. 141, REJB 2000-20233 (S.C.C.) — considered
- R. v. T.A.* (2020), 2020 ONSC 6714 (Ont. S.C.J.) — referred to
- R. v. T.W.W.* (2024), 2024 SCC 19, 2024 CSC 19, 2024 CarswellBC 1463, 2024 CarswellBC 1464, 492 D.L.R. (4th) 193, 437 C.C.C. (3d) 1, 95 C.R. (7th) 231 (S.C.C.) — referred to
- R. v. Truscott* (2007), 2007 ONCA 575, 2007 CarswellOnt 5305, [2007] O.J. No. 3221, (sub nom. *Truscott, Re*) 226 O.A.C. 200, 50 C.R. (6th) 1, (sub nom. *Reference re: Truscott*) 225 C.C.C. (3d) 321, 2007 QCCS 4159 (Ont. C.A.) — referred to
- R. v. Webber* (2021), 2021 NSCA 35, 2021 CarswellNS 286, 403 C.C.C. (3d) 239 (N.S. C.A.) — referred to
- R. v. Williams* (2020), 2020 ONSC 206, 2020 CarswellOnt 5656, 64 C.R. (7th) 226 (Ont. S.C.J.) — followed
- R. v. Williams* (2020), 2020 ONSC 6347, 2020 CarswellOnt 15222, 68 C.R. (7th) 183, 396 C.C.C. (3d) 267, [2020] O.J. No. 4567 (Ont. S.C.J.) — followed

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, [1998] S.C.J. No. 2, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, [1998] A.C.S. No. 2 (S.C.C.) — referred to

Statutes considered:

Canada Evidence Act, R.S.C. 1985, c. C-5

s. 9(2) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — referred to

s. 11(d) — referred to

Controlled Drugs and Substances Act, S.C. 1996, c. 19

s. 5 — referred to

s. 5(1) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 153(1) — referred to

s. 264.1(3) [en. R.S.C. 1985, c. 27 (1st Supp.), s. 38] — referred to

s. 266 — referred to

s. 273.1(2)(c) [en. 1992, c. 38, s. 1] — referred to

s. 276 — referred to

s. 276(1) — referred to

s. 276(1)(a) — referred to

s. 276(1)(b) — referred to

s. 276(2) — referred to

s. 276(2)(a) — referred to

s. 276(3) — referred to

s. 276(4) “sexual activity” — referred to

s. 278.2 [en. 1997, c. 30, s. 1] — referred to

s. 278.2(1)(b) [en. 1997, c. 30, s. 1] — referred to

s. 278.92 [en. 2018, c. 29, s. 25] — referred to

s. 278.92(1) [en. 2018, c. 29, s. 25] — referred to

s. 278.92(1)(a) [en. 2018, c. 29, s. 25] — referred to

s. 278.92(1)(b) [en. 2018, c. 29, s. 25] — referred to

s. 278.92(2) [en. 2018, c. 29, s. 25] — referred to

s. 278.93 [en. 2018, c. 29, s. 25] — referred to

s. 278.93(2) [en. 2018, c. 29, s. 25] — referred to

s. 278.93(4) [en. 2018, c. 29, s. 25] — referred to

s. 278.94 [en. 2018, c. 29, s. 25] — referred to

s. 278.94(2) [en. 2018, c. 29, s. 25] — referred to

s. 278.94(3) [en. 2018, c. 29, s. 25] — referred to

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s. 278.94(4) [en. 2018, c. 29, s. 25] — referred to
 s. 278.94(4)(a) [en. 2018, c. 29, s. 25] — referred to
 s. 278.94(4)(b) [en. 2018, c. 29, s. 25] — referred to
 s. 278.94(4)(c) [en. 2018, c. 29, s. 25] — referred to
 s. 278.97 [en. 2018, c. 29, s. 25] — referred to
 s. 279.01 [en. 2005, c. 43, s. 3] — referred to
 s. 279.01(1) [en. 2005, c. 43, s. 3] — referred to
 s. 279.01(2) [en. 2005, c. 43, s. 3] — referred to
 s. 279.02(1) [en. 2014, c. 25, s. 19] — referred to
 s. 279.011(1) [en. 2010, c. 3, s. 2] — referred to
 s. 286.2(1) [en. 2014, c. 25, s. 20] — referred to
 s. 286.2(4) [en. 2014, c. 25, s. 20] — referred to
 s. 286.2(5)(d) [en. 2014, c. 25, s. 20] — referred to
 s. 286.3 [en. 2014, c. 25, s. 20] — referred to
 s. 286.3(1) [en. 2014, c. 25, s. 20] — referred to
 s. 286.4 [en. 2014, c. 25, s. 20] — referred to
 s. 686(1)(b)(iii) — referred to

Criminal Code (sexual assault), Act to amend the, S.C. 1992, c. 38

Generally — referred to

Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, An Act to amend the, S.C. 2018, c. 29

Generally — referred to

Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, Act to amend the, S.C. 1980-81-82-83, c. 125

s. 6 — referred to

s. 19 — referred to

Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93

s. 8 — referred to

APPEALS by accused from judgment reported at *R. v. A.M.* (2020), 2020 ONSC 4191, 2020 CarswellOnt 9480 (Ont. S.C.J.), convicting them of sexual services offences and, for accused M, trafficking drugs and from judgment reported at *R. v. A.M.* (2020), 2020 ONSC 7919, 2020 CarswellOnt 18765 (Ont. S.C.J.), imposing sentences.

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4 or 486.6 of the Criminal Code shall continue. These sections of the Criminal Code provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;

(b) on application made by the victim, the prosecutor or any such witness, make the order; and

(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

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- (a) *as soon as feasible, inform the victim of their right to make an application for the order;*
- (b) *on application of the victim or the prosecutor, make the order; and*
- (c) *if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.*

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

- (a) *if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;*
- (b) *if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and*
- (c) *in any event, advise the prosecutor of their duty under subsection (3.2).*

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

- (a) *informed the witnesses and the victim who are the subject of the order of its existence;*
- (b) *determined whether they wish to be the subject of the order; and*

(4) An order made under this section does not apply in either of the following circumstances:

- (a) *the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or*
- (b) *the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal par-*

ticalars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

486.6 (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

- (a) the person knowingly failed to comply with the order;*
- (b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and*
- (c) a warning to the individual is not appropriate.*

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

K. van Rensburg J.A.:

A. OVERVIEW

- ¹ The appellants, A.M. and M.P., were charged with various offences arising out of their relationship with the complainant, A.K., including human trafficking and sexual services offences. They were alleged to have acted as pimps for A.K. at various times during a two-and-a-half-year period, part of which A.K. spent working out of a house rented by the appellants. It was alleged that they posted advertisements for A.K.'s sexual services, made arrangements with her clients, received a share of the money she earned, and exploited her drug dependency as a means of controlling and influencing her involvement in the sex trade.

- ² The appellants were convicted of procuring A.K., receiving a material benefit from A.K.'s sexual services, and advertising her sexual services. A.M. was also convicted of trafficking MDMA to A.K. A.M. was sentenced to 24 months in prison (20 months for the sexual services offences and 4 months consecutive for the drug offence)¹ and M.P. was sentenced to 18 months. They appeal their convictions. The appellants also seek leave to appeal their sentences in respect of the sexual services offences only.²
- ³ The focal point of the conviction appeals is s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46. Broadly speaking, s. 276 requires that, for proceedings "in respect of" one or more of 14 listed offences, the court, in a pre-trial screening application, must determine whether and to what extent evidence may be led by an accused with respect to a complainant's sexual activities other than the offence charged. None of the offences with which the appellants were charged are listed in s. 276.
- ⁴ Accordingly, the main issue in the conviction appeals is the test for applying s. 276 to offences that are not specifically listed in the section, which I refer to as "non-enumerated offences", and in particular to proceedings involving sexual services or human trafficking offences. The appellants assert that the trial judge erred in applying s. 276 to these proceedings, with the result that their cross-examination of A.K. was improperly restricted and that evidence material to their defences was redacted from A.K.'s preliminary inquiry testimony (which was ultimately admitted in evidence at the trial). If successful on this ground of appeal, they seek a new trial.
- ⁵ The jurisprudence to date is unsettled on the application of s. 276 to cases in which the accused is charged with a sexual services or human trafficking offence, but not with a listed offence. In *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, the Supreme Court described a "broad relational test" for determining when a proceeding involving only non-enumerated offences can nevertheless be considered as being "in respect of" a listed offence, stating that the question is whether any of the charged offences have "some connection to" a listed offence, and

¹ After the application of credit for time spent in pre-trial custody and on house arrest, A.M.'s sentence, as is the case with M.P., is a reformatory sentence.

² A.M.'s sentence appeal does not address his four-month sentence for trafficking MDMA.

“whether, in substance, a listed offence is implicated in the proceeding”: at paras. 75-76. The post-*Barton* case law at the trial level in Ontario is divided. Some decisions have taken a categorical approach and held that s. 276 applies whenever an accused is charged with a sexual services or human trafficking offence, as these offences invariably have “some connection” to a listed offence. Other decisions have declined to apply s. 276 after undertaking a fact-specific analysis to determine whether there was “some connection” between the charged offences and a listed offence.

6 For the reasons that follow, I have concluded that s. 276 does not apply categorically to all proceedings where the accused is charged with a human trafficking or sexual services offence, but not with a listed offence, and that the application of s. 276 to such proceedings must be determined on a case-by-case basis having regard to the charges, the evidence the Crown proposes to lead, and whether the defence proposes to elicit or lead evidence of a listed offence, to assess whether a listed offence, although not charged, is implicated in the proceeding.

7 I have also concluded that the trial judge erred in this case in applying s. 276, in redacting A.K.’s preliminary inquiry evidence, and in precluding the appellants in advance of the trial from pursuing certain lines of questioning in their cross-examination of A.K. The effect of the s. 276 ruling was to prevent the appellants from eliciting evidence that was material to their defences to the human trafficking and sexual services offences. I would decline the Crown’s invitation to apply the curative proviso to uphold the appellants’ convictions for the sexual services offences. The appellants were prevented from making full answer and defence to these charges.

8 This is sufficient to allow the appeals in respect of the appellants’ convictions for the sexual services offences, and it is unnecessary to address the three other grounds of appeal they raise in respect of these convictions. Although the appellants seek an acquittal based on one or more of the other grounds of appeal, if they were successful on any of these grounds they would be entitled only to a new trial.

9 A.M. also appeals his conviction for trafficking MDMA, asserting that the verdict was unreasonable because the evidence was insufficient to prove the nature of the substance, and he seeks an acquittal on the drug trafficking charge. As I will explain, the trial judge was entitled to find that the substance was MDMA based on A.K.’s testimony and text messages on A.M.’s phone.

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- ¹⁰ I would accordingly allow the appeals in respect of the sexual services offences and direct a new trial on those charges. I would dismiss A.M.'s appeal from his conviction for trafficking MDMA, and, since none of the grounds raised in his sentence appeal relates to the drug trafficking conviction, I would uphold his four-month sentence in respect of that offence.

B. BACKGROUND FACTS

- ¹¹ A.M. and M.P. were charged with various offences related to sexual services provided by the complainant, A.K. Both were charged with trafficking a person (s. 279.01(1) of the *Criminal Code*); receiving a material benefit from trafficking a person (s. 279.02(1)); receiving a material benefit from sexual services (s. 286.2(1)); exercising control, direction or influence over the movements of a person for the purpose of facilitating obtaining sexual services for consideration (s. 286.3(1)); advertising an offer to provide sexual services for consideration (s. 286.4); and trafficking MDMA, cocaine and cannabis (s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”). In addition, A.M. was charged with uttering threats (s. 264.1(3) of the *Criminal Code*) and assault (s. 266).
- ¹² Two of the offences — trafficking a person (s. 279.01(1)) and receiving a material benefit from trafficking a person (s. 279.02(1)) — are so-called “human trafficking offences”. Three of the offences — receiving a material benefit from sexual services (s. 286.2(1)), procuring (s. 286.3(1)) and advertising sexual services (s. 286.4) — are so-called “sexual services offences”.
- ¹³ The offences were alleged to have occurred in a city in Ontario over a period of about nine months during a two-and-a-half-year period between January 2015 and September 2017. During her association with the appellants, A.K. would frequently return to her parents’ home in a town outside of the city.
- ¹⁴ A.K. was introduced to A.M. and another man, referred to as “Mr. X.”, in a bar in the city. A.K. went to another province to work with Mr. X. who sent her back to Ontario after she stole drugs from him. He put her in touch again with A.M., and she reached out to A.M. on her return to the city. With A.M.’s assistance, A.K. started working out of hotels in the area. Ads for her services were routinely placed on Backpage.com, using A.M.’s cell phone number as the contact. During this time, A.K.

and A.M. also began a casual romantic relationship. A.M. introduced A.K. to M.P., who occasionally drove her to hotels and to clients' homes.

15 Eventually A.K. began working out of a house in a nearby town that the appellants rented and where they all lived. One day, there was an incident between the parties that culminated in a physical altercation, during which A.M. allegedly grabbed A.K. by the arm and pulled her to the floor. Later, as the appellants were driving A.K. to a bus stop, she left the car and went to a neighbour's house, where she asked to speak to the police. A.K. was taken to the police station, where she gave a video statement. Although A.K. returned to the rented house for a period of time, the appellants were eventually arrested and charged.

16 Throughout the period that A.K. was involved with the appellants and for much of her life, A.K. struggled with alcohol and substance use.

17 At the preliminary hearing (which occurred before the Supreme Court decision in *Barton*), A.K. was questioned in cross-examination about her work in the sex trade before, during and after her association with the appellants. She testified that, through a friend, she had begun working in the sex trade at the age of 18 shortly after leaving school, and that, apart from a brief period when she had returned to school, she had worked as an escort independently and for various agencies. She testified that when she first started out, she had posted ads on Backpage.com using photos taken by a friend and that the same ads were used when she worked with the appellants. She testified that, as was the case with the appellants, there was usually an earnings split of 50/50 when she worked for an agency, and most of her work was for agencies because working as an independent "didn't go well". She explained that working for an agency also offered greater safety protections, such as assistance with screening clients. She noted that safety was a primary concern for her and her parents, who disapproved of her work in the sex trade but prioritized ensuring that she was safe. As a result of the s. 276 ruling, this evidence was redacted from the preliminary inquiry transcript.

C. THE SECTION 276 APPLICATION

18 In this section I will briefly describe the background to the screening procedure that is provided for under s. 276 of the *Criminal Code*, s. 276 itself, and the *Barton* decision. I will then turn to the trial judge's decision on the s. 276 application in this case.

(1) Background to Section 276

- ¹⁹ Historically in the prosecution of sexual offences, few limits were placed on the admissibility and use of evidence about a complainant's prior sexual activities. Such evidence was routinely used to distort the trial process and to malign the complainant's character based on myths and stereotypes, including the "twin myths" that the complainant was more likely to have consented to the sexual act at issue, or was less worthy of belief, because of their sexual history: *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paras. 33-34; *Barton*, at paras. 55-56; and *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 604.
- ²⁰ In 1976, Parliament intervened by amending an existing provision of the *Criminal Code* to provide greater procedural protections to complainants.³ When judicial interpretation of the provision did not alleviate the problems with the common law, Parliament responded in 1982 by enacting a broader set of legislative reforms.⁴ The 1982 reforms prohibited an accused in proceedings in respect of listed sexual offences (sexual assault; sexual assault with a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault) from adducing evidence of the complainant's sexual conduct on other occasions, subject to three limited exceptions: (1) rebuttal evidence, (2) evidence going to identity, and (3) evidence relating to consent to sexual activity on the same occasion as the trial incident: *Seaboyer*, at pp. 601, 613.
- ²¹ In its 1991 decision in *Seaboyer*, the Supreme Court determined that the provision, which was by then renumbered as s. 276, violated ss. 7 and

³ See *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8. As noted in the explanatory note to the clause amending the provision, the amendment abolished the requirement of a warning as to corroboration and excluded questions concerning the complainant's sexual conduct with persons other than the accused in specified offences: see Bill C-71, *Criminal Law Amendment Act, 1975*, 1st Sess., 30th Parl., 1976, cl. 8 (assented to 30 March 1976), S.C. 1974-75-76, c. 93.

⁴ See *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, ss. 6, 19. See also Bill C-127, *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, 1st Sess., 32nd Parl., 1982, cls. 6, 19 (assented to 27 October 1982), S.C. 1980-81-82-83, c. 125.

11(d) of the *Canadian Charter of Rights and Freedoms*. McLachlin J. (as she then was), writing for the majority, concluded that the blanket exclusion of evidence of the complainant's sexual activity overshot the provision's purpose and undermined trial fairness, leading to a risk of wrongful conviction. The court struck down the 1982 provision as unconstitutional because it was too restrictive — it had the potential to exclude relevant evidence crucial to a fair trial: at p. 625. The court emphasized that the relevance of all evidence, including sexual history evidence, must be assessed on a case-by-case basis: at p. 609.

- ²² In striking down the section, the court was careful to note that it was not reviving the old common law rules of evidence that generally permitted evidence of the complainant's other sexual conduct and condoned invalid inferences from such evidence. Rather, McLachlin J. offered a set of principles to guide courts in determining on a *voir dire* that the proposed use of evidence of a complainant's other sexual conduct is legitimate in a sexual offence trial: see *Seaboyer*, at pp. 634-36.
- ²³ Parliament responded in 1992 by enacting a new s. 276.⁵ The 1992 regime was challenged on constitutional grounds but was upheld in 2000 by the Supreme Court in *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443. Gonthier J., writing for a unanimous court, explained that the new regime was essentially a codification of the guidelines in *Seaboyer*, which had affirmed that the purpose of s. 276 is “to protect the integrity of the trial by excluding evidence that is misleading, to protect the rights of the accused as well as to encourage reporting of sexual offences by protecting the security and privacy of complainants”: at paras. 19-20. In the court's view, the new legislation preserved “[t]he balance struck in *Seaboyer* among the interests of justice, the accused and the complainant”: at para. 22.

(2) Section 276 of the Criminal Code

- ²⁴ Section 276(1) of the *Criminal Code* currently provides that, in proceedings in respect of 14 listed offences,⁶ evidence that the complainant

⁵ See *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38. See also Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3rd Sess., 34th Parl., 1992 (assented to 23 June 1992), S.C. 1992, c. 38.

⁶ The listed offences are sexual interference; invitation to sexual touching; sexual exploitation; sexual exploitation of a person with a disability; incest; compelling the commission of bestiality; bestiality in the presence of or by a child; a

has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or (b) is less worthy of belief. Pursuant to s. 276(4), “sexual activity” includes “any communication made for a sexual purpose or whose content is of a sexual nature”.

25 Section 276(2) provides that in proceedings in respect of a listed offence, evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge, or justice determines, in accordance with the procedures set out in ss. 278.93 and 278.94, that the evidence:

- (a) is not being adduced for the purpose of supporting an inference described in subsection (1);
- (b) is relevant to an issue at trial; and
- (c) is of specific instances of sexual activity; and
- (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

26 Section 276(3) sets out the following factors a judge is required to take into account on an application to determine whether evidence that the complainant has engaged in other sexual activity is admissible:

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society’s interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;

parent or guardian procuring sexual activity; a householder permitting prohibited sexual activity; corrupting children; indecent acts; sexual assault; sexual assault with a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault.

- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge or justice considers relevant.

²⁷ In sum, s. 276 governs the admission and use of evidence that a complainant engaged in sexual activity that does not form the subject matter of the charge. Section 276 “balances a number of trial fairness considerations, seeking to exclude evidence known to distort the fact-finding process while protecting the rights of both the accused and the complainant”: *Goldfinch*, at para. 28. Section 276(2) provides a screening mechanism, informed by the factors in s. 276(3), that requires the defence to disclose aspects of its case because of the potential prejudice that could result from the admission of the evidence: *R. v. J.J.*, 2022 SCC 28, 415 C.C.C. (3d) 285, at para. 160.

²⁸ Sections 278.93 and 278.94 of the *Criminal Code* set out the procedure for an accused's application under s. 276(2). Section 278.93 provides for a first-stage determination based on an accused's written application on notice to the Crown. The accused must provide “detailed particulars of the [other sexual activity] evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial”: *Criminal Code*, s. 278.93(2). If the judge determines that “the evidence sought to be adduced is capable of being admissible under [s.] 276(2)” (that is, it does not engage the twin myths prohibited under s. 276(1), it is relevant to an issue at trial, it is evidence of specific instances of sexual activity, and it has significant probative value that is not substantially outweighed by the danger of prejudice), then the application proceeds to a hearing under s. 278.94 to determine whether the evidence or any part of it is admissible under s. 276(2): *Criminal Code*, s. 278.93(4). The complainant has the right to be represented by counsel and to participate in the hearing, but is not compellable as a witness: *Criminal Code*, ss. 278.94(2), (3). The court is required to provide reasons on the application, including (a) where not all of the evidence is to be admitted, stating the parts that are admitted; (b) stating the factors in s. 276(3) that affected the determination; and (c) where all or any part of the evidence is

to be admitted, stating the manner in which that evidence is expected to be relevant to an issue at trial: *Criminal Code*, s. 278.94(4).

(3) *The Barton Decision*

- ²⁹ Typically, the screening mechanism under s. 276 has been applied in cases where the accused was charged with at least one of the offences listed in that section. The landscape changed however with the Supreme Court's decision in *Barton*, where the court concluded, at para. 77, that a trial for a murder allegedly committed in the course of a sexual assault with a weapon was a "proceeding in respect of" the listed offence of sexual assault with a weapon, and that as such, defence evidence about the accused's prior sexual activity with the victim ought to have been screened through s. 276.
- ³⁰ Moldaver J., writing for the majority, applied the modern approach to statutory interpretation.⁷ First, considering the words of the section in their context, he explained that the phrase "in respect of" in s. 276 is intentionally broad and of the widest possible scope, and imports such meanings as "in relation to", "with reference to", or "in connection with". This indicated that Parliament did not intend to limit the application of the s. 276 regime to proceedings in which a listed offence was expressly charged: *Barton*, at paras. 72-73.
- ³¹ Second, Moldaver J. explained that a broad and generous interpretation would best achieve the objects of s. 276 — which include protecting the integrity of the trial by excluding irrelevant and misleading evidence, protecting the accused's right to a fair trial, and encouraging the reporting of sexual offences by protecting the security and privacy of complainants — and would avoid form trumping substance, where the applicability of the regime would turn on how the charges were drafted and not on "whether, in substance, a listed offence is implicated in the proceeding": *Barton*, at paras. 74-75.
- ³² After considering the text and purpose of s. 276, Moldaver J. stated that s. 276 applies to "any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged", which he described as a "broad relational test": *Barton*, at para. 76.

⁷ See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

- ³³ In *Barton*, it was plain to Moldaver J. that the proceeding implicated an offence listed in s. 276(1) because the accused was charged with first degree murder while committing the listed offence of sexual assault with a weapon: at para. 77. He noted however that, “where there is uncertainty about whether the s. 276 regime applies to the proceeding in question, the trial judge should raise that issue with the parties at the earliest opportunity and, after giving the parties the opportunity to make submissions, issue a ruling on the matter”: *Barton*, at para. 78. He also noted that, although s. 276(2) applies only to evidence adduced by or on behalf of the accused, trial judges should follow *Seaboyer* to determine the admissibility of Crown-led prior sexual activity evidence in a *voir dire*: *Barton*, at para. 80.

(4) The Section 276 Application Decision⁸

- ³⁴ I begin by observing that the trial judge’s decision was one of the first reported decisions to consider a s. 276 application where the accused were not charged with a listed offence. The application was heard in October 2019, a few months after the Supreme Court’s decision in *Barton*. The trial judge was informed that the appellants were bringing the application because counsel had been advised in a judicial pre-trial shortly after the release of *Barton* that they would need to address s. 276.
- ³⁵ The parties and the trial judge did not have the benefit of the case law that has since emerged, addressing whether or not s. 276 applies categorically to trials for human trafficking and/or sexual services offences and the factors that would apply on a case-by-case determination of this issue. Defence counsel brought the application on the assumption that s. 276 applied.
- ³⁶ The application was heard over the course of two days. The trial judge recognized that he was to use a two-stage approach. First, he had to determine whether the evidence sought to be adduced was capable of being admissible under s. 276(2), and then to the extent that the evidence passed that threshold, to conduct a *voir dire* to determine whether and to what extent to admit the proposed evidence. A.K. was represented by counsel when the matter was first brought before the trial judge. Ultimately the trial judge provided his reasons in respect of both stages in a single set of reasons.

⁸ The trial judge’s reasons on the s. 276 application are reported at *R. v. A.M.*, 2019 ONSC 7293.

³⁷ Early in his reasons the trial judge explained briefly why he agreed that the s. 276 application was required. Referring to the test in *Barton* that s. 276 applies to “any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document”, the trial judge reasoned that the listed offence of sexual assault was engaged because the charges “[struck] at the heart of the necessary consent for [A.K.] to engage in the sexual services provided by her at the request of the [appellants]”, and that “[a]s a result, the sexual assault provisions contained in s. 271 of the *Criminal Code* [were] engaged”.

³⁸ The trial judge identified ten areas for the appellants’ proposed cross-examination of A.K.:

- (a) that A.K. had worked previously in the sex trade;
- (b) the details regarding how A.K. entered the sex trade;
- (c) how often/how long A.K. worked in the sex trade;
- (d) that A.K. had previously posted advertisements on Backpage.com (including copies of advertisements she previously posted);
- (e) who A.K. worked with in the past (agency work and independent work);
- (f) what the money split was during her previous work experiences;
- (g) that A.K. could make more money working independently;
- (h) that A.K. was open with her family about her work for safety reasons;
- (i) the meeting with Mr. X and arrangements to work with him;
- (j) A.K.’s independent work during the time of the allegations; and
- (k) that A.K. worked as a sex worker after the time frame for the allegations.

³⁹ As I mentioned earlier, the appellants had touched on a number of these questions in their cross-examination of A.K. at the preliminary inquiry.

⁴⁰ The trial judge concluded that the appellants could cross-examine A.K. about her meeting and arrangements to work with Mr. X (area (i)) and her independent work during the time of the allegations (area (j)), but that they were not permitted to cross-examine A.K. in respect of any of the other areas.

⁴¹ First, the trial judge held that A.K.’s previous work in the sex trade (areas (a), (b) and (c)) was not relevant. He reasoned that the appellants

sought to adduce this evidence to suggest that, because A.K. was already a sex worker, she was less likely to be coerced or exploited to perform the specific sex work forming the basis of the charges. According to the trial judge, this fell into one of the twin myths set out in s. 276(1). He stated that “[t]he fact that [A.K.] was a sex trade worker and was addicted to drugs previously does not have any relevance to the charges faced by the accused”. He concluded that this proposed area of cross-examination was not relevant to an issue at trial and was therefore inadmissible, with no need for any stage two analysis.

42 Second, the trial judge concluded that the appellants could not cross-examine A.K. on the advertisements she had previously posted on Backpage.com or introduce those ads into evidence (area (d)). The trial judge noted that the Crown had advised that it would agree that A.K. knew how to post advertisements on the Internet. He thus reasoned that the proposed cross-examination was not relevant because the fact that A.K. posted advertisements in the past added nothing to the question of who posted ads while she was allegedly working for the appellants.

43 Third, the trial judge held that the appellants could not cross-examine A.K. about who she worked for in the past (area (e)), how she split money during those experiences (area (f)), whether she could make more money working independently (area (g)), and whether she was open with her family about her work in the sex trade (area (h)). He reasoned that this evidence was not relevant and, with respect to the evidence about past work with agencies and independent work, it “appear[ed] to violate one of the twin myths which is that the complainant [was] more likely to have consented to the sexual activity that form[ed] the subject matter of the charge based on her prior history of sexual activity”.

44 Fourth, the trial judge held that A.K.’s work in the sex trade after the time period of the allegations was not relevant (area (k)), and he was of the view that it also engaged the myth that the complainant was more likely to have consented to the sexual activity forming the subject matter of the charge because of her subsequent sexual activity. He concluded that the evidence was not relevant to an issue at trial and was not properly admissible, and accordingly that no stage two analysis was required.

45 The trial judge held that the appellants could cross-examine A.K. about her meeting and arrangements to work with Mr. X (area (i)) and her independent work during the time of the allegations (area (j)). He reasoned that this evidence was relevant to the issues at trial and that to deny the appellants the right to cross-examine A.K. on this evidence

would significantly impair their right to make full answer and defence. The trial judge explained that this evidence did not engage the twin myths, and that its narrow focus minimized the potential prejudice to A.K.

46 Finally, the trial judge observed that he would not permit the appellants to cross-examine A.K. about inconsistencies in her evidence concerning when she started working in the sex trade since, in his view, the inconsistencies were minor, of trifling significance, and related to a period well before the alleged offences.

47 The trial judge accordingly granted the application in part but noted that his decision was without prejudice to the appellants renewing their application based on additional evidence arising at trial. The transcript of A.K.'s preliminary inquiry was redacted to comply with the trial judge's s. 276 ruling. The appellants did not renew their application.

D. THE TRIAL AND THE CONVICTIONS

48 The trial judge convicted the appellants of receiving a material benefit from A.K.'s sexual services, procuring (by exercising influence over her movements for the purpose of facilitating obtaining sexual services for consideration), and advertising A.K.'s sexual services. A.M. was also convicted of trafficking MDMA. The appellants were acquitted of human trafficking, receiving a material benefit from human trafficking, and trafficking cocaine and cannabis. M.P. was also acquitted of trafficking MDMA, and A.M. was acquitted of uttering threats and assault.

49 The trial judge noted that there were serious discrepancies between A.K.'s testimony at trial and her original police statement and preliminary inquiry testimony, prompting the Crown to successfully apply under s. 9(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, to cross-examine her on the inconsistencies, and then to adduce her redacted preliminary inquiry testimony as evidence at the trial. The trial judge noted that A.K.'s evidence was also unreliable. She could not remember dates or important details, in part because of her consumption of alcohol and drugs.

50 The trial judge observed that A.K. "was generally an honest witness and that most of her evidence [was] in fact accurate", but that "[t]here were serious discrepancies between her evidence at trial as compared to her evidence at the preliminary inquiry and the statement that she gave to police", and that not all of the inconsistencies could be explained by A.K.'s attempt to protect the appellants. He therefore determined that it

would be dangerous to convict the appellants based on her testimony alone and he looked for corroborative evidence to support her preliminary inquiry testimony.

- 51 Analyzing the counts one by one, the trial judge first acquitted the appellants of human trafficking. He was not satisfied that the appellants exercised control, direction or influence over A.K. for the purpose of exploitation. He found that A.K.'s main motivation for engaging in the escort business was the pursuit of financial compensation, rejecting the Crown's theory that the appellants abused a position of trust as drug suppliers to A.K. for the purpose of exploiting her. Given that the underlying offence had not been proven, the appellants were also acquitted of receiving a material benefit from human trafficking.
- 52 The trial judge convicted the appellants of advertising sexual services. He explained that a series of advertisements from backpage.com had been entered into evidence and that he was satisfied both that the appellants had intentionally posted the ads and that they related to sexual services being offered by A.K. The trial judge acknowledged some inconsistencies in A.K.'s evidence about who posted the ads, but underscored that she testified at both the trial and at the preliminary inquiry that the appellants had posted some. The trial judge also referred to messages exchanged between the appellants that supported this evidence.
- 53 The trial judge convicted A.M. of trafficking in MDMA, based on his acceptance of A.K.'s testimony and confirmatory messages on A.M.'s phone.
- 54 The trial judge convicted the appellants of procuring. He explained that "[t]he essential element of this offence is that an accused must intentionally exercise control, direction or influence over the movements of a person in relation to the provision of sexual services for consideration." He observed that both appellants were involved in posting advertisements for A.K.'s sexual services which listed their phone numbers, and that along with the messages extracted from A.M.'s phone, this evidence supported A.K.'s testimony at the preliminary inquiry that the appellants were involved in arranging meetings with and screening out undesirable clients. The trial judge was satisfied these activities constituted at the very least influence over A.K.'s movements, noting that exercising influence means doing anything to affect the person's movements: see *R. v. Gallone*, 2019 ONCA 663, 147 O.R. (3d) 225, at para. 47. While A.K. was at liberty to overrule their decisions, their behaviour nonetheless constituted influence and was intentional.

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- 55 The trial judge also convicted both appellants of receiving a material benefit from A.K.'s sexual services. He reasoned that evidence from A.K. that she split the proceeds from her escort activities with the appellants was supported by data on A.M.'s phone.
- 56 The trial judge also provided brief reasons for acquitting A.M. of uttering threats and of assault, for acquitting M.P. of trafficking MDMA, and for acquitting the appellants of the other drug offences.

E. THE SECTION 276 ISSUE

- 57 The appellants' main argument on their conviction appeals is that the trial judge erred in concluding that s. 276 applied in this case. Even if s. 276 applies, however, they assert that the trial judge erred in limiting their cross-examination of A.K. On appeal, the appellants have narrowed the scope of their proposed cross-examination to focus on A.K.'s prior work in the sex industry, including her prior posting of advertisements for sexual services.⁹ They submit that the trial judge should not have precluded them from cross-examining A.K. in these areas or redacted any references to such evidence in her preliminary hearing testimony (which was ultimately introduced as evidence at the trial on the Crown's application).¹⁰

⁹ At the oral hearing, counsel for M.P. clarified that he only took issue with areas (a)-(f) of proposed cross-examination, identified above at para. 38. This does not include A.K.'s subsequent work in the sex industry, after the time frame of the allegations. Although A.M. did not expressly disavow his request to cross-examine A.K. on her subsequent work, he made no specific argument on the issue. Given the absence of argument and the general alignment of the appellants' positions, I understand both appellants to have narrowed their focus to A.K.'s prior work in the sex industry, including her prior postings on Backpage.com.

¹⁰ The appellants also sought leave to challenge the constitutionality of the sexual services offences to preserve their right to argue this issue pending the decision in *Canadian Alliance for Sex Work Law Reform v. Attorney General*, 2023 ONSC 5197, 535 C.R.R. (2d) 40, which was a civil application involving a constitutional challenge to the same provisions and was on reserve at the time that factums for this appeal were filed. At the hearing of the appeal, counsel acknowledged that the decision in *Canadian Alliance* had since been rendered and had upheld the constitutionality of the sexual services offences. Counsel noted that *Canadian Alliance* is now on appeal to this court, but declined to make submissions on whether the decision in this appeal should be reserved until the

(1) Positions of the Parties

58 I will set out in general terms the positions of the parties at this stage. In my analysis I will set out their arguments on each point in greater detail.

59 The appellants contend that the pre-trial screening procedure mandated by s. 276(2) was not applicable to these proceedings. First, they reject the proposition that s. 276 applies categorically, that is in every case, to sexual services and human trafficking prosecutions. They assert that, consistent with *Barton*, the application of s. 276 to non-enumerated offences falls to be determined on a case-by-case basis, having regard to the charges, and the anticipated evidence of the Crown and the defence. They submit that the trial judge erred in finding “some connection” between these proceedings and the offences listed in s. 276 on the basis that the offences charged engaged A.K.’s consent “to engage in the sexual services provided by her at the request of the [appellants]”. Instead, the appellants contend that none of the listed offences were implicated in the current proceedings, such that s. 276 was not engaged.

60 The appellants submit that the restrictions resulting from the s. 276 ruling prejudiced their right to a fair trial. They were prevented from cross-examining A.K. on her work in the sex trade other than her work with them, and specifically prevented from eliciting evidence that was material to their defence. In accordance with the ruling, material evidence was also redacted from A.K.’s testimony at the preliminary inquiry that was ultimately in evidence at the trial.

61 The Crown asserts that the trial judge was correct to conclude that s. 276 applied because of the nature of the sexual offences charged and the factual context. The Crown submits that s. 276 should apply to sexual services and human trafficking offences because they are essentially sexual exploitation offences and carry the same risk — namely, that the admission of evidence of other sexual activity will distort the fact-finding process. The Crown further submits that s. 276 was engaged in the par-

Canadian Alliance appeal is decided. Counsel also acknowledged that this court upheld the constitutionality of the sexual services offences in *R. v. N.S.*, 2022 ONCA 160, 169 O.R. (3d) 401, leave to appeal refused, [2022] S.C.C.A. No. 281. Beyond offering these observations, counsel did not argue the constitutional issues at the hearing of the appeal. We accordingly consider this ground of appeal to have been abandoned.

ticular circumstances of this case because the allegations factually implicated at least some of the elements of sexual assault.

62 In the alternative, the Crown submits that if s. 276 was not engaged, then this court should recognize and endorse the application of the common law procedure under *Seaboyer* to proceedings involving sexual services and human trafficking charges.

63 The Crown further contends that, even if s. 276 or the procedure under *Seaboyer* does not apply, the appellants were not prejudiced by the trial judge's s. 276 ruling. They were able to thoroughly explore the degree of the appellants' involvement in A.K.'s sale of her sexual services as well as her financial motivation. The trial judge took a cautious approach to A.K.'s evidence, and he made findings favorable to the appellants on the issues of exploitation and coercion. Finally, if the trial judge erred in applying s. 276 or in his decision on the application, the Crown asks this court to apply the curative proviso under s. 686(1)(b)(iii) to uphold the convictions for the sexual services offences.

64 I will begin by turning to the first question: whether s. 276 applied to these proceedings. After addressing the Crown's argument for the application of *Seaboyer*, I will then address the questions of the impact of the error on the appellants and whether the curative proviso applies.

(2) Section 276 Did Not Apply to These Proceedings

65 I begin by observing that admissibility rulings under s. 276 — which necessarily entail a determination of whether s. 276 applies to a particular proceeding — are questions of law for the trial judge: *Criminal Code*, s. 278.97; *R. v. T.W.W.*, 2024 SCC 19, 437 C.C.C. (3d) 1, at para. 19. More specifically, the trial judge's determination that s. 276 applied to these proceedings raises the question of whether he applied the correct legal principles — a question on which no deference is owed: *T.W.W.*, para. 22.

66 I note that the Crown does not take the position that the appellants, having brought a s. 276(2) application, are precluded from arguing for the first time on appeal that the section does not apply. Rather, the Crown acknowledges that the appellants are entitled to advance this issue on appeal given the circumstances in which it arose — namely, that trial counsel had conceded the applicability of s. 276 after being advised in a judicial pre-trial that they would need to address s. 276, and without having had the benefit of the competing case law that has since emerged on its applicability to trials for human trafficking and sexual services of-

fences. The Crown concedes that if the trial judge wrongly accepted that s. 276 applied to these proceedings, this amounted to an error of law.

⁶⁷ In the wake of *Barton*, courts have split in the application of its “broad relational test” to offences not enumerated in s. 276. The division has played out most visibly in the trial courts in Ontario. Since the release of *Barton* on May 24, 2019, the issue has been canvassed in more than two dozen decisions. Two conflicting lines of jurisprudence have emerged as to whether s. 276 applies in trials for human trafficking and sexual services offences when a listed offence is not among the counts charged.

⁶⁸ The appellants submit that, unless a listed offence is also charged, s. 276 does not apply categorically to trials for sexual services and human trafficking offences, and that the application of s. 276 to such proceedings must instead be determined on a case-by-case basis. The appellants rely on a line of cases that reason that the offences listed in s. 276 are not predicate or included offences in relation to human trafficking or sexual services offences. This line of cases also refers to the legislative history of s. 276, as evidence that Parliament has deliberately chosen not to include these offences as listed offences. In addition, because human trafficking and sexual services offences involving exploitation or coercion do not necessarily require the sexual activity in question to be non-consensual, these offences do not invariably have “some connection” to sexual assault. See e.g., *R. v. Williams*, 2020 ONSC 206, 64 C.R. (7th) 226 (“*Williams #1*”), at paras. 3-37; *R. v. M.D.*, 2020 ONSC 951, at paras. 17-46; *R. v. Langford*, 2021 ONSC 4307, 74 C.R. (7th) 147, at paras. 2, 6-25; *R. v. Powell*, 2021 ONCJ 708, at paras. 6-10; and *R. v. Europe*, 2023 ONSC 5322, at paras. 8-24.

⁶⁹ The appellants submit that the trial judge erred in applying s. 276 on the basis that “the charges in the indictment would strike at the heart of the necessary consent for [A.K.] to engage in the sexual services provided by her at the request of the [appellants]”, and that “[as] a result, the sexual assault provisions contained in s. 271 of the *Criminal Code* [were] engaged”. According to the appellants, s. 276(2) ought not to have been applied in the circumstances of this case. A listed offence was not an included or underlying predicate offence of the charges, was not implicated by the charges and did not form a material part of the transactions comprising the charges.

⁷⁰ The Crown submits that, although *Barton* describes a case-by-case analysis when there is uncertainty as to whether the s. 276 regime applies

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to the proceeding in question (at para. 78), generally speaking sexual services and human trafficking offences would always have “some connection to” a listed offence. The connection exists because these offences involve the sexual exploitation of a complainant: the offences address the same type of harm as some of the listed offences, and their prosecution gives rise to the same risk of misuse of other sexual conduct evidence. Finally, the Crown submits that s. 276 responds to negative biases and stereotypical assumptions about sex workers, who are vulnerable witnesses.

⁷¹ The Crown relies on a line of cases where one or more of these arguments have been accepted in concluding that s. 276 applies categorically to sexual services and/or human trafficking offences. See e.g., *R. v. Floyd*, 2019 ONSC 7006, at paras. 4-10; *R. v. T.A.*, 2020 ONSC 6714, at paras. 2-26; *R. v. MacMillan*, 2021 ONSC 3952, at paras. 16-27; *R. v. Ryckman*, 2022 ONSC 20, at paras. 4-15; *R. v. Maldonado Vallejos*, 2022 ONSC 2753, at paras. 3-24; *R. v. Lees*, 2023 ONSC 124, at paras. 5-18; and *R. v. N.G.*, 2023 ONSC 792, at paras. 3-28.

⁷² If s. 276 does not apply categorically where an accused is charged with a sexual services or human trafficking offence, then the Crown submits that in this particular case, the trial judge was correct to conclude that s. 276 applied because the factual allegations implicated A.K.’s consent to engage in sexual activity as the appellants were alleged to have abused a position of trust or authority by exploiting her drug dependency to cause her to provide sexual services.

⁷³ In the discussion that follows I will first explain why I agree with the appellants that s. 276 does not apply to all proceedings in respect of sexual services and human trafficking offences, and then I will explain why s. 276 did not apply to these particular proceedings.

(i) Section 276 Does Not Apply Categorically to Prosecutions for Sexual Services and Human Trafficking Offences

⁷⁴ Whether s. 276 applies categorically to proceedings in respect of sexual services and human trafficking charges is a question of statutory interpretation.

⁷⁵ The point of departure is the wording of s. 276. The section does not apply to all sexual offences. Rather, it lists 14 specific offences and states that it applies to proceedings “in respect of” those offences. The sexual services and human trafficking offences are not specifically listed. Before *Barton*, s. 276 was typically applied only to proceedings involv-

ing listed offences. As such, it would only have been applied to sexual services and human trafficking cases where a listed offence was also charged. That, however, changed after *Barton* established a “broad relational test” for applying s. 276 to proceedings in which no listed offence has been charged, with the question being whether “in substance [a listed offence] is implicated in the proceeding”.

⁷⁶ Cases that have extended s. 276 to any prosecution for sexual services and/or human trafficking offences have tended to advance three specific reasons: (1) these offences, like the listed offences, are sexual offences; (2) some elements of these offences, such as exploitation, overlap with elements of certain listed offences, meaning that there is “some connection” between all proceedings involving these offences and a listed offence such as sexual assault; and (3) complainants in these types of proceedings are subject to the same biases and prejudices that s. 276 is intended to address.

⁷⁷ I appreciate the validity of each of these concerns. But as Nakatsuru J. stated in *Langford*, at para. 7, while applying s. 276 to sexual services offences and protecting vulnerable sex workers “makes sense in many ways”, the application of s. 276 to offences other than those listed is not a matter of policy, but of statutory interpretation and following *Barton*.

⁷⁸ I agree with the reasoning in *Langford*, along with *Williams #1* and *M.D.*, which applied the modern approach to statutory interpretation and rejected the categorical application of s. 276 to prosecutions where the accused had been charged with sexual services and/or human trafficking offences, but not with a listed offence.

⁷⁹ The first important point from these cases is that, for there to be “some connection” between a listed offence and the charged offences, it is not sufficient that the offences merely share a common feature or element — such as the fact that they are all sexual offences, or that the complainant engages in sexual activity in circumstances of exploitation. Rather, what is required is that the commission of a listed offence, while not charged, arises on the facts such that it is, in substance, implicated in the particular proceeding.

⁸⁰ In *Williams #1*, the accused was charged with sexual services offences. The Crown argued that because of the coercive actions of the accused, the complainant did not truly consent to providing sexual services, and as such there was a connection to the listed offence of sexual assault. Stribopoulos J. rejected this argument, noting that lack of consent is not an element of the offence of procuring and that the two of-

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fences are not the same. He stated, at para. 27, that “[a]cceding to this argument would conflate the more stringent requirement for concluding that consent to sexual activity has not been genuinely and freely given, with the less exacting demands for the *actus reus* of the procuring offence found in s. 286.3(1)”. While he agreed that there is no consent to sexual activity where a complainant concludes that she has no choice in the matter — for example, because of violence, threats of violence, or extortion — he observed, at paras. 29 to 30:

[A] coercive exertion of power by an accused over a complainant that leaves her some degree of choice in whether or not to sell her sexual services can still result in an accused being culpable for exercising [“control, direction or influence”] under s. 286.3(1)....

In other words, “consent” to sexual activity is not necessarily vitiated whenever an accused has exercised “control” over a complainant’s involvement in the sex trade. It follows that the offence of sexual assault, listed in s. 276(1), is not an included offence to procuring (s. 286.3(1)), even where the accused has committed that offence by exercising control over a complainant’s movements.

[Emphasis added.]

- 81 Similarly, in *M.D.*, Dennison J. concluded that, for the purpose of determining the application of s. 276, there is no connection between the listed offence of sexual assault and acting for the purpose of exploiting a complainant within the meaning of the human trafficking offence in s. 279.01: at para. 40. As Nakatsuru J. noted in *Langford*, simply because the offences share some common features does not mean that the *Barton* test is met.
- 82 These three cases also relied on the recent legislative history of s. 276 and other provisions to conclude that Parliament made a deliberate choice not to include the sexual services and human trafficking offences in the list of offences found in s. 276(1), and that applying the screening mechanism in s. 276(2) to all such proceedings would be contrary to the intention of Parliament.
- 83 Notably, in December 2018, Parliament made extensive amendments to the *Criminal Code*, including changes to the s. 276 regime.¹¹ Bill C-51 added in s. 276(2)(a) a new criterion that must be satisfied before any

¹¹ *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29. See also Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act*

sexual activity evidence is admissible to clarify that such evidence is not being adduced for the purpose of supporting an inference prohibited in s. 276(1), i.e., one of the twin myths. Further, through s. 276(4), Bill C-51 extended the definition of “sexual activity” to include “any communication made for a sexual purpose or whose content is of a sexual nature”. Parliament did not, however, add any other offences — including the sexual services or human trafficking offences — to the 14 offences listed in s. 276(1).

- 84 This stands in contrast to the listed offences governing the admission of private records relating to the complainant held by the accused (see s. 278.92) and third-party record applications (see s. 278.2). Importantly, Bill C-51 added s. 278.92, to require an application whenever an accused seeks to admit into evidence a “record relating to the complainant” that is in the possession or control of the accused “in any proceedings in respect of” an offence listed in s. 278.92(1). The listed offences for the purpose of this section include the 14 offences listed in s. 276(1), as well as 7 sexual services and human trafficking offences (including 4 of the 5 offences charged in this case): *Criminal Code*, s. 278.92(1)(a). This expanded list also applies to third-party record applications: *Criminal Code*, s. 278.2(1)(b).
- 85 Bill C-51 also revoked the existing procedural provisions governing s. 276(2) applications and replaced them with ss. 278.93 and 278.94, which are procedural provisions that apply to both s. 276(2) and s. 278.92(2) applications. These provisions include the right of complainants to be represented and to participate in both types of application.
- 86 In its legislative summary of Bill C-51, the Library of Parliament noted that s. 276(1) was not amended to include historical offences, unlike the Bill’s new provision for private records relating to the complainant held by the accused (see s. 278.92(1)(b)) and the existing provision for third-party record applications (see s. 278.2(1)(b)): see Lyne Casavant *et al.*, *Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, Publication No. 42-1-C51-E (Ottawa: Library of Parliament, 1 October 2018, revised 18 December 2018), at p. 22. No explanation for the exclusion was provided, nor do the legislative debates shed any light

and to make consequential amendments to another Act, 1st Sess., 42nd Parl., 1992 (assented to 13 December 2018), S.C. 2018, c. 29.

on the decision not to include historical offences in the ambit of s. 276 or discuss the reach of the provision more generally.

- 87 I agree with Stribopoulos J. in *Williams #1*, that “[t]he combined effect of these various amendments provides a strong indication of Parliament’s intention concerning the offences listed in s. 276(1)”, especially when its attention was focused on those offences, given its decision to list them in s. 278.92(1)(a), and that Parliament “deliberately chose not to include the sexual services offences within the list of offences found in s. 276(1)”: at paras. 35-36.
- 88 I also agree with the observation of Nakatsuru J. in *Langford*, at para. 16, that the conclusion that Parliament’s intention not to specifically incorporate the sexual services offences within the ambit of s. 276 does not end the inquiry. Each case must still be scrutinized on its facts to determine whether the proceeding is, in substance, “in respect of” a listed offence.
- 89 This is consistent with the case-by-case determination contemplated by *Barton* for proceedings where there is uncertainty about whether s. 276 applies because no listed offence has been charged. The focus is on the individual proceeding, and not the category of offence. As Moldaver J. observed in *Barton*, “[t]he ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge ... who is the gatekeeper in a criminal trial”: at para. 68.
- 90 In some cases, the fact that the proceeding implicates a listed offence will be obvious: while a listed offence is not charged, it may be an included offence or a predicate offence. This was the case in *Barton*, where the listed offence of aggravated sexual assault was a predicate offence to the first degree murder charge. Alternatively, it may be readily discernible from the charge that a listed offence is implicated. For example, a proceeding involving charges under s. 279.011(1) (trafficking a person under 18) will often plainly engage the listed offence under s. 153(1), the sexual exploitation of a young person.
- 91 In other cases, a more detailed assessment will be required. On a case-by-case basis the court will need to consider the charges, the evidence the Crown proposes to lead and whether the defence proposes to elicit or lead evidence of a listed offence, to assess whether a listed offence, although not charged, is implicated in the proceeding.
- 92 In summary, the issue is whether the proceeding is, in substance, “in respect of” one of the listed offences. It is incorrect to adopt the categorical approach taken in a number of cases that s. 276 will always apply to

prosecutions for sexual services or human trafficking offences, with the result that any offence that is analogous to, or shares some common features with, a listed offence is essentially read into s. 276. Instead, the application of s. 276 to proceedings in respect of non-enumerated offences must be determined “in the context of [the] particular prosecution, taking into account the charges, the nature of the allegations, and the subjects about which the accused seeks to cross-examine the complainant”: *Williams #1*, at para. 6. See also *M.D.*, at para. 8, and *Langford*, at para. 16.

(ii) *Section 276 Did Not Apply in the Circumstances of This Case*

- 93 Having determined that s. 276 does not apply categorically to all prosecutions involving sexual services or human trafficking offences, I turn now to consider whether s. 276 applied in the specific circumstances of this case. This determination must be made on the basis of the circumstances that existed at the time the matter was before the trial judge, and not with hindsight, that is with knowledge of what ultimately transpired at trial: *T.W.W.*, at para. 23.
- 94 In this case, the Crown’s theory was that the appellants exercised control, direction or influence over A.K.’s movements to facilitate the provision of sexual services for consideration, and that this was for the purpose of her exploitation. The Crown submitted that the appellants had exploited A.K. because she was dependent on them for drugs. The Crown also asserted that the appellants received a material benefit from these offences and that they had advertised her sexual services.
- 95 The Crown contends that s. 276 applied in this case because A.K. was forced or coerced into providing sexual services that were not truly voluntary. That is, the appellants were alleged to have exercised control over A.K. and to have exploited a position of trust to force her to provide sexual services.
- 96 The trial judge accepted the Crown’s argument that the circumstances of the case engaged the question of consent. He concluded that the listed offence of sexual assault — and therefore s. 276 — was engaged because the human trafficking and sexual services charges “[struck] at the heart of the necessary consent for [A.K.] to engage in the sexual services provided by her at the request of the [appellants]”.
- 97 I disagree that s. 276 applied in the circumstances of this case. None of the listed offences was an included offence to the charges in this case, nor was such an offence implicated in the factual circumstances ad-

vanced by the Crown. As noted earlier, sexual assault is not an included offence to procuring, even when it is alleged that the accused has committed the offence by exercising control over the complainant's movements. The requirement that the Crown prove an accused "exercised control, direction or influence" is not the same as saying the complainant did not consent to the sexual act. In a different case it might be alleged that the accused used violence or the threat of violence to compel the complainant to offer her sexual services, implicating the offence of sexual assault: see e.g., *R. v. J.C. and D.B.*, 2023 ONSC 6093. In this case however there was no suggestion that the sexual services A.K. provided were non-consensual. Nor was lack of consent an element of the two counts of human trafficking. For one count (exercising control, direction or influence for the purpose of exploitation contrary to s. 279.01(1)), any consent is statutorily declared to be invalid by s. 279.01(2), and for the other (receiving material benefits from the commission of a s. 279.01(1) offence), consent is irrelevant.

98 Consent was also not a live issue based on the application record before the trial judge. There was no suggestion that A.K. had been sexually assaulted or that the appellants forced her to work in the sex trade. Rather, the Crown's theory that the appellants exploited A.K. rested on the allegation that they had abused a position of trust, power or authority by taking advantage of her drug and alcohol addiction, and not on any meaningful vitiation of consent. Further, and in any event, while abusing a position of trust, power or authority vitiates consent for the purpose of a sexual assault charge (see *Criminal Code*, s. 273.1(2)(c)), lack of consent is only one element of the sexual assault offence: see *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 25. As Fraser J. explained in *R. v. A.M.*, 2021 ONCJ 266, at paras. 25 and 27, s. 276 is not engaged "by the mere alignment of 'some elements' of the charged offence and an enumerated offence" but requires "the complete constellation of elements comprising a listed offence". Here that constellation of elements is lacking. Even on the Crown's theory, there was no sexual assault.

99 Finally, there was nothing in the proposed defence cross-examination that would have elicited evidence of a listed offence.

100 Accordingly, s. 276 was not engaged in the circumstances of these proceedings.

(iii) *A “Seaboyer-type” Application Is Not Required in All Sexual Services and Human Trafficking Proceedings*

- 101 I pause here to refer to the Crown’s alternative argument — that, in the event that s. 276 does not apply to all trials for human trafficking and sexual services offences, this court should recognize an extension to the common law under *Seaboyer* to require a pre-trial screening procedure for the admissibility of evidence of a complainant’s other sexual activity (and in particular, evidence of other sex work). The Crown relies on *M.D.*, where Dennison J., after rejecting the application of s. 276 to proceedings involving sexual services and human trafficking offences, directed that a *Seaboyer* -type procedure be adopted in respect of evidence of other sexual conduct by sex workers where the accused is charged with sexual services offences: at paras. 47-76. Dennison J. also directed, in that particular case, that the complainant be afforded counsel and provided with the opportunity to make submissions at the hearing.
- 102 The appellants argue that this court should not extend the *Seaboyer* process where s. 276 does not apply because this would be an unwarranted extension of the common law in circumstances where Parliament has spoken clearly: *R. v. Williams*, 2020 ONSC 6347, 396 C.C.C. (3d) 267 (“*Williams #2*”), at paras. 8-65; *Langford*, at paras. 40-52.
- 103 *Seaboyer* resulted from the Supreme Court’s decision to strike down the earlier version of s. 276 as unconstitutional and its unwillingness to return to the pre-s. 276 *status quo*. In place of s. 276 the court provided guidelines for the admission of evidence designed “to remedy [the section’s] defects while preserving the intent of s. 276”: *Darrach*, at para. 19. And in 1992, Parliament enacted a new s. 276 regime which essentially codified the common law principles set out in *Seaboyer* governing the admissibility of other sexual activity evidence. As such, applications under s. 276 of the *Criminal Code* are often referred to as “*Seaboyer*” applications.
- 104 As noted earlier, in *Barton* Moldaver J. observed that, although s. 276(2) applies only to evidence adduced by or on behalf of the accused, trial judges should follow *Seaboyer* to determine the admissibility of Crown-led prior sexual activity evidence in a *voir dire*: at para. 80. In other words, he recognized that *Seaboyer* will apply in some cases that fall outside s. 276, and will require a similar prior assessment of admissibility to be made.
- 105 In *M.D.*, after determining that s. 276 did not apply, Dennison J. concluded that an accused person charged with a sexual service offence

should be required to bring a written application when seeking to admit evidence of other sexual conduct of the complainant. In her careful analysis of the issue, she relied on the obligation of a trial judge to ensure that only relevant evidence is admitted and to exclude irrelevant and misleading evidence. Recognizing that the common law *Seaboyer* procedure was in relation to sexual assault complainants, she noted that its purpose and rationale “applies with at least equal force when considering the admission of evidence of other sexual conduct by sex workers”: at para. 57. Referring to the systemic biases, prejudices and stereotypes faced by sex workers, she concluded that a *voir dire* was necessary in proceedings involving sexual services to ensure that evidence of other sexual activity was not introduced for the purpose of fostering myths and stereotypes: at paras. 62-63. Her decision also appointed counsel for the complainant and anticipated that the factors under s. 276 would be applied in the determination of the *Seaboyer* application.

106 Other cases have considered the issue and concluded that this aspect of *M.D.* was wrongly decided, and they have rejected the proposed extension of *Seaboyer* to proceedings involving sexual services and human trafficking offences: see *Williams #2*; *Langford*, at paras. 40-52; and *Europe*, at paras. 25-27.

107 Essentially the procedure that was endorsed in *M.D.* and that the Crown urges this court to accept would result in an extension of s. 276 beyond its current scope which is “in proceedings in relation to” 14 named offences. I agree with the appellants that such an extension would be contrary to the intent of Parliament, and an unwarranted and unnecessary extension of the common law.

108 First, applying the *Seaboyer* framework in this case would represent a dramatic shift in the common law. As Stribopoulos J. observed in *Williams #2*, at paras. 30-33, there are significant constraints on the authority of courts to change the common law, and extending the *Seaboyer* procedures to an entirely new category of offences would be more than an incremental change to the existing common law and would circumvent Parliament’s deliberate legislative choice not to include sexual offences in s. 276. The Supreme Court has repeatedly noted the need to proceed cautiously through incremental change to the common law. As L’Heureux-Dubé J. (dissenting, but not on this point) explained in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 45:

[T]he duty to review the common law carries with it a corresponding responsibility to proceed prudently. This Court has limited changes

in the common law to those which are “slow and incremental” rather than “major and far-reaching”: *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 760, *per* McLachlin J. This Court must restrict reforms to only “those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society”: *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670, *per* Iacobucci J.

- 109 *Barton*’s extension of *Seaboyer* to Crown-led evidence of prior sexual activity is an example of this incremental approach, but it would be a major change to the common law if the *Seaboyer* framework were extended to human trafficking and sexual services offences. Such an extension to whole new categories of offences would have considerable consequences for the legal system, requiring a *voir dire* to determine the admissibility of proposed evidence of other sexual activity.
- 110 Second, *Seaboyer* should not be extended because there is no legislative gap for the common law to fill. Parliament enumerated certain offences in s. 276 but chose not to include the human trafficking and sexual services offences within the provision’s purview. Extending *Seaboyer* to cover those non-enumerated offences would undermine Parliament’s deliberate choice not to include those offences within the s. 276 regime. Crown-led evidence is different, as s. 276 is simply silent on that issue.
- 111 Third, while there is a risk of stereotypical or myth-based reasoning in sexual services and human trafficking prosecutions, the trial judge as gatekeeper has the ability to intervene, with or without objection at trial, to preclude questions from being answered on the basis of relevance or where the probative value of the evidence is substantially outweighed by its prejudicial effect. The trial judge will always have the authority and responsibility to guard against improper reasoning and the invocation of myths and stereotypes: see *Barton*, at paras. 1, 68 and 201.
- 112 As Stribopoulos J. emphasized in *Williams #2*, at paras. 50-63, existing rules of evidence already protect against the admission of irrelevant and prejudicial evidence. Even without *Seaboyer*’s extension, a trial judge is well-positioned to balance the competing interests at play as testimony unfolds by barring or placing limits on the admissibility and use of evidence of other sexual activity, intervening to stop inappropriate questioning, and directing a *voir dire* in exceptional cases if one is required. Trial judges, as Nakatsuru J. observed in *Langford*, at paras. 48-

49, are not powerless when a sex worker is questioned about unrelated sexual activity:

A trial judge hearing the evidence of a complainant [in such a case] is well-placed to assess and balance the competing interests as the testimony unfolds, both in examination-in-chief and cross-examination. A trial judge can quickly intervene and stop inappropriate questioning. They can even set prior limits to the questioning... [and] can instruct the jury in such a fashion as to ensure that the evidence is rightfully considered and that no prejudicial stereotypes or myths enter into the deliberations. How this role is exercised by the trial judge will depend very much upon the facts of each individual case.

... Finally, if questions are permitted, the trial judge can place strict limits on it. It does not have to be an all or nothing choice.

113 Further, as Stribopoulos J. observed in *Williams #2*, at paras. 50-51, the fact that courts in the three decades since *Seaboyer's* release have not, at least until *M.D.*, extended *Seaboyer* to other offences suggests that courts have not found it necessary to apply the guidelines from that case to prosecutions for charges that lack a connection to the offences enumerated in s. 276.

114 Accordingly, I reject the Crown's invitation to require a *Seaboyer* - type application by the defence in all cases involving sexual services or human trafficking offences.

115 I turn now to consider the effect of the trial judge's error on the appellants' rights at trial.

(iv) *The Effect of the Section 276 Ruling*

116 I have concluded that the trial judge erred in applying the screening mechanism in s. 276 to this case, and by his ruling in advance of the trial that the appellants could not cross-examine A.K. about her prior work in the sex trade, including asking her questions about her experience advertising her services. As a result of the trial judge's errors, A.K.'s evidence at the preliminary inquiry (which was ultimately admitted in evidence at the trial) was redacted to remove relevant evidence about those subjects.

117 Specifically, the appellants were prevented from cross-examining A.K. on how she conducted her business in the sex trade both independently and while working for agencies, and on her prior posting of ads on Backpage.com. I agree with the appellants that this evidence was relevant to their relationship with A.K., for the procuring and material benefit counts. Also, the evidence that A.K. had posted her own ads in the

past — and was continuing to use the same content when she was working with the appellants — was relevant to whether she or the appellants posted ads for her services during the relevant time period, particularly in light of A.K.’s evidence that she needed the appellants’ help because she was “not good with words”.

118 The appellants assert that evidence of A.K.’s prior working arrangements was relevant to a proper understanding of the true nature of her relationship with the appellants, that she would not have required their assistance in posting ads and that she had posted and composed ads herself in the past. The appellants contend that this evidence was critical to avoid mischaracterizing their relationship with A.K. — the evidence countered the Crown’s portrayal of her as a vulnerable woman brought into the sex trade because of a drug dependency, and instead suggested that she sought out the appellants to improve her financial circumstances in part to feed her dependency. The appellants submit that there were no privacy or dignity concerns with the evidence, as they had disclaimed any interest in eliciting sexual activity details and sought to rely not on the sexual nature of A.K.’s activities, but on the pattern of how she carried on the financial and advertising aspects of her work in the past, and during the time she was involved with them.

119 I agree with the appellants that it was an error for the trial judge to prevent them from eliciting any of this evidence on their cross-examination of A.K. and to redact such evidence from her preliminary inquiry testimony. To the extent that the trial judge ended up accepting A.K.’s preliminary inquiry evidence where it was supported by other evidence, that evidence lacked context about A.K.’s prior work in the sex trade because it had been redacted to remove the impugned areas of cross-examination.

120 I also agree with the appellants that their proposed use of the evidence would not have engaged prohibited twin myths reasoning. On the s. 276 application the Crown asserted and the trial judge accepted, that the appellants’ proposed use of the evidence of A.K.’s other work in the sex trade was founded on impermissible twin myths reasoning about her propensity to engage in sexual activity: that if she had engaged in sex work before and after she worked with the appellants, it was less likely that she was exploited by the appellants.

121 I disagree. The appellants were not seeking to adduce evidence of A.K.’s sexual activity to support an inference that, by reason of the sexual nature of that activity, she was more likely to have consented to the

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sexual activity that formed the subject matter of the charges or that she was less worthy of belief. The appellants disclaimed any interest in the specifics of A.K.'s sexual activities and in drawing any inference that she was unworthy of belief because she was a sex worker. Rather, their proposed areas of cross-examination focused on the non-sexual features of the activity, including her experience in and knowledge of the sex trade business, the conduct of her business, and her reasons for seeking A.M.'s help. This evidence was relevant and probative to characterizing A.K.'s relationship with the appellants. It showed that A.K. had voluntarily engaged in sex trade work in the past and it helped to explain why she got involved with the appellants. The evidence was not being proffered to show that A.K. was more likely to have consented to the sexual activity in question or was less worthy of belief, but rather to suggest that she previously pursued work in the sex trade voluntarily and that the appellants did not lure or exploit her into working in the industry.

¹²² As the Supreme Court explained in *Darrach*, s. 276 prohibits inferences from the sexual nature of the activity, not inferences from other potentially relevant features of the activity: "If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted": at para. 35. See also *R. v. Webber*, 2021 NSCA 35, 403 C.C.C. (3d) 239, at paras. 115-19; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at paras. 44, 53-54; and *T.W.W.*, at para. 26. Here, the appellants should have been allowed to cross-examine A.K. about her other sex work and prior posting of advertisements, and references to such evidence that were elicited during the preliminary inquiry ought not to have been redacted from the transcript. I therefore conclude that the trial judge erred by precluding the appellants, in advance of the trial, from cross-examining A.K. about her prior work in the sex trade, including questions about her experience advertising her services, and by redacting such evidence from the preliminary inquiry transcript. This evidence was relevant and not being proffered for impermissible purposes. Further, if the appellants had been permitted to solicit this evidence and strayed beyond permissible bounds, the trial judge would have had the authority and responsibility to exercise his gatekeeping function and to intervene.

(3) The Curative Proviso Does Not Apply

¹²³ The fact that the trial judge erred in applying s. 276 and in excluding relevant evidence from the trial is not determinative of the appeal. The question is whether the legal error had any impact on the appellants' con-

victions, or put another way, whether the curative proviso applies in this case.

124 The Crown relies on the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* to argue that, even if the court were to conclude that the trial judge erred in relation to the scope of permissible cross-examination, “no substantial wrong or miscarriage of justice” occurred.

125 There are two circumstances where the court’s application of the proviso is appropriate: (1) where the error is harmless or trivial; or (2) where the evidence is so overwhelming that a conviction was inevitable: *R.V.*, at para. 85. The Crown submits that the first branch of the curative proviso applies in this case because, based on the trial judge’s reasoning, the evidence about A.K.’s other sex work would not have impacted the verdict.

126 First, the Crown argues that the appellants were able to fully canvass the exploitation issue at trial, and that it was ultimately resolved in their favour. The appellants cross-examined A.K. extensively about the scope of her work with them and her motivation for working with them and the trial judge found that they had not supplanted A.K.’s free will through exploitation or coercion. Given that the trial judge effectively found that A.K. voluntarily provided the sexual services forming the basis of the charges in this case, evidence that she voluntarily provided sexual services before her association with the appellants would not have affected the result. Moreover, since this evidence at best speaks to A.K.’s relationship with other individuals, not the appellants, it would not have impacted the verdicts.

127 Second, the Crown argues that the admission of evidence that A.K. previously posted advertisements on Backpage.com would not have affected the result. The trial judge relied not only on A.K.’s testimony to ground the convictions on the advertising sexual services count, but also on confirmatory evidence found both in messages on A.M.’s phone and the content of those ads, which referenced phone numbers that belonged to the appellants. The exclusion of evidence that A.K. previously posted ads on Backpage.com was therefore harmless or trivial.

128 The Crown argues that the court should accordingly conclude that, as in *R.V.*, no substantial wrong or miscarriage of justice resulted from any improper curtailment of the appellants’ cross-examination.

129 The appellants assert that they were prejudiced by the inability to establish that A.K. had been introduced to escort work through a friend several years before she met them, that she had worked both indepen-

dently and with agencies before she met Mr. X and the appellants, and that she had booked her own hotel rooms and posted her own advertisements. In short, the appellants allege that evidence of A.K.'s previous sex work strongly suggested that they had minimal influence on her state of mind and her decision to engage in sex work. They argue that the restrictions on cross-examination and the redactions from A.K.'s preliminary inquiry evidence denied them the ability to make full answer and defence by preventing them from putting before the court the full picture of their relationship with A.K. and how she conducted her business with them.

¹³⁰ Rarely will the curative proviso apply where cross-examination has been improperly curtailed: *R.V.*, at para. 86; *R. v. Samaniego*, 2022 SCC 9, 466 D.L.R. (4th) 581, at para. 77. That said, even if a trial judge erroneously restricts the scope of cross-examination following a s. 276 application, the proviso may apply if the errors did not prevent the accused from making full answer and defence: *R.V.*, at para. 87.

¹³¹ For example, in *R.V.* the accused was charged with the listed offences of sexual assault and sexual exploitation. It was alleged that the complainant was a virgin and that she had become pregnant as a result of the assault. The Supreme Court concluded that the trial judge erred in his s. 276 disposition by preventing the accused from putting relevant questions to the complainant in cross-examination about her prior sexual activity during the estimated period of conception. Karakatsanis J., for the majority, emphasized the importance of cross-examination to an accused's right to make full answer and defence. She stated at para. 64:

Simply put, the more important evidence is to the defence, the more weight must be given to the rights of the accused. For example, the need to resort to questions about a complainant's sexual history will be significantly reduced if the accused can advance a particular theory without referring to the complainant's sexual history. But in other circumstances — where challenging the Crown's evidence of the complainant's sexual history directly implicates the accused's ability to raise a reasonable doubt — cross-examination becomes fundamental to the accused's ability to make full answer and defence and must be allowed in some form: [*R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 71 and 94].

¹³² Nevertheless, in that case, the Supreme Court applied the curative proviso to restore the convictions. The court concluded that the accused was not prevented from making full answer and defence and that the error had resulted in no substantial wrong. The defence had been permitted

to ask questions at trial that allowed the accused to adequately challenge the inference urged by the Crown that the complainant's pregnancy confirmed his participation in the assault. In particular, counsel was able to advance the theory that the complainant had a boyfriend at the time, and that she had a motive to lie. He was not prevented from exploring the complainant's definition of "virginity" and what she meant when she told her doctor she was not sexually active at the time she became pregnant. After a careful review of the evidence, the court concluded that the errors in the s. 276 ruling were harmless and there was no reasonable possibility that the verdict would have been different.

133 Given the high bar for invoking the curative proviso, particularly where cross-examination has been wrongly restricted, I am not satisfied that this is an appropriate case in which it should be applied. First, evidence elicited through cross-examination about how A.K. conducted her business in the past may have supported an inference that A.K. worked independently of the appellants and that they did not exercise influence over the conduct forming the basis for the charges. Second, regarding A.K.'s prior posting of advertisements on Backpage.com, cross-examination in this area may have revealed evidence supporting the appellants' argument that it was A.K., not the appellants, who posted the ads forming the basis of the advertising sexual services charge. As Karakatsanis J. acknowledged in *R.V.*, at para. 86, "[b]ecause it is difficult to predict what lines of questioning counsel might pursue and what evidence may have emerged had cross-examination been permitted, a failure to allow relevant cross-examination will almost always be grounds for a new trial".

134 The Crown contends that the principal focus of the proposed cross-examination was to respond to the assertion that the appellants had exploited A.K.'s drug dependency to cause her to engage in the sex trade, and that the trial judge rejected this theory and ultimately acquitted the appellants of the human trafficking offences. The Crown argues the convictions for the sexual services offences did not require proof of exploitation and were supported by other evidence. In my view the areas the appellants proposed to explore in cross-examination of A.K. (and evidence that had been excluded in the redactions to the preliminary inquiry transcript) were relevant to the appellants' defences to the sexual services offences because they shed light on the appellants' relationship with A.K.

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135 In *R. v. Ochrym*, 2021 ONCA 48, 69 C.R. (7th) 285, leave to appeal refused, [2021] S.C.C.A. No. 106, this court emphasized the importance of assessing the relationship between the accused and the complainant in determining whether the accused committed the offence of procuring under s. 286.3(1). In granting an appeal from a conviction for procuring by exercising influence over the movements of the complainant because the trial judge had not considered the nature of the relationship and the impact of the appellant's conduct on the complainant's state of mind, this court stated, at para. 33:

Had Parliament intended s. 286.3(1) to criminalize any conduct affecting a complainant's movements that facilitates the provision of sexual service[s] for consideration, it would have done so more clearly.... Rather ... Parliament used terms which require consideration of whether because of the relationship between the accused and the complainant, the accused was in a position or had the ability to, and did, exercise control, direct or influence the movements of a person who provides sexual services for consideration. Some regard must be had to the nature of the relationship between the accused and the complainant.

136 In *Ochrym*, the court refused to apply the curative proviso to uphold the conviction, recognizing that, while it was possible that the trial judge may have found the *actus reus* of the offence to have been satisfied if he had considered the nature of the relationship between the appellant and the complainant, this outcome was not assured.

137 The same reasoning applies to the appellants' convictions under s. 286.3(1). The trial judge found that the appellants had not exploited A.K.'s drug dependency or otherwise coerced her to sell her sexual services, and he concluded that her motivation was financial. The appellants' proposed cross-examination on A.K.'s experience in the sex trade was relevant to her relationship with the appellants and her state of mind regarding the appellants' conduct that was alleged to have influenced her movements. As in *Ochrym*, while it is possible the appellants would have been convicted of procuring if the trial judge had considered all relevant evidence about A.K.'s relationship with the appellants, this outcome is not inevitable.

138 As such, I disagree with the Crown that the appellants' acquittals on the human trafficking offences indicate that they had the opportunity to fully cross-examine A.K. on this issue, and in turn to elicit sufficient relevant evidence to respond to the charges of which they were convicted. Although the other charges did not require the appellants' conduct to

have been for the purpose of exploitation, the appellants' ability to adduce evidence relevant to their relationship with A.K. was particularly important to their defence on the procuring charge.

139 The same result follows in respect of the appellants' convictions under s. 286.2(1) for having received a material benefit from the sale of A.K.'s sexual services. Although s. 286.2(4) carves out exemptions to the prohibition under s. 286.2(1), they were not available to the appellants because s. 286.2(5)(d) provides the exemptions do not apply to a person engaged in conduct that would constitute an offence under s. 286.3. If, as I have explained above, the convictions under s. 286.3(1) were not inevitable if the appellants had been able to adduce evidence about A.K.'s prior experience in the sex trade, then their convictions under the material benefits provision were also not assured because the exceptions under s. 286.2(4) would have been available. The appellants' ability to cross-examine A.K. on how she conducted her business in the past and to refer to evidence from her preliminary inquiry on this point might have been sufficient to raise a reasonable doubt with respect to the material benefits charge.

140 I turn finally to the appellants' convictions for advertising A.K.'s sexual services contrary to s. 286.4. While there was no question that the appellants' phone numbers appeared in ads for her services on Backpage.com during the time she was working with them, this evidence was not sufficient to make out the offence. The relevant question was whether the appellants or A.K. had authored and posted the ads.

141 A.K.'s evidence on this issue was contradictory and included her admission that she and the appellants had posted ads for her services during their association, and that she may have posted the ads using A.M.'s number. A.K. testified that she needed the appellants' help because she was not very good with words; however the appellants contend that there was evidence, that was excluded at trial, that A.K. had advertised her own sexual services on Backpage.com in the past, and that the ads that were posted during their association with A.K. were the same as ads she had used in the past while working independently. Had the appellants been able to explore this issue, they might have raised a reasonable doubt on this count as well. While the trial judge ultimately relied on two text messages saying "Repost?" on A.M.'s phone to support A.K.'s evidence, I am not persuaded that their convictions would inevitably have followed if they had been able to ask A.K. questions about her prior experience posting ads for her services, including when working for others.

¹⁴² I therefore conclude that the curative proviso does not apply. Cross-examination and evidence from the preliminary inquiry concerning A.K.'s prior work in the sex trade, including her experience advertising her services, was incorrectly excluded from the trial. The Crown has not established that this error was harmless or trivial. I would accordingly order a new trial on the sexual services offences. I pause to reiterate, however, that it will be incumbent on the trial judge at the new trial to ensure that any cross-examination and evidence adduced stays within permissible bounds. It does not necessarily follow that, because the appellants may ask A.K. about her prior work in the sex trade, all questions concerning this work will elicit relevant, material, and admissible evidence. As I have already noted, and emphasize here, the trial judge has the authority and responsibility to intervene where the evidence is irrelevant or where the probative value of the evidence is substantially outweighed by its prejudicial effect.

F. OTHER GROUNDS OF APPEAL

¹⁴³ The appellants also challenge their convictions on the following grounds: (1) the trial judge erred by failing to consider the nature of their relationship with A.K., which would impact the receiving a material benefit from sexual services and procuring counts; (2) the trial judge misapprehended the "rent"/"loot" text messages extracted from A.M.'s cell phone, which would impact the receiving a material benefit from sexual services count; (3) for M.P. only, the trial judge misapprehended the "re-post"/client text messages, which would impact the advertising sexual services count; and (4) for A.M. only, the trial judge erred in finding the Crown had proven the substance was MDMA, which would impact the trafficking MDMA count.

¹⁴⁴ It is unnecessary to address the three other grounds of appeal with respect to the sexual services offences, as I would allow the appeal and direct a new trial on these charges based on the trial judge's error in applying s. 276 to prevent the appellants from adducing evidence that was relevant to their defences.

¹⁴⁵ Although the appellants assert that with respect to two of the other alleged errors, they would be entitled to an acquittal if successful on appeal, I disagree. Each of the grounds essentially alleges that the trial judge failed to consider or misapprehended evidence. Even if such a ground were made out, the remedy would be a new trial, unless there was no other evidence upon which a properly instructed trier of fact could

have convicted. The record, in my view, admits of a reasonable possibility of convictions on a retrial. Accordingly, if the appellants were successful on any of these three grounds of appeal, the appropriate remedy would be a new trial: *R. v. Fryza*, 2012 MBCA 47, 280 Man. R. (2d) 134, at paras. 16-18; *Truscott (Re)*, 2007 ONCA 575, 226 O.A.C. 200, at paras. 247-48; and *R. v. Levy*, (1991), 62 C.C.C. (3d) 97 (Ont. C.A.), at p. 104.

146 As for A.M.'s conviction for trafficking MDMA, he asserts that the verdict was unreasonable because the trial judge accepted that the Crown proved the nature of the substance he was alleged to have provided to A.K., where no drugs had been seized or tested and accordingly no certificate of analysis was tendered in evidence.

147 I disagree. There is no requirement for the seizure and testing of a substance to support a conviction for trafficking of a substance contrary to s. 5(1) of the *CDSA*. The nature of the substance can be proven by circumstantial evidence in the absence of a seizure: *R. v. Pearle*, 2016 ONCA 954, at paras. 6-10. It was open to the trial judge to conclude that A.M. trafficked MDMA to A.K. given the admission at trial that MDMA is commonly known as "Molly", A.K.'s evidence that A.M. had supplied her with "Molly", her substantial prior experience using "Molly", and a text message on A.M.'s phone to an unknown person asking for "Molly" just before he confirmed to a client that A.K. would soon be back in town. The verdict against A.M. on the count of trafficking MDMA was not unreasonable. It was a verdict that a properly instructed trier of fact could reach on the evidence, and it was not reached irrationally or illogically.

148 A.M.'s four-month sentence for trafficking MDMA is unaffected by his sentence appeal which addresses only his sentence in respect of the sexual services offences.

G. DISPOSITION

149 For these reasons I would quash the appellants' convictions for the offences under ss. 286.2(1), 286.3(1) and 286.4 of the *Criminal Code* and I would direct a new trial on these charges. I would dismiss A.M.'s appeal of his conviction for having trafficked MDMA contrary to s. 5 of the *CDSA*, and uphold his four-month sentence in respect of that offence.

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J. George J.A.:

I agree.

L. Favreau J.A.:

I agree.

Appeals allowed in part.

CANADIAN CRIMINAL CASES

[Indexed as: **R. v. Barton**]

Bradley David Barton (Appellant) and Her Majesty The Queen
(Respondent) and Attorney General of Canada, Attorney
General of Ontario, Director of Criminal and Penal
Prosecutions, Attorney General of Manitoba, Vancouver Rape
Relief Society, La Concertation des luttes contre l'exploitation
sexuelle, AWCEP Asian Women for Equality Society,
Aboriginal Women's Action Network, Formerly Exploited
Voices Now Educating, Centre to End All Sexual Exploitation,
Assembly of First Nations, Ad Idem / Canadian Media Lawyers
Association, Women of the Métis Nation / Les Femmes Michif
Otipemisiwak, National Inquiry into Missing and Murdered
Indigenous Women and Girls, Independent Criminal Defence
Advocacy Society, Criminal Lawyers' Association of Ontario,
Institute for the Advancement of Aboriginal Women, Women's
Legal Education and Action Fund Inc., David Asper Centre for
Constitutional Rights, Aboriginal Legal Services and Criminal
Trial Lawyers' Association (Alberta) (Intervenors)

Supreme Court of Canada

Docket: 37769

2019 SCC 33, 2019 CSC 33

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown,
Rowe JJ.

Heard: October 11, 2018

Judgment: May 24, 2019

Sexual offences — Sexual conduct of complainant — Accused charged with first degree murder — Accused alleged to have cut deceased's vaginal wall causing her death — Accused testified that the injury took place during consensual sexual activity — Jury heard evidence that deceased was a prostitute and had previously had sexual relations with the accused — Accused was acquitted by jury — Court of Appeal ordered new trial on charge of first degree murder — Appeal allowed in part and new trial on charge of manslaughter ordered — s. 276 applied to first degree murder where underlying allegation is of sexual assault with a weapon — Trial judge erred by allowing evidence of deceased's prior sexual activity without a voir dire — Trial judge erred by failing to give

mid-trial instruction on the prohibited use of this evidence — Appropriate remedy was new trial on charge of manslaughter as errors would not have affected verdict on murder — Cr. Code, s. 276.

Defences — Mistake — Mistaken belief in consent — Accused charged with first degree murder — Accused alleged to have cut deceased's vaginal wall causing her death — Accused testified that the injury took place during what he believed was consensual sexual activity — Jury heard evidence that deceased was a prostitute and had previously had sexual relations with the accused — Accused was acquitted by jury — Court of Appeal ordered new trial on charge of first degree murder — Appeal allowed in part and new trial on charge of manslaughter ordered — Instructions on defence of mistaken belief in communicated consent were deficient — Trial judge failed to caution jury about mistakes of law that do not provide a defence.

Trial — Charge to jury — Motive and opportunity — Accused charged with first degree murder — Accused alleged to have cut deceased's vaginal wall causing her death — Accused testified that the injury took place during what he believed was consensual sexual activity — Accused acquitted by jury — Court of Appeal ordered new trial in part on basis that trial judge erred in instructions on motive — Appeal allowed in part — Trial judge did not err in instructing jury that absence of evidence of motive may be relevant to intent for murder.

Appeal — Crown appeal — Procedure — Appeal Court raising issue on own motion — Accused charged with first degree murder — Crown counsel assisted in drafting instruction on after-the-fact conduct and did not object to instruction — Accused acquitted and Crown appealed on other grounds — Court of Appeal raised adequacy of instruction on own motion — Court did not permit supplementary written submissions from defence — Court allowed appeal on this and other grounds — Appeal allowed in part — Court of Appeal erred by ordering new trial on this ground.

The accused was charged with first degree murder. The deceased was found dead in the bathtub in a hotel room occupied by the accused. She died from blood loss from a perforation of her vaginal wall. The Crown theory was that while the deceased was incapacitated by alcohol the accused used a sharp object to cut her vaginal wall. The defence position was that the vaginal tear was accidental and took place during consensual sexual activity, or in the alternative during activity that the accused believed was consensual. The accused testified that on the previous night he had agreed to pay the deceased \$60 for sex. He testified that on the night in question he believed she had agreed to the same price. The fatal injury took place when he was thrusting his hand into her vagina. The Crown led evidence of the accused's after the fact conduct including cleaning up the scene and leaving the hotel and making false statements to six people. No application was made during the trial under s. 276 of the Criminal Code. The

jury acquitted the accused. The Court of Appeal allowed the Crown's appeal and ordered a new trial on first degree murder. The accused appealed.

Held: The appeal was allowed in part and a new trial ordered on a charge of manslaughter (Wagner C.J., Abella and Karakatsanis JJ. dissenting in part).

Per Moldaver J., Cote, Brown and Rowe JJ. concurring:

The s. 276 regime applied to this trial because the offence of first degree murder was premised on sexual assault with a weapon, an offence listed in s. 276(1). Before adducing evidence of the deceased's sexual activity on the night before the alleged offence, the accused was required to bring a s. 276 application. Even if some of the accused's evidence on the subject had been admitted, a careful limiting instruction would have been required.

The trial judge's instructions to the jury on the defence of mistaken belief in communicated consent were deficient. The accused's defence rested largely on the notion that the sexual activity he said occurred on the first night led him to believe the complainant consented on the second night. The defence raised the spectre of several mistakes of law. First of all, a belief that the absence of signs of disagreement could be substituted for affirmative communication of consent is a mistake of law. Further, a belief that prior "similar" sexual activities between the accused and the complainant, the complainant's status as a sex worker, or the accused's own speculation about what was going through the complainant's mind could be substituted for communicated consent to the sexual activity in question at the time is a mistake of law. Moreover, a belief that the complainant could give broad advance consent to whatever the accused wanted to do to her is a mistake of law. Finally, the inference that the complainant's past sexual activities, by reason of their sexual nature, may make it more likely that she consented to the sexual activity in question — the first of the "twin myths" — is also a mistake of law. It was incumbent on the trial judge to caution the jury against acting on these mistakes of law.

The trial judge did not err by charging the jury that an absence of evidence of motive could be relevant to their decision. This was a relevant consideration bearing upon whether the accused intended to seriously harm or kill the deceased.

The Court of Appeal should not have ordered a new trial on the basis of errors in the trial judge's instructions on after-the-fact conduct. The Crown was actively involved in drafting the jury charge and in fact requested an instruction nearly identical to language that, according to the Court of Appeal, amounted to reversible misdirection. The Crown did not appeal on the basis of any error in the instruction and the issue was raised by the Court of Appeal without giving the accused the opportunity to provide supplementary written submissions.

The appropriate remedy was a new trial on a charge of manslaughter. The Crown's case on first degree murder rested on the straightforward factual ques-

tion of whether the accused cut the deceased with a sharp object. The trial judge's errors would not have affected the jury's resolution of that question.

Per Abella and Karakatsanis JJ., Wagner C.J. concurring:

The significant errors in allowing the deceased's prior sexual activity to be admitted with no limiting instruction and for her to be referred to as "Native" and "prostitute" on dozens of occasions could not be compartmentalized. With no protection from the trial judge, either in the form of a s. 276 inquiry or a cautionary instruction to resist the kinds of prejudicial inferences a sexual assault trial involving a female Indigenous sex worker can attract, the jurors were left to draw their own unobstructed conclusions about what happened. The trial judge failed to appreciate that the victim's prior sexual conduct, occupation, and race required the jury to be specifically alerted to the dangers of discriminatory attitudes toward Indigenous women, particularly those working in the sex trade. He provided no specific instructions crafted to confront the operative social and racial biases potentially at work. This rendered the whole trial unfair.

Cases considered by Moldaver J.:

- Ewert v. Canada* (2018), 2018 SCC 30, 2018 CSC 30, 2018 CarswellNat 2804, 2018 CarswellNat 2805, 46 C.R. (7th) 339, 37 Admin. L.R. (6th) 1, 423 D.L.R. (4th) 577, [2018] 2 S.C.R. 165, 413 C.R.R. (2d) 184 (S.C.C.) — referred to
- Nowegijick v. The Queen* (1983), [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123, 1983 CarswellNat 520, [1983] S.C.J. No. 5 (S.C.C.) — considered
- Primeau v. R.* (2017), 2017 QCCA 1394, EYB 2017-284483, 2017 CarswellQue 7904, 41 C.R. (7th) 22, 356 C.C.C. (3d) 329, 31 Admin. L.R. (6th) 225 (C.A. Que.) — referred to
- R. c. Cinous* (2002), 2002 SCC 29, 2002 CarswellQue 261, 2002 CarswellQue 262, 49 C.R. (5th) 209, (sub nom. *R. v. Cinous*) 162 C.C.C. (3d) 129, (sub nom. *R. v. Cinous*) 210 D.L.R. (4th) 64, (sub nom. *R. v. Cinous*) 285 N.R. 1, [2002] S.C.J. No. 28, [2002] 2 S.C.R. 3, REJB 2002-29526 (S.C.C.) — referred to
- R. c. Gagnon* (2018), 2018 SCC 41, 2018 CSC 41, 2018 CarswellNat 5739, 2018 CarswellNat 5740, 49 C.R. (7th) 263, 427 D.L.R. (4th) 426 (S.C.C.) — referred to
- R. c. Noël* (2002), 2002 SCC 67, 2002 CarswellQue 2167, 2002 CarswellQue 2168, 5 C.R. (6th) 1, 168 C.C.C. (3d) 193, 218 D.L.R. (4th) 385, 295 N.R. 1, 99 C.R.R. (2d) 1, [2002] S.C.J. No. 68, [2002] 3 S.C.R. 433, REJB 2002-35061 (S.C.C.) — referred to
- R. v. A. (J.)* (2011), 2011 SCC 28, 2011 CarswellOnt 3515, 2011 CarswellOnt 3516, [2011] S.C.J. No. 28, (sub nom. *R. v. J.A.*) 84 C.R. (6th) 1, 417 N.R. 1,

53 However, interveners must not overstep their proper role, particularly in criminal appeals. In fairness to the accused, they must not assume the role of third-party Crown prosecutors, nor can they “widen or add to the points in issue” (*Morgentaler*, at p. 463), particularly where doing so would widen or add to the Crown’s grounds of appeal from an acquittal. Appellate courts, in turn, have a duty to enforce these principles and protect the accused’s right to a fair trial under ss. 7 and 11(d) of the *Charter* by ensuring interveners do not stray beyond their proper — and important — role.

B. Standard of Review for Reversible Error

54 In Canada, misdirection in a jury charge is an error of law from which the Crown may appeal. When considering arguments of alleged misdirection, the appellate court must review the charge as a whole from a functional perspective, asking whether the jury was properly, not perfectly, equipped to decide the case, keeping in mind that it is the substance of the charge, not adherence to a set formula, that matters (see *Jacquard*, at para. 62; *Daley*, at para. 30; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26 (S.C.C.), at para. 32; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3 (S.C.C.), at para. 49). Alleged errors must be examined “in the context of the entire charge and of the trial as a whole” (*Jaw*, at para. 32).

C. Section 276 and Prior Sexual Activity Evidence

(1) A Brief History of the Section 276 Regime

55 Historically, the *Code* did not place any specific limits on the admissibility of evidence about a complainant’s prior sexual activities or the uses to which that evidence could be put. Consequently, there was nothing stopping counsel from adducing such evidence through cross-examination of the complainant and arguing, based on myths and stereotypes that were aided and abetted by the common law, that it undermined her credibility or increased the likelihood that she consented to the sexual activity in question because she had a propensity to consent (see H. C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at § 7:400.10). In this way, evidence of prior sexual activities was used to “blacken the character of the complainant, distort the trial process, and undermine the ability of the criminal justice system to effectively and fairly try sexual allegations” (*R. v. L.S.*, 2017 ONCA 685, 40 C.R. (7th) 351 (Ont. C.A.), at para. 79).

- ⁵⁶ In 1982, however, as part of a broader legislative package aimed at protecting the integrity of the person, protecting children and special groups, safeguarding public decency, and eliminating sexual discrimination, Parliament tabled the first “rape shield” provisions (see House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 77, 1st Sess., 32nd Parl., April 22, 1982, at p. 77:29).³ These provisions restricted the right of defence counsel in proceedings “in respect of” certain sexual offences to adduce evidence of a complainant’s sexual conduct on other occasions. One of the core objectives of these provisions was to debunk the “twin myths”, being the myths that “unchaste women” are (1) more likely to have consented to the sexual activity in question and (2) less worthy of belief.
- ⁵⁷ Almost a decade later, in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), this Court struck down s. 276 of the *Code*, as it then read, which set out a blanket exclusion of sexual activity evidence subject to three exceptions. The Court determined that although the provision had the laudable goals of abolishing the outmoded, sexist use of sexual activity evidence, it “oversho[t] the mark and render[ed] inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial” (p. 625). In its stead, the Court articulated common law principles governing the admissibility of sexual activity evidence.
- ⁵⁸ In the wake of *Seaboyer*, Parliament enacted a new s. 276 regime in 1992 through Bill C-49, which ushered in a suite of major reforms to the law on sexual offences in Canada (see *An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38). The animating purposes behind this new regime, aligned with those of its predecessor, were to protect the integrity of the trial by excluding irrelevant and misleading evidence, protect the accused’s right to a fair trial, and encourage the reporting of sexual offences by protecting the security and privacy of complainants (see *Seaboyer*, at pp. 605-6; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 (S.C.C.), at paras. 19 and 25). It essentially codified the prin-

³ The term “rape shield” should be avoided for several reasons, including the fact that the relevant provisions do not offer protection against rape, apply to a number of sexual assault offences that do not involve rape, and have purposes going beyond shielding the complainant from the rigours of cross-examination (see *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), at pp. 604 (per McLachlin J.) and 648 (per L’Heureux-Dubé J.)).

ciples set out by this Court in *Seaboyer* (see *Darrach*, at para. 20) and established substantive rules that prevent evidence of a complainant's sexual activities from being used for improper purposes, backed by procedural requirements designed to enforce these rules. This general framework, which survived a constitutional challenge in *Darrach*, remains in place today, albeit in amended form.

(2) *The Section 276 Regime*⁴

59 Section 276(1) of the *Code* reads:

Evidence of complainant's sexual activity

276(1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

- (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or
- (b) is less worthy of belief.

60 This section gives effect to the holding in *Seaboyer* that the “twin myths”, identified in paras. (a) and (b) respectively, “are simply not relevant at trial” and “can severely distort the trial process” (*Darrach*, at para. 33). It is “an expression of the fundamental rule that to be admissible, evidence must be relevant to a fact in issue” (*L.S.*, at para. 45), and it confirms that the twin myths simply “have no place in a rational and just system of law” (*Seaboyer*, at p. 630). These myths are “prohibited not only as a matter of social policy but also as a matter of ‘false logic’” (*R. v. Boone*, 2016 ONCA 227, 347 O.A.C. 250 (Ont. C.A.), at para. 37, citing *R. v. H. (W.)*, 2015 ONSC 3087 (Ont. S.C.J.), at para. 10; see also *Seaboyer*, at p. 605).

⁴ On December 13, 2018, various amendments to the s. 276 regime came into force. These reasons deal with the s. 276 regime as it existed before that date.

- 61 However, under s. 276(2), prior sexual activity evidence⁵ adduced by or on behalf of the accused is potentially admissible for other purposes where it meets a three-fold test:

Idem

276(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

- 62 This provision essentially mirrors the common law principles set out in *Seaboyer* (see *Darrach*, at para. 38). Importantly, it indicates that evidence of the complainant's prior sexual activity adduced by or on behalf of the accused is presumptively inadmissible unless, after the procedures set out in ss. 276.1 and 276.2 have been followed, the trial judge rules to the contrary, applying the three-fold test prescribed in s. 276(2).

- 63 In making this admissibility determination, the trial judge must take into account the factors listed under s. 276(3):

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;

⁵ To be clear, s. 276(2) covers evidence of the complainant's sexual activities both before and after the alleged offence took place. However, for convenience, I will use the language "prior sexual activity evidence" in these reasons, as there is obviously no evidence of any post-offence sexual activity in this case.

- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge or justice considers relevant.

⁶⁴ In addition to providing for substantive rules governing the admissibility of prior sexual activity evidence adduced by or on behalf of the defence, the s. 276 regime contains procedural components set out in ss. 276.1 to 276.4, which include the following salient provisions. Where the accused seeks to adduce evidence of the complainant's prior sexual activities, the accused must make a written application to the court setting out (a) detailed particulars of the evidence the accused seeks to adduce, and (b) the relevance of that evidence to an issue at trial (s. 276.1(1) and (2)). Where the accused submits such an application and the trial judge is satisfied the evidence is capable of being admitted under s. 276(2), a hearing must be held (s. 276.1(4)). Both the jury and the public must be excluded from this hearing, and the complainant is not compellable (s. 276.2(1) and (2)). Following the hearing, the judge must provide reasons setting out whether any of the evidence is admissible (s. 276.2(3)). If any of the evidence is admissible, then the trial judge must instruct the jury on the purposes for which that evidence can — and *cannot* — be used (s. 276.4).

⁶⁵ Finally, a ruling on the admissibility of prior sexual activity evidence under s. 276 is not necessarily set in stone. There may be circumstances in which it would be appropriate for the trial judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence. By way of illustration, where a complainant makes a statement to the police that prior sexual activity occurred but later contradicts that evidence in her testimony at trial, that contradictory testimony would open the door to the defence bringing a renewed s. 276 application seeking to have the prior sexual activity evidence admitted for credibility purposes (see *R. v. Crosby*, [1995] 2 S.C.R. 912 (S.C.C.); *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.)), despite an initial ruling of inadmissibility. This is but one example. There may be other circumstances in which it would be appropriate for the trial

judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence.

(3) *Proceedings Below*

⁶⁶ Turning to the case at hand, in its opening address to the jury, the Crown referred to Ms. Gladue as a “prostitute” and explained that she and Mr. Barton “struck a working relationship” on the night before her death (A.R., vol. III, p. 13). In addition, without submitting an application under s. 276.1(1) and (2) of the *Code*, Mr. Barton testified at length about his sexual activity with Ms. Gladue on the night prior to her death. The Crown did not object, nor did the trial judge order a separate hearing to consider the admissibility and permissible uses of this evidence. Consequently, the evidence went to the jury unedited and without a detailed limiting instruction.

⁶⁷ The Court of Appeal found this to be a serious error. It concluded that the failure to comply with the s. 276 regime led to reversible misdirection in the jury charge on the permissible uses of prior sexual activity evidence and the defence of honest but mistaken belief in communicated consent. It held that this error warranted a new trial on first degree murder.

(4) *Procedural Fairness Argument*

⁶⁸ Mr. Barton submits that as a matter of procedural fairness, the s. 276 issue was not properly raised before the Court of Appeal. Respectfully, I disagree. While the Crown did not object to Mr. Barton’s testimony about Ms. Gladue’s prior sexual activity, in my view, its failure to do so was not fatal. The ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge, not with the Crown. After all, it is the trial judge, not the Crown, who is the gatekeeper in a criminal trial. Moreover, I simply cannot accept that a complainant’s dignity, equality, and privacy rights, which the s. 276 regime is meant to protect, may be waived by mere Crown inadvertence. There is nothing in the record suggesting that the Crown made a deliberate attempt to avoid the application of the s. 276 regime, and indeed it had no reason to. It certainly gained no tactical advantage as a result of non-compliance — quite the opposite. And in any event, given the important objectives underlying s. 276, the Crown should refrain from commenting on a complainant’s prior sexual history unless necessary.

- 69 Having settled the procedural fairness aspect of the s. 276 issue, I turn to its substance.

(5) *The Applicability of the Section 276 Regime*

- 70 The first substantive issue is one of scope: Can the s. 276 regime apply in a case where the offence charged — here, murder under ss. 231(5)(c) and 235(1) — is not one of the offences listed in s. 276(1)?
- 71 This issue raises a question of statutory interpretation. The modern approach to statutory interpretation provides that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as cited in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21).
- 72 Beginning with the text, the opening words of s. 276(1) and (2) — proceedings “in respect of” a listed offence — are “of the widest possible scope” and are “probably the widest of any expression intended to convey some connection between two related subject matters” (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 39). These words import such meanings as “in relation to”, “with reference to”, or “in connection with” (*ibid.*).
- 73 Parliament would not have chosen this exceptionally broad language if it intended to limit the application of the s. 276 regime to proceedings in which a listed offence was expressly charged. Narrower language such as “in a prosecution for” a listed offence or “where a person is charged with” a listed offence was equally available. Yet Parliament declined to adopt those narrower formulations and instead chose a much broader one. That choice must be given effect.
- 74 Turning to purpose, the s. 276 regime’s objects — which include protecting the integrity of the trial by excluding irrelevant and misleading evidence, protecting the accused’s right to a fair trial, and encouraging the reporting of sexual offences by protecting the security and privacy of complainants (see *Seaboyer*, at pp. 605-6; *Darrach*, at paras. 19 and 25) — are fundamental. Giving the s. 276 regime a broad, generous interpretation that does not unduly restrict the regime’s scope of application would best achieve these objects.
- 75 Moreover, imposing a rigid requirement that a listed offence must be expressly charged before the s. 276 regime can apply would put form over substance. The regime’s applicability would turn on the way in

which the prosecutor drafts the charging document, not on whether, in substance, a listed offence is implicated in the proceeding. If a listed offence is implicated in the proceeding, surely it makes no difference that the Crown did not particularize that offence in the charging document.

76 With these points in mind, I am of the view that the s. 276 regime applies to any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document. For example, this broad relational test would be satisfied where the listed offence is the predicate offence for the offence charged or an included offence of the offence charged.

77 In Mr. Barton's case, the s. 276 regime was engaged because the offence charged, first degree murder under ss. 231(5)(c) and 235(1), was premised on sexual assault with a weapon contrary to s. 272, which is an offence listed in s. 276(1). That alone was sufficient to engage the s. 276 regime.

78 In this case, it is plain that the proceeding implicated an offence listed in s. 276(1). However, that will not always be the case. With that in mind, going forward, where there is uncertainty about whether the s. 276 regime applies to the proceeding in question, the trial judge should raise that issue with the parties at the earliest opportunity and, after giving the parties the opportunity to make submissions, issue a ruling on the matter. If the trial judge holds that the s. 276 regime applies, then the defence may require an adjournment to prepare the necessary application under s. 276.1(1) and (2) to have the proposed evidence admitted.

79 The foregoing analysis points to the conclusion that Mr. Barton's testimony about Ms. Gladue's sexual activity on the night before her death was subject to the s. 276 regime. However, Mr. Barton stresses that s. 276(2) applies only in respect of "evidence ... adduced by or on behalf of the accused" and submits that the s. 276 regime therefore does not apply to evidence adduced by or on behalf of the Crown. Based on this premise, he maintains that by referring to Ms. Gladue as a "prostitute" in its opening address and explaining that she and Mr. Barton "struck a working relationship" on the night before her death, the Crown opened the door to wholesale admission of Mr. Barton's evidence about Ms. Gladue's past sexual activities, without having to first sift that evidence through the s. 276 filter. He also says that the Crown's questioning of witnesses about Ms. Gladue's relationship with him, and about his ques-

tion to his colleague about whether he wanted a “piece” of Ms. Gladue, had the same effect.

80 Respectfully, I cannot agree. First, s. 276(1), which confirms the irrelevance of the “twin myths”, is categorical in nature and applies irrespective of which party has led the prior sexual activity evidence. Thus, regardless of the evidence adduced by the Crown, Mr. Barton’s evidence was inadmissible to support either of the “twin myths”. Moving to s. 276(2), while it is true that this provision applies only in respect of “evidence ... adduced by or on behalf of the accused”, the common law principles articulated in *Seaboyer* speak to the general admissibility of prior sexual activity evidence. Given that the reasoning dangers inherent in prior sexual activity evidence are potentially present regardless of which party adduces the evidence, trial judges should follow this Court’s guidance in *Seaboyer* to determine the admissibility of Crown-led prior sexual activity evidence in a *voir dire* (see pp. 633-36).

81 However, the limited information conveyed in the Crown’s opening address did not, in my view, exclude s. 276(2)’s application to Mr. Barton’s detailed testimony about Ms. Gladue’s sexual activity on the night before her death, which went well beyond the basic narrative recounted by the Crown. Nor did the Crown’s limited questioning of witnesses on Ms. Gladue’s relationship with Mr. Barton and Mr. Barton’s question to his colleague about whether he wanted a “piece” of Ms. Gladue have this effect. These were mere drops in the expansive pool of information Mr. Barton flooded the jury with through his testimony. In short, the Crown did not give him a “free pass” and cloak his evidence with immunity from the s. 276 regime.

82 It follows that before adducing evidence of Ms. Gladue’s sexual activity on the night before her death, Mr. Barton was required to make an application under s. 276.1(1) and (2). Similarly, the trial judge was required to determine whether that evidence was capable of being admitted under s. 276(2) and, if so, hold an *in camera* hearing to determine the admissibility of that evidence (ss. 276.1(4), 276.2(1) and 276.2(2)). Following the issuance of reasons (s. 276.2(3)), if any of the evidence was deemed admissible, then the trial judge would have been required to issue a detailed instruction to the jury identifying the purposes for which the evidence could — and *could not* — be used (s. 276.4).

83 Yet none of these requirements was observed. While this non-compliance may have been advantageous to Mr. Barton, as his evidence was shielded from scrutiny under the s. 276 regime, it came at the expense of

Ms. Gladue's dignity and privacy (which continued despite her death), the truth-seeking process, and trial fairness, which must be assessed "from both the perspective of the accused *and of society more broadly*" (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651 (S.C.C.), at para. 22 (emphasis added)). As this Court stated in *Darrach*, an accused does not have the right "to adduce misleading evidence to support illegitimate inferences" and thereby "distort the truth-seeking function of the trial process" (para. 37, citing *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at para. 74).

84 Finally, since the procedural requirements under ss. 276.1 to 276.4 were not observed, I am of the view that it would be both unwise and practically unworkable for this Court to speculate about what prior sexual activity evidence would have been admitted, and for what purposes, had a s. 276 hearing been held. However, assuming without deciding that at least some of Mr. Barton's evidence was admissible, a careful limiting instruction was essential to instruct the jury on the permissible and impermissible uses of that evidence. Because that did not happen, the jury was left adrift in a sea of dangerous and impermissible inferences.

85 Further, as I will develop, the failure to observe the requirements of the s. 276 regime had ripple effects, most acutely in the instructions on the defence that is commonly associated with s. 276: the defence of honest but mistaken belief in communicated consent (see *Darrach*, at para. 59).

D. Instructions on the Defence of Honest but Mistaken Belief in Communicated Consent

(1) Legal Principles

86 One of the ways in which an accused may respond to a charge of sexual assault is to rely on the defence of honest but mistaken belief in communicated consent. To lay the foundation for the analysis that follows, it will first be useful to briefly review several key principles relating to this defence, namely: (a) the role consent plays in the sexual assault analysis, (b) the necessity of having a belief in *communicated* consent in order to raise the relevant defence, (c) mistakes of law, and (d) the reasonable steps requirement. I will address these four points in turn.

(a) The Role of Consent in the Sexual Assault Analysis

87 A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused com-

Regina v. Seaboyer
Regina v. Gayme

a [Indexed as: R. v. Seaboyer; R. v. Gayme]

Supreme Court of Canada, Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ. August 22, 1991.

b Charter of Rights — Fundamental justice — Evidentiary provisions — Provisions of Criminal Code governing admissibility of evidence of reputation and prior sexual conduct in trial on sexual assault — Provision prohibiting admission of evidence of sexual reputation for purpose of challenging or supporting credibility of complainant valid — Provision prohibiting adducing of evidence of prior sexual conduct except in limited circumstances infringing principles of fundamental justice and right to fair trial — Effect of provision to prevent trier of fact from considering relevant evidence — **c** Provision not shown to be reasonable limit — Cr. Code, ss. 276, 277 — Canadian Charter of Rights and Freedoms, ss. 7, 11(d) — Constitution Act, 1982, s. 52.

d Charter of Rights — Right to fair trial — Evidentiary provisions — Provisions of Criminal Code governing admissibility of evidence of reputation and prior sexual conduct in trial on sexual assault — Provision prohibiting admission of evidence of sexual reputation for purpose of challenging or supporting credibility of complainant valid — Provision prohibiting adducing of evidence of prior sexual conduct except in limited circumstances infringing principles of fundamental justice and right to fair trial — Effect of provision to prevent trier of fact from considering relevant evidence — **e** Provision not shown to be reasonable limit — Cr. Code, ss. 276, 277 — Canadian Charter of Rights and Freedoms, ss. 7, 11(d) — Constitution Act, 1982, s. 52.

f Charter of Rights — Enforcement of rights — Court of competent jurisdiction — Accused charged with sexual assault seeking to lead evidence of complainant's prior sexual conduct — Admission of such evidence prohibited by Criminal Code provisions — Accused seeking to have provisions declared unconstitutional at preliminary inquiry — Judge presiding at preliminary inquiry having no jurisdiction to declare provisions unconstitutional — Canadian Charter of Rights and Freedoms, ss. 7, 11(d), 24(1) — Constitution Act, 1982, s. 52 — Cr. Code, ss. 276, 277.

g Charter of Rights — Enforcement of rights — Constitutional exemption — Criminal Code provision limiting admission of evidence of prior sexual conduct of complainant on trial for sexual offences — Court finding that provision infringing principles of fundamental justice and right to fair trial as limiting admissibility of evidence which may be necessary for accused to make full answer in defence — Legislation held to be unconstitutional — Not **h** appropriate case to invoke doctrine of constitutional exemption — Cr. Code, s. 276 — Constitution Act, 1982, s. 52 — Canadian Charter of Rights and Freedoms, ss. 7, 11(d).

Evidence — Admissibility — Power to exclude relevant evidence — Trial judge having power to exclude evidence adduced by Crown where prejudicial effect of evidence outweighs probative value — Right to exclude relevant

defence evidence more limited — Judge may only exclude evidence tendered by defence where prejudicial effect substantially outweighs probative value.

The two accused who were charged separately with sexual assault sought to adduce evidence, at their preliminary inquiries, as to the prior sexual conduct of the complainants. Such evidence was inadmissible by virtue of ss. 276 and 277 of the *Criminal Code*, which respectively limit the admissibility of prior sexual conduct of the complainant with persons other than the accused except in certain limited circumstances, and prohibit the admission of evidence of sexual reputation for the purpose of challenging or supporting the credibility of the complainant. The accused, therefore, applied to have ss. 276 and 277 declared unconstitutional by virtue of their inconsistency with ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. The judges presiding at the preliminary inquiries refused and the accused then applied for *certiorari* to quash their committals for trial. This application was granted, the court holding that the provisions did offend the Charter and were inoperative. An appeal by the Crown to the Ontario Court of Appeal was allowed and the committals for trial restored.

On appeal by the accused to the Supreme Court of Canada, **held**, L'Heureux-Dubé and Gonthier JJ. dissenting in part, the appeal should be dismissed.

Per McLachlin J., Lamer C.J.C., La Forest, Sopinka, Cory, Stevenson and Iacobucci JJ. concurring: While the accused challenged the constitutionality of ss. 276 and 277 on the basis that the provisions infringe both ss. 7 and 11(d) of the Charter, the issue can be determined by application of s. 7. The principles of fundamental justice are the fundamental tenets upon which the legal system is based and the right to a fair trial enshrined in s. 11(d) merely reflects a particular principle of fundamental justice. The principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and against the applicable principles and policies that have animated legislative and judicial practice in the field. The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice. A measure which denies the accused the right to present a full and fair defence would violate s. 7.

Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the complainant. The notion that a complainant's credibility might be affected by whether she has had other sexual experience is universally discredited. There is no logical or practical link between the complainant's sexual reputation and whether she is a truthful witness. Section 277 thus excludes no relevant evidence and is valid.

Section 276 of the *Criminal Code*, however, does violate the principles of fundamental justice as guaranteed by s. 7 of the Charter. The purpose of s. 276 is to preserve the integrity of the trial by eliminating evidence which has little or no probative force but which unduly prejudices the trier of fact against the complainant. The legislation is designed to encourage the reporting of crime by eliminating to the greatest extent possible those elements of the trial which cause embarrassment or discomfort to the complainant. Finally, the legislation has as its purpose the protection of the witness's privacy. In addition to furthering the reporting of sexual crimes, our system of justice has an interest in preventing unnecessary invasion of a witness's privacy. However, it is a fundamental principle of justice that the innocent not be punished. This principle is reflected in society's fundamental commitment to a fair trial, including the guarantee of an opportunity to adequately present a defence. The right to present full answer and defence

a depends on being able to call evidence necessary to establish a defence and to challenge the evidence called by the Crown. A rule of evidence which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law to justify the exclusion runs afoul of the fundamental conceptions of justice and a fair trial. The problem with s. 276 is that it fails to recognize that relevancy cannot be determined in a vacuum. Evidence which may be relevant to one issue may be irrelevant to another issue. The law of evidence deals with this problem by giving to the trial judge the task of balancing the value of the evidence against its potential prejudice. Where evidence is b tendered by the Crown, its admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission. Where evidence is presented by the defence, the courts have been much more cautious in view of the fundamental tenet of our judicial system that an innocent person must not be convicted. Thus, the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to c a defence allowed by law. The effect of s. 276 is to exclude evidence irrespective of the purpose for which it is tendered, unless it fits into one of three exceptions. In the result, the section may exclude evidence which is relevant to the defence even though the probative value of the evidence is not substantially outweighed by the potential prejudice to the trial process. Section 276, although enacted for the purpose of helping judges and juries arrive at the proper and just verdict in the particular case, overshoots the mark, with the result that it may have the opposite d effect of impeding the trier of fact from discovering the truth. Accepting that evidence which diverts the trier of fact from the real issue and prejudices the chances of a true verdict can be properly excluded, even if it possesses some relevance to a defence, the fact remains that a provision that categorically excludes evidence, without permitting the trial judge to engage in the exercise of determining whether the possible prejudicial effect of the evidence outweighs its e value to the truth-finding process, runs the risk of overbreadth. The argument based on the reporting of sexual offences also fails to justify the wide reach of s. 276. It is counter-productive to encourage reporting of sexual offences by a rule which impairs the ability of the trier of fact to arrive at a just result and determine the truth of the report. As regards the interests of protecting the privacy of the witness, the constitutional right to a fair trial must take precedence in the case of f conflict. Section 276 by adopting a pigeon-hole approach to the admissibility of evidence, prevents the trial judge from dealing adequately with the fundamental evidentiary problem, that of determining whether the evidence is truly relevant, rather than irrelevant and misleading.

g It was not shown that s. 276 constitutes a reasonable limit within the meaning of s. 1 of the Charter. While the legislation addresses a pressing and substantial objective, it fails the proportionality test. To the extent that the section excludes relevant defence evidence the value of which is not clearly outweighed by its danger, the section is overbroad. A provision which rules out probative defence evidence which is not clearly outweighed by the prejudice it may cause to the trial strikes the wrong balance between the rights of the complainant and the rights of h the accused. Accordingly, the legislation is of no force and effect.

h Assuming that the doctrine of constitutional exemption can save legislation which otherwise violates the Charter, this was not an appropriate case to apply that doctrine. In the first place, the doctrine of constitutional exemption would not achieve the end of substantially upholding the law which Parliament enacted. The constitutional exemption doctrine would import into the provision an element which Parliament specifically chose to exclude, the discretion of the trial judge.

The exemption, while perhaps saving the law in one sense, dramatically alters it in another. Where the effect is to change the law so substantially, it is questionable whether it is useful or appropriate to apply the doctrine of constitutional exemption. This solution would also, in effect, accomplish precisely what striking down would do, that is, set up a regime based on common law notions of relevancy. Finally, the doctrine would delegate to the trial judge the task of determining when the legislation should not be applied. This amounts to saying that it should not be applied when it should not be applied, unless some criterion outside the Charter is found. This would place the burden on the accused to show that the decision to exclude evidence, for example, is unconstitutional, a burden the accused would not bear if the section were struck out.

Striking down s. 276 does not, however, revive the old common law rules of evidence which permitted liberal and often inappropriate reception of evidence of the complainant's sexual conduct. The common law must be adapted to conform to current reality. The reality is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. The applicable principles of the new common law rules may be summarized as follows. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions is not admissible solely to support the inference that the complainant is, by reason of such conduct, more likely to have consented to the sexual conduct at issue and is less worthy of belief. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence. Examples of the purpose for which such evidence may be admissible would include evidence tending to prove that a person other than the accused caused the physical consequences of the alleged sexual assault, evidence tending to prove bias or motive to fabricate on the part of the complainant, evidence of prior sexual conduct known to the accused tending to prove the accused believed the complainant was consenting, evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence where such evidence is not used merely to show that the complainant consented or is an unreliable witness, and evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct. These, however, are merely examples. Before evidence of consensual sexual conduct on the part of the complainant is received, it must be established on a *voir dire*, which may be held *in camera*, by affidavit or the testimony of the accused or third parties, that the proposed use of the evidence of other sexual conduct is legitimate. Where evidence that the complainant has engaged in sexual conduct on other occasions is admitted on a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit.

The judges presiding at the preliminary inquiries properly found that they did not have jurisdiction to strike down ss. 276 and 277. Section 52 of the *Constitution Act, 1982* does not confer jurisdiction on a tribunal to determine whether a law is constitutional. That jurisdiction must be found in the legislation which defines the powers of the body. The *Criminal Code* does not give a judge presiding in a preliminary inquiry jurisdiction to hear and determine the constitutionality of an evidentiary provision of the *Criminal Code*. Since the Provincial Court judges did not commit jurisdictional error in refusing to strike

down the legislation, their decisions were not reviewable on *certiorari* and the appeals must be dismissed.

- a *Per L'Heureux-Dubé J., Gonthier J. concurring, dissenting in part:* Both ss. 276 and 277 of the *Criminal Code* are valid and do not infringe the rights of an accused to fundamental justice and to a fair trial as guaranteed by ss. 7 and 11(d) of the Charter. As regards s. 277, it merely excludes evidence of sexual reputation used to impeach or support the credibility of the complainant. The notion that reputation for unchasteness is relevant to credibility is insupportable and its legislative exclusion uncontroversial. Evidence of sexual reputation is, as well,
- b inherently unreliable.

- As regards s. 276, it was a response to the unique evidentiary rules developed at common law with respect to the evidence of victims of sexual assault and to the judicial interpretation of the predecessor to s. 276. In the case of sexual offences, the common law enshrined prevailing mythology and stereotype by formulating
- c rules that made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her morality or character. Section 276 was enacted in an attempt to eliminate sexual discrimination and to rationalize trials of sexual offences through restricting the ability of the accused to adduce invasive, prejudicial evidence of sexual history and sexual reputation, except in circumstances where the evidence was sufficiently proximate
 - d to the legal issues raised. The legislation would also fulfil the objective of increasing reporting of sexual assaults. The concept of relevance has been imbued with stereotypical notions of female complainants and sexual assault. A decision on relevancy whether formed by experience, common sense or logic, is a decision particularly vulnerable to the application of private beliefs and, thus, stereotype and myth. Once the mythical bases of relevancy determination in the area of
 - e sexual assault cases are revealed, the irrelevance of most evidence of prior sexual history is clear. In s. 276, Parliament has provided broad avenues for admissibility. Evidence that is excluded by s. 276 is simply in a myth and stereotype-free decision-making context irrelevant. Properly understood, the exemptions in s. 276 would admit most evidence which has real probative value in support of a defence for the accused. Those examples which remain which would not be permitted by s. 276 would be either irrelevant or properly excluded because of their prejudicial
 - f effect on the trial process. Thus, so-called similar fact or pattern evidence would almost invariably be irrelevant and is nothing more than a prohibited propensity argument, besides being highly prejudicial to the integrity and fairness of the trial process. As regards evidence tendered to support a defence of consent, any evidence which would be excluded by s. 276 would not satisfy the air of reality prerequisite for maintaining that defence in any event. Nor would such evidence
 - g provide reasonable grounds for the jury to consider in assessing whether the belief of the accused was honestly held. As regards evidence of prior acts of prostitution or allegations of prostitution, these are never relevant and are hugely prejudicial. With respect to evidence going to show motive to fabricate or bias, most such alleged motives or bias will not be grounded in the complainant's sexual history. Much of this history depends for its relevance on certain stereotypical false visions
 - h of women. As to evidence that a complainant has made prior false allegations of sexual assault, such evidence is admissible under the existing provisions since the evidence does not involve the admission of her prior sexual history. Any evidence which would be excluded under s. 276 would have a significant distorting effect on the trial and sidetrack the search for truth. Neither fairness of the trial nor the principles of fundamental justice mandate the invalidity of s. 276. An accused has no constitutional right to adduce irrelevant evidence. Nor does an accused have

the right to adduce evidence that prejudices and distorts the fact-finding process at trial. The accused on any meaningful and purposive interpretation of the rights in ss. 7 and 11(d) of the Charter which are involved, has no right to adduce the evidence excluded by s. 276. Further, ss. 7 and 11(b) protect not only the accused's interest in adducing all exculpatory evidence but other interests as well. The complainant and the community at large has an interest in the reporting and prosecution of sexual offences. They also have a legitimate interest in ensuring the trials of sexual matters are conducted in a fashion that does not subordinate the fact-finding process to myth and stereotype. Sexual history evidence excluded by s. 276 is either irrelevant or so prejudicial that its minimal probative value is overwhelmed by its distorting effect.

Further, even if s. 276 did infringe the accused's Charter rights, it is a reasonable limit within the meaning of s. 1 of the Charter. The goal of Parliament in enacting s. 276 was to eliminate sexual discrimination in the trial of sexual offences through the elimination of irrelevant and prejudicial sexual history evidence. The legislation was also designed to encourage women to report their victimization. These objectives are of sufficient importance to warrant restricting the rights of an accused. The measures in s. 276 are proportional to the objectives. In view of the demonstrated effect that sexual history evidence can have upon a trier of fact, it is clear that s. 276 is rationally connected to Parliament's objective. This section also impairs the rights of the accused as little as possible. The test to be applied with respect to minimal impairment is whether the government had a reasonable basis for concluding that the legislative solution that they chose impaired the right of an accused as little as possible, given the government's pressing and substantial objective. The solution chosen by Parliament in s. 276 was a reasonable one. In particular, it would not have been better to leave the matter to the discretion of trial judges. History demonstrates that it was the discretion of trial judges that saturated the law in this area with stereotype. Finally, the exclusion of largely irrelevant and highly prejudicial sexual history evidence does not significantly trench upon an accused's right to a fair trial or an accused's right to make full answer and defence. Accordingly, ss. 276 and 277 are valid.

R. v. Wray, [1970] 3 C.C.C. 122, 9 C.R.N.S. 131, 12 Crim. L.Q. 103, [1970] 2 O.R. 3; rev'd [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272, 11 C.R.N.S. 235, **overd**

Douglas/Kwantlen Faculty Assn. v. Douglas College (1990), 77 D.L.R. (4th) 94, [1990] 3 S.C.R. 570, 13 C.H.R.R. D/403, 91 C.L.L.C. ¶17,002, 2 C.R.R. (2d) 157, [1991] 1 W.W.R. 643, 52 B.C.L.R. (2d) 68, 118 N.R. 340, 24 A.C.W.S. (3d) 481, **distd**

Reference re: s. 94(2) of Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 15 W.C.B. (2d) 343; *Duke v. The Queen* (1972), 7 C.C.C. (2d) 474, 28 D.L.R. (3d) 129, [1972] S.C.R. 917, 18 C.R.N.S. 302; *R. v. Morris* (1983), 7 C.C.C. (3d) 97, 1 D.L.R. (4th) 385, [1983] 2 S.C.R. 190, 36 C.R. (3d) 1, [1984] 2 W.W.R. 1, 48 N.R. 341, 10 W.C.B. 361; *R. v. Corbett* (1988), 41 C.C.C. (3d) 385, [1988] 1 S.C.R. 670, 64 C.R. (3d) 1, 34 C.R.R. 54, [1988] 4 W.W.R. 481, 28 B.C.L.R. (2d) 145, 85 N.R. 81, 4 W.C.B. (2d) 148; *R. v. Sweitzer* (1982), 68 C.C.C. (2d) 193, 137 D.L.R. (3d) 702, [1982] 1 S.C.R. 949, 29 C.R. (3d) 97, [1982] 5 W.W.R. 555, 37 A.R. 294, 21 Alta. L.R. (2d) 97, 42 N.R. 550, 8 W.C.B. 62; *R. v. Mills* (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 543n, **consd**

a McLACHLIN J.:—These cases raise the issue of the constitution-
 ality of ss. 276 and 277 of the *Criminal Code*, R.S.C. 185, c. C-46
 (formerly ss. 246.6 and 246.7), commonly known as the “rape-
 shield” provisions. The provisions restrict the right of the defence
 on a trial for a sexual offence to cross-examine and lead evidence
 of a complainant’s sexual conduct on other occasions. The question
 is whether these restrictions offend the guarantees accorded to an
 b accused person by the *Canadian Charter of Rights and
 Freedoms*.

c My conclusion is that one of the sections in issue, s. 276, offends
 the Charter. While its purpose — the abolition of outmoded, sexist-
 based use of sexual conduct evidence — is laudable, its effect goes
 beyond what is required or justified by that purpose. At the same
 time, striking down s. 276 does not imply reversion to the old
 common law rules, which permitted evidence of the complainant’s
 sexual conduct even though it might have no probative value to the
 issues on the case and, on the contrary, might mislead the jury.
 d Instead, relying on the basic principles that actuate our law of
 evidence, the courts must seek a middle way that offers the
 maximum protection to the complainant compatible with the
 maintenance of the accused’s fundamental right to a fair trial.

e A second issue arises as to the procedure to be followed where a
 constitutional question is raised on a preliminary inquiry to
 determine if there is sufficient evidence to commit the accused for
 trial. On this issue I conclude that the preliminary inquiry judges
 correctly declined to consider the constitutionality of the legislation
 and that the cases should be remitted for trial in accordance with
 f the principles of evidence as canvassed in these reasons.

The background

g I deal first with *Seaboyer*. The accused was charged with sexual
 assault of a woman with whom he had been drinking in a bar. On
 the preliminary inquiry the judge refused to allow the accused to
 cross-examine the complainant on her sexual conduct on other
 occasions. The appellant contends that he should have been
 permitted to cross-examine as to other acts of sexual intercourse
 which may have caused bruises and other aspects of the complain-
 h ant’s condition which the Crown had put in evidence. While the
 theory of the defence has not been detailed at this early stage, such
 evidence might arguably be relevant to consent, since it might
 provide other explanations for the physical evidence tendered by
 the Crown in support of the use of force against the complainant.

(b) *The positions of the parties*(i) *The arguments in favour of the legislation*

The supporters of the legislation submit that it conforms to, and indeed furthers, the principles of fundamental justice, both in purpose and effect.

The main purpose of the legislation is to abolish the old common law rules which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar. In an effort to rid the criminal law of these outmoded and illegitimate notions, legislatures throughout the United States and in England, Australia and Canada passed "rape-shield" laws. (I note that the term "rape shield" is less than fortunate; the legislation offers protection not against rape, but against the questioning of complainants in trials for sexual offences.)

Three subsidiary purposes of such legislation may be discerned. The first, and the one most pressed before us, was the preservation of the integrity of the trial by eliminating evidence which has little or no probative force but which unduly prejudices the judge or jury against the complainant. If we accept, as we must, that the purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent, then it follows that irrelevant evidence which may mislead the jury should be eliminated in so far as possible. There is no doubt that evidence of the complainant's sexual activities has often had this effect. Empirical studies in the United States suggest that juries often misused evidence of unchastity and improperly considered "victim-precipitating" conduct, such as going to a bar or getting into a car with the defendant, to "penalize" those complainants who did not fit the stereotype of the "good woman" either by convicting the defendant of a lesser charge or by acquitting the defendant: Harriett R.

a Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 Minn. L. Rev. 763, at p. 796. It follows that society has a legitimate interest in attempting to eliminate such evidence.

b The second rationale cited in support of rape-shield legislation is that it encourages the reporting of crime. Despite the fact that the statistics do not demonstrate with any certainty that reporting of sexual offences has increased in Canada as a consequence of rape-shield provisions, I accept that it is a legitimate legislative goal to attempt to encourage such reporting by eliminating to the greatest extent possible those elements of the trial which cause embarrassment or discomfort to the complainant. As time passes and the existence of such provisions becomes better known, they may well have some effect in promoting reporting. Certainly, failure to consider the position of the complainant in the trial process may have the opposite effect.

d A third and related reason sometimes offered for rape-shield legislation is protection of the witness's privacy. This is really the private aspect upon which the social interest in encouraging the reporting of sexual offences is based. In addition to furthering reporting, our system of justice has an interest in preventing unnecessary invasion of witnesses' privacy.

e The goals of the legislation — the avoidance of unprobative and misleading evidence, the encouraging of reporting and the protection of the security and privacy of the witnesses — conform to our fundamental conceptions of justice. The concern with the legislation is not as to its purpose, which is laudable, but with its effect. The reasons for these concerns emerge from a consideration of the appellants' position, to which I now turn.

(ii) *The arguments against the legislation*

g The appellants contend that the legislation, however laudable its goals, in fact infringes their right to present evidence relevant to their defence and hence violates their right to a fair trial, one of the most important of the principles of fundamental justice.

h The precept that the innocent must not be convicted is basic to our concept of justice. One has only to think of the public revulsion felt at the improper conviction of Donald Marshall in this country or the Birmingham Six in the United Kingdom to appreciate how deeply held is this tenet of justice. Lamer J. (as he then was) put it this way in *Reference re: Section 94(2) of Motor Vehicle Act*, *supra*, at p. 310:

It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an

prejudice to the trial process of admitting the evidence clearly outweighs its value.

This then is the yardstick by which ss. 276 and 277 of the *Code* are to be measured. Do they exclude evidence the probative value of which is not substantially outweighed by its potential prejudice? If so, they violate the fundamental principles upon which our justice system is predicated and infringe s. 7 of the Charter.

The parties, as I understand their positions, agree on this view of the principles of fundamental justice. The Attorney-General for Ontario, for the respondent, does not assert that the Charter permits exclusion of evidence of real value to an accused's defence. Rather, he contends that any evidence which might be excluded by ss. 276 and 277 of the *Code* would be of such trifling value in relation to the prejudice that might flow from its reception that its exclusion would enhance rather than detract from the fairness of the trial. Others who defend the legislation, do so on the ground that it does not exclude evidence relevant to the defence, that the exceptions contained in the provisions "encompass all potential situations where evidence of a complainant's sexual history with men other than the accused would be relevant to support a legitimate defence.": see Grant, *ibid.*, at p. 601. It is to this issue, which I see as the crux of the case, which I now turn.

(d) *The effect of the legislation — what evidence is excluded?*

Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by s. 277 can serve no legitimate purpose in the trial. Section 277, by limiting the exclusion to a purpose which is clearly illegitimate, does not touch evidence which may be tendered for valid purposes, and hence does not infringe the right to a fair trial.

I turn then to s. 276. Section 276, unlike s. 277, does not condition exclusion on use of the evidence for an illegitimate purpose. Rather, it constitutes a blanket exclusion, subject to three exceptions — rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident. The question is whether this may exclude evidence which is relevant to the defence and the probative value of which is not substantially outweighed by the potential prejudice to the trial process. To put the matter another way, can it be said a

priori, as the Attorney-General for Ontario contends, that any and all evidence excluded by s. 276 will necessarily be of such trifling weight in relation to the prejudicial effect of the evidence that it may fairly be excluded?

In my view, the answer to this question must be negative. The Canadian and American jurisprudence affords numerous examples of evidence of sexual conduct which would be excluded by s. 276 but which clearly should be received in the interests of a fair trial, notwithstanding the possibility that it may divert a jury by tempting it to improperly infer consent or lack of credibility in the complainant.

Consider the defence of honest belief. It rests on the concept that the accused may honestly but mistakenly (and not necessarily reasonably) have believed that the complainant was consenting to the sexual act. If the accused can raise a reasonable doubt as to his intention on the basis that he honestly held such a belief, he is not guilty under our law and is entitled to an acquittal. The basis of the accused's honest belief in the complainant's consent may be sexual acts performed by the complainant at some other time or place. Yet s. 276 would preclude the accused leading such evidence.

Another category of evidence eliminated by s. 276 relates to the right of the defence to attack the credibility of the complainant on the ground that the complainant was biased or had motive to fabricate the evidence. In *State v. Jalo*, 557 P.2d 1359 (Or. Ct. App. 1976), a father accused of sexual acts with his young daughter sought to present evidence that the source of the accusation was his earlier discovery of the fact that the girl and her brother were engaged in intimate relations. The defence contended that when the father stopped the relationship, the daughter, out of animus toward him, accused him of the act. The father sought to lead this evidence in support of his defence that the charges were a concoction motivated by animus. Notwithstanding its clear relevance, this evidence would be excluded by s. 276. The respondent submits that the damage caused by its exclusion would not be great, because all that would be forbidden would be evidence of the sexual activities of the children, and the father could still testify that his daughter was angry with him. But surely the father's chance of convincing the jury of the validity of his defence would be greatly diminished if he were reduced to saying, in effect: "My daughter was angry with me, but I can't say why or produce any corroborating evidence." As noted above, to deny a defendant the building blocks of his defence is often to deny him the defence itself.

Other examples abound. Evidence of sexual activity excluded by s. 276 may be relevant to explain the physical conditions on which the Crown relies to establish intercourse or the use of force, such as semen, pregnancy, injury or disease — evidence which may go to consent: see Galvin, *ibid.*, at pp. 818-23; J. A. Tanford and A. J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980), 128 U. Pa. L. Rev. 544, pp. 584-5; D. W. Elliott, "Rape Complainants' Sexual Experience with Third Parties", [1984] Crim. L. R. 4, p. 7; *State v. Carpenter*, 447 N.W.2d 436 (Minn. Ct. App. 1989), at pp. 440-2; *Commonwealth v. Majorana*, 470 A.2d 80 (Pa. 1983), at pp. 84-5; *People v. Mikula*, 269 N.W.2d 195 (Mich. Ct. App. 1978), at pp. 198-9; *State ex rel. Pope v. Superior Court*, 545 P.2d 946 (Ariz. 1976), at p. 953. In the case of young complainants where there may be a tendency to believe their story on the ground that the detail of their account must have come from the alleged encounter, it may be relevant to show other activity which provides an explanation for the knowledge: see *R. v. LeGallant* (1985), 47 C.R. (3d) 170, 18 C.R.R. 362, 14 W.C.B. 427 (B.C.S.C.), at pp. 175-6; *R. v. Greene* (1990), 76 C.R. (3d) 119 (Ont. Dist. Ct.), at p. 122; *State v. Pulizzano*, 456 N.W. 2d 325 (Wis. 1990), at pp. 333-5; *Commonwealth v. Black*, 487 A.2d 396 (Pa. Super. Ct. 1985), at p. 400, fn. 10; *State v. Oliveira*, 576 A.2d 111 (R.I. 1990), at pp. 113-4; *State v. Carver*, 678 P.2d 842 (Wash. Ct. App. 1984); *State v. Howard*, 426 A.2d 457 (N.H. 1981); *State v. Reinart*, 440 N.W.2d 503 (N.D. 1989); *Summitt v. State*, 697 P.2d 1374 (Nev. 1985).

Even evidence as to pattern of conduct may on occasion be relevant. Since this use of evidence of prior sexual conduct draws upon the inference that prior conduct infers similar subsequent conduct, it closely resembles the prohibited use of the evidence and must be carefully scrutinized: *R. v. Wald* (1989), 47 C.C.C. (3d) 315 at pp. 339-40, 68 C.R. (3d) 289, [1989] 3 W.W.R. 324 (Alta. C.A.); *R. v. Seaboyer* (1987), 37 C.C.C. (3d) 53, 58 C.R. (3d) 289, 35 C.R.R. 300 (Ont. C.A.), at p. 63; *Tanford and Bocchino, ibid.*, pp. 586-9; Galvin, *ibid.*, pp. 831-48; Elliott, *ibid.*, pp. 7-8; A. P. Ordovery, "Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity" (1977), 63 Cornell L. Rev. 90, at pp. 112-9; *Winfield v. Commonwealth*, 301 S.E.2d 15 (Va. 1983), at pp. 19-21; *State v. Shoffner*, 302 S.E. 2d 830 (N.C.Ct. App. 1983), at pp. 832-3; *State v. Gonzalez*, 757 P.2d 925 (Wash. 1988), at pp. 929-31; *State v. Hudlow*, 659 P.2d 514 (Wash. 1983), at p. 520. Yet such evidence might be admissible in non-sexual cases under the similar fact rule. Is it fair then to deny it to an accused, merely because the trial relates to a sexual offence?

Consider the example offered by Tanford and Bocchino, *ibid.*, p. 588, commenting on the situation in the United States:

- a** A woman alleges that she was raped. The man she has accused of the act claims that she is a prostitute who agreed to sexual relations for a fee of twenty dollars, and afterwards, threatening to accuse him of rape, she demanded an additional one hundred dollars. The man refused to pay the extra amount. She had him arrested for rape, and he had her arrested for extortion. In the extortion trial, the state would be permitted to introduce evidence of the woman's previous sexual conduct — the testimony of other men that, using the same method, she had extorted money from them. When **b** the woman is the complaining witness in the rape prosecution, however, evidence of this *modus operandi* would be excluded in most states. The facts are the same in both cases, as is the essential issue whether the woman is a rape victim or a would-be extortionist. Surely the relevance of the testimony **c** should also be identical. If the woman's sexual history is relevant enough to be admitted against her when she is a defendant, entitled to the protections of the Constitution, then certainly it is relevant enough to be admitted in a trial at which she is merely a witness, entitled to no constitutional protection. Relevance depends on the issues that must be resolved at trial, not on the particular crime charged.

- d** These examples leave little doubt that s. 276 has the potential to exclude evidence of critical relevance to the defence. Can it honestly be said, as the Attorney-General for Ontario contends, that the value of such evidence will always be trifling when **e** compared with its potential to mislead the jury? I think not. The examples show that the evidence may well be of great importance to getting at the truth and determining whether the accused is guilty or innocent under the law — the ultimate aim of the trial process. They demonstrate that s. 276, enacted for the purpose of **f** helping judges and juries arrive at the proper and just verdict in the particular case, overshoots the mark, with the result that it may have the opposite effect of impeding them in discovering the truth.

- g** The conclusion that s. 276 overreaches is supported by consideration of how it impacts on the justifications for s. 276 set out above. The first and most important justification for s. 276 is that it prevents the judge or jury from being diverted by irrelevant evidence of other sexual conduct of the complainant which will unfairly prejudice them against the complainant and thus lead to an improper verdict. Accepting that evidence that diverts the trier **h** of fact from the real issue and prejudices the chance of a true verdict can properly be excluded even if it possesses some relevance, the fact remains that a provision which categorically excludes evidence without permitting the trial judge to engage in the exercise of whether the possible prejudicial effect of the

evidence outweighs its value to the truth-finding process runs the risk of overbreadth: see Doherty, *ibid.* at p. 65.

The argument based on the reporting of sexual offences similarly fails to justify the wide reach of s. 276. As Doherty points out at p. 65, it is counterproductive to encourage reporting by a rule which impairs the ability of the trier of fact to arrive at a just result and determine the truth of the report. Reporting is but the first step in the judicial process, not an end in itself. But even if it is assumed that increased reporting will result in increased convictions, the argument is unpersuasive. Elliott, at p. 14, discounts this justification for prohibitions of relevant evidence on the ground that it "cross[es] a hitherto uncrossed line" to rule out legitimate tactics which may help an innocent man escape conviction. To accept that persuasive evidence for the defence can be categorically excluded on the ground that it may encourage reporting and convictions is, Elliott points out, to say either (a) that we assume the defendant's guilt, or (b) that the defendant must be hampered in his defence so that genuine rapists can be put down. Neither alternative conforms to our notions of fundamental justice.

Finally, the justification of maintaining the privacy of the witness fails to support the rigid exclusionary rule embodied in s. 276 of the *Code*. First, it can be argued that important as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in case of conflict. As Doherty puts it (at p. 66):

Every possible procedural step should be taken to minimize the encroachment on the witness's privacy, but in the end if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted.

Secondly, s. 276 goes further than required to protect privacy because it fails to permit an assessment of the effect on the witness of the evidence — an effect which may be great in some cases and small in others — in relation to the cogency of the evidence.

The failings of s. 276 are inherent in its concept. Commentators have identified two fundamental flaws in rape-shield provisions similar to s. 276. The first is that such provisions fail to distinguish between the different purposes for which evidence may be tendered. The legislation may misdefine the evil to be addressed as evidence of sexual activity, when in fact the evil to be addressed is the narrower evil of the *misuse* of evidence of sexual activity for irrelevant and misleading purposes, namely, the inference that the complainant consented to the act or that she is an unreliable witness. The result of this misdefinition of the problem is a blanket

prohibition of evidence of sexual activity, regardless of whether the evidence is tendered for an illegitimate purpose or for a valid one.

- a** This defect is noted by Professor Galvin in her analysis of the various statutes in force in the United States (at p. 812):

The basic problem with existing rape-shield legislation is its failure to distinguish between benign and invidious uses of sexual conduct evidence. This failure stems from a misperception by the drafters of the precise wrong to be redressed by reform legislation. The result is not merely bad evidence law; in many instances, the result is constitutional problems that stem from unnecessarily broad enactments. These various problems could have been avoided . . . if the legislators had clearly understood the underlying evidentiary concepts and had properly incorporated those concepts in the rape-shield statutes.

- b**
- c** Section 276 takes the form of a basic prohibition of evidence of other sexual activity, regardless of the purpose for which it is tendered. It then stipulates three exceptions — evidence to rebut prosecution evidence of sexual activity; evidence tending to establish the identity of the person who committed the act; and evidence of sexual activity on the same occasion relating to consent. While
- d** there is some concession to the need to permit evidence of sexual activity for legitimate purposes, the exceptions exclude other purposes where the evidence would not be merely misleading, but truly relevant and helpful. In so far as they do so, the legislation falls into the trap identified by Professor Galvin.

- e** A second and related criticism of provisions such as s. 276 is that they adopt a “pigeon-hole” approach which is incapable of dealing adequately with the fundamental evidentiary problem at stake, that of determining whether or not the evidence is truly relevant, and not merely irrelevant and misleading. This amounts,
- f** in effect, to predicting relevancy on the basis of a series of categories. Courts and scholars frequently have alluded to the impossibility of predicting relevance in advance by a series of rules or categories. In *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at p. 218, [1988] 2 S.C.R. 345, 66 C.R. (3d) 1, Sopinka J., speaking for the
- g** majority of this court, stated:

It is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in a case. Attempts in the past to define the criteria for the admission of similar facts have not met with much success . . . The test must be sufficiently flexible to accommodate the varying circumstances in which it must be applied.

- h**
- Scholars have criticized rape-shield legislation adopting the format of a blanket exclusion supplemented by exceptions on the ground that this approach is inherently incapable of permitting the court sufficient latitude to properly determine relevance in the

individual case. Professor Galvin says of this type of provision (the "Michigan" model), at p. 814:

... many of the statutes fail to afford the accused the opportunity to present sexual conduct evidence which is indisputably relevant and necessary to the presentation of a legitimate defense theory. On one level, the problem is simply a failure to codify a sufficient number of exceptions; the case law amply demonstrates the need to amend many of these statutes by providing more bases for admitting sexual conduct evidence. More significant, however, is the fact that the common element linking each of these relevant uses of sexual conduct evidence seems to have escaped the notice of the drafters — none requires reliance on the invidious common-law notions that a woman's consent to sexual relations with one man implies either consent to relations with others or a lack of credibility.

In short, the problem with legislation like s. 276, as Professor Galvin sees it, is its failure to rely on the governing concept of whether the evidence is being tendered for an irrelevant, illegitimate purpose, and its reliance instead on categories of admissible evidence which can never anticipate the multitude of circumstances which may arise in trials for sexual offences. The failing is summed up succinctly by Doherty, *ibid.*, at p. 57, where he characterizes s. 276 as calling for "a mechanical 'pigeon-holing' approach to the question of admissibility based on criteria which may in a given case have little to do with the potential value of the evidence".

To summarize, s. 276 has the potential to exclude otherwise admissible evidence which may in certain cases be relevant to the defence. Such evidence is excluded absolutely, without any means of evaluating whether in the circumstances of the case the integrity of the trial process would be better served by receiving it than by excluding it. Accepting that the rejection of relevant evidence may sometimes be justified for policy reasons, the fact remains that s. 276 may operate to exclude evidence where the very policy which imbues the section — finding the truth and arriving at the correct verdict — suggests the evidence should be received. Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed in the absence of an assurance that the curtailment is clearly justified by even stronger contrary considerations. What is required is a law which protects the fundamental right to a fair trial while avoiding the illegitimate inferences from other sexual conduct that the complainant is more likely to have consented to the act or less likely to be telling the truth.

(e) *Other rules of evidence*

It was suggested that s. 276 is only one of many rules of evidence which limit the right to present relevant defence evidence.

The rules against hearsay, opinion, and character evidence, as well as the rules of privilege, undeniably limit the right to call evidence.

- a The presence of such rules, it is argued, suggests that rules categorically prohibiting evidence that may be relevant to the defence are not contrary to the principles of fundamental justice nor to our notions of what constitutes a fair trial.

- b This argument rests on the assumption that rules of evidence commonly exclude evidence relevant to the defence, the value of which is not substantially outweighed by its prejudice. A closer examination of the rules, however, casts doubt on this proposition. In fact, the exclusionary rules of evidence are based on the justification that the evidence excluded is likely to do more harm than good to the trial process. Moreover, these rules, as they have developed in recent years, admit of a great deal of flexibility, allowing considerable discretion to the trial judge to admit evidence in cases where the value of the evidence outweighs its potential prejudice.

- d Consider the hearsay rule. At one time it was seen as an absolute prohibition subject to a number of limited, rigidly defined exceptions. In this respect, it resembled s. 276 of the *Criminal Code*. But in more recent times, this inflexible approach has been replaced by an approach which allows more discretion to the trial judge. Thus, this court in *Ares v. Venner* (1970), 14 D.L.R. (3d) 4, [1970] S.C.R. 608, 12 C.R.N.S. 349, held that old categories are no longer exclusive and that hearsay evidence which does not fall within one of the traditional exceptions may be received if it is (a) necessary, and (b) reliable. This approach was recently affirmed by this court in *R. v. Khan* (1990), 59 C.C.C. (3d) 92, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1. The reason for the change was simple. The judges perceived that the rules of evidence were unfairly restricting the right to bring relevant and helpful evidence before the court, thereby undermining the ability of the court to find the truth and do justice. So the courts broadened the rule to conform to their sense of justice by permitting judges convinced of the reliability and trustworthiness of the evidence to admit it despite its failure to conform to the traditional exceptions to the hearsay rule.

- g The same is true of privilege. Courts have held that informer and solicitor-and client privilege do not apply where the effect would be to prevent the defendant on a criminal charge from bringing forward relevant evidence: *Canada (Solicitor-General) v. Ontario (Royal Commission of Inquiry)*, *supra*; *R. v. Dunbar and Logan*, *supra*.

The law relating to opinion evidence similarly stops far short of absolute exclusion. The opinion evidence rule is less a rule of

exclusion than a means of setting certain conditions for the reception of evidence which might otherwise be unreliable — evidence which, moreover, is usually collateral to the issues of fact involved in the case and which may arguably infringe on the role of the trier of fact of drawing inferences from the facts as found. Provided the witness can be shown to be qualified to give the opinion and provided the opinion is relevant and does not trench unduly on the judge's or jury's ultimate task, it may be received. Again, in practice considerable discretion rests with the trial judge in weighing the proper considerations in the particular case.

Similarly, character evidence may be received on a criminal trial where its relevance outweighs its prejudice. The effect of s. 276 may be to exclude such evidence. Consider evidence as to the conduct of the accused on other occasions, sometimes called evidence of similar acts. The law has abandoned the former category approach to similar fact evidence and now permits evidence of similar prior acts, notwithstanding the inference of disposition or character which may be drawn from them, provided their relevance to a specific feature of the case outweighs their prejudicial value. The determination is made by the trial judge on the facts of the particular case. Section 276, on the other hand, excludes evidence of similar sexual acts categorically, without any consideration of the probative value of the evidence in relation to its potential for prejudice.

The common law rules of evidence may not be perfect. Certainly, the rules relating to evidence of sexual conduct which s. 276 abolished often operated unfairly. At the same time, the more flexible approach which the courts of late have taken in decisions on the rules of evidence reflects a keen sensibility to the need to receive evidence which has real probative force in the absence of overriding countervailing considerations. The problem with s. 276 is that it may operate to exclude relevant evidence where there are no countervailing considerations capable of outweighing the value of the evidence.

For these reasons, I cannot accept the argument that the common law approach to the rules of evidence supports the constitutionality of s. 276 of the *Criminal Code*.

(f) *Other jurisdictions*

In support of the contention that s. 276 of the *Code* does not infringe the principles of fundamental justice or the right to a fair trial, it is argued that provisions similar to s. 276 have been upheld in other jurisdictions.

The first point to note is that s. 276 is among the most Draconian approaches to the problem of eradicating improper inferences as to consent and credibility from the evidence of the sexual activities of the complainant. Section 276 follows the so-called “Michigan” model, which consists in a general prohibition followed by a series of exceptions. The Michigan model is generally regarded as the most invasive of the rape-shield laws in so far as it admits of no judicial discretion to receive relevant evidence which may not fall into the enumerated exceptions. Provisions in England, Australia and many of the United States generally allow for some measure of judicial discretion to deal with the impossibility of foreseeing all eventualities and avoiding the unfairness of excluding evidence which may be highly relevant to the defence. Professor Galvin, at pp. 876-902, identifies three other types of rape-shield provisions found in the United States and elsewhere — the “Texas”, “federal”, and “California” models — which all provide for some judicial discretion.

It is a misleading oversimplification to say that statutes following the Michigan model have been widely upheld. While the courts have avoided striking them down in their entirety, they have used two techniques to permit the reception of relevant evidence which does not fall within the exceptions, thereby circumventing them. The techniques are “reading down” and “constitutional exemption”. Professor Galvin comments on these statutes and the judicial response to them as follows, at pp. 773-4:

In effect, these statutes have stripped courts of their discretion to determine the relevancy of sexual conduct evidence on a case-by-case basis. Although these statutes are highly protective of the interests of the complainant and the state, they do not accommodate sufficiently the needs of the accused to present relevant evidence in his behalf.

Indeed, a pattern of judicial response to restrictive Michigan-type statutes has developed. In a significant number of cases, appellate courts have strained to uphold the validity of these statutes while at the same time ordering the introduction of relevant sexual conduct evidence. This result has been achieved by circumventing the explicit statutory prohibitions and by relying instead on legislative history and underlying policy considerations. In a smaller number of cases, courts have held the Michigan-style statutes unconstitutional as applied in particular factual settings. Some of the statutes have been amended in response to cases that demonstrated the need for additional exceptions.

The fact that courts in other jurisdictions have found it necessary to curtail the effect of legislation similar to s. 276 of the *Criminal Code* so as to permit accused persons to present evidence relevant to their defence reinforces the conclusion that

the legislation offends the principles of fundamental justice underlying a fair criminal trial.

(g) *Summary*

I conclude that the operation of s. 276 of the *Criminal Code* permits the infringement of the rights enshrined in ss. 7 and 11(d) of the Charter. In achieving its purpose—the abolition of the outmoded, sexistbased use of sexual conduct evidence—it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent. Support for this conclusion is found in other rules of evidence which have adapted to meet the dangers of arbitrarily excluding valuable evidence, as well as the law in other jurisdictions, which by one means or another rejects the idea that rape-shield legislation, however legitimate its aims, should be cast so widely as to deprive the accused of the tools with which to build a legitimate defence.

Section 277 does not, by contrast, offend the Charter.

2. *Is s. 276 saved by s. 1 of the Charter?*

Is s. 276 of the *Criminal Code* justified in a free and democratic society, notwithstanding the fact that it may lead to infringements of the Charter?

The first step under s. 1 is to consider whether the legislation addresses a pressing and substantial objective: *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, [1986] 1 S.C.R. 103. As already discussed, it does.

The second requirement under s. 1 is that the infringement of rights be proportionate to the pressing objective. This inquiry involves three considerations. The first—whether there exists a rational connection between the legislative measure and the objective—is arguably met; s. 276 does help to exclude unhelpful and potentially misleading evidence of the complainant's prior sexual conduct. The second consideration under proportionality is whether the legislation impairs the right as little as possible. It has been suggested that legislatures must be given some room to manoeuvre, particularly where the legislation is attempting to fix a balance between competing groups in society: *Irwin Toy Ltd. v. Quebec (Attorney-General)* (1989), 58 D.L.R. (4th) 577, 25 C.P.R.

4. *What follows from striking down s. 276?*

The first question is whether the striking down of s. 276 revives the old common law rules of evidence permitting liberal and often inappropriate reception of evidence of the complainant's sexual conduct. Some inappropriate uses of such evidence are precluded by s. 277, which I have found to be valid. But other common law rules fall outside s. 277. Does striking s. 276 revive them?

The answer to this question is no. The rules in question are common law rules. Like other common law rules of evidence, they must be adapted to conform to current reality. As all counsel on these appeals accepted, the reality in 1991 is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. Although they still may inform the thinking of many, the twin myths which s. 276 sought to eradicate are just that — myths — and have no place in a rational and just system of law. It follows that the old rules which permitted evidence of sexual conduct and condoned invalid inferences from it solely for these purposes have no place in our law.

The inquiry as to what the law is in the absence of s. 276 of the *Code* is thus remitted to consideration of the fundamental principles governing the trial process and the reception of evidence. Harking back to Thayer's maxim, relevant evidence should be admitted, and irrelevant evidence excluded, subject to the qualification that the value of the evidence must outweigh its potential prejudice to the conduct of a fair trial. Moreover, the focus must be not on the evidence itself, but on the use to which it is put. As Professor Galvin puts it, our aim is "to abolish the outmoded, sexist-based use of sexual conduct evidence while permitting other uses of such evidence to remain": *ibid.*, p. 809.

This definition of the problem suggests an approach which abolishes illegitimate uses and inferences, while preserving legitimate uses. There is wide agreement that the approach of a general exclusion supplemented by categories of exceptions is bound to fail because of the impossibility of predicting in advance what evidence may be relevant in a particular case: see Galvin, *ibid.*, Doherty, *ibid.*, and Elliott, *ibid.*. On the other hand, judges are not free to act on whim. As Professor Vivian Berger puts it in her article "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom" (1977), 77 Colum. L. Rev. 1, at p. 69:

The problem is to chart a course between inflexible legislative rules and wholly untrammelled judicial discretion: The former threatens the rights of defendants; the latter may ignore the needs of complainants.

a Professor Galvin, after a comprehensive review of the various approaches to rape-shield legislation which have been adopted in different jurisdictions, proposes a prohibition on illegitimate uses of the evidence, combined with case-by-case judgment exercised with the aid of guidelines. Her proposal is as follows (at pp. 903-4):

b *Sexual conduct of victim of rape. In a prosecution for rape, evidence that the victim has engaged in consensual sexual conduct with persons other than the accused is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason more likely to consent to the sexual conduct with respect to which rape is alleged. Evidence of consensual sexual conduct on the part of the victim may, however, be admissible for other purposes.*

c (1) *By way of illustration only, and not by way of limitation, the following are examples of evidence admissible under this section:*

(A) *Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;*

d (B) *Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the victim;*

(C) *Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of the alleged encounter with the victim as to tend to prove that the victim consented to the act charged or behaved in such a manner as to lead the accused reasonably to believe that the victim consented;*

e (D) *Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused reasonably believed that the victim was consenting to the act charged;*

(E) *Evidence tending to rebut proof introduced by the prosecution regarding the victim's sexual conduct;*

(F) *Evidence that the victim has made false allegations of rape;*

f Galvin's proposal, with some modification, reflects an appropriate response to the problem of avoiding illegitimate inferences from evidence of the complainant's sexual conduct, while preserving the general right to a fair trial. It is, moreover, a response which is open to trial judges in the absence of legislation. It reflects, in essence, an application of the fundamental common law notions which govern the reception of evidence on trials. The general prohibition on improper use of evidence of sexual conduct reflects the fact that it is always open to a judge to warn against using a particular piece of evidence for an inference on an issue for which that evidence has no probative force. Similarly, the mandate to the judge to determine when the evidence may be properly receivable is a reflection of the basic function of the trial judge of determining the relevance of evidence and whether it should be received bearing in mind the balance between its probative value and its potential prejudice.

As for the procedures which should govern the determination of whether the sexual conduct evidence should be admitted, Galvin proposes a written motion followed by an *in camera* hearing (p. 904). The devices of a preliminary affidavit and an *in camera* hearing are designed to minimize the invasion of the complainant's privacy. If the affidavit does not show the evidence to be relevant, it will not be heard at all. Where this threshold is met, the evidence will be heard *in camera* so that, in the event the judge finds its value is outweighed by its potential prejudice, it will not enter the public domain. Such procedures do not require legislation. It has always been open to the courts to devise such procedures as may be necessary to ensure a fair trial. The requirement of a *voir dire* before a confession can be admitted, for example, is judge-made law.

While accepting the premise and the general thrust of Galvin's proposal, I suggest certain modifications. There seems little purpose in having separate rules for the use of sexual conduct evidence for illegitimate inferences of consent and credibility in the Canadian context. Again, I question whether evidence of other sexual conduct with the accused should automatically be admissible in all cases; sometimes the value of such evidence might be little or none. The word "complainant" is more compatible with the presumption of innocence of the accused than the word "victim". Professor Galvin's reference to the defence of reasonable belief in consent must be adapted to meet Canadian law, which does not require reasonableness. And the need to warn the jury clearly against improper uses of the evidence should be emphasized, in my view.

In the absence of legislation, it is open to this court to suggest guidelines for the reception and use of sexual conduct evidence. Such guidelines should be seen for what they are — an attempt to describe the consequences of the application of the general rules of evidence governing relevance and the reception of evidence — and not as judicial legislation cast in stone.

In my view the trial judge under this new regime shoulders a dual responsibility. First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence. The examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional. The trial judge must ensure that evidence is tendered for a legitimate purpose, and that it logically supports a defence. The fishing expeditions which unfortunately

did occur in the past should not be permitted. The trial judge's discretion must be exercised to ensure that neither the *in camera* procedure nor the trial become forums for demeaning and abusive conduct by defence counsel.

The trial judge's second responsibility will be to take special care to ensure that, in the exceptional case where circumstances demand that such evidence be permitted, the jury is fully and properly instructed as to its appropriate use. The jurors must be cautioned that they should not draw impermissible inferences from evidence of previous sexual activity. While such evidence may be tendered for a purpose logically probative of the defence to be presented, it may be important to remind jurors that they not allow the allegations of past sexual activity to lead them to the view that the complainant is less worthy of belief, or was more likely to have consented for that reason. It is hoped that a sensitive and responsive exercise of discretion by the judiciary will reduce and even eliminate the concerns which provoked legislation such as s. 276, while at the same time preserving the right of an accused to a fair trial.

I would summarize the applicable principles as follows:

1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:
 - (a) more likely to have consented to the sexual conduct at issue in the trial;
 - (b) less worthy of belief as a witness.
2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence. By way of illustration only, and not by way of limitation, the following are examples of admissible evidence:
 - (A) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;
 - (B) evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant;

- (C) evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused believed that the complainant was consenting to the act charged (without laying down absolute rules, normally one would expect some proximity in time between the conduct that is alleged to have given rise to an honest belief and the conduct charged); a
- (D) evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness. b
- (E) evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct; c
- 3. Before evidence of consensual sexual conduct on the part of a victim is received, it must be established on a *voir dire* (which may be held *in camera*) by affidavit or the testimony of the accused or third parties, that the proposed use of the evidence of other sexual conduct is legitimate. d
- 4. Where evidence that the complainant has engaged in sexual conduct on other occasions is admitted on a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit. e

II. *The jurisdiction of the preliminary inquiry judge and the reviewability of the judge's error by way of certiorari* f

The preliminary inquiry judge in each of the cases before us decided that he did not have jurisdiction to decide whether ss. 276 and 277 should be struck down under the Charter, and went on to commit the accused for trial after excluding evidence pursuant to those sections. g

Galligan J. ruled in each case that the preliminary inquiry judge had the jurisdiction to determine the constitutional question and sent the matter back to him for continuance of the preliminary inquiry on the basis that ss. 276 and 277 were invalid. g

The Seaboyer motion to Galligan J. was by way of *certiorari* from which the *Criminal Code* grants a right of appeal. Gayme also applied under s. 24(1) of the Charter, from which no appeal lies under the *Criminal Code*. h

The Court of Appeal held that the preliminary inquiry judges were correct in concluding that they did not possess jurisdiction to

determine the validity of ss. 276 and 277 of the *Code*, and accordingly that Galligan J. had erred in granting the orders sought and remitting the matters back to the preliminary inquiry judges. The Court of Appeal ordered that the trials proceed.

Three issues arise from these facts:

- (1) Do judges on a preliminary inquiry have the power to decide the constitutionality of legislation relating to evidence?
- (2) If they do have this power and erred in holding they did not, was that error reviewable on the motion before Galligan J.?
- (3) Does the Crown have a right of appeal from the order of Galligan J. in the *Gayme* case?

I will deal with each issue in turn.

1. *Do preliminary inquiry judges have jurisdiction to determine the constitutionality of evidentiary legislation under s. 52 of the Constitution Act, 1982?*

I would answer this question in the negative on the ground that the *Criminal Code* does not authorize judges sitting on preliminary inquiries to enter into constitutional questions.

Section 52 of the *Constitution Act, 1982* does not confer jurisdiction on a tribunal to determine whether a law is constitutional. That jurisdiction must be found in the legislation which defines the powers of the body: *R. v. Mills* (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863; *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94, [1990] 3 S.C.R. 570, 13 C.H.R.R. D/403.

The jurisdiction of a judge on a preliminary hearing is conferred exclusively by Part XVIII of the *Criminal Code*. In *Mills* this court found that a justice presiding over a preliminary inquiry does not have the jurisdiction to grant a remedy under s. 24 of the Charter because a preliminary inquiry is not a “court of competent jurisdiction” under that section. The majority held that the magistrate sitting on a preliminary inquiry is not a court of competent jurisdiction because the *Criminal Code* gives the magistrate “no jurisdiction which would permit him to hear and determine the question of whether or not a Charter right has been infringed or denied” (*per* McIntyre J. at p. 493). La Forest J., agreeing with this view, elaborated on the task of the magistrate at p. 565:

The task of the preliminary hearing magistrate under the *Criminal Code* is by the *Code* limited in essence to determining whether, in his opinion, the evidence presented before him is or is not sufficient to commit the accused for trial; if it is, he is to commit the accused; otherwise, he must discharge him.

I see no warrant in the Charter for extending the ambit of the specific task assigned to the magistrate by the *Code*. From a practical standpoint, too, I

R. v. Kruk

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[Indexed as: **R. v. Kruk**]

His Majesty The King (Appellant) and Christopher James Kruk
(Respondent) and Independent Criminal Defence Advocacy
Society, Criminal Lawyers' Association (Ontario) and Trial
Lawyers Association of British Columbia (Interveners)

His Majesty The King (Appellant) and Edwin Tsang
(Respondent) and Attorney General of Alberta, Independent
Criminal Defence Advocacy Society, Association québécoise
des avocats et avocates de la défense, West Coast Legal
Education and Action Fund Association, Women's Legal
Education and Action Fund Inc. and Trial Lawyers Association
of British Columbia (Interveners)

Supreme Court of Canada

Docket: 40095, 40447

2024 SCC 7, 2024 CSC 7

Wagner C.J.C., Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin JJ.

Heard: May 18, 2023

Judgment: March 8, 2024*

Susanne Elliott, Christie Lusk, Lauren Chu, for Appellant
Brent R. Anderson, Christopher Johnson, K.C., for Respondent, Christo-
pher James Kruk
Richard S. Fowler, K.C., Eric Purtzki, for Respondent, Edwin Tsang
Sarah Clive, for Intervener, Attorney General of Alberta
Gregory P. DelBigio, K.C., Daniel J. Song, K.C., for Intervener, Inde-
pendent Criminal Defence Advocacy Society
Breana Vandebeek, for Intervener, Criminal Lawyers' Association
(Ontario)
Mark Iyengar, Benjamin Reedijk, for Intervener, Trial Lawyers Associa-
tion of British Columbia
Hugo Caissy, Myralie Roussin, for Intervener, Association québécoise
des avocats et avocates de la défense

* A corrigendum issued on March 13, 2024 has been incorporated herein.

Megan Stephens, Humera Jabir, Roxana Parsa, for Interveners, West Coast Legal Education and Action Fund Association and the Women's Legal Education and Action Fund Inc.

Appeal — Grounds — Miscarriage of justice — K encountered complainant extremely intoxicated, lost and distressed — K brought complainant to his home, contacted her parents by telephone — Complainant woke up in K's bed, with K's penis in her vagina — K charged with sexual assault — At trial, K testified no sexual intercourse took place, rather intoxicated complainant removed her pants before passing out, when she awoke, she assumed she had been assaulted — Trial judge rejected K's testimony and despite extreme intoxication, accepted complainant's testimony that she was sure K put his penis in her vagina — K convicted and appealed — Court of Appeal allowed K's appeal, finding trial judge relied on speculative reasoning, ungrounded assumptions in concluding it was unlikely complainant would be mistaken about penile-vaginal penetration — Crown appealed to Supreme Court of Canada — Appeal allowed, conviction restored — Use of ungrounded common-sense assumptions in testimonial assessment not error of law — Reliance on assumptions reviewable for palpable and overriding error — Trial judge made finding complainant was not mistaken about penile-vaginal penetration — Common-sense assumption that person with vagina would not be mistaken about penetration not untrue or inaccurate.

Appeal — Grounds — Miscarriage of justice — T and complainant spent time together, engaged in consensual sexual foreplay — Complainant alleged following consensual foreplay, T committed violent sexual assault — T charged with sexual assault — At trial, T testified all sexual activity was consensual — Trial judge rejected T's testimony, accepted complainant's version of events — T convicted and appealed — Court of Appeal allowed T's appeal, finding trial judge erred in law by relying on ungrounded common-sense assumptions to reject T's testimony — Crown appealed to Supreme Court of Canada — Appeal allowed, conviction restored — Use of ungrounded common-sense assumptions in testimonial assessment not error of law — Reliance on assumptions reviewable for palpable and overriding error — Court of Appeal erred in characterizing trial judge's factual findings as unsupported generalizations about human behaviour — Trial judge's erroneous reliance on assumption with respect to T's after-the-fact conduct palpable but not overriding.

Sexual offences — Sexual assault — K encountered complainant extremely intoxicated, lost and distressed — K brought complainant to his home, contacted her parents by telephone — Complainant woke up in K's bed, with K's penis in her vagina — K charged with sexual assault — At trial, K testified no sexual intercourse took place, rather intoxicated complainant removed her pants before passing out, when she awoke, she assumed she had been assaulted — Trial judge rejected K's testimony and despite extreme intoxication, accepted com-

plainant's testimony that she was sure K put his penis in her vagina — K convicted and appealed — Court of Appeal allowed K's appeal, finding trial judge relied on speculative reasoning, ungrounded assumptions in concluding it was unlikely complainant would be mistaken about penile-vaginal penetration — Crown appealed to Supreme Court of Canada — Appeal allowed, conviction restored — Use of ungrounded common-sense assumptions in testimonial assessment is not error of law — Reliance on assumptions in drawing inferences reviewable for palpable and overriding error — Assumption that that person with vagina would not be mistaken about feeling of penile penetration not untrue or inaccurate, permissible assumption against which to consider complainant's testimony.

Sexual offences — Sexual assault — T and complainant spent time together, engaged in consensual sexual foreplay — Complainant alleged following consensual foreplay, T committed violent sexual assault — T charged with sexual assault — At trial, T testified all sexual activity was consensual — Trial judge rejected T's testimony, accepted complainant's version of events — T convicted and appealed — Court of Appeal allowed T's appeal, finding trial judge erred in law by relying on ungrounded common-sense assumptions to reject T's testimony — Crown appealed to Supreme Court of Canada — Appeal allowed, conviction restored — Use of ungrounded common-sense assumptions in testimonial assessment is not error of law — Reliance on assumptions reviewable for palpable and overriding error — Trial judge's erroneous reliance on assumption with respect to T's after-the-fact conduct palpable but not overriding. [See *Ewaschuk, Criminal Pleadings & Practice*: 16:72; 16:188.30; 16:188.50; 16:190; 23:34]

In two unrelated trials, the accused K and T were convicted of sexual assault. At K's trial, the principal issue was whether sexual intercourse occurred. K encountered the complainant heavily intoxicated and lost in downtown Vancouver. K brought the complainant to his home and contacted her parents by telephone. The complainant testified that she woke up in K's home with her pants down around her ankles and his penis in her vagina. K testified that the complainant spilled water on her pants, took them off and then passed out on his bed. K found her and woke her up, at which point the complainant assumed a sexual assault occurred. The trial judge rejected K's testimony and found it did not raise a reasonable doubt. The trial judge found that the complainant's testimony was largely unreliable but accepted her testimony on the core sexual assault. K was convicted and appealed. The British Columbia Court of Appeal held that the trial judge erred in law by relying on an ungrounded common-sense assumption in concluding the complainant's testimony was reliable, namely, that a woman would not be mistaken about the feeling of penile-vaginal penetration. The Court of Appeal allowed the appeal and ordered a new trial.

At T's trial, the principal issue was consent. T and the complainant met for the first time on the night in question and spent time together drinking at a nightclub. They left together in T's car. On the way to the complainant's home, she directed T to a secluded parking lot. The two got into the back seat to "make out." The trial judge found that what ensued after consensual foreplay was a sexual assault involving forced intercourse. The trial judge rejected T's evidence and found it did not raise a reasonable doubt. T was convicted and appealed. The British Columbia Court of Appeal found that the trial judge erred in law by relying on three ungrounded generalizations about human behaviour as a basis to reject T's testimony: (1) that it was unbelievable the complainant asked to be spanked; (2) that T would not have refrained from vaginal intercourse without a condom, and; (3) that people who engage in consensual sex do not leave each other unceremoniously. T's appeal was allowed and a new trial ordered. The Crown appealed both decisions to the Supreme Court of Canada and the appeals were heard together.

Held: The appeals were allowed and the convictions restored.

The Court of Appeal erred in allowing both appeals by finding the trial judges erred in law by relying on ungrounded common-sense assumptions. The so-called rule against ungrounded common-sense assumptions should not be recognized as giving rise to an error of law. Testimonial assessment requires triers of fact to rely on common-sense assumptions, which underlie all credibility and reliability assessments. Triers of fact must draw on factors outside the immediate record in drawing inferences from the evidence at trial. The so-called rule is not a logical extension of the prohibition of the use of myths and stereotypes to reject the evidence from sexual assault complainants. This error of law was designed with the specific goal of protecting complainants against prejudicial or discriminatory reasoning in criminal trials. All ungrounded assumptions about human behaviour, including stereotypes, share two characteristics: (1) they take a general proposition and apply it to a particular individual without any assessment of that person's unique character or characteristics, and (2) the general proposition is untrue in all cases, or as applied to the individual. Stereotypes have a particular legal meaning that general assumptions do not: stereotypes are rooted in discrimination and inequality of treatment. It remains open for parties to argue that a trial judge has employed stereotypes rooted in inequality of treatment in assessing credibility and reliability; where reliance on stereotypes is established, it remains an error of law. The use of mere common-sense assumptions drawn in the course of assessing a witness' credibility and reliability should continue to be controlled by the existing standard of review for findings of fact, palpable and overriding error. The appellate court must determine whether an erroneous reliance on an assumption is "palpable" in that it is "plainly seen" or "obvious." Palpable errors include where the assumption in question is obviously untrue, or where it is untrue in light of other evidence or findings of fact. Appellate courts employ their own common sense to determine

whether the presumption was clearly illogical or unwarranted so as to make out a palpable error. If a palpable error is identified, the appellate court must also find that reliance on the assumption was “overriding” in the sense that it is shown to have affected the result. If it cannot be shown that the error was both palpable and overriding, the trial judge’s assessment of credibility and reliability will be entitled to deference.

With respect to K, the trial judge committed no palpable and overriding error. The trial judge’s comment that no woman would be mistaken about whether she experienced penile-vaginal penetration was made in response to the theory advanced by the defence in closing submissions. The trial judge’s comment was not an assumption about any woman, but a finding that he accepted the complainant’s evidence that she was not mistaken about what she felt. Even if it was an assumption, it was not untrue or inaccurate, and a proper basis against which to consider the complainant’s testimony that she was certain as to what she felt.

With respect to T, the trial judge’s finding that it was unbelievable that the complainant asked to be spanked in the car was not based on assumption but represented her assessment of the evidence of the complainant. Similarly, the trial judge did not rely on an assumption that a controlling person would not refrain from having unprotected sex, but was a finding that T himself would not be so dissuaded. The trial judge did rely on an erroneous assumption that people who engage in consensual sexual intercourse do not drive off quickly. The assumption is plainly inaccurate as T’s after-the-fact conduct in speeding away from the complainant’s home is neither consistent nor inconsistent with a sexual assault having occurred. However, the trial judge’s erroneous assumption did not form an essential part of the trial judge’s decision to convict T and as such, was not overriding.

Cases considered by *Martin J.*:

- Benhaim v. St-Germain* (2016), 2016 SCC 48, 2016 CSC 48, 2016 CarswellQue 10215, 2016 CarswellQue 10216, 402 D.L.R. (4th) 579, 33 C.C.L.T. (4th) 1, [2016] 2 S.C.R. 352, [2016] 2 R.C.S. 352 (S.C.C.) — referred to
- Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354, 1951 CarswellBC 133, [1951] B.C.J. No. 152, [1952] 4 W.W.R. 171, [1951] B.C.J. No. 128 (B.C. C.A.) — referred to
- Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, [2002] S.C.J. No. 31, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, REJB 2002-29758, 2002 CSC 33 (S.C.C.) — referred to
- J.P. c. R.* (2022), 2022 QCCA 104, EYB 2022-423366, 2022 CarswellQue 505 (C.A. Que.) — referred to
- Kritik-Langer v. R.* (2022), 2022 QCCA 657, EYB 2022-449273, 2022 CarswellQue 6108 (C.A. Que.) — referred to

not rely on assumptions and stereotypes in their assessment of testimony given by both sexual assault complainants and accused persons.

[Emphasis added; para. 42.]

- ²⁶ The proposed rule against ungrounded common-sense assumptions thus represents a radical departure from how appellate courts have typically approached credibility and reliability assessments, especially in the context of sexual assault. Crucially, the rule transformed all factual findings that could be said to constitute “assumptions” — which, in the ordinary course, were previously subject to review for palpable and overriding error — into errors of law reviewable on a standard of correctness. The rule also enlarged the well-established prohibition against myths and stereotypes about complainants — a relatively narrow error of law targeted at the fair assessment of a discrete category of witness testimony in a particular subset of criminal trials — well beyond its original scope, presenting it as the doctrinal basis for the creation of a far broader error that applies to credibility assessments of *any* witness in *all* criminal trials.

B. The Proposed Rule Against Ungrounded Common-Sense Assumptions Should Not Be Adopted

- ²⁷ For the following reasons, the proposed rule against ungrounded common-sense assumptions should not be recognized as giving rise to an error of law.
- ²⁸ First, in the sexual assault context, the rule disregards the distinct nature of myths and stereotypes about complainants, transforming all factual generalizations regardless of their nature into errors of law and imposing a false symmetry to the circumstances of accused persons. Second, the rule runs contrary to long-settled law on credibility and reliability assessments and existing standards of review, leading to unprecedented and undesirable consequences.

(1) The Proposed Rule Is Not a Logical Extension of the Prohibition Against Myths and Stereotypes About Sexual Assault Complainants

- ²⁹ As noted, the proposed rule against ungrounded common-sense assumptions builds on the well-established prohibition against the use of myths and stereotypes when assessing the testimony of sexual assault complainants. In the ordinary course, credibility and reliability assessments are reviewable for palpable and overriding error and are otherwise

entitled to deference. However, if a trial judge relies on myths or stereotypes about sexual assault complainants in their reasons, this amounts to an error of law. The proponents of the rule against ungrounded common-sense assumptions argue that if reliance on myths and stereotypes about complainants is an error of law, then all unfounded and speculative assumptions about all witnesses, including the accused, should be treated in the same manner.

- 30 With respect, this impulse towards symmetry and formally identical treatment is unwarranted. It reflects a misunderstanding of the distinct body of law associated with myths and stereotypes in sexual assault cases, which developed in a particular historical context to protect complainants alone.

(a) The History of Myths and Stereotypes Against Complainants

- 31 The prohibition against myths and stereotypes that undermine the credibility of sexual assault complainants has a unique history and a specific remedial purpose: to remove discriminatory legal rules that contributed to the view that women, as a group, were less worthy of belief and did not deserve legal protection against sexual violence.
- 32 In the past, multiple legal barriers operated to ensure that the testimony of sexual assault complainants — who, at the time, were almost exclusively women — was treated as inherently unreliable. The term “myths and stereotypes” was coined to describe how the exceptional procedural protections historically afforded to those accused of sexual assault discriminated against complainants and made sexual assault not only the most underreported crime, but one that was exceptionally difficult to prove in court. These myths and stereotypes, formerly embedded into the law, arose in relation to both credibility and consent, and made sexual assault inherently dissimilar to other crimes.
- 33 Before 1983, “rape” was a main type of sexual offence: it criminalized non-consensual penetration of a penis into a vagina and was thus understood as a gendered crime committed by men against women. Under the express terms of the prohibition, a married woman could not be raped by her husband as she was deemed, by her status as a wife, to have forfeited her legal capacity to refuse unwanted sexual activity. The law thereby enforced the notion that certain relationships provided men with a right to women’s sexual availability (see, e.g., J. Koshan, “Marriage and Advance Consent to Sex: A Feminist Judgment in *R v JA*” (2016), 6 *Oñati Socio-legal Series* 1377, at p. 1387).

- ³⁴ Special evidentiary rules also governed the testimony of sexual assault complainants. The statutory corroboration requirement obliged judges to instruct juries that it was dangerous to convict the accused of a sexual offence based only on the testimony of a complainant (*Criminal Code*, S.C. 1953-54, c. 51, s. 131(1); corroboration requirements were abolished by *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, ss. 5 and 19; see also *Criminal Code*, R.S.C. 1985, c. C-46 (“Code”), s. 274; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 676). The doctrine of recent complaint required immediate disclosure of a sexual assault to avoid an adverse credibility inference, meaning a complainant’s initial silence could be taken as “a virtual self-contradiction of her story” (*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at paras. 60-61, quoting *Kribs v. The Queen*, [1960] S.C.R. 400, at p. 405; see also *Timm v. The Queen*, [1981] 2 S.C.R. 315).
- ³⁵ By virtue of these rules, not only were women as a group seen as lacking credibility, there was a construct about the specific subset of women who *could* be believed. Negative social attitudes about women were often used to differentiate “real” rape victims from women suspected to be concocting false allegations out of self-interest or even revenge. Prejudicial beliefs about women who were Indigenous, racialized, persons with disabilities, or part of the 2SLGBTQI+ community also operated to socially prescribe ideals and norms about sexual assault victims. To the extent a particular complainant deviated from the characteristics of the idealized real rape victim, her credibility and entitlement to the law’s protection was diminished, sometimes to zero (see, e.g., J. Benedet, “Judicial Misconduct in the Sexual Assault Trial” (2019), 52 *U.B.C. L. Rev.* 1; S. Ehrlich, “Perpetuating — and Resisting — Rape Myths in Trial Discourse”, in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (2012), 389; M. Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010), 22 *C.J.W.L.* 397; J. Benedet and I. Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007), 52 *McGill L.J.* 515).
- ³⁶ This Court has repeatedly recognized the prevalence of myths and stereotypes about sexual assault complainants, some of which include the following:

- Genuine sexual assaults are perpetrated by strangers to the victim (*Seaboyer*, at p. 659, per L’Heureux-Dubé J., dissenting in part; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 130, per Wagner C.J. and Rowe J.).
- False allegations of sexual assault based on ulterior motives are more common than false allegations of other offences (*Seaboyer*, at p. 669, per L’Heureux-Dubé J., dissenting in part; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 625, per L’Heureux-Dubé J., dissenting; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439, at para. 3, per L’Heureux-Dubé J., concurring).
- Real victims of sexual assault should have visible physical injuries (*Seaboyer*, at pp. 650 and 660, per L’Heureux-Dubé J., dissenting in part; *R. v. McCraw*, [1991] 3 S.C.R. 72, at pp. 83-84, per Cory J. for the Court).
- A complainant who said “no” did not necessarily mean “no”, and may have meant “yes” (*Seaboyer*, at p. 659, per L’Heureux-Dubé J., dissenting in part; *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 82, per McLachlin J. (as she then was), dissenting; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 87 and 89, per L’Heureux-Dubé J., concurring; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 167, per Arbour J., dissenting; *R. v. Kirkpatrick*, 2022 SCC 33, at para. 54, per Martin J. for the majority; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paras. 44 and 74, per Karakatsanis J. for the majority).
- If a complainant remained passive or failed to resist the accused’s advances, either physically or verbally by saying “no”, she must have consented — a myth that has historically distorted the definition of consent and rendered rape “the only crime that has required the victim to resist physically in order to establish nonconsent” (*Ewanchuk*, at paras. 93, 97 and 99, per L’Heureux-Dubé J., concurring, quoting S. Estrich, “Rape” (1986), 95 *Yale L.J.* 1087, at p. 1090; see also para. 103, per McLachlin J., concurring, and para. 51, per Major J. for the majority; see further *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3, at p. 4, per Sopinka J. for the Court; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 101, per McLachlin C.J. for the Court; *Cinous*, at para. 167, per Arbour J., dissenting; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paras. 98, 105, 107, 109 and 118, per Moldaver J. for the majority; *Friesen*, at para. 151, per Wagner C.J. and Rowe J. for the Court).

- A sexually active woman (1) is more likely to have consented to the sexual activity that formed the subject matter of the charge, and (2) is less worthy of belief — otherwise known as the “twin myths”, which allowed for regular canvassing of the complainant’s prior sexual history at trial, regardless of relevance, thereby shifting the inquiry away from the alleged conduct of the accused and towards the perceived moral worth of the complainant (*Seaboyer* ; *Ewanchuk*).

³⁷ Myths and stereotypes about sexual assault complainants capture widely held ideas and beliefs that are not empirically true — such as the now-discredited notions that sexual offences are usually committed by strangers to the victim or that false allegations for such crimes are more likely than for other offences. Myths, in particular, convey traditional stories and worldviews about what, in the eyes of some, constitutes “real” sexual violence and what does not. Some myths involve the wholesale discrediting of women’s truthfulness and reliability, while others conceptualize an idealized victim and her features and actions before, during, and after an assault. Historically, all such myths and stereotypes were reflected in evidentiary rules that only governed the testimony of sexual assault complainants and invariably worked to demean and diminish their status in court.

³⁸ Overall, this legal backdrop reflected a time in which less was known about the prevalence of sexual violence and its lifelong harms. Eventually, Parliament, the courts, academics, and the public came to understand that the previous legal rules and the inaccurate, outdated, and inequitable social attitudes they represented impeded the equal treatment of sexual assault complainants and, hence, the overall fairness of trials.

³⁹ New *Criminal Code* provisions were drafted replacing the former offence of rape with a new offence of sexual assault, and the marital rape exemption was repealed — reflecting the reality that while women continue to make up the vast majority of sexual assault complainants, the offence of sexual assault can be perpetrated by and against people of all genders. Consent was expressly defined in s. 273.1(1) of the *Code* as the voluntary agreement of the complainant to engage in the sexual activity in question, and ss. 273.1(2) and 273.2 clearly circumscribed when no consent is obtained and the scope of mistaken belief in consent. The corroboration requirement was abolished and the doctrine of recent complaint was abrogated, pursuant to ss. 274 and 275 of the *Code*, respectively. Finally, ss. 276 and 278.1 to 278.91 now govern the admissibility

Protection of Communities and Exploited Persons Act

S.C. 2014, c. 25

Assented to 2014-11-06

An Act to amend the [Criminal Code](#) in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts

SUMMARY

This enactment amends the [Criminal Code](#) to, among other things,

- (a) create an offence that prohibits purchasing sexual services or communicating in any place for that purpose;
- (b) create an offence that prohibits receiving a material benefit that derived from the commission of an offence referred to in paragraph (a);
- (c) create an offence that prohibits the advertisement of sexual services offered for sale and to authorize the courts to order the seizure of materials containing such advertisements and their removal from the Internet;
- (d) modernize the offence that prohibits the procurement of persons for the purpose of prostitution;
- (e) create an offence that prohibits communicating — for the purpose of selling sexual services — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre;
- (f) ensure consistency between prostitution offences and the existing human trafficking offences; and
- (g) specify that, for the purposes of certain offences, a weapon includes any thing used, designed to be use or intended for use in binding or tying up a person against their will.

The enactment also makes consequential amendments to other Acts.

Preamble

Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;

Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;

Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;

Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution;

Whereas it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution;

Whereas the Parliament of Canada wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution;

And whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Year	276 Regime	Third Party Record Regime	Defence Records Regime
1982	No evidence concerning sexual activity 246.6 (1) In proceedings in respect of an offence under section 246.1, 246.2 or 246.3¹, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution; (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or (e) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.		

¹ S. 246.1, 246.2 and 246.3 refer to the sexual assault offences enacted at the same time. They are now Ss 271, 272, and 272.

1985	Renumbered to S. 276d: 276. (1) In proceedings in respect of an offence under section 271, 272 or 273, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution; (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or (c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.		
1991	S. 276 declared as no force and effect for being contrary to the <i>Charter</i> and a new common law rule for trials of		

	sexual offences created: <i>R. v. Seaboyer</i> ; <i>R. v. Gayme</i> , [1991] 2 S.C.R. 577.		
1992	New S. 276 enacted to comply with <i>Seaboyer</i>. <i>Preamble</i> WHEREAS the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children; WHEREAS the Parliament of Canada recognizes the unique character of the offence of sexual assault and how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada; WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the <i>Canadian Charter of Rights and Freedoms</i>; WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws		

	that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons; WHEREAS the Supreme Court of Canada has declared the existing section 276 of the <i>Criminal Code</i> to be of no force and effect; AND WHEREAS the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence; ... Evidence of complainant's sexual activity 276. (1) In proceedings in respect of an offence under section 151², 152, 153, 155 or 159³, subsection 160(2) or (3)⁴ or section 170⁵, 171, 172, 173, 271⁶, 272		

² S. 151 – sexual interference; 152 – invitation to sexual touching; 153 = sexual exploitation; 155 = incest

³ S. 159 anal intercourse repealed in 2019 and deleted.

⁴ S. 160(2) = compelling a person to commit bestiality; 160(3) committing bestiality in presence of person under 16.

⁵ S. 170 = parent procuring sexual activity under 18, 171 = householder permitting sex under 18, 172 = corrupting children under 18, 173 = indecent act in public

⁶ S. 271 = sexual assault, 272 = sexual assault with a weapon, causing bodily harm, 273 = aggravated sexual assault

	or 273, evidence that. the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.		
1997		Production of record to accused 278.2 (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of: (a) an offence under section 151, 152, 153, 155, 159, 160⁷, 170, 171, 172, 173, 210⁸, 211, 212, 213⁹, 271, 272, 273, or (b) an offence under section 144, 145, 149, 156, 245 or 246 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada,	

⁷ S. 160 = bestiality; 160(1) is committing bestiality.

⁸ S. 210 = keeping a common bawdy house, 211 = transporting to bawdy house, 212 = procuring (repealed 2014) deleted in 2019.

⁹ S. 213: Soliciting for the purpose of prostitution repealed 2014 and replaced by a new S. 213 Stopping or impeding traffic or communicating for the purpose of prostitution in 2014.

		1970, as it read immediately before January 4, 1983, or (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988, or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (a) to (c), except in accordance with sections 278.3 to 278.91.	
1998		The newly enacted S. 153.1 (Sexual exploitation of person with disability) added to list of offences in 278.2(1).	
2002	S. 153.1 (Sexual exploitation of person with disability) added to list of offences in 276(1).		
2014		Creation of modern commercial sex trade offences. With the enactment of C. 25, Protection of Communities and Exploited Persons Act, S. 278.2(1) amended to delete the now repealed 212 and to replace “272	

		or 273" with "272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3" so it reads: Production of record to accused 278.2 (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of : (a) an offence under section 151, 152, 153, 153.1,¹⁰ 155, 159, 160, 170, 171, 172, 173, 210 , 211, 213 , 271, 272, 273, 279.01¹¹, 279.011, 279.02, 279.03, 286.1¹², 286.2 or 286.3, or (b) an offence under section 144, 145, 149, 156, 245 or 246 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1,	

¹⁰ 153.1 = sexual exploitation with disability.

¹¹ S. 279.01 = trafficking in persons; 279.011 = under 18; 279.02 = material benefits trafficking; 279.03 = withholding or destroying documents - trafficking

¹² S. 286.1 = obtaining sexual services; 286.2 = material benefits; 286.3 = procuring. No advertising – 286.4.

		1988, or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (a) to (c), except in accordance with sections 278.3 to 278.91.	
2015		S. 278.2(1) revised to read: Production of record to accused 278.2 (1) Except in accordance with sections 278.3 to 278.91, no record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences (a) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3, or (b) any offence under this Act, as it read at any time before the day on which this paragraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in paragraph	

		(a) if it occurred on or after that day.	
2018	Amendments to S. 276(2) and adding S. 276(4).		Admissibility — accused in possession of records relating to complainant 278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences: (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 210, 211, 213,¹³ 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1 286.2 or 286.3; or (b) any offence under this Act, as it read from time to time before the day on which this paragraph

¹³ S. 213 = stopping or impeding traffic for purpose of sex work, communicating in a public place.

			comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.
2019	C. 25 to modernize the Criminal Code enacted, repealing S. 159, 210 and 211. S. 276(1) amended to delete reference to the repealed section 159. The offences applicable to S. 276(1) become: “an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273”	C. 25 to modernize the Criminal Code enacted, repealing S. 159, 210 and 211. S. 278.2(1)(a) amended to delete reference to the repealed sections 159, 210, and 211 so the offences now read: “(a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3”	C. 25 to modernize the Criminal Code enacted, repealing S. 210 and 211. S. 278.92(1)(a) amended to delete reference to the repealed sections 210, and 211 so the offences now read: “(a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3”
As of December, 2023	Evidence of complainant’s sexual activity 276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with	Production of record to accused 278.2 (1) Except in accordance with sections 278.3 to 278.91, no record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences or in any proceedings in	Admissibility — accused in possession of records relating to complainant 278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the

	the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.	respect of two or more offences at least one of which is any of the following offences: (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.	accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences: (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.
Bill C-16 (First Reading) December 9, 2025¹⁴	276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273 <u>or any other offence under this Act that is of a sexual nature or that is committed for a sexual purpose</u> Insertion end , evidence that the	278.11 (1) Except in accordance with sections <u>278.12 to 278.19</u> no record <u>or therapeutic record</u> relating to a complainant or a witness Insertion start that is in the possession or control of a third party Insertion end shall be produced to an accused in any	278.29 (1) Except in accordance with this section, no record <u>or therapeutic record</u> relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in

¹⁴ <https://www.parl.ca/DocumentViewer/en/45-1/bill/C-16/first-reading>

	complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.	proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences: (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3 <u>or any other offence under this Act that is of a sexual nature or that is committed for a sexual purpose</u>; (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day. 278.2 (1) Except in accordance with sections <u>278.21 to 278.28</u>, no record <u>or therapeutic record</u> relating to a complainant or a witness <u>that is in the possession or control of the prosecutor</u> shall be produced to an accused in any	any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences: (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3 <u>or any other offence under this Act that is of a sexual nature or that is committed for a sexual purpose</u>; or (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

		proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences: (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3 or any other offence under this Act that is of a sexual nature or that is committed for a sexual purpose; or (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.	

**L.C. et al. v. Mills; Attorney General
of Canada et al., Interveners**

[Indexed as: R. v. Mills]

Court File No. 26358

Supreme Court of Canada

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin,
Iacobucci, Major, Bastarache and Binnie JJ.*

Heard: January 19, 1999

Judgment rendered: November 25, 1999

Charter of Rights — Enforcement of rights — Standing — Accused challenging constitutionality of Criminal Code provisions with respect to production of private third party records prior to making application under impugned provisions — Charter claim not premature — Constitutionality of provisions may be considered with respect to general effects — Accused need not establish violation of own rights — Record containing sufficient factual basis to consider Charter claim.

Charter of Rights — Fundamental justice — Disclosure — Third party records — Sections 278.1 to 278.91 of Criminal Code establishing procedure for production of private third party records — Legislation not unconstitutional by virtue of differing from common law regime previously held to be constitutional — Scope of right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses — Criminal Code provisions not violating s. 7 or s. 11(d) of Charter with respect to scope of documents affected, fact that third party records in possession of Crown subject to same regime, requirement that accused point to case-specific information to show that records likely relevant to issue at trial or competence to testify, requirement that trial judge balance both accused's and complainant's rights in determining whether to order production to court, or in factors to be considered with respect to production to accused — Cr. Code, ss. 278.1 to 278.91 — Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(d), 15.

Charter of Rights — Right to fair trial — Third party records — Sections 278.1 to 278.91 of Criminal Code establishing procedure for production of private third party records — Legislation not unconstitutional by virtue of differing from common law regime previously held to be constitutional — Scope of right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses — Criminal Code provisions not violating s. 7 or s. 11(d) of Charter with respect to scope of documents affected, fact that third party records in possession of Crown subject to same regime, requirement that accused point to case-specific

* Cory J. took no part in the judgment.

information to show that records likely relevant to issue at trial or competence to testify, requirement that trial judge balance both accused's and complainant's rights in determining whether to order production to court, or in factors to be considered with respect to production to accused — Cr. Code, ss. 278.1 to 278.91 — Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(d), 15.

Disclosure — Third party records — Sections 278.1 to 278.91 of Criminal Code establishing procedure for production of private third party records — Legislation not unconstitutional by virtue of differing from common law regime previously held to be constitutional — Scope of right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses — Criminal Code provisions not violating s. 7 or s. 11(d) of Charter with respect to scope of documents affected, fact that third party records in possession of Crown subject to same regime, requirement that accused point to case-specific information to show that records likely relevant to issue at trial or competence to testify, requirement that trial judge balance both accused's and complainant's rights in determining whether to order production to court, or in factors to be considered with respect to production to accused — Cr. Code, ss. 278.1 to 278.91 — Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(d), 15.

Disclosure — Duty on Crown — Sections 278.1 to 278.91 of Criminal Code establishing procedure for production of third party records — Third party records in possession of Crown subject to same regime except where complainant or witness has waived protections of legislation — Crown also required to notify accused of any records in its possession — Provisions not violating s. 7 or s. 11(d) of the Charter — Cr. Code, s. 278.1 to 278.91 — Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(d), 15.

The accused was charged with sexual assault and unlawful sexual touching in relation to a 13-year-old complainant. The accused sought production of a psychiatrist's records relating to the complainant. Without first making an application under ss. 278.1 to 278.91 of the *Criminal Code*, the accused challenged the constitutionality of these provisions. These provisions dealt with the production of third party records, and were enacted subsequent to the Supreme Court of Canada's decision in *R. v. O'Connor*. The trial judge held that the provisions infringed ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. The complainant was granted leave to appeal to the Supreme Court of Canada.

Held, Lamer C.J.C. dissenting in part, the appeal should be allowed and ss. 278.1 and to 278.91 of the *Criminal Code* declared to be constitutional.

Per McLachlin and Iacobucci JJ., L'Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ. concurring: The constitutional challenge was not premature, nor did it lack an adequate factual foundation. The accused did not have to prove that the legislation would probably violate his right to make full answer and defence. A constitutional challenge could be based on the general effects of the legislation. Furthermore, there was an appropriate factual basis to adjudicate the Charter issues.

The mere fact that Parliament had passed a law which differed from a regime envisaged by this Court in the absence of a statutory scheme did not render that law unconstitutional. While it is the role of the courts to specify constitutional standards, there may be a range of permissible regimes that can meet these standards.

Three principles were at issue in this case: Full answer and defence, privacy and equality. No one was absolute or capable of trumping the others. All must be defined in light of competing claims. The right to make full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial. In such a situation, privacy and equality rights are paramount. However, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent. However, most cases will not be so clear. In assessing applications for production, courts must determine the weight to be granted to the interests protected by privacy and full answer and defence in the particular circumstances. Full answer and defence will be more centrally implicated where the information contained in a record is part of the case to meet or where its potential probative value is high. A complainant's privacy interest is very high where the confidential information contained in a record concerns the complainant's personal identity or where the confidentiality of the record is vital to protect a therapeutic relationship.

The statutory regime for the production of private third party records applies to all records of complainants and witnesses in sexual offence proceedings containing personal information for which there is a reasonable expectation of privacy. This is stated to include "medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries and records containing personal information the production and disclosure of which is protected by any other Act of Parliament or a provincial legislature". These aspects of the legislation, set out in s. 278.1 and 278.2(1) were not overly broad. They apply only to documents that truly raise a legally recognized privacy interest. With respect to concerns that the legislation imposed an excessive burden on judicial resources, there was no reason to disturb Parliament's conclusion with respect to such questions of administrative convenience.

The legislative regime was also not unconstitutional in that it also applied, pursuant to s. 278.2(2) of the *Criminal Code* to records in the possession or control of the Crown, with two important variations. First the legislative regime does not apply if the complainant or witness has expressly waived the protections provided. Second, the Crown must notify the accused of any records in its possession. Section 278.2 simply defines the scope of the legislation, but does not deny access to documents to which the defence is constitutionally entitled. It does not follow from the fact that the Crown has possession of the records that any reasonable expectation of privacy disappears. Although this means that the Crown can obtain the complainant's private records through means such as a search warrant or subpoena, whereas the accused can only get these documents by applying under the *Criminal Code* regime for production of private records, the Crown's advantage is

not unconstitutional as it does not prevent the accused from getting access to all constitutionally required documents. There is no principle of fundamental justice that the Crown and defence must enjoy precisely the same privileges and procedures. Any unfairness that might flow from the Crown being in possession of documents that the defence has not seen is offset by the fact that the documents must be disclosed to the defence where the complainant or witness waives the protection of the legislation, and by the requirement that the Crown notify the accused of private documents in its possession.

Section 278.3(4) of the *Criminal Code* lists a series of assertions that “are not sufficient on their own to establish that the record is likely relevant to any issue at trial or the competence of a witness to testify”. This provision is not unconstitutional. It does not entirely prevent an accused from relying on the factors listed, but simply prevents reliance on bare assertions of the listed matters, where there is no other evidence and they stand on their own. The accused is not prevented from relying on the listed assertions where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance, with the exception of “recent complaint” which, quite apart from the section, cannot be relied on in any event. The provision requires only that the accused be able to point to case-specific evidence or information to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify. However, where an accused does provide evidence or information to support a listed assertion, this does not mean that likely relevance is made out. This is a matter for the trial judge’s discretion.

Although the non-compellability of witnesses on an application for production of private records was not directly challenged, without deciding that issue, it should be noted that the fact that witnesses are not compellable must be viewed in light of the preliminary, investigatory nature of the process and the other sources upon which the judge can draw in assessing whether the documents may be relevant and whether their production is necessary in the interests of justice.

Pursuant to s. 278.5, the rights of both the complainant and the accused must be considered when deciding whether to order production to the judge. Although this differed from the common law regime set out in *R. v. O'Connor*, which held that no balancing of rights should be undertaken at this stage, Parliament had the benefit of information not available to the court, and decided to supplement the “likely relevant” standard for production to the trial judge with the further requirement that the production be “necessary in the interests of justice”. This additional requirement encompasses but is not confined to the concern that even where likely relevance is shown, there should be room for the court to consider the rights and interests of all those affected by disclosure before documents are ordered disclosed to the court. Section 278.5(2) of the *Criminal Code* requires the trial judge to consider the salutary and deleterious effects of production to the court on the accused’s right to make full answer and defence and on the rights to privacy and equality of the complainant or witness and any other person to whom the record relates. It directs the trial judge to “take into account” a series of factors in deciding whether the documents should be produced to the court. The requirement that the production be “necessary in the interests of justice” at this stage refers to whether production to the judge is

necessary in the interests of justice. The first factor in s. 278.5(2) requires the judge to consider the accused's right to make full answer and defence. If the judge concludes that it is necessary to examine the documents in order to determine whether they should be produced to enable the accused to make full answer and defence, then production to the judge is "necessary in the interests of justice". If a record is established to be "likely relevant" and, after considering the various factors, the judge is uncertain about whether production is necessary to make full answer and defence, the judge should rule in favour of inspecting the document. Section 278.5(2) does not require that the judge engage in a conclusive evaluation of each of the factors, but rather requires the judge to take them into account to the extent possible at this early stage of proceedings in deciding whether to order a particular record produced for inspection by the court. While the enumerated factors are relevant, in the final analysis the judge is free to make whatever order is necessary in the interests of justice. A sufficient evidentiary basis to support such an analysis at this early stage can be established through Crown disclosure, defence witnesses, the cross-examination of Crown witnesses both at the preliminary inquiry and the trial, expert evidence, as well as the nature of the records in question.

Once the records are produced to the judge, the judge must determine whether it is in the interests of justice that they be produced to the defence and must again be satisfied that the records are likely relevant and that production, this time to the accused, is necessary in the interests of justice. In making this decision, the judge must again consider the factors set out in s. 278.5(2). Once again, trial judges are not required to rule conclusively on each of the factors nor are they required to determine whether factors relating to the privacy and equality of the complainant or witness outweigh factors relating to the accused's right to full answer and defence. Trial judges are only asked to "take into account" the factors listed. The inclusion of the societal interest factors in s. 278.5(2)(f) (society's interest in encouraging the reporting of sexual offences) and s. 278.5(2)(g) (society's interest in encouraging the obtaining of treatment by complainants of sexual offences) is not unconstitutional. These factors are not given controlling weight. With respect to s. 278.5(2)(h), which requires the trial judge to take into account the effect of the determination on the integrity of the trial process, this requires courts to consider, along with the other enumerated factors, whether the search for truth would be advanced by the production of the records in question or whether the material in question would introduce discriminatory biases and beliefs into the fact-finding process. By giving judges wide discretion to consider a variety of factors and requiring them to make whatever order is necessary in the interests of justice at both stages of an application for production, Parliament has created a scheme that permits judges not only to preserve the complainant's privacy and equality rights to the maximum extent possible, but also to ensure that the accused has access to the documents required to make full answer and defence. This provision does not infringe either s. 7 or s. 11(d) of the *Canadian Charter of Rights and Freedoms*.

Per Lamer C.J.C., dissenting in part: The reasons of McLachlin and Iacobucci JJ. were agreed with except with respect to the production of records in the hands of the Crown. The Crown's constitutional and ethical duty to disclose all information

in its possession reasonably capable of affecting the accused's ability to raise a reasonable doubt concerning his innocence flows from the right to make full answer and defence. It is subject only to the Crown's discretion to withhold material that is irrelevant or privileged. The duty of disclosure is premised on the presumption that material in the Crown's possession has probative value. Generally speaking, the Crown would not obtain possession or control of therapeutic records unless the information was somehow relevant to the case against the accused. Disclosure of records in the Crown's possession furthers the search for truth by enabling the defence to challenge the accuracy and cogency of the prosecution's case. The accused's ability to access relevant information that may ultimately deprive him of his liberty strikes at the very core of the principles of fundamental justice. The requirement that the accused prove the relevance of records that form part of the case to meet is a serious incursion on the meaningful exercise of the right to make full answer and defence. The legislative scheme supplants the presumption of relevance, and raises the standard for access to the documents by requiring the accused to establish likely relevance to an issue at trial or the competence of a witness to testify. The requirement that the Crown notify the accused that it is in possession of a private record does not provide much assistance to the accused in establishing the likely relevance of a document. It will be difficult for an accused to establish likely relevance of a document he has never seen. By displacing the presumption of relevance and increasing the relevance threshold, ss. 278.3(3)(b) and 278.5(1)(b) give the Crown a distinct advantage over the defence, as it holds information that the accused must surmount a significant obstacle to obtain. These provisions infringe the accused's right to a fair trial and violate ss. 7 and 11(d) of the Charter insofar as they apply to records in the Crown's possession.

The protection of the privacy and equality rights of complainants and witnesses in the context of sexual assault trials is a pressing and substantial objective which was rationally advanced by the legislative scheme. However, ss. 278.3(3)(b) and 278.5(1)(b) fail to protect those rights in a manner that minimally impair the accused's right to make full answer and defence. Requiring the accused to demonstrate the likely relevance of records held by the Crown is more intrusive than reasonably necessary to achieve the legislative goals, and the risk of suppressing evidence and of convicting an innocent person outweighs the salutary effects of the impugned provisions on privacy and equality rights.

Records which the Crown procures absent waiver would still be subject to the principles of disclosure in that the Crown may attempt to resist disclosure by rebutting the presumption that the documents are relevant or by demonstrating that they are privileged. However, if the Crown is unable to discharge this burden, the record should be disclosed to the trial judge rather than the accused because of the privacy rights at stake, if the trial judge is satisfied that the other requirements in s. 278.5(1) and (2) are met. The second stage, of judicial examination of the documents to determine whether and to what extent they should be produced to the accused, would then proceed according to the criteria in ss. 278.6 to 278.91. A combination of reading down the sections and reading in new language was the

most appropriate way to vindicate the Charter rights at play while refraining from intrusion into the legislative sphere beyond what was necessary.

Cases referred to

By McLachlin and Iacobucci JJ.

- Baron v. Canada* (1993), 78 C.C.C. (3d) 510, 99 D.L.R. (4th) 350, [1993] 1 S.C.R. 416, 13 C.R.R. (2d) 65, 18 C.R. (4th) 374, [1993] 1 C.T.C. 111, 93 D.T.C. 5018, 146 N.R. 270, 18 W.C.B. (2d) 355, 37 A.C.W.S. (3d) 1297 — **referred to**
- Bisaillon v. Keable* (1983), 7 C.C.C. (3d) 385, 2 D.L.R. (4th) 193, [1983] 2 S.C.R. 60, 37 C.R. (3d) 289, 51 N.R. 81, 10 W.C.B. 359 — **referred to**
- Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (1996), 110 C.C.C. (3d) 193, 139 D.L.R. (4th) 385, [1996] 3 S.C.R. 480, 39 C.R.R. (2d) 189, 2 C.R. (5th) 1, 182 N.B.R. (2d) 81, 203 N.R. 169, 32 W.C.B. (2d) 273, 66 A.C.W.S. (3d) 444 — **referred to**
- Carey v. Ontario* (1986), 30 C.C.C. (3d) 498, 35 D.L.R. (4th) 161, [1986] 2 S.C.R. 637, 14 C.P.C. (2d) 10, 20 O.A.C. 81, 72 N.R. 81, 58 O.R. (2d) 352n — **referred to**
- Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492, [1993] 2 S.C.R. 143, (1993), 11 Admin. L.R. (2d) 1, 14 C.R.R. (2d) 234, 20 C.R. (4th) 57, 62 O.A.C. 243, 151 N.R. 161, 19 W.C.B. (2d) 276 — **referred to**
- Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289, 120 D.L.R. (4th) 12, [1994] 3 S.C.R. 835, 25 C.R.R. (2d) 1, 34 C.R. (4th) 269, 76 O.A.C. 81, 175 N.R. 1, 25 W.C.B. (2d) 304, 51 A.C.W.S. (3d) 1045 — **referred to**
- Dersch v. Canada (Attorney General)* (1990), 60 C.C.C. (3d) 132, 77 D.L.R. (4th) 473, [1990] 2 S.C.R. 1505, 50 C.R.R. 272, 80 C.R. (3d) 299, [1991] 1 W.W.R. 231, 51 B.C.L.R. (2d) 145, 43 O.A.C. 256, 36 Q.A.C. 258, 116 N.R. 340, 11 W.C.B. (2d) 354 — **referred to**
- Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, [1984] 2 S.C.R. 145, 27 B.L.R. 297, 9 C.R.R. 355, 41 C.R. (3d) 97 84 D.T.C. 6467, [1984] 6 W.W.R. 577, *sub nom. Dir. of Inv. & Research, Combines Investigation Branch v. Southam Inc.*, 33 Alta. L.R. (2d) 193, 55 A.R. 291, 55 N.R. 241 — **referred to**
- Irwin Toy Ltd. v. Quebec (Attorney General)* (1989), 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, [1989] 1 S.C.R. 927, 39 C.R.R. 193, 24 Q.A.C. 2, 94 N.R. 167, 15 A.C.W.S. (3d) 121 — **referred to**
- M. (A.) v. Ryan* (1997), 143 D.L.R. (4th) 1, [1997] 1 S.C.R. 157, 34 C.C.L.T. (2d) 1, 8 C.P.C. (4th) 1, 42 C.R.R. (2d) 37, 4 C.R. (5th) 220, [1997] 4 W.W.R. 1, 138 W.A.C. 81, 29 B.C.L.R. (3d) 133, 207 N.R. 81, 68 A.C.W.S. (3d) 835 — **referred to**
- MacKay v. Manitoba* (1989), 61 D.L.R. (4th) 385, [1989] 2 S.C.R. 357, 43 C.R.R. 1, [1989] 6 W.W.R. 351, 61 Man. R. (2d) 270, 99 N.R. 116, 17 A.C.W.S. (3d) 169 — **referred to**
- Marks v. Beyfus* (1890), 25 Q.B.D. 494 — **referred to**
- New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1999), 177 D.L.R. (4th) 124, 66 C.R.R. (2d) 267, 26 C.R. (5th) 203, 244 N.R. 276, 90 A.C.W.S. (3d) 698 — **referred to**
- R. v. A. (G.J.)* (1997), 37 W.C.B. (2d) 40, [1997] O.J. No. 5354 (QL) — **referred to**
- R. v. B. (G.C.)* (1997), 36 W.C.B. (2d) 228, [1997] O.J. No. 5019 (QL) — **referred to**
- R. v. Beharriell* (1995), 103 C.C.C. (3d) 92, 130 D.L.R. (4th) 422, [1995] 4 S.C.R. 536, 33 C.R.R. (2d) 87, 44 C.R. (4th) 91, *sub nom. A. (L.L.) v. B. (A.)*, 88 O.A.C. 241, 190 N.R. 329, *sub nom. A. (L.L.) v. Beharriell*, 29 W.C.B. (2d) 154 — **referred to**

Regan, supra, at paras. 26-27; *R. v. Stromner* (1997), 205 A.R. 385 (Prov. Ct.) at paras. 39-42; *R. v. G. (J.F.)*, [1997] N.W.T.J. No. 47 (QL) (S.C.) at paras. 27-28. It does not entirely prevent an accused from relying on the factors listed, but simply prevents reliance on bare “assertions” of the listed matters, where there is no other evidence and they stand “on their own”.

[119] As has frequently been noted, speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences. See *Seaboyer, supra*, at p. 634. The myths that a woman’s testimony is unreliable unless she made a complaint shortly after the event (recent complaint), or if she has had previous sexual relations, are but two of the more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law. The notion that consultation with a psychiatrist is, by itself, an indication of untrustworthiness is a more recent, but equally invidious, example of such a myth. The purpose of s. 278.3(4) is to prevent these and other myths from forming the entire basis of an otherwise unsubstantiated order for production of private records.

[120] The purpose and wording of s. 278.3 does not prevent an accused from relying on the assertions set out in subsection 278.3(4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance. (An exception is “recent complaint” which has been abolished by the jurisprudence and cannot be relied on in any event, quite apart from the section.) The section requires only that the accused be able to point to case-specific evidence or information to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify, see *Leipert, supra*, at para. 21. Conversely, where an accused does provide evidence or information to support an assertion listed in s. 278.3(4), this does not mean that likely relevance is made out. Section 278.3(4) does not supplant the ultimate discretion of the trial judge. Where any one of the listed assertions is made and supported by the required evidentiary and informational foundation, the trial judge is the ultimate arbiter in deciding whether the likely relevance threshold set out in ss. 278.5 and 278.7 is met.

R. v. J.J.

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[Indexed as: **R. v. J.J.**]

Her Majesty The Queen (Appellant/Respondent on cross-appeal) and J.J. (Respondent/Appellant on cross-appeal) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of Saskatchewan, Attorney General of Alberta, West Coast Legal Education and Action Fund, Women Against Violence Against Women Rape Crisis Centre, Barbra Schlifer Commemorative Clinic, Criminal Trial Lawyers' Association, Criminal Lawyers' Association (Ontario), Canadian Council of Criminal Defence Lawyers and Independent Criminal Defence Advocacy Society (Interveners)

A.S. (Appellant) and Her Majesty The Queen and Shane Reddick (Respondents) and Attorney General of Canada, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Criminal Lawyers' Association (Ontario), Barbra Schlifer Commemorative Clinic, Women's Legal Education and Action Fund Inc., Criminal Defence Lawyers Association of Manitoba, West Coast Legal Education and Action Fund and Women Against Violence Against Women Rape Crisis Centre (Interveners)

Supreme Court of Canada

Docket: 39133, 39516

2022 SCC 28, 2022 CSC 28

Wagner C.J.C., Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer, Jamal JJ.

Heard: October 5, 6, 2021

Judgment: June 30, 2022

Sexual offences — General — Regime governing admissibility of complainant's private records in possession of accused constitutionally valid — Definition of "record" and application of regime given broad interpretation — Content and context of record must be considered to determine reasonable expectation of privacy — Regime complies with both ss. 7 and 11(d) of Charter — No infringement of accused's fair trial rights — Law strikes reasonable balance between rights of accused and complainant — Reverse disclosure requirement, complainant participation do not unduly prejudice accused — Crimi-

nal Code, R.S.C. 1985, c. C-46, ss. 276, 278.92 to 278.94 — Canadian Charter of Rights and Freedoms, ss. 7, 11(d).

[See *Ewaschuk, Criminal Pleadings & Practice*: 12:10; 13:77; 13:80; 13:95; 13:96; 16:111; 21:303.50; 31:468; 31:468.50; 31:492; 31:496; 31:497; 31:575]

Two accused, J and R, charged with sexual offences in unrelated cases, brought pre-trial applications challenging the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*. These provisions, enacted in 2018, dictate a new procedure for screening complainants' private records in the hands of the accused to determine whether they are admissible as evidence at trial, and a new procedure to provide complainants with additional participation rights in admissibility proceedings. The new procedure operates in two stages. At Stage One, the judge reviews the accused's application to determine whether the evidence sought to be adduced is a "record" within the meaning of the provisions and whether it is capable of being admissible. At Stage Two, the judge decides whether the proposed evidence meets the tests for admissibility. Complainants are permitted to appear at the Stage Two hearing and make submissions, with the assistance of counsel, if they so choose. The accused argued that the impugned provisions violated three fundamental rights guaranteed to accused persons under the *Charter*, namely: the right to silence and the privilege against self-incrimination under ss. 7 and 11(c); the right to a fair trial under ss. 7 and 11(d); and the right to make full answer and defence under ss. 7 and 11(d). In J's case, the application judge held that one provision of the record screening regime was unconstitutional. The Crown appealed that ruling, and J cross-appealed, challenging the regime in its entirety. In R's case, the trial judge invalidated the regime as a whole. The complainant was granted standing to appeal.

Held: The appeal was allowed; the cross-appeal was dismissed.

Per Wagner C.J.C. and Moldaver J. (Karakatsanis, Martin, Kasirer and Jamal JJ. concurring): The scope and application of the regime must be interpreted before determining its constitutionality. "Enumerated" records are those that fall within the categories specified in s. 278.1 and will always require a s. 278.93(1) application before being adduced at trial. For other "non-enumerated" records in the possession of the accused, the necessity of such an application depends on whether they contain personal information for which there is a reasonable expectation of privacy. Both the content and context of the record must be considered in determining whether the complainant has a reasonable expectation of privacy in it. The court should consider whether the record contains information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological, or emotional well-being. Communications like text messages and emails from the complainant and the accused are not categorically excluded or included by this definition. Recorded communications concerning the subject matter of the charge itself also may be caught. Additionally, a record is "adduced" if it is referred to in examination of witnesses or in sub-

missions, not only when it is marked as an exhibit. As for timing, the application should be brought on 7 days' notice, but this period may be truncated in the interests of justice. Mid-trial applications should not be the norm. An accused may bring a "motion for directions" to determine whether the materials in question are "records" requiring an application. Only if the judge is satisfied that the proposed evidence clearly does not constitute a "record" should they direct that the accused need not bring an application.

As for constitutionality, the key principles of fundamental justice that apply are that (1) an individual must be proven guilty beyond a reasonable doubt; (2) the state must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with due process. The broad principle of trial fairness is not assessed solely from the accused's perspective, but also from the point of view of the complainant and community.

The admissibility threshold in s. 278.92 does not impair fair trial rights. The record screening regime embodies the fundamental principle governing the law of evidence — i.e., relevant evidence should be admitted, and irrelevant evidence excluded, subject to the qualification that the probative value of the evidence must outweigh its potential prejudice to the conduct of a fair trial. The record screening regime and the s. 276 regime governing evidence of other sexual activity both seek to protect complainants against harmful myths and stereotypes. The right to make full answer and defence will only be violated if the accused is prevented from adducing relevant and material evidence, the probative value of which is not outweighed by its prejudicial effect. The admissibility threshold in the record screening regime does not give rise to such a violation.

The application process in s. 278.92 is not overbroad. It was intended to fill a legislative gap to ensure statutory protection of complainants' privacy and dignity, where the accused is in possession or control of their highly private records. The procedure for the record screening regime is not overbroad relative to this legislative purpose because it does not go further than is reasonably necessary. The definition of "record" in s. 278.1 supports the constitutionality of s. 278.92 because it will only capture materials that come within the enumerated categories, or that otherwise contain information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological, or emotional well-being. This respects both the accused's fair trial rights and the complainant's privacy and equality interests.

The record screening regime does not require compelled defence disclosure in a manner that violates an accused's right to a fair trial. There is no absolute rule against requiring the defence to disclose evidence to the Crown before the prosecution closes its case, and in any event the regime applies to a narrow category of evidence implicating sensitive interests with the potential to create serious prejudice.

The complainant participation provisions in s. 278.94, which apply to the s. 276 regime and to the record screening regime do not violate the accused's fair trial rights. As well, the complainant participation provisions in s. 278.94 have no impact on prosecutorial independence. The role of the Crown is not usurped and the fundamentally bilateral nature of a criminal trial is not compromised. The impugned provisions strike a balance that protects fundamental justice for accused persons and complainants alike.

Per Brown J. (dissenting in part): The record screening regime in ss. 278.92 to 278.94 limits the accused's rights under ss. 11(c), 11(d) and 7 of the *Charter*. These limits are disproportionate and cannot be demonstrably justified in a free and democratic society. They are constitutional only as they apply to the existing s. 276 regime.

There was agreement with Rowe J. with respect to the proper analytical framework to be applied where both ss. 7 and 11(d) of the *Charter* are raised. The majority's reasons deepen the methodological incoherence of *Charter* jurisprudence by using s. 7 not to protect the fair trial and due process guarantees under the *Charter*, but to erode them.

The record screening regime is overbroad. It renders presumptively inadmissible a remarkably broad range of records in the hands of the defence, capturing not only records that are sensitive or prejudicial, and it regulates their use in any manner. Notably, it captures digital communications sent between the accused and complainant about the very subject matter of the charge. Unlike s. 276 materials, private records are not inherently prejudicial or antithetical to truth-seeking. Since the record screening regime captures all private records relating to the complainant that are in the accused's possession, which the accused intends to adduce or rely on in any manner, and which may include the accused's own digital conversations with the complainant about the subject matter of the charge, it could deprive individuals of liberty in situations that have no connection whatsoever to the object of the law. It requires reverse disclosure of evidence that would not distort the truth-seeking process or significantly interfere with the complainant's privacy, all before the Crown makes out a case to meet. This goes well beyond what is necessary to achieve Parliament's objective.

In addition, the record screening regime limits the accused's rights under ss. 11(c), 11(d) and 7 of the *Charter* in four ways. First, it forces accused persons to reveal particulars of their own defence even before the Crown has laid out a case to be answered, as an application will be brought pre-trial in the vast majority of cases. This violates the principle against self-incrimination, the right to silence, the presumption of innocence, and the related principle that the Crown must establish a case to meet before the accused can be expected to respond. Second, the advance disclosure requirement and complainant's participatory rights operate together to limit the accused's ability to effectively cross-examine the complainant, contrary to the presumption of innocence, the right to make full answer

and defence and the right to a fair trial. While there is no right to ambush a complainant with misleading or abusive cross-examination, confronting a complainant with inconsistencies that have not previously been disclosed is a well-established and often exceedingly effective aspect of cross-examination used to test the complainant's credibility. Impeachment of a Crown witness, including impeachment by surprise, is a legitimate and valuable defence tactic, which the regime eviscerates. Third, the fact that the record screening regime makes private records presumptively inadmissible when tendered by the defence, but presumptively admissible when tendered by the Crown, renders the trial unfair and undermines the regime's purpose. Fourth, combined with the broad scope of "record" and advance notice requirement, the effect of the heightened standard of admissibility of defence evidence set by the record screening regime limits the rights to a fair trial and to make full answer and defence.

The limits on the accused's rights are not demonstrably justified in a free and democratic society. While the record screening regime has a pressing and substantial objective, it fails at the rational connection, minimal impairment, and final balancing stages of the s. 1 analysis. A narrower regime could further the goals of empowering and protecting complainants in a real and substantial manner, while impairing the accused's rights to a lesser extent. The harmful impacts and risk of wrongful convictions outweigh any potential benefits of the regime.

Per Rowe J. (dissenting in part): There was agreement with Brown J. on the unconstitutionality of the regime in ss. 278.92 to 278.94 of the *Criminal Code*.

The methodological approach to ss. 7 and 11 of the *Charter* required reconsideration. Where a specific *Charter* guarantee, such as s. 11, is pleaded along with the broader guarantee in s. 7, the specific guarantee should be addressed first. If a violation of the specific *Charter* guarantee is found, there is no reason to proceed to s. 7. If there is no violation of the specific guarantee, or the violation is found to be justified under s. 1, the courts must then look to s. 7. When s. 7 is given priority in the analysis, it subsumes ss. 11(c) and 11(d) and the latter can be limited without a s. 1 analysis.

Introducing internal limits into the s. 11 guarantees through s. 7 principles, as the majority does, is wrong in principle and, in this case, undermines the long-standing, fundamental right to a fair trial. Channeling the entire constitutional analysis through s. 7 operates almost entirely outside the constitutional text, structure, and purposes of the various provisions. It defines the right to a fair trial by reference to the perspectives of the accused, the complainant, the community and the criminal justice system at large. However, the right to a fair trial under s. 11(d) is one that belongs to the accused only. Instead, the proper methodology by which to have regard to such societal considerations is under s. 1 and not by using s. 7 as a mechanism to limit rights under s. 11. The majority's internal balancing approach also leads to a reversal of the burden of proof and a dilution of *Charter* protections. Rather than the state having to justify a violation

under s. 1, the onus effectively remains on the accused throughout. Most fundamentally, limiting s. 11 through s. 7 is contrary to the purposes of both ss. 7 and 11.

Per Côté J. (dissenting in part): There was agreement with Brown J. that the record screening regime does not come close to passing constitutional muster. There was also agreement with Rowe J. on the proper analytical approach in respect of s. 7 of the *Charter*. However, there was disagreement with both the majority and Brown J. on the interpretation of “record” and “adduce”. A narrow interpretation should be preferred.

A proper interpretation of “record” as defined in s. 278.1 excludes any communications — electronic or otherwise — between the accused and the complainant other than communications made in the context of a professional relationship in which there was an expectation of some degree of confidentiality. By importing a definition of “record” from the regime for the production of third party records, which did not contemplate or include communications between the accused and the complainant, Parliament signaled an intention that such communications do not constitute records for the purposes of the record screening regime. As well, the record screening regime was enacted to address a gap in the law that arose where an accused legally came into possession of a record. The mischief to be remedied was not the admission at trial of voluntary communications between the complainant and the accused. The phrase “reasonable expectation of privacy” must be given coherent meaning. Where the accused’s liberty is at stake, a complainant’s expectation of privacy in communications with the accused is objectively unreasonable. The only exception to this category-based approach relates to messages exchanged in the context of a professional relationship in which there is an expectation of some degree of confidentiality. In all cases, as in the s. 8 context, a content-neutral analysis should be adopted. The majority’s approach gives no meaningful guidance. This had adverse consequences for trial efficiency. The majority’s approach will also result in an absurd two-tiered system of admissibility that favours the Crown and will lead to the absurd consequence of having the record screening regime create a distinction between information exchanged orally and information exchanged through electronic means.

With respect to “adduce”, its plain meaning should be adopted. An application is required only where an accused intends to introduce a copy of the actual record into evidence. It is not required where an accused intends only to ask questions about the information contained in the record, and not to adduce the record in evidence. Interpreting “adduce” more broadly leads to an inherent incongruity, preventing one accused from using relevant information merely because this accused possesses the best evidence of the information.

Even with narrower interpretations of “record” and “adduce”, Brown J.’s constitutional analysis remains dispositive. The regime forces accused persons to re-

veal their defence before the Crown has made out a case to meet, contrary to the principle against self-incrimination, the right to silence, and the presumption of innocence. It restricts the accused's ability to cross-examine Crown witnesses by giving the complainant a role in pre-trial admissibility determinations. It makes private records presumptively inadmissible when tendered by the defence, but presumptively admissible when tendered by the Crown. Finally, the regime erects a more stringent test for admitting defence evidence than is constitutionally permissible. None of these limits on the accused's *Charter* rights can be justified under s. 1. The regime is not rationally connected to its objective, it is not minimally impairing, and its salutary effects do not outweigh its deleterious effects.

Cases considered by Wagner C.J.C.:

- A. (*L.L.*) v. B. (A.) (1995), 103 C.C.C. (3d) 92, 44 C.R. (4th) 91, 130 D.L.R. (4th) 422, 190 N.R. 329, 33 C.R.R. (2d) 87, [1995] 4 S.C.R. 536, 88 O.A.C. 241, 1995 CarswellOnt 955, 1995 CarswellOnt 1188, [1995] S.C.J. No. 102, EYB 1995-67686 (S.C.C.) — considered
- Bedford v. Canada (Attorney General)* (2013), 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] S.C.J. No. 72, 303 C.C.C. (3d) 146, 366 D.L.R. (4th) 237, 7 C.R. (7th) 1, 312 O.A.C. 53, 452 N.R. 1, (sub nom. *Canada (Attorney General) v. Bedford*) [2013] 3 S.C.R. 1101, (sub nom. *Canada (Attorney General) v. Bedford*) 297 C.R.R. (2d) 334, 128 O.R. (3d) 385 (note) (S.C.C.) — considered
- Canada v. Canada North Group Inc.* (2021), 2021 SCC 30, 2021 CSC 30, EYB 2021-397318, 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 D.T.C. 5080, (sub nom. *La Reine c. Canada North Group Inc.*) 2021 D.T.C. 5081, 91 C.B.R. (6th) 1, [2021] 5 C.T.C. 111, 28 Alta. L.R. (7th) 1, [2021] 10 W.W.R. 1, 460 D.L.R. (4th) 309, 19 B.L.R. (6th) 1 (S.C.C.) — referred to
- Carter v. Canada (Attorney General)* (2015), 2015 SCC 5, 2015 CSC 5, 2015 CarswellBC 227, 2015 CarswellBC 228, [2015] S.C.J. No. 5, [2015] A.C.S. No. 5, 66 B.C.L.R. (5th) 215, [2015] 3 W.W.R. 425, 17 C.R. (7th) 1, 320 C.C.C. (3d) 1, 468 N.R. 1, 384 D.L.R. (4th) 14, 366 B.C.A.C. 1, 629 W.A.C. 1, [2015] 1 S.C.R. 331, 327 C.R.R. (2d) 334 (S.C.C.) — considered
- Dagg v. Canada (Minister of Finance)* (1997), 213 N.R. 161, 148 D.L.R. (4th) 385, 1997 CarswellNat 869, 1997 CarswellNat 870, 46 Admin. L.R. (2d) 155, [1997] 2 S.C.R. 403, 132 F.T.R. 55 (note), [1997] S.C.J. No. 63 (S.C.C.) — referred to
- M. (A.) v. Ryan (1997), 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, [1997] S.C.J. No. 13, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — referred to
- Martineau c. Ministre du Revenu national* (2004), 2004 SCC 81, 2004 CarswellNat 4564, 2004 CarswellNat 4565, 24 C.R. (6th) 207, (sub nom.

of their defence admitted. Many exclusionary rules exist in Canadian criminal law to prevent the Crown or defence from distorting the truth-seeking function of the trial process, which is an integral component of trial fairness (*Mills*, at para. 74).

¹³⁰ Moreover, when assessing the prejudicial effect, or the “costs”, of admitting potential evidence, trial judges should consider its effect on all aspects of trial fairness, including “the practicalities of its presentation, the fairness to the parties *and to witnesses*, and the potentially distorting effect the evidence can have on the outcome of the case” (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 47 (emphasis added)). In the present context, trial judges must consider the “prejudicial effect” of admitting a record as evidence at trial, which includes the effect on complainants whose private information is implicated.

¹³¹ In *Darrach*, at para. 39, this Court found that the phrase “significant probative value” in the s. 276 context simply requires that the evidence not “be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt”. The Court used language that specified that its analysis on the threshold was specific to s. 276, noting: “*In light of the purposes of s. 276*, the use of the word ‘significant’ is consistent with both the majority and the minority reasons in *Seaboyer*” (para. 41 (emphasis added)). However, at para. 26, *Darrach* recognized the analogous legislative purposes behind the s. 276 regime and the third party production regime, which relies on s. 278.1:

The Court in *Mills* upheld the constitutionality of the provisions in the *Criminal Code* that control the use of personal and therapeutic records in trials of sexual offences. The use of these records in evidence is analogous in many ways to the use of evidence of prior sexual activity, and the protections in the *Criminal Code* surrounding the use of records at trial are motivated by similar policy considerations. [Emphasis added.]

The similarity between the use of s. 276 and s. 278.1 evidence recognized in *Darrach* supports our view that the admissibility threshold in s. 278.92(2)(b) is constitutional.

¹³² An important similarity between s. 276 evidence and private records is that they both seek to protect complainants against harmful myths and stereotypes. Specifically, a key purpose of s. 276 is to prevent the accused from adducing evidence that engages the “twin myths” about sexual offence complainants: that complainants are more likely to have con-

sented or are less worthy of belief by reason of past sexual activity that they engaged in (*Darrach*, at para. 32). While the enumerated records in s. 278.1 do not necessarily engage the twin myths, which relate specifically to prior sexual activity, this Court has recognized that many other problematic myths and stereotypes may be at play — e.g., individuals who consult with mental health professionals are not credible and reliable; failure to immediately report a sexual offence means that it did not occur; drug and alcohol use demonstrates bad character; a “real victim” will avoid all contact with the perpetrator after the fact (*Mills*, at para. 119; see also *R. v. Lavallee*, [1990] 1 S.C.R. 852, at pp. 871-72; *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 134). Our colleague Brown J.’s dissenting reasons focus only on the “twin myths” implicated specifically by s. 276 evidence; they fail to meaningfully recognize the risks posed by other myths, including those listed above.

133 In sum, the right to make full answer and defence will only be violated if the accused is prevented from adducing relevant and material evidence, the probative value of which is not outweighed by its prejudicial effect. Section 278.92 does no such thing. With respect to private record applications, the admissibility threshold in s. 278.92(2)(b) and the factors in s. 278.92(3) require the judge to weigh the potential prejudice arising from the proposed evidence, including whether it is myth-based or unjustifiably intrusive on a complainant’s privacy, against the extent of its probative value. It follows, in our view, that the admissibility threshold in s. 278.92(2) does not breach ss. 7 or 11(d) of the *Charter*.

(b) Section 278.92 Procedure Is Not Overbroad

134 The respondent J.J. argues that s. 278.92 violates the accused’s rights under s. 7 of the *Charter* because it is overbroad. Specifically, he says that the record screening regime forces the accused to disclose a wide range of records to the Crown and the complainant, going beyond what is necessary to accomplish Parliament’s objectives. Furthermore, in Mr. Reddick’s case, the application judge concluded that s. 278.92 was overbroad because it subjected all “records” under s. 278.1 to the record screening regime, even if the records would not perpetuate myths and stereotypes about sexual offence complainants (paras. 43-49 and 77).

135 To be clear, the constitutionality of the definition of “record” set out in s. 278.1 is not in issue. The concern is the *application* of the definition in the context of the record screening regime in s. 278.92 — specifically,

[Indexed as: **R. v. Ochrym**]

Her Majesty the Queen (Respondent) and Terrell Ochrym
(Appellant)

Ontario Court of Appeal

Docket: CA C67930

2021 ONCA 48

Alexandra Hoy, Gary Trotter, David M. Paciocco JJ.A.

Heard: December 8, 2020

Judgment: January 27, 2021*

Prostitution — Procuring — Accused charged with procuring for sexual services — Complainant testified that she asked accused to drive her to motels where she sold sexual services — Trial judge convicted accused on this basis — Appeal from conviction allowed and new trial ordered — Trial judge failed to assess accused's actions in context of entire relationship — Accused providing means to sell sexual services was not sufficient to prove actus reus of the offence — Cr. Code, s. 286.3(1).

Trial — Conduct of trial — New theory of liability — Accused charged with advertising sexual services — Accused testified that complainant used his internet site account to advertise her own sexual services — Crown sought conviction on basis that accused's evidence was false — Trial judge convicted accused as a party in reliance on his version of events — Appeal from conviction allowed and new trial ordered — Trial judge erred by convicting accused on theory of liability disavowed by Crown without providing notice and inviting submissions.

The accused was charged with offences relating to the provision of sexual services for consideration. The complainant, who was under 18 years of age, testified that at her request the accused drove her to motels where she provided sexual services and bought her food. The accused testified that he allowed the complainant to use his account on the website Backpage to advertise sexual services. The Crown argued that this evidence should be rejected and that the trial judge should find that the accused had advertised her services himself. The trial judge had a reasonable doubt that the accused knew or was willfully blind that the complainant was underage, but convicted him of procuring the complainant

* Leave to appeal refused at *Her Majesty the Queen v. Terrell Ochrym*, 2021 CarswellOnt 10305 (S.C.C.)

under s. 286.3(1). The trial judge accepted the accused's evidence that the advertisements were made by the complainant using his account but convicted him of advertising sexual services contrary to s. 286.4 as a party. The accused appealed his convictions.

Held: The appeal was allowed and a new trial ordered.

The trial judge's factual findings did not establish the *actus reus* of procuring. Finding that the accused had coordinated and provided the means for the complainant to sell sexual services was not sufficient to prove that he exercised control, direction or influence over her movements. The trial judge failed to assess the accused's actions in the context of his relationship with the complainant to determine whether the *actus reus* of the offence was satisfied.

The trial judge erred by convicting the accused of advertising sexual services based on a theory of liability that the Crown disavowed without giving the accused notice and an opportunity to respond. This denial of the opportunity for the accused to make submissions undermined the appearance of the due administration of justice.

Cases considered:

- R. v. Gallone* (2019), 2019 ONCA 663, 2019 CarswellOnt 13146, 56 C.R. (7th) 288, 147 O.R. (3d) 225, 379 C.C.C. (3d) 1, [2019] O.J. No. 4247 (Ont. C.A.) — followed
- R. v. Grandine* (2017), 2017 ONCA 718, 2017 CarswellOnt 14323, 41 C.R. (7th) 131, 355 C.C.C. (3d) 120 (Ont. C.A.) — considered
- R. v. Groot* (1998), 1998 CarswellOnt 3613, 112 O.A.C. 303, 129 C.C.C. (3d) 293, 41 O.R. (3d) 280, [1998] O.J. No. 3674 (Ont. C.A.) — considered
- R. v. Groot* (1999), 1999 CarswellOnt 3434, 1999 CarswellOnt 3573, [1999] S.C.J. No. 64, [1999] 3 S.C.R. 664, 144 C.C.C. (3d) 287 (S.C.C.) — referred to
- R. v. Joseph* (2020), 2020 ONCA 733, 2020 CarswellOnt 17018, 153 O.R. (3d) 145 (Ont. C.A.) — considered
- R. v. McDonald* (2018), 2018 ONCA 369, 2018 CarswellOnt 5689, 360 C.C.C. (3d) 494 (Ont. C.A.) — considered
- R. v. Pickton* (2010), 2010 SCC 32, 2010 CarswellBC 2000, 2010 CarswellBC 2001, 257 C.C.C. (3d) 296, 321 D.L.R. (4th) 577, 404 N.R. 198, 77 C.R. (6th) 12, 290 B.C.A.C. 264, 491 W.A.C. 264, [2010] 2 S.C.R. 198 (S.C.C.) — considered

Statutes considered:

- Criminal Code*, R.S.C. 1985, c. C-46
 - s. 279.01(1) [en. 2005, c. 43, s. 3] — considered
 - s. 286.1 [en. 2014, c. 25, s. 20] — considered
 - s. 286.1(1) [en. 2014, c. 25, s. 20] — considered
 - s. 286.1(2) [en. 2014, c. 25, s. 20] — considered

- 20 Further, the trial judge found that the Crown’s submission that the appellant had held, concealed or harboured the complainant was contrary to the complainant’s evidence that the appellant never restricted her movements and at all times she was free to leave the motels at any time she wished. Indeed, the trial judge noted, on the weekend of April 7, 2017, when the complainant’s mother found the postings, advertising the complainant’s sexual services on the website backpage.ca (“Backpage”), the complainant cut short her weekend and hired a taxi that brought her home.
- 21 The complainant testified that she gave Mr. Richards part of the monies that she earned. No evidence was introduced that the appellant received any money from the complainant’s provision of sexual services and the trial judge found the appellant not guilty of the charges under s. 286.2, i.e. receiving a financial or other material benefit, knowing that it was obtained by or derived directly or indirectly from the commission of an offence under ss. 286.1(1) or 286.1(2).
- 22 The appellant admitted that he let Mr. Richards use his cell phone and Backpage account to advertise sexual services to be provided by the complainant for consideration. The trial judge also accepted that the complainant, directly and through Mr. Richards, sent photos of the complainant in lingerie, in sexual poses, to the appellant’s phone.
- 23 Based on this evidence, the trial judge found the appellant guilty of knowingly advertising an offer to provide sexual service for consideration by posting an advertisement on Backpage, contrary to s. 286.4.

IV. THE PARTIES’ POSITIONS IN RELATION TO THE CONVICTION UNDER S. 286.3(1)

- 24 In *R. v. Gallone*, 2019 ONCA 663, 147 O.R. (3d) 225 (Ont. C.A.), the court concluded the terms “control, direction *or* influence” in the *actus reus* of the human trafficking offence in s. 279.01(1) and the procuring offence in s. 286.3(1) of the Code are disjunctive and have different meanings.
- 25 Duty counsel and crown counsel both point to the following passage at para. 47 of *Gallone*:
- Consistent with [*R. c. Perrault*, [1997] R.J.Q. 4 (C.A. Que.), 113 C.C.C. (3d) 573] I would define “exercises influence” over the movements of a person for the purposes of s. 279.01(1) as something less coercive than “exercises direction”. Exercising influence over a person’s movements means doing anything to affect the person’s

movements. Influence can be exerted while still allowing scope for the person's free will to operate. This would include anything done to induce, alter, sway, or affect the will of the complainant. Thus, if exercising control is like giving an order that the person has little choice but to obey, and exercising direction is like imposing a rule that the person should follow, then exercising influence is like proposing an idea and persuading the person to adopt it. [Citation omitted.]

- 26 Duty counsel argues that the trial judge's factual findings do not support his conclusion that the appellant exercised control, direction or influence over the complainant. In particular, he points to the trial judge's findings that the complainant sought out the appellant to assist in the prostitution scheme, that there was no evidence that the appellant pressured, controlled *or encouraged* the complainant to sell her sexual services, and that the complainant was free to leave the motels at any time she wished. Duty counsel argues that the trial judge's factual finding that the appellant "did coordinate and provide [the complainant] with the means to provide sexual services for consideration" does not amount to exercising control, direction or influence over her movements within the meaning of those terms in s. 286.3(1) of the *Code*. Moreover, he argues, the evidence cannot support a finding that the appellant exercised control, direction or influence over the appellant's movements. All the appellant did was to facilitate the complainant's (or the complainant and Mr. Richard's) scheme for the complainant to sell sexual services.
- 27 Crown counsel focuses on the second sentence in para. 47 of *Gallone*: "Exercising influence over a person's movements means doing anything to affect the person's movements." Crown counsel points to the complainant's evidence, which the trial judge accepted, that the appellant drove her to the motels, booked the motels, brought her to the rooms using back entrances, and provided her with food and other necessities on request when she was at the motels. Crown counsel argues that coordinating and providing the complainant with the means to provide sexual services for consideration affected where the complainant went and how she got there and, accordingly, the trial judge correctly found that the appellant exercised influence over the movements of the complainant.
- 28 Further, Crown counsel submits that this broad interpretation of "exercise influence" is consistent with the purpose of s. 286.3, as described by the court in *R. v. Joseph*, 2020 ONCA 733 (Ont. C.A.), at para. 90: "Parliament enacted these provisions in order to eradicate prostitution to

the extent possible while largely immunizing the sellers from prosecution.”

V. ANALYSIS IN RELATION TO THE CONVICTION UNDER S. 286.3(1)

- 29 We agree with duty counsel that the trial judge’s factual finding that the appellant “did coordinate and provide [the complainant] with the means to provide sexual services for consideration” does not, of itself, support the conclusion that the appellant exercised control, direction or influence over her movements within the meaning of those terms in s. 286.3(1) of the *Code*. In convicting the appellant under s. 286.3(1) of exercising discretion and influence, the trial judge erred in determining the *actus reus* of the offence by focusing solely on what the appellant did, without regard to the nature of the relationship between the appellant and the complainant, and the impact of the appellant’s conduct on the complainant’s state of mind. Sometimes, the nature of the relationship and the impact of the accused’s conduct on the complainant’s state of mind will be evident from what an accused said or did and what the complainant said or did in response. But that is not the case here.
- 30 The statement at para. 47 of *Gallone* that “[e]xercising influence over a person’s movements means doing anything to affect the person’s movements” cannot be read in isolation. The balance of para. 47 and para. 50, reproduced below, indicate that in considering whether what an accused did amounted to exercising control, direction or influence over the movements of a complainant, regard must be had to the nature of the relationship between the accused and complainant:

...all these residual terms — “exercises control, direction or influence” — evoke a scenario in which a person, by virtue of her or his relationship with the complainant, has some power — whether physical, psychological, moral or otherwise — over the complainant and his or her movements. As stated in *A Handbook for Criminal Justice Practitioners on Trafficking in Persons*, (Ottawa: Department of Justice, 2015), which was developed by the Federal/Provincial/Territorial Working Group on Trafficking in Persons, these residual terms characterize “the nature of conduct in terms of the relationship between the accused and the victim in relation to the victim’s mobility”: at p. 20. In other words, by virtue of the relationship between the accused and the complainant, the accused was in a position or had the ability to control, direct or influence the movements of the complainant. However, as already stated, the terms

“control”, “direct” and “influence” involve different degrees of coercion[.]

- 31 The meaning *Gallone* ascribes to “exercise of control, direction or influence” covers a wide range of intentional conduct and is consistent with the purpose of s. 286.3, as articulated in *Joseph*.
- 32 In *Joseph*, the court, among other things, rejected the trial judge’s definition of “harbour” in s. 286.3 as to “secretly shelter and protect”. The court concluded that “harbour” in s. 286.3 includes the simple provision of shelter, whether secretly or not. The court observed, at para. 90, that Parliament enacted s. 286.3 and the other commodification of sexual services provisions “in order to eradicate prostitution to the extent possible while largely immunizing the sellers from prosecution.” However, the interpretation of the section was supported by the statute. The court’s interpretation of “harbour” was consistent with the meaning of word used in the French version of the section — “héberge” — and, as the court noted at para. 85, supported by the presumption against redundancy. To avoid tautology, the court reasoned, “harbour” must mean something other than “conceals”.
- 33 Had Parliament intended s. 286.3(1) to criminalize any conduct affecting a complainant’s movements that facilitates the provision of sexual service for consideration, it would have done so more clearly. For example, s. 286.4 provides that it is an offence to knowingly advertise an offer to provide sexual services for consideration. Parliament did not provide that driving a sex worker to a motel or booking the motel where the worker provides sexual services for consideration is an offence. Rather, as noted above, Parliament used terms which require consideration of whether because of the relationship between the accused and the complainant, the accused was in a position or had the ability to, and did, exercise control, direct or influence the movements of a person who provides sexual services for consideration. Some regard must be had to the nature of the relationship between the accused and the complainant. Yet the trial judge failed to do so.
- 34 In convicting the appellant under s. 286.3(1) of exercising direction and influence, the trial judge thereby erred in examining the *actus reus* of the offence by focusing solely on what the appellant did, without regard to the nature of the relationship between the appellant and the complainant.
- 35 It is possible that had the trial judge turned his mind to the nature of the relationship he may have found the *actus reus* of the offence to have

been satisfied. There was evidence before him about the nature of relationship between the appellant and the complainant. The appellant was a middle-aged man experienced in the selling of sexual services and the complainant was an impressionable and inexperienced teenager. The appellant had some financial means and resources, whereas the complainant had none. The appellant was involved in drug trafficking with Mr. Richards, whom the complainant sought to please and who benefitted financially from the sale of the complainant's sexual services. The appellant's drug customers included sex workers. Arguably, a reasonable inference from the nature of the relationship between the appellant and the complainant is that the appellant's conduct impacted the complainant's state of mind, and the appellant accordingly exercised influence over her movements when he coordinated and provided her with the means to provide sexual services for consideration.

³⁶ However, this outcome is not assured. The relationship between the complainant, Mr. Richards, and the appellant was — to put it mildly — complex. The trial judge approached the complainant's and Mr. Richards' evidence, minimizing Mr. Richards' involvement and implicating the appellant as the main facilitator of the sex work, with great caution. While the evidence could support a finding that the appellant exercised influence over the movements of the complainant under s. 286.3(1), given the trial judge's finding that the appellant did not *encourage* the appellant to sell her sexual services for consideration in relation to the separate charge of recruiting, holding, concealing or harbouring the complainant contrary to s. 286.3, and the trial judge's cautious approach to the complainant and Mr. Richards' evidence, it is unclear that, having regard to the nature of the relationship between the appellant and the complainant and the impact of the appellant's conduct on the complainant's state of mind, the trial judge would have found the appellant exercised influence over the movements of the complainant. We say this appreciating that there is a difference between encouraging someone to sell sexual services for consideration and exercising influence over the movements of a person who offers or provides sexual services for consideration.

³⁷ We turn to the conviction under s. 286.4.

VI. THE CONVICTION UNDER S. 286.4

³⁸ We agree with duty counsel that the trial judge erred by convicting the appellant under s. 286.4 on a theory of liability disavowed by the

[Indexed as: **R. v. Williams**]

HER MAJESTY THE QUEEN and JONATHAN WILLIAMS

Ontario Superior Court of Justice

Docket: CR 18/0980

2020 ONSC 6347

J. Stribopoulos J.

Heard: August 24, 2020

Judgment: October 20, 2020

Sentence — Sexual offences — Sexual offences against children — Accused pled guilty to two counts of sexual interference — Accused was in lengthy sexual relationships with 14- and 15-year olds — Trial judge imposed 6.5-year sentence — Court of Appeal reduced sentence to 4 years — Supreme Court of Canada remanded for re-hearing in light of *R. v. Friesen*, 2020 SCC 9 — Appeal dismissed — Trial judge erred in treatment of mitigating factors — Sentence was fit notwithstanding error — Sentence was consistent with principles established in *Friesen* — Proper approach in BC involved ranges, not starting points — Not yet appropriate to set new post-*Friesen* range for these offences — Criminal Code, ss. 151, 718.01, 718.2(ii.1).

Sentence — Sexual offences — Sexual offences against children — Prohibition orders — Accused pled guilty to two counts of sexual interference — Trial judge imposed 6.5-year sentence, 20-year prohibition orders under s. 161 — Appeal allowed in part — Prohibition orders varied — 20-year duration was disproportionate in circumstances — 10-year duration was appropriate — Internet condition was too broad — Condition should restrict communication with young people, not internet use generally — Criminal Code, s. 161.

The accused pled guilty to two counts of sexual interference. He was 23 and 25 years old at the time of the two offences. He used a social media app to connect with the two victims. The first victim initially told him she was 18, and they commenced a sexual relationship. When she disclosed that she was actually 14, the sexual relationship continued. The second victim initially told the accused she was 16, but the next day revealed she was 15. Their sexual relationship included slapping and choking, but he stopped when she told him to. She gave birth to their child after the relationship ended and placed the child for adoption. Evidence at the sentencing hearing disclosed that the accused had a difficult background, having suffered abuse and hardship as a young person. He continued to suffer from mental health problems. The sentencing judge imposed a global sentence of six and a half years, less 18 months' credit for pre-sentence

custody. He also imposed five 20-year prohibitions under s. 161 of the Criminal Code. On appeal by the accused, the court reduced the net custodial sentence to a total of four years. It also varied the s. 161 prohibitions by reducing their duration to two years and by narrowing the scope of the s. 161(1)(d) prohibition which related to Internet access. The Crown sought leave to appeal to the Supreme Court, which remanded the case for reconsideration in light of *R. v. Friesen*, 2020 SCC 9.

Held: The accused's sentence appeal was allowed to the extent of varying the s. 161 prohibitions. The appeal was otherwise dismissed.

The sentencing judge did err by failing to classify the accused's mental health and personal circumstances as mitigating factors. However, following the Friesen framework, the sentence was nonetheless fit and there was no basis upon which to interfere. Under this framework, it is not sufficient for courts to simply state that sexual offences against children are serious; sentences must be imposed that reflect the normative character of the offender's actions and the consequential harm, which includes both actual and potential harm. The accused in this case engaged in prolonged, predatory relationships with underaged females. His moral culpability was high. An offender's personal circumstances cannot be used to reduce a sentence to a point where the sentence becomes disproportionate. It is an error in principle for sentencing judges in British Columbia to use the starting point as opposed to the sentencing range approach, and the trial judge should not have done so. However, it was not appropriate to use this appeal as an occasion to set a new, post-Friesen sentencing range for sexual offences against children.

The 20-year duration of conditions under s. 161(a), (b), (c) and (d), were excessive. Instead, 10-year prohibitions would properly recognize the principle of proportionality in the circumstances. Additionally, the blanket internet prohibition was excessively broad. It should be modified to only prohibit communication over the internet with underage persons.

Cases considered by J. Stribopoulos J.:

Bedford v. Canada (Attorney General) (2013), 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] S.C.J. No. 72, 303 C.C.C. (3d) 146, 366 D.L.R. (4th) 237, 7 C.R. (7th) 1, 312 O.A.C. 53, 452 N.R. 1, (sub nom. *Canada (Attorney General) v. Bedford*) [2013] 3 S.C.R. 1101, (sub nom. *Canada (Attorney General) v. Bedford*) 297 C.R.R. (2d) 334, 128 O.R. (3d) 385 (note) (S.C.C.) — referred to

Friedmann Equity Developments Inc. v. Final Note Ltd. (2000), 2000 SCC 34, 2000 CarswellOnt 2458, 2000 CarswellOnt 2459, 48 O.R. (3d) 800 (headnote only), 188 D.L.R. (4th) 269, [2000] S.C.J. No. 37, 34 R.P.R. (3d) 159, 255 N.R. 80, [2000] 1 S.C.R. 842, 7 B.L.R. (3d) 153, 134 O.A.C. 280, 2000 CSC 34, 48 O.R. (3d) 800 (S.C.C.) — referred to

- ³⁰ Over the intervening years, the Supreme Court has periodically reiterated the constraints it recognized in *Watkins*, *Salituro* and *Hawkins* on the courts' authority to make changes to the common law: see e.g. *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842 (S.C.C.), at p. 871.
- ³¹ With the benefit of the guidance provided by the Supreme Court's jurisprudence regarding the authority of courts to make changes to the common law, I return to the decision in *M.D.* As mentioned, *M.D.* neither acknowledges nor addresses the significant constraints on the authority of courts to make changes to the common law. Mindful of these limitations, which are essential to maintaining the appropriate division of labour between legislatures and courts in our constitutional democracy, I believe that the changes made by *M.D.* exceed the bounds of the sorts of modifications to common law rules judges are permitted to make. I have come to that conclusion for two main reasons.
- ³² First, in my view, extending the rules and procedures established in *Seaboyer* to an entirely new category of offences involves more than an "incremental change" or "small extension" to an existing common law rule. The consequences of such a change are considerable. It will mean that whenever an accused charged with a sexual services offence wants to cross-examine a complainant on matters that would elicit evidence regarding sexual activity that is not the subject of the charge(s), a formal pre-trial application will be necessary. The notice of application will need to identify the proposed evidence and explain why the accused contends it is relevant and why it has significant probative value that is not substantially outweighed by any potential prejudicial effect. A supporting affidavit will be necessary, most likely from the accused, to provide an evidentiary foundation for the application. In *M.D.*, the court appointed counsel for the complainant, a decision that will occasion some expense for the Crown, and in many cases, a fair degree of delay. Finally, a *voir dire* will be required to address the admissibility of the proposed evidence.
- ³³ Considered collectively, the changes endorsed by *M.D.* are significant. They involve much more than just an incremental change to an existing common law rule. The potential ramifications are no small matter. Adding yet another potential pre-trial application to criminal proceedings does not come without a cost. Judicial resources are already stretched thin, and there are ever-increasing concerns about delays in the criminal justice system that have only been exacerbated by the Covid-19 pan-

demic. Mindful of all of that, I believe the rules and procedures developed in *M.D.* go beyond the sort of incremental changes to the common law that judges are permitted to make.

³⁴ Second, it is apparent that Parliament’s decision not to list the sexual services offences in s. 276(1) was deliberate. By not including the sexual services offences in that subsection, Parliament chose to exempt those offences from the substantive rules and procedures in s. 276 that control the admissibility of evidence concerning other sexual activity by a complainant. In *Williams*, after carefully reviewing the legislative scheme and its history, including the comprehensive amendments Parliament made to these provisions in 2018, I concluded that the decision not to include the sexual services offences in s. 276(1) was deliberate: see *Williams*, at paras. 31-37. After undertaking a similar analysis of the legislative scheme in *M.D.*, Dennison J. arrived at that very same conclusion: see *M.D.*, at paras. 41-46.

³⁵ In my view, it would be inappropriate for the court to effectively use its authority to develop the common law to circumvent a deliberate legislative choice made by Parliament. Even if the failure to include the sexual services offences in s. 276(1) was somehow inadvertent, courts “have no jurisdiction to cure gaps in a legislative scheme”: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., (Markham: LexisNexis, 2014), at §12.14. Instead, it is the role of Parliament, not the courts, to correct legislative deficiencies: *R. v. Colet*, [1981] 1 S.C.R. 2 (S.C.C.), at p. 11.

³⁶ In any event, for reasons that I shall explain in the next section, I am less than convinced that the failure to list the sexual services offences in s. 276(1) was a legislative oversight.

II. “Sexual Services” cases do not pose the same risk of “twin-myths” reasoning endemic to “Sexual Offences” cases

³⁷ The most likely explanation for why Parliament chose not to list the sexual services offences in s. 276(1) of the *Criminal Code*, and thereby make them subject to the s. 276 regime, is because prosecutions involving sexual services offences do not raise the same “twin-myths” reasoning concerns that are endemic to sexual offences prosecutions.

³⁸ In *Seaboyer*, the Supreme Court of Canada’s focus was squarely on sexual offences. For the most part, crimes for which a complainant’s lack of consent to sexual activity, or an inability to consent (i.e. due to age), are essential elements of the offence. Historically, it was offences of that

nature that attracted sexist, misogynistic, outdated, and illogical twin-myths reasoning that interfered with the criminal trial's truth-seeking function. In addressing the constitutionality of s. 276 in *Seaboyer*, for the majority, McLachlin J., as she then was, described the primary purpose of that scheme in these terms, at p. 604:

The main purpose of the legislation is to abolish the old common law rules which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. **These twin myths are now discredited.** The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar. In an effort to rid the criminal law of these outmoded and illegitimate notions, legislatures throughout the United States and in England, Australia and Canada passed "rape-shield" laws. (I note that the term "rape shield" is less than fortunate; the legislation offers protection not against rape, but against the questioning of complainants in trials for sexual offences.)

[Emphasis added]

- 39 The Supreme Court recently recounted this unfortunate history and the dangers posed by twin-myths reasoning in sexual offences cases: see *Barton*, at paras. 55, 212, and 222.
- 40 Although the Supreme Court in *Seaboyer* described the goals of s. 276 as "laudable" (at p. 606), as noted above, it found the provision unconstitutional because it went too far by preventing an accused from presenting legitimate defences and thereby having a fair trial: *Seaboyer*, at p. 625. To fill the void left by its decision, the Supreme Court in *Seaboyer* developed common law rules and procedures to prevent a return to the same outdated and harmful practices that had marred rape trials in the past and invited twin-myths reasoning. From a practical standpoint, the significance of the common law scheme developed in *Seaboyer* was relatively short-lived.

- 41 The very next year, Parliament enacted a revised version of s. 276 that essentially codified the decision in *Seaboyer*, providing a legislated mechanism for trial judges to determine the admissibility of evidence of a complainant's prior sexual activity in prosecutions "in respect of" one of the sexual offences enumerated in s. 276(1). As the Supreme Court of Canada recognized in *Barton*: "The animating purposes behind this new regime, aligned with those of its predecessor, were to protect the integrity of the trial by excluding irrelevant and misleading evidence, protect the accused's right to a fair trial, and encourage the reporting of sexual offences by protecting the security and privacy of complainants": *Barton*, at para. 58.
- 42 The sexual services offences are a relatively recent addition to the *Criminal Code*, enacted by Parliament in response to the Supreme Court of Canada's decision in *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.): see *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25. In *Bedford*, the Supreme Court invalidated some of the prostitution offences that had long been part of the *Criminal Code*, including the bawdy-house prohibition (s. 210), the living off the avails of prostitution prohibition (s. 212(1)(j)), and the communicating prohibition (s. 213(1)(c)). Although the purpose of each was to redress some of the harms associated with sex work, the Supreme Court concluded that the prohibitions each had the effect of making the situation of sex workers more dangerous, thereby violating their s. 7 *Charter* rights.
- 43 Unfortunately, the vulnerability of sex workers is not limited to their work. There can be little doubt that when a sex worker is a complainant in a sexual assault case, the risk of pernicious twin-myths reasoning is especially acute because of the social stigma that has long accompanied such work. In such cases, some jurors' prejudices may prime them to be especially prone to prohibited twin-myths reasoning. The Supreme Court of Canada has expressly acknowledged this heightened danger in sexual assault cases involving sex workers: see *Barton*, at paras. 1, 230-231.
- 44 That said, I am less than persuaded that the danger of twin-myths reasoning, the concern behind s. 276 and the common law scheme developed in *Seaboyer*, is of the same nature in prosecutions that *only* involve sexual services charges. Critically, the first myth — that unchaste women are more likely to consent to sexual activity — has no real potential to infect the jury's reasoning in sexual services prosecutions because consent is not a live issue in such cases.

- 45 The second myth, which s. 276 and *Seaboyer* seek to redress — that unchaste women are less deserving of belief — is unquestionably a pervasive concern in all sexual services cases. However, extending the rules and procedures from *Seaboyer* to sexual services cases will do little to ameliorate this myth's potential influence. After all, sexual services prosecutions necessarily entail evidence that the complainant exchanged sexual services for money. Therefore, in all sexual services prosecutions there is an inherent risk that some jurors may be prone to unfairly and illogically discount the complainant's credibility because she worked in the sex trade. Accordingly, the trial judge's standard instruction to jurors to decide the case without prejudice and based only on the evidence is especially important in these cases.
- 46 There are significant differences between sexual offences and sexual services prosecutions when it comes to the risk of twin-myths reasoning. These differences may help to explain why Parliament decided not to include the sexual services offences in s. 276(1) and thereby exempted them from the substantive and procedural requirements found in s. 276.
- 47 Nevertheless, it *does not* follow that because s. 276 does not apply to prosecutions for sexual services offences, that accused facing such charges are free to elicit evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge(s).
- 48 With respect, *M.D.* appears to overlook a critical analytical step, moving quickly from the inapplicability of s. 276 to a conclusion that the common law needs to provide analogous rules and procedures to safeguard complainants and the trial process from irrelevant and prejudicial evidence.
- 49 Judges are only free to make incremental changes to existing common law rules when experience reveals them inadequate to the task of meeting contemporary challenges. In making that assessment, it is essential to consider the efficacy of existing safeguards and examine whether they fail to protect the trial process from irrelevant and prejudicial evidence. That brings us to the rules of evidence at present.

III. Existing rules of evidence protect against the admission of irrelevant and prejudicial evidence in cases not involving s. 276(1) offences

- 50 It is noteworthy that since the Supreme Court of Canada's decision in *Seaboyer*, courts have never found it necessary to extend the reach of

that holding to prosecutions for charges that lack a connection to one of the sexual offences listed in s. 276(1). That includes sexual services offences and the analogous prostitution offences that pre-dated the Supreme Court of Canada's decision in *Bedford*.

- 51 Of course, that could be because the possibility of extending the reach of *Seaboyer* to other types of charges has just not arisen for consideration. However, that possibility seems rather unlikely, given that nearly three decades have passed since the Supreme Court's decision in *Seaboyer*. At least one relatively recent decision from this court, which does not appear to have come to the court's attention in *M.D.*, suggests that the failure to extend *Seaboyer* is not just happenstance.
- 52 In *R. v. Thomas*, 2017 ONSC 7023 (Ont. S.C.J.), the accused faced a charge of simple assault. After referencing both the accused's failure to bring a s. 276 application and the Supreme Court's decision in *Seaboyer*, the trial judge refused to permit cross-examination of the complainant or the accused's testimony regarding the complainant's prior sexual activity. The defence had not proffered the evidence to suggest that the complainant consented to the alleged assault or that she was less credible as a witness because of her prior sexual experience. In the context of the case, the evidence had nothing to do with twin-myths reasoning. Instead, the evidence was relevant to the complainant's motive to fabricate the assault allegation.
- 53 In *Thomas*, sitting as a summary conviction appeal court, Hill J. allowed the accused's appeal because the trial judge erred in excluding the evidence regarding the complainant's sexual activity. He held that in a prosecution for simple assault, which is not an offence listed in s. 276(1), the rules and procedures contained in s. 276 have no application: *Thomas*, at para. 86.
- 54 At the same time, Hill J. emphasized that in cases where s. 276 does not apply; the existing rules of evidence only permit the admission of relevant evidence and already work to exclude defence evidence that is substantially more prejudicial than probative. He provided the following comprehensive summary of our pertinent trial procedures and rules of evidence, at paras. 65-75, which is worth reproducing in entirety:

[65] Not infrequently in a criminal trial, in response to objection from an opposing party, or in answer to inquiry by the court acting on its own motion to control the process, a cross-examiner may be called upon to identify the relevance of a line of questioning: *John*, at para. 59 ("... where a proper foundation has been laid, the cross-ex-

amination may be permitted”); *R. v. McDonald*, 2017 ONCA 568, at para. 68 (“... the importance that the proponent identify the issue(s) to which the evidence is relevant”); *R. v. Savojipour* (2006), 205 C.C.C. (3d) 533 (Ont. C.A.), at para. 25 (“Absent any evidence to relate the incidents to some relevant theory, they could not meet the test of relevance or materiality”).

[66] Accordingly, when called upon to do so, counsel is obliged to justify a proposed course of cross-examination (*R. v. Osman*, [1996] O.J. No. 3540 (C.A.), at para. 1; *681210 Alberta Ltd. v. Hunter*, 2012 ABCA 83, at para. 30), failing which the court has authority to direct counsel to “get on with some other subject”: *Osman*, at para. 1.

[67] Section 276(1) of the *Criminal Code* prescribes, in very particular circumstances, an exclusionary rule of evidence relating to a complainant’s prior sexual history:

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief.

The legislation does not purport to preclude admission of evidence touching upon the prior sexual conduct of a complainant in a s. 266 common assault prosecution: *R. v. M.T.*, 2012 ONCA 511, at paras. 29-30. That said, the illegitimate and discredited stereotypical twin myths targeted by s. 276 as irrelevant in sex crime cases will generally be equally irrelevant in other prosecutions where the traditional common law rules of evidence govern: see *R. v. Darrach*, [2000] 2 S.C.R. 443, at paras. 32, 37; *R. v. L.S.*, 2017 ONCA 685, at para. 45.

[68] Justice fundamentally includes “society’s interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process”: *R. v. Handy*, [2002] 2 S.C.R. 908, at para. 150; *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), at p. 389. Wrongful convictions and acquittals both stand as miscarriages of justice.

[69] “It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues”: *Seaboyer*, at p. 389.

[70] Evidence is generally admissible where it advances in some degree the inquiry, in the sense of logical connection to a material issue in the trial. This may involve evidence “logically relevant to an available defence”: *R. v. Grant*, [2015] 1 S.C.R. 475, at para. 45.

[71] Logical relevance arises where the proffered evidence, as a matter of logic, common sense and human experience, has some tendency to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence: *R. v. J. (J.L.)* (2000), 148 C.C.C. (3d) 487 (S.C.C.), at p. 507; McDonald, at para. 66; *M.T.*, at para. 37; *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.), at para. 27; *R. v. Pilon*, 2009 ONCA 248, at paras. 32-33; *R. v. Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.), at para. 33.

[72] Relevance must, of course, be assessed, not in a vacuum or “in the abstract” (*R. v. Handy*, [2002] 2 S.C.R. 908, at para. 73), but in the context of the entirety of the evidence in a criminal trial, known and anticipated, as well the issues in the case, and the respective positions of the prosecution and the defence: *R. v. Clarke* (1998), 129 C.C.C. (3d) 1 (Ont. C.A.), at pp. 12-13; *Watson*, at para. 30; *Arp*, at para. 38; *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.), at p. 218.

[73] “[E]verything which is probative should be received, unless its exclusion can be justified on some other ground”: *Seaboyer*, at pp. 389-390. While there is no minimum probative value required for evidence to be logically relevant (*R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 715 per La Forest J. dissenting in the result; *R. v. Morris*, [1983] 2 S.C.R. 190, pp. 191-2; *Clarke*, at p. 12), it must be recognized that probative value “will depend in part on the strength of the connection or nexus” between the proffered evidence and the factual matter to which it is said to relate — the evidence must have a sufficient connection beyond mere conjecture or speculation: *Grant*, at paras. 38, 41.

[74] Not all evidence which may be said to be logically relevant at a threshold level is admissible (*Grant*, at para. 19) as such evidence, where not otherwise subject to an exclusionary rule, falls to be assessed as well on a legal relevance standard engaging the court’s discretionary, and highly fact-driven, gatekeeper role to consider applicable counter-balancing factors such as (1) danger of arousing the triers’ emotions of prejudice, hostility or sympathy, (2) the prospect of the admitted evidence and responding evidence creating a side is-

sue or satellite litigation unduly distracting the jury from the main issues for its determination, (3) the risk that the evidence and any counter proof will consume an undue amount of time unduly protracting the trial, and (4) the danger of unfair surprise of the opposite party unprepared to meet the evidence in question: *Seaboyer*, at p. 390; *Grant*, at para. 61.

[75] Where the legal relevance balancing is undertaken in the context of defence-led evidence, the court asks itself whether any prejudicial effects of the proffered evidence substantially outweigh the potential probative value of the evidence: *Grant*, at para. 41.

[76] In the context of defence-led evidence having logical relevance, bearing in mind the presumption of innocence and the importance to full answer and defence of letting an accused “confirm and strengthen the case for his innocence” (*R. v. Bishop*, 2013 NUCA 3, at para. 48 (notice of discontinuance filed [2013] S.C.C.A. No. 76)), courts have understandably been cautious in restricting the power of an accused to call evidence in his or her defence and reluctant to exclude even tenuous defence evidence: *Seaboyer*, at pp. 388-391; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 141; *Bishop*, at para. 51.

- 55 There could be a case for extending the reach of *Seaboyer*’s procedural and substantive preconditions on the admission of evidence concerning other sexual activity by the complainant to an entirely new category of cases. It would depend on experience revealing that our existing rules are inadequate to the task of protecting the trial process from irrelevant and prejudicial evidence in certain types of cases.
- 56 In the context of sexual services prosecutions, I have no reason to believe that to be the case. In such prosecutions, especially in this day and age, attempts to elicit evidence concerning the complainant’s sexual activity, other than that which is the subject of the charge(s), will undoubtedly attract notice. An objection by the Crown or the court’s intervention will almost immediately require the accused to explain the relevance of the evidence.
- 57 Should the apparent purpose of the questioning be nothing more than a misguided effort to embarrass the complainant, to demean her because of her experience in the sex trade, or to exploit prejudices against sex workers more generally, then the evidence will be inadmissible. Evidence proffered for such improper ends has no probative value and is irrelevant. At that point, the trial judge will sustain the objection and halt the impermissible questioning.

- 58 Even if the area of proposed questioning is relevant, that will not end the admissibility analysis. Admissibility will also depend on the court being satisfied that the evidence's potential prejudicial effects do not substantially outweigh its probative value.
- 59 Take one of the examples of the evidence the accused wants to proffer in this case. Given the charge of procuring and the allegation that the accused exercised control, direction, or influence over the complainant's movements for the purpose of facilitating the sale of her sexual services, evidence of her involvement in the sex trade before the complainant became involved with the accused, or after their relationship ended, appears relevant. If true, it makes it slightly less probable, as a matter of logic and common sense, that the complainant's involvement in that industry during the period charged in the indictment was due to the accused's actions and by implication, much more significantly, that he exerted influence over her for that purpose.
- 60 I recognize that the complainant's prior involvement in the sex trade or her continuing in that industry after their relationship ended does not necessarily foreclose the accused having encouraged her participation while they were also together. However, that possibility does not render the evidence irrelevant. As Doherty J. observed in *R. v. L.S.*, 2017 ONCA 685, 40 C.R. (7th) 351 (Ont. C.A.), at para. 89:
- Evidence does not have to establish or refute a fact in issue to be relevant; it need only, as a matter of common sense and human experience, have some tendency to make the existence or non-existence of that material fact more or less likely. There is a big difference between evidence that is relevant and evidence that is determinative: see *R. v. A.* (No. 2), [2001] 2 W.L.R. 1546, at para. 31 (H.C.).
- 61 Of course, a determination that the evidence is relevant does not end the admissibility analysis. The trial judge will still need to consider whether the evidence is substantially more prejudicial than probative. After all, such evidence could exacerbate potential prejudices that some jurors might harbour towards sex workers. The trial judge will need to balance the probative value of the evidence against its potential prejudicial effects to decide whether the evidence is admissible.
- 62 It may be that the trial judge will place limits on the evidence to minimize any prejudicial effects. For example, the trial judge may decide to allow the accused to ask about the complainant's involvement in the sex trade and its timing while prohibiting any questioning about the salacious details. That would permit the jury to hear the relevant evidence, with its

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probative value left undiminished, while minimizing any potential prejudicial effects.

- 63 This example illustrates how our existing trial procedures and rules of evidence are already well-suited to weeding out irrelevant or prejudicial evidence concerning a complainant's other sexual activity in sexual services cases. As a result, I am less than convinced of the need to extend *Seaboyer*'s holding concerning the admission of such evidence to sexual services cases.

Conclusion

- 64 For all of these reasons, I decline to follow *M.D.*'s holding that the common law furnishes procedural and substantive safeguards, analogous to those provided by s. 276, in cases where an accused charged with a sexual services offence wants to elicit evidence regarding the complainant's sexual activity other than that which is the subject of the charge(s).
- 65 At the accused's trial, the admissibility of any evidence concerning other sexual activity by the complainant should turn on the trial judge's application of the existing rules of evidence. Those rules are already well-calibrated to exclude irrelevant and misleading evidence.

Order accordingly.

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on the decision not to include historical offences in the ambit of s. 276 or discuss the reach of the provision more generally.

- 87 I agree with Stribopoulos J. in *Williams #1*, that “[t]he combined effect of these various amendments provides a strong indication of Parliament’s intention concerning the offences listed in s. 276(1)”, especially when its attention was focused on those offences, given its decision to list them in s. 278.92(1)(a), and that Parliament “deliberately chose not to include the sexual services offences within the list of offences found in s. 276(1)”: at paras. 35-36.
- 88 I also agree with the observation of Nakatsuru J. in *Langford*, at para. 16, that the conclusion that Parliament’s intention not to specifically incorporate the sexual services offences within the ambit of s. 276 does not end the inquiry. Each case must still be scrutinized on its facts to determine whether the proceeding is, in substance, “in respect of” a listed offence.
- 89 This is consistent with the case-by-case determination contemplated by *Barton* for proceedings where there is uncertainty about whether s. 276 applies because no listed offence has been charged. The focus is on the individual proceeding, and not the category of offence. As Moldaver J. observed in *Barton*, “[t]he ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge ... who is the gatekeeper in a criminal trial”: at para. 68.
- 90 In some cases, the fact that the proceeding implicates a listed offence will be obvious: while a listed offence is not charged, it may be an included offence or a predicate offence. This was the case in *Barton*, where the listed offence of aggravated sexual assault was a predicate offence to the first degree murder charge. Alternatively, it may be readily discernible from the charge that a listed offence is implicated. For example, a proceeding involving charges under s. 279.011(1) (trafficking a person under 18) will often plainly engage the listed offence under s. 153(1), the sexual exploitation of a young person.
- 91 In other cases, a more detailed assessment will be required. On a case-by-case basis the court will need to consider the charges, the evidence the Crown proposes to lead and whether the defence proposes to elicit or lead evidence of a listed offence, to assess whether a listed offence, although not charged, is implicated in the proceeding.
- 92 In summary, the issue is whether the proceeding is, in substance, “in respect of” one of the listed offences. It is incorrect to adopt the categorical approach taken in a number of cases that s. 276 will always apply to

prosecutions for sexual services or human trafficking offences, with the result that any offence that is analogous to, or shares some common features with, a listed offence is essentially read into s. 276. Instead, the application of s. 276 to proceedings in respect of non-enumerated offences must be determined “in the context of [the] particular prosecution, taking into account the charges, the nature of the allegations, and the subjects about which the accused seeks to cross-examine the complainant”: *Williams #1*, at para. 6. See also *M.D.*, at para. 8, and *Langford*, at para. 16.

(ii) *Section 276 Did Not Apply in the Circumstances of This Case*

- 93 Having determined that s. 276 does not apply categorically to all prosecutions involving sexual services or human trafficking offences, I turn now to consider whether s. 276 applied in the specific circumstances of this case. This determination must be made on the basis of the circumstances that existed at the time the matter was before the trial judge, and not with hindsight, that is with knowledge of what ultimately transpired at trial: *T.W.W.*, at para. 23.
- 94 In this case, the Crown’s theory was that the appellants exercised control, direction or influence over A.K.’s movements to facilitate the provision of sexual services for consideration, and that this was for the purpose of her exploitation. The Crown submitted that the appellants had exploited A.K. because she was dependent on them for drugs. The Crown also asserted that the appellants received a material benefit from these offences and that they had advertised her sexual services.
- 95 The Crown contends that s. 276 applied in this case because A.K. was forced or coerced into providing sexual services that were not truly voluntary. That is, the appellants were alleged to have exercised control over A.K. and to have exploited a position of trust to force her to provide sexual services.
- 96 The trial judge accepted the Crown’s argument that the circumstances of the case engaged the question of consent. He concluded that the listed offence of sexual assault — and therefore s. 276 — was engaged because the human trafficking and sexual services charges “[struck] at the heart of the necessary consent for [A.K.] to engage in the sexual services provided by her at the request of the [appellants]”.
- 97 I disagree that s. 276 applied in the circumstances of this case. None of the listed offences was an included offence to the charges in this case, nor was such an offence implicated in the factual circumstances ad-

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to the proceeding in question (at para. 78), generally speaking sexual services and human trafficking offences would always have “some connection to” a listed offence. The connection exists because these offences involve the sexual exploitation of a complainant: the offences address the same type of harm as some of the listed offences, and their prosecution gives rise to the same risk of misuse of other sexual conduct evidence. Finally, the Crown submits that s. 276 responds to negative biases and stereotypical assumptions about sex workers, who are vulnerable witnesses.

⁷¹ The Crown relies on a line of cases where one or more of these arguments have been accepted in concluding that s. 276 applies categorically to sexual services and/or human trafficking offences. See e.g., *R. v. Floyd*, 2019 ONSC 7006, at paras. 4-10; *R. v. T.A.*, 2020 ONSC 6714, at paras. 2-26; *R. v. MacMillan*, 2021 ONSC 3952, at paras. 16-27; *R. v. Ryckman*, 2022 ONSC 20, at paras. 4-15; *R. v. Maldonado Vallejos*, 2022 ONSC 2753, at paras. 3-24; *R. v. Lees*, 2023 ONSC 124, at paras. 5-18; and *R. v. N.G.*, 2023 ONSC 792, at paras. 3-28.

⁷² If s. 276 does not apply categorically where an accused is charged with a sexual services or human trafficking offence, then the Crown submits that in this particular case, the trial judge was correct to conclude that s. 276 applied because the factual allegations implicated A.K.’s consent to engage in sexual activity as the appellants were alleged to have abused a position of trust or authority by exploiting her drug dependency to cause her to provide sexual services.

⁷³ In the discussion that follows I will first explain why I agree with the appellants that s. 276 does not apply to all proceedings in respect of sexual services and human trafficking offences, and then I will explain why s. 276 did not apply to these particular proceedings.

(i) Section 276 Does Not Apply Categorically to Prosecutions for Sexual Services and Human Trafficking Offences

⁷⁴ Whether s. 276 applies categorically to proceedings in respect of sexual services and human trafficking charges is a question of statutory interpretation.

⁷⁵ The point of departure is the wording of s. 276. The section does not apply to all sexual offences. Rather, it lists 14 specific offences and states that it applies to proceedings “in respect of” those offences. The sexual services and human trafficking offences are not specifically listed. Before *Barton*, s. 276 was typically applied only to proceedings involv-

ing listed offences. As such, it would only have been applied to sexual services and human trafficking cases where a listed offence was also charged. That, however, changed after *Barton* established a “broad relational test” for applying s. 276 to proceedings in which no listed offence has been charged, with the question being whether “in substance [a listed offence] is implicated in the proceeding”.

- 76 Cases that have extended s. 276 to any prosecution for sexual services and/or human trafficking offences have tended to advance three specific reasons: (1) these offences, like the listed offences, are sexual offences; (2) some elements of these offences, such as exploitation, overlap with elements of certain listed offences, meaning that there is “some connection” between all proceedings involving these offences and a listed offence such as sexual assault; and (3) complainants in these types of proceedings are subject to the same biases and prejudices that s. 276 is intended to address.
- 77 I appreciate the validity of each of these concerns. But as Nakatsuru J. stated in *Langford*, at para. 7, while applying s. 276 to sexual services offences and protecting vulnerable sex workers “makes sense in many ways”, the application of s. 276 to offences other than those listed is not a matter of policy, but of statutory interpretation and following *Barton*.
- 78 I agree with the reasoning in *Langford*, along with *Williams #1* and *M.D.*, which applied the modern approach to statutory interpretation and rejected the categorical application of s. 276 to prosecutions where the accused had been charged with sexual services and/or human trafficking offences, but not with a listed offence.
- 79 The first important point from these cases is that, for there to be “some connection” between a listed offence and the charged offences, it is not sufficient that the offences merely share a common feature or element — such as the fact that they are all sexual offences, or that the complainant engages in sexual activity in circumstances of exploitation. Rather, what is required is that the commission of a listed offence, while not charged, arises on the facts such that it is, in substance, implicated in the particular proceeding.
- 80 In *Williams #1*, the accused was charged with sexual services offences. The Crown argued that because of the coercive actions of the accused, the complainant did not truly consent to providing sexual services, and as such there was a connection to the listed offence of sexual assault. Stribopoulos J. rejected this argument, noting that lack of consent is not an element of the offence of procuring and that the two of-

fences are not the same. He stated, at para. 27, that “[a]cceding to this argument would conflate the more stringent requirement for concluding that consent to sexual activity has not been genuinely and freely given, with the less exacting demands for the *actus reus* of the procuring offence found in s. 286.3(1)”. While he agreed that there is no consent to sexual activity where a complainant concludes that she has no choice in the matter — for example, because of violence, threats of violence, or extortion — he observed, at paras. 29 to 30:

[A] coercive exertion of power by an accused over a complainant that leaves her some degree of choice in whether or not to sell her sexual services can still result in an accused being culpable for exercising [“control, direction or influence”] under s. 286.3(1)....

In other words, “consent” to sexual activity is not necessarily vitiated whenever an accused has exercised “control” over a complainant’s involvement in the sex trade. It follows that the offence of sexual assault, listed in s. 276(1), is not an included offence to procuring (s. 286.3(1)), even where the accused has committed that offence by exercising control over a complainant’s movements.

[Emphasis added.]

- 81 Similarly, in *M.D.*, Dennison J. concluded that, for the purpose of determining the application of s. 276, there is no connection between the listed offence of sexual assault and acting for the purpose of exploiting a complainant within the meaning of the human trafficking offence in s. 279.01: at para. 40. As Nakatsuru J. noted in *Langford*, simply because the offences share some common features does not mean that the *Barton* test is met.
- 82 These three cases also relied on the recent legislative history of s. 276 and other provisions to conclude that Parliament made a deliberate choice not to include the sexual services and human trafficking offences in the list of offences found in s. 276(1), and that applying the screening mechanism in s. 276(2) to all such proceedings would be contrary to the intention of Parliament.
- 83 Notably, in December 2018, Parliament made extensive amendments to the *Criminal Code*, including changes to the s. 276 regime.¹¹ Bill C-51 added in s. 276(2)(a) a new criterion that must be satisfied before any

¹¹ *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29. See also Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act*

sexual activity evidence is admissible to clarify that such evidence is not being adduced for the purpose of supporting an inference prohibited in s. 276(1), i.e., one of the twin myths. Further, through s. 276(4), Bill C-51 extended the definition of “sexual activity” to include “any communication made for a sexual purpose or whose content is of a sexual nature”. Parliament did not, however, add any other offences — including the sexual services or human trafficking offences — to the 14 offences listed in s. 276(1).

- 84 This stands in contrast to the listed offences governing the admission of private records relating to the complainant held by the accused (see s. 278.92) and third-party record applications (see s. 278.2). Importantly, Bill C-51 added s. 278.92, to require an application whenever an accused seeks to admit into evidence a “record relating to the complainant” that is in the possession or control of the accused “in any proceedings in respect of” an offence listed in s. 278.92(1). The listed offences for the purpose of this section include the 14 offences listed in s. 276(1), as well as 7 sexual services and human trafficking offences (including 4 of the 5 offences charged in this case): *Criminal Code*, s. 278.92(1)(a). This expanded list also applies to third-party record applications: *Criminal Code*, s. 278.2(1)(b).
- 85 Bill C-51 also revoked the existing procedural provisions governing s. 276(2) applications and replaced them with ss. 278.93 and 278.94, which are procedural provisions that apply to both s. 276(2) and s. 278.92(2) applications. These provisions include the right of complainants to be represented and to participate in both types of application.
- 86 In its legislative summary of Bill C-51, the Library of Parliament noted that s. 276(1) was not amended to include historical offences, unlike the Bill’s new provision for private records relating to the complainant held by the accused (see s. 278.92(1)(b)) and the existing provision for third-party record applications (see s. 278.2(1)(b)): see Lyne Casavant *et al.*, *Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, Publication No. 42-1-C51-E (Ottawa: Library of Parliament, 1 October 2018, revised 18 December 2018), at p. 22. No explanation for the exclusion was provided, nor do the legislative debates shed any light

on the decision not to include historical offences in the ambit of s. 276 or discuss the reach of the provision more generally.

- 87 I agree with Stribopoulos J. in *Williams #1*, that “[t]he combined effect of these various amendments provides a strong indication of Parliament’s intention concerning the offences listed in s. 276(1)”, especially when its attention was focused on those offences, given its decision to list them in s. 278.92(1)(a), and that Parliament “deliberately chose not to include the sexual services offences within the list of offences found in s. 276(1)”: at paras. 35-36.
- 88 I also agree with the observation of Nakatsuru J. in *Langford*, at para. 16, that the conclusion that Parliament’s intention not to specifically incorporate the sexual services offences within the ambit of s. 276 does not end the inquiry. Each case must still be scrutinized on its facts to determine whether the proceeding is, in substance, “in respect of” a listed offence.
- 89 This is consistent with the case-by-case determination contemplated by *Barton* for proceedings where there is uncertainty about whether s. 276 applies because no listed offence has been charged. The focus is on the individual proceeding, and not the category of offence. As Moldaver J. observed in *Barton*, “[t]he ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge ... who is the gatekeeper in a criminal trial”: at para. 68.
- 90 In some cases, the fact that the proceeding implicates a listed offence will be obvious: while a listed offence is not charged, it may be an included offence or a predicate offence. This was the case in *Barton*, where the listed offence of aggravated sexual assault was a predicate offence to the first degree murder charge. Alternatively, it may be readily discernible from the charge that a listed offence is implicated. For example, a proceeding involving charges under s. 279.011(1) (trafficking a person under 18) will often plainly engage the listed offence under s. 153(1), the sexual exploitation of a young person.
- 91 In other cases, a more detailed assessment will be required. On a case-by-case basis the court will need to consider the charges, the evidence the Crown proposes to lead and whether the defence proposes to elicit or lead evidence of a listed offence, to assess whether a listed offence, although not charged, is implicated in the proceeding.
- 92 In summary, the issue is whether the proceeding is, in substance, “in respect of” one of the listed offences. It is incorrect to adopt the categorical approach taken in a number of cases that s. 276 will always apply to

2002 SCC 28, 2002 CSC 28
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Sarvanis v. Canada

2002 CarswellNat 537, 2002 CarswellNat 538, 2002 SCC 28, 2002 CSC 28, 2002
C.E.B. & P.G.R. 8412 (headnote only), [2002] 1 S.C.R. 921, [2002] S.C.J. No. 27, 112
A.C.W.S. (3d) 867, 210 D.L.R. (4th) 263, 284 N.R. 263, J.E. 2002-593, REJB 2002-29520

Ioannis Sarvanis, Appellant v. Her Majesty The Queen in Right of Canada, Respondent

Arbour J., Bastarache J., Binnie J., Gonthier J., Iacobucci J., LeBel J., Major J.

Judgment: March 21, 2002

Heard: October 10, 2001

Docket: 27796

Proceedings: reversing (2000), 184 D.L.R. (4th) 124, 252 N.R. 131, 179 F.T.R. 153 (note), [2000]
F.C.J. No. 12 (Fed. C.A.); (1998), 156 F.T.R. 265, [1998] F.C.J. No. 1304 (Fed. T.D.)

Counsel: *David R. Tenszen*, for Appellant
David Sgayias, Christopher Rupar, for Respondent

Subject: Public; Civil Practice and Procedure; Labour; Employment

Related Abridgment Classifications

Civil practice and procedure

XVIII Summary judgment

XVIII.3 Availability of summary judgment

XVIII.3.b Miscellaneous

Pensions

II Federal and provincial pension plans

II.1 Federal pension plans

II.1.g Practice and procedure before board

II.1.g.iv Appeals

Public law

I Crown

I.8 Availability of statutory defences to Crown

Headnote

Crown --- Miscellaneous factors affecting civil rights of Crown — Availability of statutory defences to Crown

Section 9 of Crown Liability and Proceedings Act does not immunize Crown from tort liability where person has received benefits under Canada Pension Plan — Language in s. 9, though broad, requires that such pension paid or payable as will bar action against Crown be made on same factual basis as action barred — Disability benefit awarded under CPP does not constitute pension or compensation "in respect of" death, injury, damage or loss for purposes of s. 9 — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 9.

Practice --- Summary judgment — Availability of summary judgment — General

Section 9 of Crown Liability and Proceedings Act does not immunize Crown from tort liability where person has received benefits under Canada Pension Plan — Language in s. 9, though broad, requires that such pension paid or payable as will bar action against Crown be made on same factual basis as action barred — Disability benefit awarded under CPP does not constitute pension or compensation "in respect of" death, injury, damage or loss for purposes of s. 9 — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 9.

Social assistance --- Federal pension plans — Practice and procedure before Board

Section 9 of Crown Liability and Proceedings Act does not immunize Crown from tort liability where person has received benefits under Canada Pension Plan — Language in s. 9, though broad, requires that such pension paid or payable as will bar action against Crown be made on same factual basis as action barred — Disability benefit awarded under CPP does not constitute pension or compensation "in respect of" death, injury, damage or loss for purposes of s. 9 — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 9.

Couronne --- Facteurs variés touchant les droits civils de la Couronne — Possibilité pour la Couronne de se prévaloir de moyens de défense prévus par la loi

Article 9 de la Loi sur la responsabilité civile de l'État et le contentieux administratif ne dégage pas la Couronne de sa responsabilité civile délictuelle dans le cas où la personne a reçu des prestations en vertu du Régime de pensions du Canada — Bien que la formulation de l'art. 9 ait une large portée, elle exige néanmoins, pour qu'une telle pension payée ou payable fasse obstacle à une action contre la Couronne, qu'elle ait le même fondement factuel que l'action — Prestation d'invalidité accordée en vertu du RPC ne constitue pas une pension ou une indemnité « in respect of » ce décès, ces blessures ou dommages aux fins de l'art. 9 — Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, c. C-50, art. 9.

Procédure --- Jugement sommaire — Possibilité d'obtenir un jugement sommaire — En général

Article 9 de la Loi sur la responsabilité civile de l'État et le contentieux administratif ne dégage pas la Couronne de sa responsabilité civile délictuelle dans le cas où la personne a reçu des prestations en vertu du Régime de pensions du Canada — Bien que la formulation de l'art. 9 ait une large portée, elle exige néanmoins, pour qu'une telle pension payée ou payable fasse obstacle à une action contre la Couronne, qu'elle ait le même fondement factuel que l'action — Prestation d'invalidité

accordée en vertu du RPC ne constitue pas une pension ou une indemnité « in respect of » ce décès, ces blessures ou dommages aux fins de l'art. 9 — Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, c. C-50, art. 9.

Aide sociale --- Régimes de retraite fédéraux — Procédure devant la Commission

Article 9 de la Loi sur la responsabilité civile de l'État et le contentieux administratif ne dégage pas la Couronne de sa responsabilité civile délictuelle dans le cas où la personne a reçu des prestations en vertu du Régime de pensions du Canada — Bien que la formulation de l'art. 9 ait une large portée, elle exige néanmoins, pour qu'une telle pension payée ou payable fasse obstacle à une action contre la Couronne, qu'elle ait le même fondement factuel que l'action — Prestation d'invalidité accordée en vertu du RPC ne constitue pas une pension ou une indemnité « in respect of » ce décès, ces blessures ou dommages aux fins de l'art. 9 — Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, c. C-50, art. 9.

A federal penitentiary inmate fell while working on a prison farm and sustained serious personal injuries, many of which appeared to be permanent. As a result of his being unable to work, he was determined to be disabled and he qualified for monthly Canada Pension Plan ("CPP") disability benefits, which are paid out of the Consolidated Revenue Fund.

The inmate brought an action in tort against the Crown soon after the accident. There was a reasonable possibility that the Crown might be found liable if the case proceeded to trial. The Crown brought a motion for summary judgment, claiming the action was statute-barred by s. 9 of the *Crown Liability and Proceedings Act*. It provides, "No proceedings lie against the Crown . . . in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund . . . in respect of the death, injury, damage or loss in respect of which the claim is made." The motions judge found that s. 9 did not apply to the payments received by the inmate and dismissed the motion. The Federal Court of Appeal allowed the Crown's appeal. The inmate appealed.

Held: The appeal was allowed; the Crown's motion for summary judgment was dismissed.

Per Iacobucci J. (Gonthier, Major, Bastarache, Binnie, Arbour and LeBel concurring): Properly construed, s. 9 of the *Crown Liability and Proceedings Act* does not operate so as to immunize the Crown from tort liability where an individual has received benefits under the Canada Pension Plan. The phrase "in respect of" in s. 9 is very broad. Words that are of a broad import must be interpreted by looking to the wider context in which they are found. Section 9 refers to pensions and compensations made in respect of "death, injury, damage or loss." The ordinary sense of these words indicates that they are specific events to which liability could but for the operation of s. 9, attach. Section 9 thus envisions pensions and compensation paid because of an "event" of death, injury, damage or loss. The loss, the recovery of which is barred by the statute, must be the same loss that creates an entitlement to the relevant pension or compensation. This interpretation is consistent with the French version of the section.

The language in s. 9, though broad, requires that such a pension paid as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the

government is liable for misconduct but has already made a payment in respect of it. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.

A disability benefit under the CPP is not contingent on events but on the present disabled condition of a qualified contributor under age 65 who applies for payment. Therefore, CPP disability benefits do not fall within the scope of s. 9 on the ordinary meaning of the words "in respect of," since payments are not made on the same factual basis set out in s. 9. The fact that the inmate was eligible for CPP benefits only because of the injuries suffered was not relevant, as it implied nothing about the contingency of such payments on an event of injury. This conclusion was bolstered both by the language of other pension-awarding statutes that are caught by s. 9 and by a consideration of the context of the broader legislative purpose of the Act, which was to establish Crown liability hitherto been blocked by the common law. The CPP and the quasi-contractual insurance scheme it created were not meant to nullify this increased exposure.

Section 9 establishes Crown immunity where the event of death, injury, damage or loss that forms the basis of the barred claim is the same event that formed the basis of a pension or compensation award. The CPP, a contributory plan contingent on physical condition and adequate quantum and duration of contribution rather than on death, injury, damage or loss, is significantly different. A disability benefit awarded under the CPP does not constitute a pension or compensation "in respect of the death, injury, damage or loss" for the purposes of s. 9. Accordingly, the Crown's motion for summary judgment should be dismissed.

Un prisonnier détenu dans un pénitencier fédéral est tombé alors qu'il travaillait sur la ferme de la prison; il a subi de graves blessures, dont plusieurs semblaient être permanentes. Puisqu'il était incapable de travailler, il a été déterminé qu'il était invalide et admissible à des prestations d'invalidité mensuelles du Régime de pensions du Canada (RPC) qui sont payées à même le Trésor. Peu de temps après l'accident, le prisonnier a intenté une action en responsabilité civile délictuelle contre la Couronne. Il existait une possibilité raisonnable que la responsabilité de la Couronne soit retenue si cette affaire donnait lieu à un procès. La Couronne a présenté une requête en jugement sommaire, soutenant que l'action était irrecevable à cause de l'art. 9 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*. L'article 9 énonce en anglais que « No proceedings lie against the Crown . . . in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund . . . in respect of the death, injury, damage or loss in respect of which the claim is made. » Le juge saisi de la requête a conclu que l'art. 9 ne s'appliquait pas aux paiements reçus par le prisonnier et il a rejeté la requête. La Cour d'appel fédérale a accueilli le pourvoi de la Couronne. Le prisonnier a interjeté appel.

Arrêt: Le pourvoi a été accueilli; la requête en jugement sommaire de la Couronne a été rejetée. Le juge Iacobucci (les juges Gonthier, Major, Bastarache, Binnie, Arbour et LeBel y souscrivant): Interprété correctement, l'art. 9 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* n'a pas pour effet de dégager la Couronne de sa responsabilité civile délictuelle dans le cas où un individu a reçu des prestations du Régime de pensions du Canada. L'expression «

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death.

Thus, the third requirement for receiving disability benefits under the CPP is that the contributor be unable to work, and likely to be unable to work for a long, indefinite period, because of his or her disability.

18 CPP disability benefits are discontinued upon the contributor ceasing to be disabled, or upon the contributor turning 65, at which time he or she is moved to the CPP retirement pension. Thus, these benefits are awarded only so long as the contributor continues to meet the eligibility criteria.

B. Section 9 of the Crown Liability and Proceedings Act

19 I turn now to a consideration of the text of s. 9 of the *Crown Liability and Proceedings Act* before moving to the ultimate question, that is, whether the section, properly construed, captures the CPP disability benefit. The crux of the question is whether the section's description of pensions paid "in respect of ... death, injury, damage or loss" encompasses the benefit. Within that context, the words of significance here are the words "in respect of".

20 This phrase, "in respect of", is clearly a broad one. In urging a broad approach to interpreting that phrase in s. 9, the respondent relies, as did the Federal Court of Appeal, on the following observations of Dickson J. (as he then was), interpreting the *Income Tax Act*, in *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 39:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to", or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

Dickson J.'s reading of these words has been more recently approved by this Court in *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para.16, interpreting s. 487(1) of the *Criminal Code*.

21 The Federal Court of Appeal has also relied on Dickson J.'s interpretation in another case interpreting s. 9 (then s. 4(1) of the *Crown Liability Act*, R.S.C. 1970, c. C-38), *Langille v. Canada, supra*. In that case, a farmer brought an action against the Crown for damages after the Ministry of Agriculture destroyed his diseased farm animals in order to prevent the spread of disease. Compensation was paid to him directly from the Consolidated Revenue Fund in settlement of his losses. The Federal Court of Appeal found that s. 4(1) barred his action. The words "in respect of" were found to catch the compensation paid. Stone J.A. concluded, at p. 213, that:

... the broad reach of subsection 4(1) does include the damage or loss for which the respondents here claim on account of their destroyed animals. The compensation was paid "in respect of" "damage or loss" resulting from the destruction of the animals and the claim in the present action is also "in respect of" that same "damage or loss". The only difference here is that respondents, by way of this action in tort, are seeking to enhance recovery in respect of that destruction beyond the level of the compensation they were paid in 1978 out of the Consolidated Revenue Fund.

22 It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.

23 The breadth and ambiguity of the words used to express the connection between the pension or compensation paid and the loss to which the payment relates is equally present in the French version. This is seen most clearly in the verb phrase connecting the loss to the pension, that is, "*ouvrant droit au paiement d'une pension ou indemnité*" (Emphasis added). It is important to keep in mind the distinct manner in which Parliament has chosen to frame the section in the two languages. However, I would note, crucially, that it is the same connection — the link between the pension paid and the loss sustained — that Parliament has rendered somewhat obscure by the use of both "in respect of" and "ouvrant droit." The distinct features of phrasing in each official version do not, in themselves, remedy the central ambiguity with which this appeal is concerned.

24 In both cases, we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach. In *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), in discussing the preferred approach to statutory interpretation, the Court stated, at para. 21:

... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In my view, the nature and content of this approach, and the accuracy of Professor Driedger's succinct formulation, has not changed. Accordingly, we cannot rely blindly on the fact that the words "in respect of" are words of broad meaning.

25 With this approach in mind, I take note that s. 9 refers to pensions and compensations that are made in respect of "*death, injury, damage or loss*". The fact that the broad phrase "in respect of" is tied to this enumeration of events is of some significance. The ordinary sense of this list of words indicates that they are specific events to which liability could, but for the operation of s. 9, attach. That is, s. 9 envisions pensions and compensation paid because of an event of death, injury, damage or loss. This is consistent with, for instance, the destruction of cattle in *Langille, supra*. The compensation paid by the government in that case was in settlement of the loss of cattle suffered by the plaintiffs. The fact that the plaintiffs sought compensation of the same loss in tort was sufficient to show identity between the subject of the attempted claim and the subject of the compensation.

26 This example is consistent with a reading of the words "in respect of" in the context of the clause in which they appear. The fact that a pension must be in respect of some *event* of "death, injury, damage or loss" gives us a fuller understanding of the import of the words. What this broad, yet in itself imprecise, phrase means, can be understood by asking what kind of a thing the pension must be in respect of. We will have a different view of the precise scope of the phrase in this context from, for example, the context of the clause which follows in s. 9. The latter clause refers to "death, injury, damage or loss *in respect of* which the claim is made". The breadth of the words "in respect of" when attached to the concept of a "claim" may be different from the breadth of the same words when attached to a series of *events*.

27 This interpretation is also consistent with the French version of the section. Actions that are barred are actions "pour toute perte," or "for every loss," "notamment décès, blessures ou dommages..," that is, "particularly for death, injury or damages" where such a loss also gives rise to ("ouvrant droit") the payment of a pension or compensation. In both the French and English versions of the statute, the key is to recognize that the loss the recovery of which is barred by the statute must be the same loss that creates an entitlement to the relevant pension or compensation. The enumeration of events as clearly explicates the meaning of "perte" in the French text as it does the meaning of "in respect of" in English.

28 In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement

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Kosicki v. Toronto (City)

2025 CarswellOnt 15134, 2025 CarswellOnt 15133, 2025 SCC 28, 2025 CSC 28,
2025 A.C.W.S. 3735, 507 D.L.R. (4th) 1, 62 M.P.L.R. (6th) 1, 71 R.P.R. (6th) 1

**Pawel Kosicki and Megan Munro (Appellants) and City of Toronto,
formerly the Corporation of the Borough of York (Respondent) and
Attorney General of Ontario, Attorney General of British Columbia, City
of Surrey, Advocates for the Rule of Law and City of Ottawa (Interveners)**

Wagner C.J.C., Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin, Moreau JJ.

Heard: January 16, 2025
Judgment: September 19, 2025
Docket: 40908

Proceedings: reversing *Kosicki v. Toronto (City)* (2023), 43 M.P.L.R. (6th) 1, 50 R.P.R. (6th) 173167 O.R. (3d) 401483 D.L.R. (4th) 5832023 CarswellOnt 96892023 ONCA 450, David Brown J.A., J.C. MacPherson J.A., L. Sossin J.A. (Ont. C.A.); affirming *Kosicki v. City of Toronto* (2022), 32 M.P.L.R. (6th) 306, 43 R.P.R. (6th) 1182022 CarswellOnt 83072022 ONSC 3473, M.J. Donohue J. (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Property; Public; Municipal

Related Abridgment Classifications

Civil practice and procedure

VII Limitation of actions

VII.2 Real property

VII.2.a Adverse possession

VII.2.a.vi Miscellaneous

Headnote

Civil practice and procedure --- Limitation of actions — Real property — Adverse possession — Miscellaneous

Disputed land was parcel of municipal lands enclosed in homeowners' backyard by chain link fence for decades — Homeowners' application for adverse possession was dismissed — Trial judge found that publicly-owned land of kind in case at bar was immune to claims for adverse possession and that disputed land could be put to use for public benefit — Homeowners' appeal was dismissed — Majority of Court of Appeal found trial judge was correct in finding that adverse possession at common law was unavailable against municipal parkland — Homeowners appealed — Appeal allowed — Majority of Court of Appeal erred in exempting possessory claim from provisions of Real Property Limitations Act — Contextual assessment of relevant provisions in Act showed that legislature did not intend to exempt municipal parkland from its operation but intended to preserve matured possessory claims — Municipal parkland does not fall within expressly legislated exceptions to operation of ss. 4, 5(1) and 15 of Act, which are set out in s. 16 — Courts below were not entitled to develop and apply public benefit test to deny possessory claim Real Property Limitations Act, R.S.O. 1990, c. L.15, s 16.

Procédure civile --- Prescription — Immeubles — Possession adversative — Divers

Bien-fonds en litige était un bien-fonds municipal enclavé dans la cour arrière des propriétaires et entouré depuis des décennies d'une clôture à mailles losangées — Demande des propriétaires en possession adversative a été rejetée — Juge de première instance a conclu qu'un bien-fonds de propriété publique comme celui en litige échappait à la possession adversative et que le bien-fonds en litige pouvait être mis à la disposition du public — Appel interjeté par les propriétaires a été rejeté — Juges majoritaires de la Cour d'appel ont estimé que c'était à bon droit que le juge de première instance a conclu qu'en common law, on ne pouvait pas invoquer la possession adversative à l'encontre d'un parc municipal — Propriétaires ont formé un pourvoi — Pourvoi accueilli — Juges majoritaires de la Cour d'appel ont eu tort de soustraire la présente revendication possessoire à l'application des dispositions de la Loi sur la prescription des actions relatives aux biens immeubles — Il ressortait d'une analyse contextuelle des dispositions de la Loi que le législateur n'entendait pas soustraire les parcs municipaux à l'application de la Loi et qu'il avait l'intention de maintenir les intérêts possessoires acquis par prescription — Parcs municipaux ne sont pas visés par les exceptions législatives expresses à l'application des art. 4, 5(1) et 15 de la Loi, énoncées à l'art. 16 — Tribunaux d'instances inférieures ne pouvaient pas établir et appliquer un test du bénéfice public pour rejeter la revendication d'intérêts possessoires.

The disputed land was a parcel of municipal lands enclosed in the homeowners' backyard by a chain link fence for decades. The disputed land was effectively cut off from public access by fencing likely erected by the homeowner sometime between 1958 and 1971, but was not fenced off when it went into public hands. The homeowners paid realty taxes on the disputed land and the municipality accepted those payments until 2020.

The homeowners' application for adverse possession was dismissed. Until the homeowners' application, the municipality was unaware of the disputed land being public, but the municipality

alleged the lands could be put to effective use for the benefit of the public to expand an access point to a park and a 29-kilometre trail. The trial judge found that publicly-owned land of the kind in the case at bar was immune to claims for adverse possession and that the disputed land could be put to use for the public benefit.

The homeowners' appeal was dismissed. The majority of the Court of Appeal found the trial judge was correct in finding that adverse possession at common law was unavailable against municipal parkland. Where adverse possession is claimed outside of land referred to in s. 16 of the Real Property Limitations Act, a public benefit test should be applied. While municipal parkland is generally unavailable for adverse possession, it may become available where the municipality waives its presumptive rights over the property either expressly or by acquiescing to a private landowner's adverse possession of parkland. The majority found the municipality had not waived its presumptive rights, or acknowledged or acquiesced to such possession. No exceptional circumstances were present, and the municipality was unaware of the private homeowners' possession of the disputed land.

The dissenting judge would have confirmed the homeowners' title to the disputed land since they had satisfied the requirements contained in the Act to establish possessory title. A common law public benefit test would inappropriately amend the provisions of the Act, and there was no sound basis for the creation of a broad immunity from adverse possession for municipal parkland.

The homeowners appealed.

Held: The appeal was allowed.

Per O'Bonsawin J. (Wagner C.J.C., Côté, Rowe, Moreau JJ. concurring): The majority of the Court of Appeal erred in exempting the present possessory claim from the provisions of the Act. A contextual assessment of the relevant provisions in the Act showed that the legislature did not intend to exempt municipal parkland from its operation but intended to preserve matured possessory claims.

Municipal parkland does not fall within the expressly legislated exceptions to the operation of ss. 4, 5(1) and 15 of the Act, which are set out in s. 16. The courts below were not entitled to develop and apply a public benefit test to deny the possessory claim. By attempting to create a common law exception for municipal parkland, the Court of Appeal's decision undermined the legislature's clear policy choice to only confer immunity to certain categories of public land and preserve matured possessory title. The legislature turned its mind to the common law and chose to integrate the aspects it deemed desirable into its scheme.

Per Kasirer J. (dissenting) (Karakatsanis, Martin, Jamal JJ. concurring): The appeal should be dismissed. Adverse possession was not acquired by the homeowners as an extension of their neighbouring backyard. Traditional explanations of adverse possession have limited resonance when the titled owner of the land is a public entity.

Common law rules regarding adverse possession are not ousted by statute in Ontario, including the Act. The Act does not give rise to the inference that, by omitting municipal parkland in the named statutory exemptions, the legislature intended to have that land treated, for the purposes of

adverse possession, as if it were held by a private landowner. The Act is not a "complete code" for adverse possession of land.

The pre-existing fence did not change the park's vocation to the benefit of the public or create a settled expectation that the municipality acquiesced to the homeowners' possession.

Le bien-fonds en litige était un bien-fonds municipal enclavé dans la cour arrière des propriétaires et entouré depuis des décennies d'une clôture à mailles losangées. Le bien-fonds en litige était effectivement gardé inaccessible au public à la suite de l'installation d'une clôture probablement plantée par le propriétaire quelque part entre 1958 et 1971, mais n'était pas clôturé lorsqu'il est tombé entre les mains des autorités publiques. Les propriétaires payaient des taxes sur le bien-fonds en litige et la municipalité a accepté ces paiements jusqu'en 2020.

La demande des propriétaires en possession adversative a été rejetée. Jusqu'au dépôt de la demande, la municipalité ignorait que le bien-fonds en litige était public, mais la municipalité a fait valoir que le bien-fonds pouvait être mis à la disposition du public pour agrandir le point d'accès à un parc et à un sentier de 29 kilomètres. Le juge de première instance a conclu qu'un bien-fonds de propriété publique comme celui en litige échappait à la possession adversative et que le bien-fonds en litige pouvait être mis à la disposition du public.

L'appel interjeté par les propriétaires a été rejeté. Les juges majoritaires de la Cour d'appel ont estimé que c'était à bon droit que le juge de première instance a conclu qu'en common law, on ne pouvait pas invoquer la possession adversative à l'encontre d'un parc municipal. Bien que l'on fit valoir la possession adversative à l'extérieur d'un bien-fonds visé par l'art. 16 de la Loi sur la prescription des actions relatives aux biens immeubles, il fallait appliquer le test du bénéfice public. Bien qu'un parc municipal ne puisse faire l'objet d'une revendication fondée sur la possession adversative, il peut en être autrement lorsqu'une municipalité renonce à ses droits présumés sur la propriété de manière expresse ou en acceptant la possession adversative d'un parc par un propriétaire privé. Les juges majoritaires ont estimé que la municipalité n'avait pas renoncé à ses droits présumés ou reconnu ou accepté l'existence d'une telle possession. Il n'y avait aucune circonstance exceptionnelles, et la municipalité ignorait que les propriétaires privés étaient en possession du bien-fonds en litige.

Le juge dissident aurait, pour sa part, confirmé le titre des propriétaires sur le bien-fonds en litige puisqu'ils satisfaisaient aux exigences prévues dans la Loi pour établir un titre possessoire. L'application d'un test du bénéfice public en common law constituerait une modification inappropriée des dispositions de la Loi, et il n'y avait aucun fondement suffisant pour la création d'une immunité générale contre la possession adversative en faveur des parcs municipaux.

Les propriétaires ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

O'Bonsawin, J. (Wagner, J.C.C., Côté, Rowe, Moreau, JJ., souscrivant à son opinion) : Les juges majoritaires de la Cour d'appel ont eu tort de soustraire la présente revendication possessoire à l'application des dispositions de la Loi. Il ressort d'une analyse contextuelle des dispositions de la Loi que le législateur n'entendait pas soustraire les parcs municipaux à l'application de la Loi et qu'il avait l'intention de maintenir les intérêts possessoires acquis par prescription.

Les parcs municipaux ne sont pas visés par les exceptions législatives expresses à l'application des art. 4, 5(1) et 15 de la Loi, énoncées à l'art. 16. Les tribunaux d'instances inférieures ne pouvaient pas établir et appliquer un test du bénéfice public pour rejeter la revendication d'intérêts possessoires. En tentant de créer une exception de common law en faveur des parcs municipaux, la Cour d'appel, dans sa décision, compromettait le choix de politique d'intérêt général clair du législateur consistant à conférer une immunité uniquement à certaines catégories de terres publiques et à maintenir les titres possessoires acquis par prescription. Le législateur, après un examen de la common law, a choisi d'intégrer à son régime les aspects qu'il jugeait souhaitables. Kasirer, J. (dissident) (Karakatsanis, Martin, Jamal, JJ., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Le bien-fonds en litige n'a pas été acquis par les propriétaires à titre de prolongement de leur cour arrière avoisinante par possession adversative. Les explications traditionnelles quant à la possession adversative avaient une résonance limitée lorsque le propriétaire titré du bien-fonds était une entité publique.

Les règles de common law concernant la possession adversative n'étaient pas écartées par une loi de l'Ontario, y compris la Loi. Celle-ci n'emportait pas l'inférence selon laquelle, en omettant de mentionner les parcs municipaux dans les exemptions prévues par la loi, le législateur voulait que ces biens-fonds soient traités, pour les besoins de la possession adversative, comme s'ils étaient détenus par des propriétaires privés. La Loi ne constituait pas un « code complet » régissant la possession adversative de bien-fonds.

La clôture préexistante ne changeait rien au fait que le parc était voué au bénéfice du public, pas plus qu'elle ne donne naissance à une attente bien établie selon laquelle la municipalité a acquiescé à la possession des propriétaires.

Table of Authorities

Cases considered by *O'Bonsawin J.*:

Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd. (2018), 2018 ONSC 4607, 2018 CarswellOnt 13140, 94 R.P.R. (5th) 236 (Ont. S.C.J.) — referred to
Armstrong v. Moore (2020), 2020 ONCA 49, 2020 CarswellOnt 870, 15 R.P.R. (6th) 200 (Ont. C.A.) — referred to

Attorney General (New South Wales) v. Love (1898), [1898] A.C. 679 (New South Wales P.C.) — referred to

Bank of Montreal v. Iskenderov (2023), 2023 ONCA 528, 2023 CarswellOnt 12093, 8 C.B.R. (7th) 305, 485 D.L.R. (4th) 452, 168 O.R. (3d) 1, 53 R.P.R. (6th) 189 (Ont. C.A.) — referred to
Barbour v. Bailey (2016), 345 O.A.C. 311, 2016 ONCA 98, 2016 CarswellOnt 9585, 66 R.P.R. (5th) 173 (Ont. C.A.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559, 2002 CSC 42 (S.C.C.) — referred to

Bishop v. Stevens (1990), 72 D.L.R. (4th) 97, [1990] 2 S.C.R. 467, 31 C.P.R. (3d) 394, 111 N.R. 376, 1990 CarswellNat 738, 1990 CarswellNat 1028 (S.C.C.) — referred to

claims. By attempting to create a common law exception for municipal parkland, the Court of Appeal's decision undermines the legislature's clear policy choice to only confer immunity to certain categories of public land and preserve matured possessory title.

(1) The RPLA Creates Only Limited Exceptions, Which Do Not Include Municipal Parkland

31 As a starting point, I look to the ordinary and grammatical meaning of the relevant provisions of the *RPLA*, which is "'the natural meaning' that appears when the provision is simply read through as a whole" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A2024 SCC 43 ("CISSS A")*, at para. 28, citing *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). In this case, the text of the provisions suggests that ss. 4 and 15 have a broad reach. Further, the undefined term, "dispossession", in s. 5(1) may be contrasted with the use of specific terminology in s. 16, which confers a special status to limited categories of public lands.

32 Section 4 of the *RPLA* provides for a 10-year limitation period within which a title holder must bring an action for the recovery of land, and in broad language subjects all persons and all lands to the operation of the *RPLA*:

4 No person shall make an entry ... or bring an action to recover any land ... but within ten years next after the time at which the right to make such entry ... or to bring such action ... first accrued to the person making or bringing it.

33 By use of the word "any", the *RPLA* does not distinguish between categories of lands, and notably it does not distinguish between public or private entities: in this general provision, the limitation period applies to all lands and persons equally. The term "land" is defined under s. 1 of the *RPLA*; its definition is expansive and all encompassing. Had the legislature intended to exclude public lands from the application of s. 4, it could have done so by employing a narrower term. Further, the use of the word "person", a necessarily broad term, encompasses municipalities (*Municipal Act, 2001*, S.O. 2001, c. 25, s. 9). Again, had the legislature not intended for the *RPLA* to be of such broad application, it could have employed "individual" in the place of "person" (*British Columbia Human Rights Tribunal v. Schrenk* 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 34).

34 Section 5(1) of the *RPLA* further clarifies that the 10-year limitation period governing the right of recovery begins to run "at the time of the dispossession":

5 (1) Where the person claiming such land ... has, in respect of the estate or interest claimed, been in possession ... of the land ... and has, while entitled thereto, been dispossessed, or has discontinued such possession ..., the right to make an entry or ... bring an action to recover the land ... shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession

As discussed above, the *RPLA* does not define the term "dispossession", which retains its common law meaning as determined by the courts (*Mowatt*, at para. 27). I will return to this below, where I consider the closed list in s. 16.

35 Like s. 4, s. 15 of the *RPLA* uses the term "any", indicating the sweeping application of this rule, extinguishing the title of "any person" who has failed to bring an action to recover land within the 10-year limitation period:

15 At the determination of the period limited by this Act to any person for making an entry ... or bringing any action, the right and title of such person to the land ... for the recovery whereof such entry ... or action, respectively, might have been made or brought within such period, is extinguished.

It is important to note that, rather than confer title to the adverse possessor, s. 15 extinguishes the rights of the paper title holder. This gives the adverse possessor the strongest claim to the land by virtue of their possession (*La Forest*, at § 29:14). The legislature has codified into statute the common law "rule allowing for [a] later possessor [to] acquir[e] ownership of land after the passage of a certain time" (*Mowatt*, at para. 17).

36 However, the rule is not absolute; exceptions to its application are found in the *RPLA* and across other statutes. Importantly for present purposes, the *RPLA* sets out at s. 16 several exceptions relating to lands of a public nature, which the parties and courts below describe as immunities:

16 Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

37 The grammatical and ordinary meaning of the text of s. 16, read as a whole, is that ss. 4, 5(1) and 15 of the *RPLA* cannot operate to extinguish title to specific types of land, which are expressly delineated. On its face, s. 16 contains a closed list. The provision uses clear and precise language to list and describe the exceptions. As this Court recently noted, the text acts as an interpretive anchor and this is particularly true where the words of a statute are "precise and unequivocal" (*Canada Trustco Mortgage Co. v. Canada* 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *CISSS A*, at para. 24).

38 The precisely worded list of exceptions in s. 16 of the *RPLA* is to be contrasted with the broad application contemplated in ss. 4 and 15. While it is uncontroversial that courts have a role in

determining what constitutes "dispossession" in s. 5(1), which is left undefined by the legislature, there is no indication in the text of s. 16 that the legislature intended that courts should supplement the statutory exceptions.

39 The maxim of interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another") is also of particular relevance here. An inference of implied exclusion may be drawn where there is an expectation that "if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (Sullivan, at § 8.09[1]; see *R. v. Wolfe* 2024 SCC 34, at para. 25; *Canada v. Loblaw Financial Holdings Inc.* 2021 SCC 51, [2021] 3 S.C.R. 687, at para. 59; *Copthorne Holdings Ltd. v. Canada* 2011 SCC 63, [2011] 3 S.C.R. 721, at para. 108).

40 In my view, the ordinary language of the provision, which establishes a closed list of exceptions, creates a strong expectation that the legislature would have made express reference to municipal parkland in s. 16 of the *RPLA* had it intended it to be excepted. I agree with the dissenting judge of the Court of Appeal that it is significant that the provision expressly includes certain municipal property, that is, road allowances or highways that have vested in a municipality, but no others (see para. 101). I also note that s. 16 sets out specific and explicit exceptions to the application of otherwise broadly framed rules barring recovery to "any land" of "any person" outside of the limitation period (*RPLA*, ss. 4 and 15) (see *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at pp. 480-81).

41 I acknowledge that implied exclusion reasoning should not be treated as determinative, as the City argues (R.F., at para. 68). However, it continues to be a relevant tool of interpretation, and, where relevant, its weight will vary when considered in light of contextual factors and the purpose of the scheme (see Sullivan, at § 8.09[5]; *Green v. Law Society of Manitoba* 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 37). I am of the view that it carries significant weight in this case, particularly, as I will explain below, since the inference is reinforced by other statutes that exempt certain categories of land from the application of the *RPLA*.

(2) The Legislative Evolution of Section 16 of the RPLA Indicates a Pattern of Codification of Immunities

42 Before turning to the broader statutory context and legislative purpose, I will address the City's argument that the implied exclusion inference is not available here because the legislature was simply reflecting the common law's treatment of specific categories, and there is no reason to believe all exempted lands would be listed (R.F., at para. 69). Contrary to the City's assertion, a historical review of the legislative evolution of s. 16 of the *RPLA* provides a compelling basis to conclude that the legislature turned its mind to the common law and chose to integrate the aspects it deemed desirable into its scheme. In light of this pattern, I agree with the appellants that it is

significant that the legislature has not sought to codify an exception to the application of the *RPLA* for municipal parkland.

43 Reliance on the legislative evolution of a provision is accepted as an important tool of statutory interpretation (Sullivan, at § 23.02[2]), as prior enactments, including their common law origins, can help shed light on the intention of the legislature in repealing, amending, replacing or adding to a statute (*Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667; *R. v. Ulybel Enterprises Ltd.* 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43). It is also well accepted that the maxim of implied exclusion takes on additional relevance when dealing with codification of the common law: "... a court may rely on implied exclusion reasoning to conclude that the part of the law not codified was meant to be excluded" (Sullivan, at § 17.02[5]; see *McChurg v. Canada*, [1990] 3 S.C.R. 1020). This is in keeping with the presumption that the legislature is presumed to know the existing law, including the common law (Sullivan, at § 8.02[1]).

44 With respect to s. 16, as the City notes, the legislature enacted the exceptions slowly over a period of 20 years. In 1902, Ontario enacted *The Statute Law Revision Act, 1902*, S.O. 1902, c. 1, s. 19, which introduced the first statutory exception to the application of the *RPLA* to protect "waste lands of the Crown". The provision was revisited in 1910 to extend the protection from possessory claims to vacant Crown lands (*The Limitations Act*, S.O. 1910, c. 34, s. 17). The provision was revisited for a third and final time in 1922 to extend the statutory protection from adverse possession to road allowances and public highways (*The Limitations Act, 1922*, S.O. 1922, c. 47, s. 2).

45 I agree these enactments largely reflect the jurisprudence and common law rules of the time, but in legislating the exceptions to the acquisition of possessory title, the legislature also opted to modify, or in some instances reject, the common law.

46 For example, the first exception added to the *RPLA*, which exempts Crown waste lands from its application, was introduced to address an incommensurable gap between a lower court decision and the Judicial Committee of the Privy Council ("JCPC") (see generally *Attorney General of Ontario v. Walker*, [1975] 1 S.C.R. 78, at pp. 82-84). In *R. v. McCormick*, (1859), 18 U.C.Q.B. 131, the Court of Queen's Bench of Upper Canada considered the application of the *Crown Suits Act, 1769* (U.K.), 9 Geo. 3, c. 16, commonly known as the *Nullum Tempus Act*, to a claim of adverse possession. The *Crown Suits Act* established a 60-year limitation period for Crown actions, with some exceptions (*Walker*, at p. 82). The court in *McCormick* held that the statute did not bar the Crown's right of recovery to waste land, which was described as land not surveyed and laid out for occupation. However, in *Attorney-General for New South Wales v. Love*, [1898] A.C. 679 (P.C.), the JCPC came to the opposite conclusion and allowed the claim for adverse possession against

the Crown. The legislature thus opted in the 1902 enactment to codify the holding in *McCormick*, contrary to the conclusion of the JCPC.

47 The statutory protection from possessory claims was later extended to "vacant" Crown land, which does not appear to have any clear common law foundation, unlike the other exceptions in s. 16 of the *RPLA*. Although there is little consideration of this type of land in the jurisprudence, our Court noted in *Walker* that it may apply to property that is not waste land (pp. 84-85).

48 The *RPLA* was further amended in 1922 to introduce statutory protections from possessory claims for both road allowances and public highways. Under the common law doctrine of dedication, illustrated by the maxim "once a highway always a highway", a public highway receives protection from adverse possession (*Household Realty Corp. Ltd. v. Hilltop Mobile Home Sales Ltd.*, (1982), 136 D.L.R. (3d) 481 (Ont. C.A.), at p. 489, citing I. M. Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), at p. 1096; see generally D. J. Manderscheid, "Dedication of Public Highways at Common Law" 199737 M.P.L.R. (2d) 215). The 1922 legislative amendments expanded the categories of land benefitting from this protection, something not possible at common law, while preserving any possessory title validly acquired before 1922. While only highways received protection at common law, the amendment extended the protection to road allowances. Previously, a road allowance that had never been opened or used by the public for that purpose would not constitute a public highway (*Gooderham v. The City of Toronto*, (1895), 25 S.C.R. 246, at p. 260). The doctrine of dedication requires actual acceptance by the public of the dedication, or the acceptance of a public authority exercising its statutory powers on behalf of the public (see *Bailey v. City of Victoria*, (1919), 60 S.C.R. 38, at p. 53). Accordingly, an unopened road allowance, which by implication would never have been used by the public, could not have benefitted from protection against adverse possession at common law. Further, as the Court of Appeal for Ontario has recognized, the amendment allowed for the acquisition of possessory title prior to its coming into force (*Di Cenzo Construction Co. Ltd. v. Glassco*, (1978), 21 O.R. (2d) 186 (C.A.); *Household Realty*, at pp. 489-90).

49 As Thorson J.A. recognized in *Household Realty*, "if a mere codification of the common law had been the legislature's intention, then the amendment would have simply provided that ss. 1 to 15 do not apply and shall be deemed never to have applied to highways" (p. 490). Rather, s. 16 of the *RPLA* provides that "nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922".

50 Given this legislative pattern of codifying common law rules in statute, but with modifications, it is significant that the legislature has not expressly legislated an immunity from adverse possession for municipal parkland. Moreover, I disagree with the City's suggestion that the legislature's silence is of little relevance because s. 16 of the *RPLA* has not been amended since 1922, or because of the difficult language of the statute, which reflects its historical origins (see R.F., at para. 43). While s. 16 itself has not been amended, a number of legislative enactments

have impacted the operation and application of the *RPLA*, which I will consider below. In such a legislative context, I would not summarily dismiss the absence of an express exception for municipal parkland.

(3) The Broader Legislative Context Confirms the Pattern of Codification and Supports the Preservation of Acquired Possessory Title

51 I turn now to the broader legislative treatment of adverse possession, which has significantly impacted the application of the doctrine in Ontario. The legislature has repeatedly turned its mind to claims for possessory title, including with respect to public lands, and has specified where the acquisition of possessory title is no longer available. In light of this, there is strong reason to believe that the legislature would have expressly exempted municipal parkland from the application of the *RPLA* if it so intended. As Professor Sullivan writes, the expectation of express reference on which implied exclusion operates need not arise from a single Act; it may arise from the examination of "related Acts within the statute book of the enacting jurisdiction or other jurisdictions as well" (§ 8.09[3]). This Court has also recognized "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter" (*Ulybel*, at para. 52; *Bell ExpressVu*, at para. 27; *Canada 3000 Inc. (Re)* 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 54).

52 A review of related statutory schemes reveals that the legislature has turned its mind to the continued application of the *RPLA* and preserved matured possessory title under that Act, despite having made the choice to prospectively abolish the doctrine of adverse possession in Ontario through the enactment of the *LTA*.

53 The adoption of a Torrens-based land title system under the *LTA*, the successor of the land registry system under the *Registry Act*, R.S.O. 1990, c. R.20, achieves a simplified way of certifying title that "provide[s] the public with security of title and facility of transfer" (*Durrani v. Augier*, (2000), 50 O.R. (3d) 353 (S.C.J.), at para. 41; *Lawrence v. Maple Trust Co.* 2007 ONCA 74, 84 O.R. (3d) 94, at para. 30). The Torrens land title system guarantees that the person named in the register has indefeasible title: the parcel register should be a perfect mirror image of the state of title; no searches behind title should be required; and the accuracy of the register is guaranteed by the state (M. Neave, "Indefeasibility of title in the Canadian context" (1976), 26 *U.T.L.J.* 173, at p. 174; Kaplinsky, Lavoie and Thomson, at pp. 546-47). Indefeasibility has been described as "immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys" (*Frazer v. Walker*, [1967] 1 A.C. 569 (P.C.), at p. 580).

54 The acquisition of possessory title by trespassers undermines the indefeasibility of title, and as a result, s. 51(1) of the *LTA* eliminates this possibility with respect to land registered under the land titles system, despite the *RPLA*. Under the heading "No title by adverse possession, etc.", s. 51(1) provides:

it has continued to consider in recent statutory enactments that balance different interests and considerations.

C. Application of a Common Law Exception for Municipal Parkland Conflicts With the Legislature's Treatment of Possessory Title

72 Given my conclusions on the statutory interpretation of the *RPLA*, I am of the view that the courts below erred in exempting the appellants' claim from the operation of its provisions by creating a novel immunity from adverse possession for municipal parkland. Contrary to the reasoning of the application judge, the question before this Court is not whether recognizing possessory title in this case is good public policy (para. 78). Rather, this Court must ask itself whether the manner in which the courts below exempted the present claim, on the basis of a judge-made rule, can be reconciled with the legislature's treatment of immunities from adverse possession (see Sullivan, at § 17.02[1]; *Basque*, at paras. 40 and 45). Pursuant to the principle of legislative sovereignty, "validly enacted legislation is paramount over the common law", and courts must give effect to legislative intent, "regardless of any reservations they might have concerning its wisdom" (Sullivan, at § 17.01.Pt1[1]).

73 That the legislature has not completely ousted the common law does not permit courts to supplement a statute in a manner that is inconsistent with legislative intent. As Professor Sullivan writes, when considering whether common law may be relied on to supplement legislation, "[r]esort to the common law is impermissible if it would interfere with the policies embodied in legislation or defeat its purpose" (§ 17.02[3]). Ontario has actively legislated with respect to possessory claims to title, including with respect to certain public lands. Commenting on the role of the courts in such a context, Professor Ziff has explained that, unlike other areas of private law, the area of property law has been extensively and substantively altered by statutory changes. As a result, when addressing questions of statutory interpretation, it is to be expected that courts' "creative capacity is abridged" (B. Ziff, "Property Law and the Supreme Court: Of Gardens and Fields" (2017), 78 *S.C.L.R.* (2d) 357, at p. 365).

74 This Court recognized this necessary restraint in *Mowatt*, where it clarified that the question properly before the Court was not whether the inconsistent use requirement was "necessary or desirable", but "whether it forms part of the law of British Columbia and therefore ought to have been applied by the courts below" (para. 21). Justice Brown, writing for a unanimous court, expressly considered the contrary legislative intent in determining that it did not form part of the law (para. 27).

75 In the case at hand, it is of crucial importance that the legislature has listed the categories of public lands exempt from the application of the *RPLA* in the *RPLA* itself and in other statutes. The legislature has turned its mind to the availability of adverse possession for both municipal lands and parkland in Ontario through the enactment of protections for *certain* municipal lands

of a complainant's prior sexual activity and the production and admission of records containing the complainant's highly sensitive personal information that is either held by a third party or comes into the hands of the accused.

- 40 The significant legislative changes in this area of law were made with a view to protecting the rights of women and children given their particular vulnerability to sexual violence. In the preamble to the Act that amended s. 276 of the *Code* post-*Seaboyer* and reformed the definition of consent to sexual activity, Parliament explicitly focused on combatting “the prevalence of sexual assault against women and children” and expressed a particular intention to “ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*” (*An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38). Parliament also expressed an intention to “encourage the reporting of incidents of sexual violence” and emphasized that the admission of the complainant's sexual history into evidence is “inherently prejudicial” and “should be subject to particular scrutiny” (*ibid.*). In amending ss. 278.1 to 278.91 of the *Code*, Parliament sought to protect complainants' privacy interests in highly sensitive personal information and, in turn, preserve their dignity. Amendments such as these appropriately balance respect for complainants' dignity, privacy, and equality and the fundamental right of the accused to the presumption of innocence and a fair trial and they have been endorsed as constitutionally compliant by this Court (see *Mills* ; *Darrach* ; *J.J.*).

- 41 In turn, several of the myths and stereotypes outlined above have now been jurisprudentially condemned as errors of law. For example, it is prohibited for a trial judge to rely on notions such as: delay in a complainant's disclosure of a sexual assault, alone, undermines the credibility of the disclosure (*D.D.* ; *R. v. Lacombe*, 2019 ONCA 938, 383 C.C.C. (3d) 114); a complainant's “failure” to dress modestly indicates that she is more likely to have consented (*Ewanchuk*, at para. 103); a complainant's “failure” to resist or cry out is suggestive of consent (para. 93); the mere fact of a complainant having psychiatric or therapeutic consultations is relevant to their credibility or reliability (s. 278.3(4) of the *Code*); or a complainant associating with or not avoiding the accused after the alleged sexual assault suggests that there was consent and that no assault occurred (*A. (A.B.)*, at paras. 6-12).

- 42 The legislative and jurisprudential treatment of these issues reflects a collective understanding that courts should strive to eradicate myths and

stereotypes from their decisions because they threaten the rights of complainants and undermine the truth-seeking function of trials. Today, sexual offences remain underreported and continue to occur mostly against women and children. There remains a “need to affirm the principles of equality and human dignity in ... criminal law by addressing the problem of myths and stereotypes about complainants in sexual assault cases” (A.G., at para. 1, per L’Heureux-Dubé J., concurring; see *R. v. O’Connor*, [1995] 4 S.C.R. 411).

43 This Court has repeatedly held that “myths and stereotypes have no place in a rational and just system of law, as they jeopardize the courts’ truth-finding function” (A.G., at para. 2). A trial is a truth-seeking process, and reliance on myths and stereotypes distorts the truth. In *Mills*, this Court explained that myths and stereotypes about sexual assault victims hamper the search for truth and impose “harsh and irrelevant burdens on complainants in prosecutions of sexual offences” (para. 119). While the accused’s constitutional rights must remain at the forefront of any criminal trial, this Court has also acknowledged that measures can be taken to avoid reliance on myths and stereotypes without compromising those rights. Myths and stereotypes in fact *undermine* a fair trial — meaning a trial that is fair not only to the accused, but to the complainant and the public (see *J.J.*, at paras. 1-2).

44 All of this history puts into perspective the distinct reasons why relying on myths and stereotypes to discredit sexual assault complainants amounts to an *error of law* — as opposed to being an ordinary factual finding reviewable for palpable and overriding error. The very reason this error of law emerged was to prevent the accused from discrediting complainants’ testimony on unwarranted, discriminatory grounds, and accordingly to correct the particular advantage accused persons historically had in sexual assault cases as compared to accused persons in other cases: myths and stereotypes are no longer meant to play any role in mounting a defence. The judicial and legislative developments designed to eradicate the categorical discounting of women as witnesses do not create any special benefits in law for complainants in sexual assault cases. They simply remove discriminatory barriers, establish a level testimonial field between sexual assault complainants and complainants in other cases, and ensure the truth-seeking function of the trial is not distorted.

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Dustin Kinamore (Appellant) and His Majesty The King
(Respondent) and Attorney General of Ontario, Attorney
General of Manitoba, Attorney General of Alberta, Criminal
Trial Lawyers' Association, Trial Lawyers Association of
British Columbia and Criminal Lawyers' Association (Ontario)
(Interveners)

Supreme Court of Canada

Docket: 40964

2025 SCC 19, 2025 CSC 19

Wagner C.J.C., Karakatsanis, Côté, Rowe, Martin, Kasirer,
Jamal, O'Bonsawin, Moreau JJ.

Heard: December 5, 2024

Judgment: June 13, 2025

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Joanne B. Dartana, K.C., for Intervener, Attorney General of Alberta
Mona Duckett, K.C., for Intervener, Criminal Trial Lawyers' Association
Sarah Pringle, Daniel J. Song, K.C., for Intervener, Trial Lawyers Asso-
ciation of British Columbia
Mark C. Halfyard, Sara Little, for Intervener, Criminal Lawyers' Associ-
ation (Ontario)

Evidence — Admissibility — Sexual conduct of complainant — Crown led evidence of social media messages between complainant and accused discussing complainant's virginity and lack of interest in sexual relationship — Accused convicted of sexual assault — British Columbia Court of Appeal dismissed appeal against conviction on basis that evidence of sexual inactivity was not prior sexual history — Accused appealed to Supreme Court of Canada — Appeal allowed conviction quashed new trial ordered — Crown-led evidence of prior sexual history is presumptively inadmissible at common law — Common law procedure for adducing Crown-led evidence of prior sexual history should mirror s. 276 procedure that applies to defence-led evidence — Crown-led evidence can rely on myths and stereotypes including those that improperly bolster credibility of sexual assault complainant — Evidence of sexual inactivity subject to s. 276 and common law regime — Given trial judge's use of inadmissible evidence in

assessing credibility of both Crown and defence witnesses curative proviso did not apply — Criminal Code, s. 276.

[See *Ewaschuk*, *Criminal Pleadings & Practice*: 16:623; 16:651; 21:310.30; 21:310.50; 21:311]

The accused was charged with sexual assault. The accused and complainant met in May of 2020 and primarily communicated over social media. At trial, the Crown introduced social media messages between the accused and complainant that were exchanged between May and June of 2020, several months prior to the alleged incident of sexual assault in August of 2020. Some of the messages were explicitly sexual in nature, referencing the complainant's virginity and her lack of interest in any sexual relationship with the accused. The accused was convicted. He appealed against his conviction, arguing that the trial judge erred in utilizing Crown-led communications between the accused and complainant without first subjecting them to an admissibility *voir dire*. The Court of Appeal dismissed the appeal, as it concluded that the communications were not presumptively inadmissible because the complainant's lack of interest in having sexual contact with the accused fell outside the exclusionary rule prohibiting evidence of a complainant's prior sexual history. The accused appealed to the Supreme Court of Canada.

Held: The appeal was allowed and a new trial ordered.

Evidence of a complainant's sexual inactivity constitutes prior sexual history and is presumptively inadmissible regardless of whether it is led by the Crown or defence. A harmonized approach should be applied to Crown-led and defence-led evidence of prior sexual history, though with two necessary modifications.

While the exclusionary rule developed through s. 276 of the *Criminal Code* and applied only to defence-led evidence, s. 276 should be seen as reflective of a common law rule of inadmissibility of all evidence of prior sexual history. Evidence of prior sexual history is inherently prejudicial to the trial process because it has the potential to infect the fact-finding process with twin myth reasoning regardless of whether a party actually explicitly invokes that reasoning. Further, the risk of using evidence of prior sexual history in support of myth-based reasoning extends beyond the recognized twin myths and can capture myths that are inherently prejudicial to the accused.

The common law procedure governing Crown-led evidence of prior sexual history should mirror the statutory regime that applies to defence-led evidence under s. 276. If the Crown or the trial judge is unsure as to whether evidence constitutes prior sexual history, the Crown ought to initiate an application for a determination as to whether or not the evidence falls under the exclusionary rule. If it does, then the Crown must prepare a written application setting out detailed particulars of the evidence it seeks to adduce and the relevance of that evidence to an issue at trial. This application must be made on fair notice to the

accused, which will typically be at least 7 days' notice. The application should typically be brought before the trial commences and heard at the same time as any s. 276 application brought by the defence. The public and jury must be excluded from the stage one inquiry.

If a judge concludes that the Crown has complied with its procedural obligations and that the evidence is capable of being admissible, a stage two hearing should be held. The factors enumerated in s. 276(3) should guide the analysis under stage two for Crown-led sexual history evidence. However, unlike the statutory regime, complainants should not have automatic standing to appear and make submissions at a stage two hearing for Crown-led sexual history evidence. This is because the interests of the Crown and complainants will generally align, and appointment of counsel for complainants along with the granting of standing risks unnecessary expense and delay. However if the Crown application is being heard alongside a s. 276 application, the complainant should have standing on both applications.

The complainant is not compellable on the stage two hearing. An affidavit from the complainant is not required in order for Crown-led sexual history evidence to be admissible, but the Crown still bears an evidentiary onus of providing a sufficient basis for the judge to assess the admissibility of the evidence. This can be introduced through affidavit or through *viva voce* evidence of an individual with personal knowledge of a complainant's sexual history.

At the conclusion of the stage two hearing, the judge must provide reasons for the admissibility ruling. The ruling may then be revisited at any point during the trial when there is a material change in circumstances, such as the evolution of a witness' testimony during the course of the trial. If any Crown-led sexual history is admissible in a jury trial, the trial judge must instruct the jury as to permissible and impermissible uses of the evidence.

Evidence of sexual inactivity, such as virginity or lack of interest in a sexual relationship, forms part of a complainant's prior sexual history and is presumptively inadmissible. The inclusion of sexual inactivity in the exclusionary rule furthers the purposes of the s. 276 and common law regimes, given that evidence of sexual inactivity is often intrinsically intertwined with evidence of explicit sexual activity. Further, this type of evidence can contribute to discriminatory generalizations about a complainant's disposition to consent or her credibility because it invokes inverse twin myth reasoning: that a complainant has a propensity not to consent and therefore is less likely to have consented; and that the complainant is more worthy of belief. Both of these myths improperly bolster the credibility of the complainant, to the detriment of the accused. Because the myth is grounded in false assumptions about sexual assault complainants, it is legally impermissible.

However, the fact that sexual inactivity evidence is presumptively inadmissible does not mean that it is categorically excluded. It can be subjected to permissible

uses, as in *R. v. R.V.* (2019), 378 C.C.C. (3d) 193 (S.C.C.), where the complainant's prior virginity provided compelling probative evidence to support the inference that she had engaged in unwanted sexual activity with the accused, given her subsequent pregnancy. Prior lack of interest in sexual activity can be admissible hearsay evidence as a statement of present intention, and may also be circumstantial evidence of consent or capacity to consent.

This was not an appropriate case in which to invoke the *curative proviso*. The Crown could not show that the inadmissible sexual history evidence played no material role in the trial judge's decision to convict, as the trial judge had disbelieved the accused in part based on reliance on the inadmissible social media messages. Because his assessment of the evidence of both the accused and complainant was inextricably intertwined with the inadmissible evidence of the complainant's prior sexual history, a new trial was required.

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s. 7 — referred to

s. 11(d) — referred to

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Generally — referred to

s. 276 — considered

s. 276(1) — considered

s. 276(2) — considered

s. 276(2)(d) — considered

s. 276(3) — considered

s. 276(3)(a) — referred to

s. 276(4) — considered

s. 278.1 “record” [en. 1997, c. 30, s. 1] — referred to

s. 278.93 [en. 2018, c. 29, s. 25] — considered

s. 278.93(2) [en. 2018, c. 29, s. 25] — referred to

s. 278.93(3) [en. 2018, c. 29, s. 25] — referred to

s. 278.93(4) [en. 2018, c. 29, s. 25] — referred to

s. 278.94 [en. 2018, c. 29, s. 25] — considered

s. 278.94(1) [en. 2018, c. 29, s. 25] — referred to

s. 278.94(4) [en. 2018, c. 29, s. 25] — referred to

s. 278.95 [en. 2018, c. 29, s. 25] — referred to

s. 686(1)(b)(iii) — considered

Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, Act to amend the, S.C. 1980-81-82-83, c. 125

Generally — referred to

Words and phrases considered:

préjudice par raisonnement

Cette règle d'exclusion découle de la reconnaissance que cette preuve comporte un risque élevé de préjudice par raisonnement et de préjudice moral. Le préjudice par raisonnement s'entend du risque que la preuve distraie le juge des faits et l'empêche de trancher la question de façon raisonnée, notamment en causant de la confusion ou en attirant une attention disproportionnée. Le préjudice moral s'entend du risque que la preuve soit utilisée pour tirer l'inférence interdite de « propension générale » selon laquelle l'accusé serait le genre de « mauvaise personne » susceptible de commettre l'infraction en ques-

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tion ([*R. c. Hart*, 2014 CSC 52, [2014] 2 R.C.S. 544], par. 74; *R. c. Handy*, 2002 CSC 56, [2002] 2 R.C.S. 908, par. 100; voir aussi [Paciocco, David M., Palma Paciocco et Lee Stuesser. *The Law of Evidence*, 8e éd., Toronto, Irwin Law, 2020.], p. 70).

reasoning prejudice

This exclusionary rule [that Crown-led evidence of the accused’s bad character is presumptively inadmissible] stems from a recognition that this evidence carries a high risk of reasoning prejudice and moral prejudice. Reasoning prejudice refers to the risk that the evidence will distract the trier of fact from deciding the issue in a reasoned way, including by causing confusion or attracting disproportionate attention. Moral prejudice refers to the risk that the evidence will be used to draw the prohibited “general propensity” inference that the accused is the kind of “bad person” likely to commit the offence in question ([*R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544], at para. 74; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 100; see also [D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020)], at p. 70).

APPEAL by accused from judgment reported at *R. v. Kinamore* (2023), 2023 BCCA 337, 2023 CarswellBC 2459, 429 C.C.C. (3d) 365, 91 C.R. (7th) 1, [2023] B.C.J. No. 1650 (B.C. C.A.), dismissing accused’s appeal from his conviction for sexual assault.

Wagner C.J.C. (Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ. concurring):

I. Introduction

- ¹ The increasing complexity of sexual offence trials in Canada poses a challenge to our overburdened criminal justice system. One source of complexity lies in the application of the rules that govern evidence of a complainant’s sexual history. Although these evidentiary rules are essential to eliminate discriminatory myths and stereotypes from the fact-finding process and safeguard the dignity, privacy, and equality interests of complainants, uncertainty about their scope and procedural requirements has caused unnecessary confusion and disruption. This appeal provides an opportunity to address some of this uncertainty by resolving two issues that were left unaddressed in this Court’s prior jurisprudence.
- ² The first issue is whether evidence of a complainant’s sexual inactivity constitutes a form of presumptively inadmissible evidence under s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, and the analogous common law rules governing Crown-led evidence of a complainant’s sexual history. In *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, this Court ex-

PLICITLY left this question open but expressed doubt about appellate authority that has held that such evidence is not captured by these exclusionary rules (para. 81). In this case, I confirm that sexual inactivity evidence is indeed presumptively inadmissible under s. 276 and the common law given that it forms part of a complainant's sexual history and can evoke distinct myths and stereotypes that these rules seek to eliminate.

- 3 The second issue relates to the substantive and procedural requirements that apply to Crown-led evidence of a complainant's sexual history. Since *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, this Court has held that the common law treats this evidence as presumptively inadmissible and that the Crown must follow the principles and procedure articulated in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. However, little explanation has been provided by this Court as to how the *Seaboyer* principles and procedure can be transposed to Crown-led evidence given that they were developed with defence-led evidence in mind. As well, limited attention has been devoted to whether the common law procedure articulated in *Seaboyer* differs significantly from the procedural requirements found in the statutory s. 276 regime. Subject only to two necessary modifications, which I discuss below, the common law rules on substantive admissibility and procedure should align with those that apply to defence-led evidence under s. 276. A harmonized regime for the admission of sexual history evidence will best allow courts to perform their important evidentiary gatekeeping function, without creating the undue complication that parallel regimes could cause.
- 4 During the judge-alone sexual assault trial in this case, the Crown introduced evidence of social media communications between the complainant and the accused, Dustin Kinamore, that were sent over a month before the alleged assault. The evidence was entered as a marked exhibit with no *voir dire*. Some of these messages were explicitly sexual in nature, while others involved references to the complainant's virginity or indications by the complainant of her disinterest in having a sexual relationship with Mr. Kinamore. The Crown and the defence relied on these messages when examining both the complainant and Mr. Kinamore, creating *viva voce* evidence about them in the process. The trial judge relied heavily on this evidence in her reasons for finding Mr. Kinamore guilty of sexual assault. The Court of Appeal found no error in the trial judge's failure to hold a *voir dire*.

- ⁵ In my view, the social media communications that included discussions of the complainant's sexual activity and inactivity were presumptively inadmissible sexual history evidence. Accordingly, the trial judge erred in failing to hold a *voir dire* to determine the admissibility of the evidence. Since this sexual history evidence played a material role in the trial judge's reasons, this evidentiary error was not harmless and the curative proviso cannot be applied.
- ⁶ I would therefore allow the appeal, quash the conviction, and order a new trial.

II. Background

- ⁷ In May 2020, Mr. Kinamore met the complainant while she was working at a motorcycle shop. At the time, the complainant was 16 years old and Mr. Kinamore was 22 years old. During their initial meeting, the two exchanged information for their social media accounts, which were subsequently used as their primary method of communicating with one another. The two met again in May and went for a motorcycle ride. On July 31, Mr. Kinamore stopped by the motorcycle shop and made plans with the complainant to meet on August 3 at his apartment.
- ⁸ At trial, Mr. Kinamore and the complainant provided differing accounts of the events of August 3. The complainant testified that, shortly after arriving at Mr. Kinamore's apartment, the two went out to his balcony, where he put his arm around her. She explained that, after they moved back indoors, Mr. Kinamore began kissing her neck without her consent and then picked her up and placed her on his bed. She said that Mr. Kinamore then attempted to remove her clothing but that he stopped and left the room after she objected. When he returned, he put a movie on, but not long afterwards Mr. Kinamore started kissing the complainant, removed her underwear, and then proceeded to digitally penetrate her vagina and perform cunnilingus on her. This later transitioned to Mr. Kinamore penetrating the complainant's vagina with his penis. The complainant testified that during this time she resisted Mr. Kinamore, which eventually led him to stop. Afterwards, the complainant briefly left the apartment to call a friend to disclose what happened. The complainant then returned inside and confronted Mr. Kinamore. Mr. Kinamore later drove the complainant to a SkyTrain station.
- ⁹ In contrast, Mr. Kinamore testified that, after returning from the balcony, the two walked together to his bedroom to watch a movie. He explained that the complainant then initiated the kissing, which eventually

led to them undressing one another. He performed cunnilingus on her with her consent and then later asked the complainant twice to perform fellatio on him. After her second refusal, Mr. Kinamore began to scroll on his phone, looking for food to order. During this time, the complainant received a phone call from someone at work, who informed her that she had mistakenly taken a pair of work keys. She also received a text from her father inviting her to join him and his friends for dinner that evening. After they decided that neither of them wanted to eat at that time, Mr. Kinamore drove the complainant to a SkyTrain station so she could meet up with her father.

¹⁰ The social media messages between the parties were key pieces of evidence at trial. The Crown introduced screenshots of the messages that were exchanged between Mr. Kinamore and the complainant in May and June 2020 as a marked exhibit without a *voir dire*. These screenshots had come from the complainant after the police requested them. In her testimony, the complainant acknowledged that the screenshots did not contain all of the messages exchanged between her and Mr. Kinamore. She had deleted her social media account by the time the police requested that she retrieve all of the messages.

¹¹ Some of the messages were explicitly sexual in nature. For example, in a series of messages, Mr. Kinamore said that he was masturbating to pictures of the complainant and requested a picture of her breasts, to which the complainant replied “Not gonna happen” and “Here tho”, with a link to a pornographic website (A.R., at p. 296). However, the sexual nature of other messages was more implicit. For instance, the complainant stated “God I’d love to put that to the test” and then, after Mr. Kinamore said “I don’t think you could keep up”, she replied “Try me” (p. 288). The complainant and Mr. Kinamore confirmed in their testimony that these messages were sexual in nature yet provided differing accounts as to what had been discussed in the conversation that preceded these messages.

¹² The social media messages included many conversations in which the complainant repeatedly indicated a disinterest in a sexual relationship with Mr. Kinamore. Some of these discussions referenced the complainant’s virginity, as demonstrated by the following messages:

[Mr. Kinamore]: But if you still can’t get me off your mind you can come see me soon

[Complainant]: You just want sex

[Mr. Kinamore]: You never understand

[Complainant]: I understand how important it is to you and I don't want to string you into thinking you'll get something you won't

[Mr. Kinamore]: It's since you are a virgin

[Mr. Kinamore]: Sex tells me more about someone, like legit in my past I can tell how well I'm going to like someone

[Mr. Kinamore]: My past exs, our sex was fantastic and it connected us

[Mr. Kinamore]: It just worked

[Mr. Kinamore]: It's hard to fully grasp this when you haven't done it

[Complainant]: Sure I get it. But what's the point of still talking to me if I'm not going to give you what you want

(A.R., at pp. 290-91)

¹³ Evidence of the complainant's virginity was also introduced through the testimony of the complainant and Mr. Kinamore. For example, the complainant testified that, following the alleged sexual assault, she was upset with Mr. Kinamore for taking her virginity. She also testified that, when she disclosed the alleged assault to her father, she told him that someone had taken her virginity. During the direct examination of the complainant's father, he recounted her making this statement. During the cross-examination of Mr. Kinamore, the Crown asked multiple times about whether he knew of the complainant's virginity.

¹⁴ Both the Crown and the defence relied on this evidence for different purposes. During closing submissions, Crown counsel relied on the complainant's virginity and prior messages showing a disinterest in a sexual relationship to suggest that Mr. Kinamore's version of events was implausible. In contrast, the defence argued that some of the complainant's prior messages contradicted the complainant's testimony that she was not sexually interested in Mr. Kinamore.

III. Procedural History

A. Provincial Court of British Columbia, 2022 BCPC 341 (Gordon Prov. Ct. J.)

¹⁵ The trial judge found Mr. Kinamore guilty of sexual assault. In her reasons, she stated that she disbelieved Mr. Kinamore and concluded that his evidence was incapable of raising a reasonable doubt because it was "amorphous" and changed over time (para. 10).

- ¹⁶ The trial judge provided various reasons to support this conclusion, which included the following: (1) Mr. Kinamore changed his story about whether the complainant had sent nude photographs to him after Crown counsel suggested that the receipt of such photos may have been a crime (para. 11); (2) Mr. Kinamore’s interpretation of a message from the complainant in which she stated “I will destroy you” evolved, and the complainant’s other messages indicating sexual disinterest contradicted his initial suggestion that the “destroy you” message was sexual (para. 13); and (3) Mr. Kinamore’s assertion that he wanted to have a relationship with the complainant at the time was contradicted by his prior messages, including those in which he suggested that the two be “friends with benefits” (para. 14).

B. Court of Appeal for British Columbia, 2023 BCCA 337, 91 C.R. (7th) 1 (Fenlon, Dickson and Skolrood JJA.)

- ¹⁷ Mr. Kinamore argued on appeal that the trial judge erred in admitting the Crown-led evidence of the prior communications between the parties without a *voir dire*. The Court of Appeal unanimously rejected this argument, holding that the previous communications were not presumptively inadmissible. The Court of Appeal cited *R. v. Langan*, 2020 SCC 33, [2020] 3 S.C.R. 499, rev’g 2019 BCCA 467, 383 C.C.C. (3d) 516, for the proposition that prior communications from the complainant indicating a disinterest in having sex with the accused fall outside the exclusionary rule governing a complainant’s sexual history.
- ¹⁸ The Court of Appeal also rejected Mr. Kinamore’s argument that the trial judge breached the rule against the admission of prior consistent statements by relying on the complainant’s social media messages to determine the issue of consent. The court held that the rule applies only to out-of-court statements made after the event in issue that are consistent with a witness’s in-court testimony. Since the communications preceded the alleged sexual assault, the rule against the admission of prior consistent statements did not apply. In any event, the Court of Appeal concluded that the trial judge did not use the prior communications for an impermissible purpose. The Court of Appeal therefore dismissed the appeal.

IV. Issues

- ¹⁹ Mr. Kinamore renews both of these arguments on appeal to this Court. The first issue is whether the trial judge erred in admitting, with-

out a *voir dire*, the parties' social media messages because they constitute presumptively inadmissible evidence of the complainant's sexual history. The Crown concedes that the trial judge erred by admitting the messages that involve explicit sexual conversations without a *voir dire* (R.F., at para. 85). The Crown takes no position on whether evidence of the complainant's virginity was presumptively inadmissible. However, the parties disagree over whether the messages containing the complainant's prior indications of disinterest in a sexual relationship were presumptively inadmissible. The Crown argues that the curative proviso can apply with respect to any error committed by the trial judge on this issue (R.F., at para. 120).

- ²⁰ The second issue is whether the trial judge breached the rule against the admission of prior consistent statements by using the social media messages to decide the issue of consent. Since this appeal can be resolved on the first issue, it is unnecessary to decide the second.

V. Analysis

A. Principles Governing the Admissibility of Sexual History Evidence

- ²¹ Sexual history evidence is subject to specific rules that govern its admissibility. Those rules are found in statute when it comes to defence-led evidence, while the admissibility of Crown-led evidence is largely regulated by common law rules. The relationship between these rules has led to some confusion, and this appeal provides an opportunity to clarify that, subject only to one necessary modification, the substantive admissibility requirements in both cases are the same.

(1) Defence-Led Sexual History Evidence

- ²² The common law historically permitted an accused to adduce evidence of a complainant's sexual history as a form of character evidence. Character evidence refers to "proof that is presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour" (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 63). This evidence can be used to support an inference about how likely it is that an individual engaged in an alleged behaviour or to assess an individual's credibility (*ibid.*; see also *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 39; *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 685-86).
- ²³ In criminal proceedings, one way in which the common law regulates the use of character evidence is through the "centuries-old" rule that

Crown-led evidence of the accused's bad character is presumptively inadmissible (*R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 73; see also *R. v. T.J.F.*, 2024 SCC 38, at para. 76; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales* 2024 (31st ed. 2024), at p. 1085). This exclusionary rule stems from a recognition that this evidence carries a high risk of reasoning prejudice and moral prejudice. Reasoning prejudice refers to the risk that the evidence will distract the trier of fact from deciding the issue in a reasoned way, including by causing confusion or attracting disproportionate attention. Moral prejudice refers to the risk that the evidence will be used to draw the prohibited "general propensity" inference that the accused is the kind of "bad person" likely to commit the offence in question (*Hart*, at para. 74; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 100; see also Paciocco, Paciocco and Stuesser, at p. 70).

24 The bad character evidence rule does not extend to ordinary witnesses in criminal proceedings because only the accused is being judged at trial and therefore risks being wrongfully convicted (see *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 32; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 139). As a result, the common law previously permitted the accused to use the complainant's sexual history as character evidence, inviting the trier of fact to infer that, because the complainant was a sexually active or "unchaste" woman, (1) she had a propensity to consent and therefore was more likely to have consented to the sexual activity that formed the subject matter of the charge; and (2) she was less worthy of belief (H. C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at § 7:12; J. Desrosiers and G. Beausoleil-Allard, *L'agression sexuelle en droit canadien* (2nd ed. 2017), at p. 192). These are now commonly referred to as the "twin myths".

25 In recognition of the fact that this reasoning evoked discriminatory myths and stereotypes about sexual assault complainants, Parliament amended the *Criminal Code* in 1982 to prohibit the accused in certain sexual offence proceedings from adducing evidence of a complainant's sexual history, subject to three limited exceptions (*An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 19).

26 However, in *Seaboyer*, this Court held that this evidentiary rule violated an accused's right to a fair trial and right to make full answer and defence guaranteed by ss. 7 and 11(d) of the *Canadian Charter of Rights*

and *Freedoms*. Trial fairness requires that an accused be able to adduce relevant evidence where its probative value is not substantially outweighed by its potential prejudice (pp. 611-12; see also *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 663-66). This Court agreed with Parliament's determination that the sexual nature of a complainant's sexual history was irrelevant to the issue of consent and credibility. But because the statutory provision failed to distinguish between the relevant and irrelevant purposes for which evidence of a complainant's sexual history could be used, it unfairly prevented the accused from adducing evidence which they were constitutionally entitled to adduce (*Seaboyer*, at pp. 620-21).

- 27 In invalidating the exclusionary rule, this Court acknowledged the need to clarify the common law to prevent the return of the "outmoded, sexist-based use of sexual conduct evidence" (*Seaboyer*, at pp. 630-31). Accordingly, this Court established guidelines for sexual history evidence that reflected the "application of the general rules of evidence governing relevance and the reception of evidence" (pp. 633-34). These guidelines offered the "maximum protection to the complainant compatible with the maintenance of the accused's fundamental right to a fair trial" (p. 598).
- 28 The *Seaboyer* guidelines can be summarized as follows: (1) in a trial for a sexual offence, evidence of a complainant's prior sexual conduct is not admissible solely to support twin-myth reasoning; (2) evidence of a complainant's prior sexual conduct may be admissible for relevant purposes if its probative value is not substantially outweighed by its prejudicial effect; (3) the admissibility of sexual conduct evidence must be established on a *voir dire* (which may be held *in camera*) by affidavit or the testimony of the accused or third parties; and (4) if evidence of a complainant's sexual conduct is admitted in a jury trial, the trial judge should warn the jury against twin-myth reasoning (pp. 634-36).
- 29 This guidance subsequently came to be reflected in s. 276 of the *Criminal Code* (*R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 20; see also Desrosiers and Beausoleil-Allard, at p. 199). This Court has stated that the s. 276 regime has three purposes: (1) to protect the integrity of the trial by excluding irrelevant and misleading evidence; (2) to protect an accused's right to a fair trial; and (3) to encourage the reporting of sexual offences by protecting the security, privacy, and equality interests of complainants (*Barton*, at para. 58; *Darrach*, at para. 25; see also *R. v. Kruk*, 2024 SCC 7, at para. 40).

³⁰ In proceedings in respect of certain enumerated offences, s. 276(1) categorically bars the admission of evidence that the complainant has engaged in sexual activity to support an inference that the activity, by reason of its sexual nature, makes it more likely that the complainant consented to the sexual activity that forms the subject matter for the charge or makes the complainant less worthy of belief. Section 276(2) then provides that evidence of the complainant's prior sexual activity "adduced by or on behalf of the accused" is presumptively inadmissible. For that evidence to be admitted, the specific procedures set out in ss. 278.93 and 278.94 must be followed, and it must be shown that the sexual activity evidence is being adduced for purposes other than the impermissible purposes identified in s. 276(1), is relevant to an issue at trial, is of specific instances of sexual activity, and has significant probative value that is not substantially outweighed by its prejudicial effect. Section 276(3) sets out a non-exhaustive list of factors that a trial judge must consider when weighing probative value and prejudicial effect.

³¹ In *Darrach*, this Court held that the version of s. 276 that existed at the time respected an accused's right to a fair trial and right to make full answer and defence (paras. 37 and 43). It stressed that s. 276 was designed to exclude only irrelevant information or relevant information that was substantially more prejudicial than it was probative (para. 43). Because an accused had "never had a right to adduce irrelevant evidence" or to "adduce misleading evidence to support illegitimate inferences", the statutory rule was constitutionally compliant (para. 37).

³² In 2018, Parliament added s. 276(4) to clarify that sexual activity for the purposes of this section includes "any communication made for a sexual purpose or whose content is of a sexual nature" (*An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29, s. 21(3)). As this Court recognized in *R. v. J.J.*, 2022 SCC 28, [2022] 2 S.C.R. 3, this amendment was introduced within a larger package of *Criminal Code* reforms that were "designed to protect the interests of complainants in their own private records" (para. 3).

(2) Crown-Led Sexual History Evidence

³³ While s. 276(1) prohibits both the Crown and the accused from adducing evidence of a complainant's sexual history for twin-myth purposes, s. 276(2) applies exclusively to evidence tendered by the accused. In *Barton*, this Court clarified that the common law principles articulated

in *Seaboyer* regarding evidence of a complainant's sexual history continue to apply to the Crown in proceedings in respect of a listed offence under s. 276(1) (para. 80). The common law therefore treats Crown-led sexual history evidence as presumptively inadmissible in these proceedings and requires the Crown to bring an application before a trial judge to determine its admissibility on a *voir dire* (*J.J.*, at para. 74).

- ³⁴ This appeal provides an opportunity for this Court to identify the rationale for treating Crown-led evidence of a complainant's sexual history as presumptively inadmissible at common law and to explain the substantive admissibility requirements that trial judges should apply when determining whether such evidence can be introduced by the Crown.
- ³⁵ The rationale behind treating Crown-led sexual history evidence as presumptively inadmissible at common law is rooted in the same three purposes as the s. 276 regime: to exclude irrelevant or misleading evidence, to protect an accused's right to a fair trial, and to safeguard the dignity, privacy, and equality interests of complainants. As this Court noted in *R.V.*, regardless of which party adduces evidence of a complainant's sexual history, the trial judge must always "guard against twin-myth reasoning as well as prejudice to the complainant, the trial process and the administration of justice" (para. 78). To be clear, the purpose of the common law exclusionary rule for Crown-led sexual history evidence is not to eliminate myths and stereotypes about the accused or other witnesses in sexual offence trials. Instead, the rule embraces the common law's broader asymmetrical approach to myths and stereotypes in sexual offence trials, which recognizes the need to eradicate well-established forms of discriminatory reasoning about complainants (*Kruk*, at para. 44).
- ³⁶ It may be less obvious how the three purposes of the s. 276 regime are furthered by screening Crown-led sexual history evidence given that the Crown is unlikely to evoke twin-myth reasoning (see *Stewart*, at § 8:2). The answer lies in the fact that this evidence is "inherently prejudicial" to the trial process (see *Kruk*, at para. 40). Evidence of prior sexual activity intrinsically has the potential to infect the fact-finding process with twin-myth reasoning regardless of whether a party explicitly invites such reasoning (see *Barton*, at para. 80; *Goldfinch*, at para. 72). This inherent risk explains why juries must be instructed against twin-myth reasoning even when this evidence is admitted for a proper purpose. The facts of *Barton* exemplify this inherent risk well. In that case, the Crown referred to the victim as a "prostitute" in its opening address and ex-

plained that she “struck a working relationship” with the accused on the night before her death (para. 66). While such comments were not made to evoke twin-myth reasoning, this Court recognized that these comments, coupled with the sexual history evidence adduced by the accused, left the jury “adrift in a sea of dangerous and impermissible inferences” (para. 84; see also paras. 80-81).

- ³⁷ In addition, as I discuss below, it is possible that sexual history evidence may be used to evoke discriminatory myths and stereotypes about sexual assault complainants that are different from the twin myths. While these myths and stereotypes can be raised by either party, the Crown may be more likely to evoke some forms of flawed reasoning that are particularly disadvantageous to the accused. These misleading lines of reasoning must be prohibited to ensure a trial that is fair for the accused, the complainant, and the broader public (*Kruk*, at para. 43).
- ³⁸ Moreover, the common law’s substantive admissibility requirements for Crown-led sexual history evidence must be clarified given that the *Seaboyer* principles were articulated with defence-led evidence in mind. Specifically, it was held in *Seaboyer* that, in order for sexual history evidence to be admitted, its probative value must not be “substantially outweighed” by its prejudicial effect (p. 635). This reflects the common law standard governing the admissibility of defence-led evidence generally, which is specifically calibrated to respect an accused’s right to a fair trial (see *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at para. 19). By contrast, Crown-led evidence is inadmissible where its prejudicial effect simply outweighs its probative value. This is the applicable standard for admitting Crown-led sexual history evidence. However, where the Crown and the defence seek to rely on the same evidence, the standard for defence-led evidence should apply.
- ³⁹ Some interveners argue that the standard for admitting Crown-led sexual history evidence should be articulated as requiring “significant” probative value (I.F., Criminal Lawyers’ Association (Ontario), at para. 26; I.F., Criminal Trial Lawyers’ Association, at paras. 17-20). This is to ensure consistency with s. 276(2)(d) of the *Criminal Code*, which requires the accused to demonstrate that evidence of the complainant’s sexual history has “significant” probative value that is not substantially outweighed by its prejudicial effect. In my view, a departure from the traditional common law standard governing the admission of Crown-led evidence is unnecessary. As explained in *Darrach* and recently reaffirmed in *J.J.*, the requirement of “significant” probative value under s.

276(2) “is not a departure from the conventional rules of evidence” and simply acknowledges that there are “inherent ‘damages and disadvantages ...’” presented by sexual history evidence (*Darrach*, at paras. 39 and 41, quoting *Seaboyer*, at p. 634; *J.J.*, at para. 131). In other words, the “significant” probative value requirement recognizes that sexual history evidence will need to have more than “trifling relevance” to overcome its intrinsic prejudice (*Darrach*, at para. 41). There is no indication that anything else was meant by the inclusion of the word “significant” in s. 276(2)(d), particularly because the word has no equivalent in the French version of the provision, which simply speaks of “*valeur probante*” (*Darrach*, at para. 39).

40 I would also note that, in weighing the probative value and prejudicial effect of Crown-led evidence of a complainant’s sexual history, trial judges must consider the non-exhaustive list of factors set out in s. 276(3) of the *Criminal Code*. These factors provide a helpful framework for assessing the proposed evidence’s probative value and for considering how the evidence can trigger reasoning prejudice for triers of fact as well as prejudice the privacy, dignity, and equality interests of complainants. Trial judges should remember, however, that some of the s. 276(3) factors have been articulated with defence-led evidence in mind. For example, s. 276(3)(a) refers to consideration of an accused’s right to make a full answer and defence, which is not implicated in the same way in the context of Crown-led evidence.

41 In sum, the common law principles governing the admissibility of Crown-led sexual history evidence must be harmonized with the statutory regime for defence-led evidence of this kind, subject only to the necessary modification that I have detailed above.

B. Procedural Requirements for Crown-Led Sexual History Evidence

42 As I have said, this Court held in *Barton* that the procedure articulated in *Seaboyer* applies to Crown-led sexual history evidence, without elaborating further. *Seaboyer* imposes a markedly simple procedure compared with the procedure imposed by the statutory regime applicable to defence-led evidence. It requires only that the admissibility of sexual history evidence be established on a *voir dire* (which may be held *in camera*) either by affidavit or by witness testimony. If the sexual history evidence is admitted, the trial judge is then required to issue a limiting instruction on its impermissible uses (pp. 633-36).

43 To facilitate consistency and predictability in the management of sexual offence trials, the common law procedure governing Crown-led sexual history evidence should mirror the statutory s. 276 scheme that applies only to the accused. This is an appropriate incremental development of the common law that serves the interests of justice in the contemporary sexual assault law context. As this Court stated in *R. v. Salituro*, [1991] 3 S.C.R. 654, judges should incrementally adapt the common law to ensure that it is “in step with the dynamic and evolving fabric of our society” (p. 670). Subject only to a single modification, the two-stage procedure set out in ss. 278.93 and 278.94 of the *Criminal Code* provides the basic structure that should govern the process for admitting Crown-led sexual history evidence.

44 As a preliminary observation, caution should be the starting point for judges when deciding whether to instruct parties to commence the procedure set out below. When a trial judge is uncertain whether a piece of evidence is presumptively inadmissible sexual history evidence, they should require the party seeking to adduce the evidence to bring the appropriate application under which a determination of whether the screening regime applies can be made (see *Barton*, at para. 78). A similar approach was endorsed by this Court in *J.J.* with respect to decisions on whether a proposed piece of evidence constitutes a “record” pursuant to s. 278.1 of the *Criminal Code* (para. 104). This cautious approach is consistent with this Court’s emphasis on the fact that judges are the “evidentiary gatekeepers” in a criminal trial and are ultimately responsible for enforcing compliance with evidentiary rules (*Goldfinch*, at para. 75; see also *Barton*, at para. 68; *R.V.*, at para. 71). A diligent gatekeeper minimizes the risk of error and promotes predictability and efficiency by avoiding protracted arguments about the precise scope of the various screening regimes that apply to sexual offence trials.

(1) Stage One

45 To start with, the Crown must prepare a written application that sets out detailed particulars of the evidence that it seeks to adduce and the relevance of that evidence to an issue at trial (see s. 278.93(2)). As under the s. 276 regime, the affidavit attached to the written application can be an “information and belief affidavit” in the Stage One inquiry (*Darrach*, at para. 53; D. Brown and J. Witkin, *Prosecuting and Defending Sexual Offence Cases* (3rd ed. 2024), at p. 412).

- ⁴⁶ The Crown must provide fair notice to the accused and the court if it seeks to bring an application. While this generally will be at least seven days' notice, judges can exercise their trial management powers in the interests of justice to shorten this notice requirement (see s. 278.93(4)). This notice assists in allowing the accused to prepare, particularly in circumstances where they wish to bring their own s. 276 application. Such an application will be necessary only when the defence wishes to adduce details beyond what the Crown is seeking to adduce (see *Brown and Witkin*, at p. 399).
- ⁴⁷ As this Court recognized in *R.V.*, it is best practice for the parties' applications to be considered at the same time. Not only does this approach mitigate delay, but it also ensures that a judge has a complete understanding of how all of the evidence of the complainant's sexual history will be used, which is necessary to properly weigh its probative value and prejudicial effect (para. 79). For example, when considering both applications, a judge may observe that granting one application will result in the other party's application regarding further particulars of the complainant's sexual history also being granted. In these circumstances, the judge may then conclude that the overall prejudice caused by granting both applications would be too significant for any of the proposed evidence to be admitted.
- ⁴⁸ In keeping with this Court's guidance on when s. 276 applications should be brought, the Crown should generally bring its application before the trial commences (*J.J.*, at para. 85; *Goldfinch*, at para. 145). This practice is preferable to mid-trial applications that lead to adjournments, delay, and scheduling difficulties, which serve the interests of no one (*J.J.*, at para. 86). Mid-trial applications may, however, be necessary where there is a material change in circumstances (*Barton*, at para. 65; *R.V.*, at para. 75; *J.J.*, at para. 86).
- ⁴⁹ The purpose of the Stage One inquiry is to decide whether an evidentiary hearing should be held and to facilitate the dismissal of frivolous applications. The judge must assess whether the Crown has complied with its procedural obligations and whether the evidence sought to be adduced is capable of being admissible (see s. 278.93(4)). If these requirements are not met, the judge has no obligation to hold an evidentiary hearing. Evidence will be incapable of being admissible where the stated relevance of the evidence engages prohibited myth-based reasoning. The judge may also use the Stage One inquiry to make a final determination on whether the evidence in question constitutes sexual history

evidence that is presumptively inadmissible under s. 276 and the common law (see *J.J.*, at para. 28).

50 In accordance with their trial management powers, judges have discretion to decide whether the Stage One inquiry is conducted in writing, as an oral hearing, or both (*J.J.*, at para. 27). Regardless of the approach taken, the jury and the public must be excluded (see s. 278.93(3)). Trial judges are authorized under the common law to make orders limiting court openness in exceptional circumstances (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 857-58; see also *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at paras. 38 and 63; *R. v. T.W.W.*, 2024 SCC 19, at paras. 68-70).

51 Sexual history evidence admissibility proceedings will invariably satisfy the prerequisites articulated in *Sherman Estate* to justify an exclusion order. Court openness during the admissibility inquiry poses a serious risk to the important public interest of protecting a complainant's privacy and dignity interests (*T.W.W.*, at para. 74). This is particularly true since the admissibility proceedings may expose irrelevant information about the complainant's sexual history that is profoundly personal. Given the nature of the information that may be exposed, there are no reasonable alternatives to an exclusion order that would prevent this risk to the complainant's interests. Likewise, the beneficial effects of the order, such as promoting the reporting of sexual offences, outweigh the limit on court openness that will be temporary if the proposed evidence is ultimately admitted.

(2) Stage Two

52 At the Stage Two hearing, the judge determines whether the sexual history evidence is admissible. The judge must decide whether the Crown has proven, on a balance of probabilities, that the evidence is relevant to an issue at trial and that its probative value is not outweighed by its prejudicial effect. As discussed, the factors enumerated in s. 276(3) must be used as a guide to structure this analysis. As in the Stage One inquiry, the jury and the public must be excluded during the hearing (see s. 278.94(1)). For the same reasons as above, these circumstances will invariably meet the *Sherman Estate* prerequisites to justify an exclusion order.

53 Unlike under the s. 276 regime, a complainant does not have automatic standing to make submissions at a Stage Two hearing regarding the admissibility of Crown-led sexual history evidence. Given that the

views of the Crown and the complainant will often align, there is a risk of unnecessary expense and delay in permitting the complainant to make submissions at every evidentiary hearing (see I.F., Attorney General of Alberta, at para. 26). With that said, judges retain the discretion to grant complainants standing as an exercise of their trial management powers (*J.J.*, at para. 105). Where the complainant and the Crown differ on the issue of admissibility, it may be particularly important to ensure that the complainant has an opportunity to be heard (see *J.J.*, at para. 178). Likewise, where a Crown application is being heard at the same time as a s. 276 application, the complainant should be granted standing for both applications.

- 54 The complainant is not compellable at the Stage Two hearing. As explained in *Darrach*, some of the purposes of this regime would be undermined if complainants were compelled to be examined on their sexual history before the admissibility of that evidence was determined (para. 68). Such a procedure would unnecessarily harm a complainant's dignity and privacy interests and deter the reporting of crimes of sexual violence (*ibid.*).
- 55 As a result, it is not necessary for a personal affidavit from the complainant to be filed. Even so, the Crown still has the burden of providing a sufficient evidentiary basis on which the judge can determine the admissibility of the sexual history evidence. Evidence can be introduced through affidavit or *viva voce* testimony from another individual with personal knowledge of a complainant's sexual history, or through other means, such as preliminary inquiry transcripts or sworn police statements (*R. v. Morris*, 2024 ONSC 4155, 97 C.R. (7th) 35, at paras. 73-74). Although these alternative avenues are available, the absence of a personal affidavit from the complainant will often undermine the judge's ability to assess the relevance and the probative value of the proposed evidence (see *R. v. T.A.H.*, 2019 BCSC 1614, 58 C.R. (7th) 148, at para. 37).
- 56 At the conclusion of the Stage Two hearing, the judge must provide reasons for their admissibility determination (see s. 278.94(4); *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 10 and 14). If some or all of the evidence is to be admitted, the judge must explain precisely how the evidence is relevant to an issue at trial and how they assessed the probative value and prejudicial effect of the evidence in light of the factors enumerated under s. 276(3).
- 57 The judge may, either on their own initiative or at the request of either party, revisit this admissibility ruling when there is a material

change in circumstances, such as when a witness's testimony evolves during the course of a trial (*T.W.W.*, at para. 51).

(3) *Additional Considerations*

58 During the aforementioned procedure, trial judges must exercise their power to issue publication bans in a manner that aligns with s. 278.95 of the *Criminal Code*. As under ss. 278.93(3) and 278.94(1), a judge who exercises their common law powers to limit court openness in accordance with this legislative enactment respects the requirements outlined in *Sherman Estate*.

59 Accordingly, the contents of the Crown's application must not be published, transmitted, or broadcast in any way. The same applies to the evidence taken, the information given, and the representations made in a Stage One inquiry and at a Stage Two hearing. The decision of the judge in a Stage One inquiry may be published after consideration of the complainant's right to privacy and the interests of justice. The judge's determination and reasons following a Stage Two hearing should not be published unless some of the evidence is held to be admissible or in circumstances where the judge determines that the reasons should be public after considering the complainant's right to privacy and the interests of justice.

60 Finally, as outlined in *Seaboyer*, if the judge holds that any of the Crown-led sexual history evidence is admissible in a jury trial, a limiting instruction must be given to the jury outlining its permissible and impermissible uses (p. 636).

C. Sexual Inactivity Evidence Is Presumptively Inadmissible

61 As I previously stated, in this case, the Crown concedes that the trial judge erred by admitting, without a *voir dire*, the Crown-led evidence consisting of social media messages that involve explicit sexual conversations. Consequently, the primary question on this appeal is whether the messages referencing the complainant's virginity and the complainant's prior indications of disinterest in a sexual relationship are also presumptively inadmissible under the common law.

62 This question implicitly asks whether this evidence is captured by s. 276 of the *Criminal Code*. The scope of the common law exclusionary rule and of s. 276 should generally be interpreted in a consistent manner given their shared purposes and the fact that the admissibility of Crown-led sexual history evidence is regulated both by s. 276(1) and by the

common law. This Court has previously treated the common law exclusionary rule as equivalent to the s. 276 regime in this respect (see *J.J.*, at para. 74; *Barton*, at para. 80; *Goldfinch*, at para. 75).

⁶³ The question of whether this evidence engages s. 276 and the common law exclusionary rule is reviewable on a standard of correctness (*T.W.W.*, at para. 22).

⁶⁴ In the following analysis, I will refer to evidence about the complainant’s virginity and the complainant’s prior indications of disinterest in a sexual relationship as evidence of “sexual inactivity”. Sexual inactivity evidence can be understood as encompassing evidence that the complainant has not previously engaged in, or prefers not to engage in, any sexual activity, certain types of sexual activity, or sexual activity under particular circumstances (see S. Mazzuca, “Regulating the Admissibility & Use of Sexual Inactivity Evidence in Criminal Cases” (2022), 70 *C.L.Q.* 161, at p. 165). As I will explain, while there are relevant purposes for which they can be used, all of these types of evidence form part of a complainant’s sexual history and should thus be treated as presumptively inadmissible.

(1) Sexual Inactivity Evidence Engages Section 276 and the Common Law Exclusionary Rule

⁶⁵ The text of s. 276 provides an initial basis for holding that sexual inactivity evidence engages the screening regime. While it is true that the statutory provisions refer to “sexual activity”, Parliament has recently clarified the meaning of the term in s. 276(4), stating that it “includes any communication made for a sexual purpose or whose content is of a sexual nature”. In my view, this provision contemplates that all evidence of a complainant’s sexual history, including sexual inactivity evidence, will be captured. By encompassing communications whose “content is of a sexual nature”, this definition includes *any* communication from the complainant in which sex is a topic of conversation. This expansive definition is inclusive of prior communications in which a complainant discusses their virginity or indicates their sexual disinterest. If Parliament wanted to limit s. 276(4) to communications about explicit sexual activity in which the complainant indicates sexual interest, it would have limited the definition to communications “made for a sexual purpose”. However, Parliament chose broader language. This language should be given effect in light of the presumption that Parliament “does not speak in vain” (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 89).

- ⁶⁶ To the extent that the plain meaning of other parts of s. 276 suggests that sexual inactivity evidence is excluded from the screening regime, it is important to remember that the text of the provision does not end the interpretive inquiry. As with any exercise of statutory interpretation, the “plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms” (*R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31). This Court has previously resisted an overly rigid reading of the text of s. 276, noting that it must be read in light of the scheme and broader purposes of the regime (*Goldfinch*, at para. 53). When the purposes of s. 276 are examined, it becomes clear that a complainant’s entire sexual history, including evidence of their sexual inactivity, is captured.
- ⁶⁷ The inclusion of sexual inactivity evidence furthers the three purposes behind the s. 276 regime and the analogous common law rules. As discussed, one of these purposes is to eliminate irrelevant and misleading evidence about sexual assault complainants from the fact-finding process. As this Court recently explained in *Kruk*, s. 276 fits within a distinct body of evidentiary rules that has been developed for sexual offence trials to prohibit myths and stereotypes about complainants (para. 40). These remedial rules seek to eliminate historically condoned forms of discriminatory legal reasoning that “conceptualize an idealized victim and her features and actions before, during, and after an assault” (para. 37).
- ⁶⁸ Not all myths and stereotypes about sexual assault complainants stem from evidence of their sexual history. The s. 276 regime is therefore only one part of this remedial effort. As I have discussed, twin-myth reasoning was, and remains, the primary target of this regime. Section 276 seeks to eliminate remnants of the common law’s historical view that the complainant’s sexual history could be used as a form of character evidence that invites the trier of fact to infer that, because the complainant was a sexually active woman, (1) she had a propensity to consent and therefore was more likely to have consented to the sexual activity that formed the subject matter of the charge; and (2) she was less worthy of belief. It is now understood that the sexual nature of a complainant’s sexual history is irrelevant to the issue of consent and credibility (see *Osolin*, at p. 670).
- ⁶⁹ The screening of sexual inactivity evidence furthers this objective of eliminating twin-myth reasoning. As a practical matter, one must keep in mind that sexual inactivity evidence is often intrinsically intertwined

with evidence of explicit sexual activity. For example, this Court noted in *R.V.* that, to adduce evidence of sexual inactivity, counsel must often pose questions that risk inviting the complainant to disclose sexual experiences (para. 81). Or, as the case at bar demonstrates, evidence of sexual inactivity can often be bound up with other explicit references to sexual activity to such a degree that distinguishing between the two types of evidence will not be feasible.

70 In addition, as this Court made clear in *Darrach*, the *Criminal Code* “excludes all discriminatory generalizations about a complainant’s disposition to consent or about her credibility based on the sexual nature of her past sexual activity” (para. 34 (emphasis added; emphasis in original deleted)). In other words, the twin myths are not the only myths and stereotypes that can arise from a complainant’s sexual history evidence. For example, while evidence of consensual sexual activity between the complainant and the accused that follows an alleged assault may be relevant to whether the alleged assault occurred, it would be wrong to rely on such evidence to infer necessarily and conclusively that the assault did not occur (see *R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71, at para. 89; see also *Kruk*, at para. 41).

71 This case presents this Court with another form of sexual history evidence that is capable of evoking other myths and stereotypes about sexual assault complainants. Sexual inactivity evidence may evoke inverse twin-myth reasoning. A complainant’s sexual inactivity can be used as a form of character evidence that invites the trier of fact to conclude that, because the complainant has been sexually inactive, (1) they have a propensity to *not* consent and therefore were *less* likely to have consented to the sexual activity that forms the subject matter of the charge; and (2) they are *more* worthy of belief.

72 What makes this form of myth-based reasoning distinctive is that it has the effect of bolstering a complainant’s testimony at the expense of the accused. Consequently, this reasoning is more likely to be evoked by the Crown rather than the defence. Crown counsel at trial did so in this case. During closing submissions, Crown counsel explicitly referred to the complainant’s virginity as a consideration that suggested that Mr. Kinamore’s version of events was implausible (A.R., at p. 262).

73 The fact that inverse twin-myth reasoning serves to bolster a complainant’s testimony and undermine the accused does not affect its permissibility. This reasoning is legally impermissible because it remains grounded in false assumptions about sexual assault complainants. As

stated in *Kruk*, “reliance on stereotypes, being rooted in inequality of treatment, is certainly not just a problem for sexual assault complainants alone. Stereotypical reasoning based in the sort of inequality of treatment at the heart of myths and stereotypes against sexual assault complainants has the potential to affect the testimony of all witnesses in all trials” (para. 54 (emphasis added)).

⁷⁴ Inverse twin-myth reasoning is fundamentally rooted in discriminatory ideas about the “ideal victim” of sexual assaults (Mazzuca, at p. 170). As L’Heureux-Dubé J. explained in *Seaboyer* (dissenting, but not on this point), the categorization of women as virgins or “madonnas” has long influenced police, jurors, and judges to perceive those sexual assault complainants as “ideal” victims and thus worthy of belief (pp. 652-56). These notions of the “ideal victim” have the effect of reinforcing the harmful idea that sexually active complainants who fall outside of this paradigm are not entitled to the law’s protection (see M. Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010), 22 *C.J.W.L.* 397, at p. 414). This Court cannot condone any party evoking myths and stereotypes about sexual assault complainants. Permitting a party to do so would further entrench these discriminatory beliefs in our criminal justice system and, by extension, distort the truth-seeking function of trials.

⁷⁵ Because the screening of sexual inactivity evidence assists in the elimination of myths and stereotypes about sexual assault complainants, the second purpose of these exclusionary rules — protecting an accused’s right to a fair trial — is also furthered. Myths and stereotypes about sexual assault complainants undermine the fairness of a trial by distorting its truth-seeking function (*R. v. Mills*, [1999] 3 S.C.R. 668, at para. 119; *J.J.*, at para. 162; *Kruk*, at para. 43). When relied on by the Crown, myths and stereotypes risk undermining an accused’s right “not to be convicted except on evidence directly relevant to the charge in question” (*Corbett*, at p. 697). Therefore, trial judges must exclude this evidence as part of the “constitutional imperative” to exclude evidence that would result in an unfair trial for the accused (*R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 24).

⁷⁶ As the Attorneys General of Ontario and Manitoba highlight, the screening of sexual inactivity evidence also facilitates the protection of a complainant’s dignity and privacy interests (I.F., Attorney General of Ontario, at para. 7; I.F., Attorney General of Manitoba, at para. 12). Evidence about whether a complainant has ever had sex before, has engaged

in certain sexual acts, or has certain sexual preferences is invasive, revealing deeply personal information (*Kruk*, at para. 55). Moreover, when sexual inactivity evidence is adduced by the Crown, its admission may increase the likelihood that the accused will be able to bring a successful s. 276 application of their own. This dynamic is exemplified by *R. v. Martin*, 2013 ONSC 7210, where the complainant cited the fact that she never had sex when menstruating as a reason for not consenting (para. 15). To rebut her assertion, the accused successfully brought a s. 276 application to introduce evidence that he previously had sex with the complainant while she was menstruating (*R. v. Martin*, 2013 ONSC 6901, at para. 20). While this type of sexual inactivity evidence can be used for relevant purposes, it also has the potential to derail the fact-finding process by turning the trial into an examination of whether the complainant's asserted sexual preferences are true. Screening this evidence ensures that it has sufficient probative value to outweigh its inevitable prejudice to the complainant's dignity and privacy.

⁷⁷ Accordingly, existing appellate authority that has excluded evidence of a complainant's virginity from the scope of s. 276 based on a "plain reading" of the provision and a narrow understanding of its purpose must be rejected (see *R. v. Brothers*, (1995), 169 A.R. 122 (C.A.), at paras. 22-25; see also *R. v. Pittman*, (2005), 198 C.C.C. (3d) 308 (Ont. C.A.), at para. 33, *aff'd* on another point 2006 SCC 9, [2006] 1 S.C.R. 381).

⁷⁸ The Crown submits that this Court's decision in *Langan* should be interpreted as holding that a complainant's prior communications indicating sexual disinterest in the accused are not captured by s. 276 or the analogous common law rules (*R.F.*, at paras. 100-102). In that case, this Court adopted the dissenting reasons of Bauman C.J.B.C. One of the three issues in that case was whether the trial judge erred in failing to hold a *voir dire* with respect to Crown-led evidence consisting of text messages exchanged between the parties prior to the sexual assault. Within these messages was a single prospective statement by the complainant that she was not going to have sex with the accused on the weekend when the assault occurred. Bauman C.J.B.C. held that this statement did not engage the common law exclusionary rule regarding sexual history evidence (para. 125).

⁷⁹ I would note that, at the time of Mr. Langan's trial, Parliament had not yet enacted s. 276(4) to clarify the application of the statutory regime to communications. This Court's decision in *Langan* should therefore be read in light of the statutory framework that applied at the time of the

trial in that case. As discussed, s. 276(4) clarifies that the regime captures “any communication made for a sexual purpose or whose content is of a sexual nature”. In enacting this provision, Parliament eliminated any ambiguity that previously existed regarding whether a complainant’s sexual communications were captured by the screening regime. It is appropriate to recognize that the common law on this point has since evolved in a manner consistent with the legislative change. As I have said, the common law and statutory regimes must be aligned to ensure the orderly administration of justice.

- 80 That being said, in *Langan*, this Court recognized the importance of reading a trial judge’s decision functionally and contextually during appellate review. As explained in *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 78, in *Langan* this Court adopted Bauman C.J.B.C.’s conclusion that the trial judge’s ambiguous use of certain text messages should not be viewed as erroneous without clear indications that there was an error. This functional reading gives effect to the presumption that trial judges correctly apply the law (*G.F.*, at para. 74).

(2) *Permissible Uses of Sexual Inactivity Evidence*

- 81 In holding that sexual inactivity evidence is presumptively inadmissible, I reiterate that this evidence is not categorically excluded. The presumption only functions to eliminate discriminatory lines of reasoning. As Professor Lisa Dufraimont emphasizes, “[b]road conclusions that particular forms of evidence are irrelevant should be avoided.... [M]yths and stereotypes about sexual assault are properly understood as prohibited inferences” (“Myth, Inference and Evidence in Sexual Assault Trials” (2019), 44 *Queen’s L.J.* 316, at p. 346).
- 82 As this Court made clear in *Darrach*, “[t]he phrase ‘by reason of the sexual nature of that activity’ in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited” (para. 35 (emphasis in original)). A similar principle applies to evidence of sexual inactivity. Some features of sexual inactivity evidence may be relevant and be properly used; it is only inferences rooted in inverse twin-myth reasoning or analogous forms of discriminatory reasoning that are prohibited.
- 83 *R.V.* provides a helpful example of how sexual inactivity evidence can be introduced for permissible purposes. In that case, the Crown adduced medical evidence to show that the complainant became pregnant

around the time of the alleged assault. This evidence was introduced to support the complainant's testimony that the assault was the cause of the pregnancy and to rebut the accused's assertion that no sexual activity took place. However, because the complainant terminated the pregnancy, a DNA paternity test was impossible, creating an evidentiary gap as to who caused the pregnancy during the relevant time. To assist in filling this gap, the complainant testified that at the time of the assault she was a virgin.

- 84 This virginity evidence was therefore used to prove that the accused committed an element of the *actus reus* (sexual touching) by inviting the trier of fact to infer that only the accused could be the cause of the pregnancy. The sexual inactivity evidence was not introduced for inverse twin-myth reasoning. The Crown did not argue that, because the complainant was a virgin, she had a propensity to not consent and therefore was less likely to have consented to the sexual activity in question or was otherwise more worthy of belief. The relevant feature of the sexual inactivity evidence was the timing of the sexual inactivity.
- 85 Sexual inactivity evidence can also be used for other admissible purposes. In some circumstances, a complainant's prior indications of sexual disinterest in the accused that are expressed near the time of the alleged assault can be admissible under the hearsay exception for statements of present intention and can be used as circumstantial evidence relevant to the issue of consent. The same principle applies to a complainant's prior indications of sexual interest (see *R. v. Reimer*, 2024 ONCA 519, 173 O.R. (3d) 412, at paras. 75-83; see also *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 29). Similar reasoning may also render a complainant's prior indications of sexual interest or disinterest admissible as circumstantial evidence of their capacity to consent, including their ability to appreciate the four criteria enumerated in *G.F.*, at para. 57 (see also *R. v. Garciacruz*, 2015 ONCA 27, 320 C.C.C. (3d) 414, at para. 69). In each of these circumstances, the relevant feature of the sexual history evidence is the statement of intention, not its sexual nature or lack thereof. With that said, the admissibility of this type of evidence must be handled with care, and it should never be given conclusive weight. Trial judges must remain attentive to the probative value of the evidence and to its potentially elevated prejudicial effect. The probative force of prior statements of intention will depend on, among other things, their degree of specificity and their temporal proximity to the alleged assault. As this Court noted in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, a statement of intention can support an inference that the declarant followed

through on the intended course of action only if it is “reasonable on the evidence for the trier of fact to infer that the declarant did so” (para. 169).

- 86 The permissible purposes for which sexual inactivity evidence can be introduced should be identified with care. As with all other forms of sexual history evidence, it is incumbent on the party seeking to introduce sexual inactivity evidence to identify with precision how the evidence is relevant to a live issue at trial through the use of permissible inferences. When the evidence is relevant to context or credibility, the evidence must go beyond a “general ability” to undermine or bolster the complainant’s credibility or to add helpful context in order for it to have sufficient probative value to outweigh its inherent prejudicial effect (*T.W.W.*, at para. 27). Accordingly, the evidence “must respond to a specific issue at trial that could not be addressed or resolved in the absence of that evidence” (*ibid.*).

D. A New Trial Is Required

- 87 The social media messages referencing the complainant’s virginity and the complainant’s prior indications of disinterest in a sexual relationship, which were sent months prior to the sexual activity that formed the subject matter of the charge, constituted Crown-led sexual history evidence that is presumptively inadmissible under the common law. The trial judge erred by admitting the messages into evidence without a *voir dire* and then permitting them to be the subject of questioning by Crown and defence counsel. Both parties should have brought their respective applications for a *voir dire* to ensure that the evidence was relevant to a live issue and otherwise admissible.
- 88 The Crown argues that, even if the trial judge erred in failing to hold a *voir dire* with respect to the sexual inactivity evidence, the curative proviso should apply because Mr. Kinamore was not prejudiced by its admission (*R.F.*, at para. 10). In the Crown’s submission, Mr. Kinamore was not prejudiced by the admission of the complainant’s prior indications of sexual disinterest because the evidence was admissible. The Crown argues that the messages, as statements of present intention, were relevant to the issue of consent (*actus reus*) and to Mr. Kinamore’s knowledge of non-consent (*mens rea*) (para. 11) and that those statements were not used for an improper purpose by the trial judge (para. 12). The Crown submits that the evidence about the complainant’s vir-

ginity was also admissible and not used for an impermissible purpose (paras. 114-16).

89 The applicable curative proviso is s. 686(1)(b)(iii) of the *Criminal Code*. As this Court recently discussed in *R. v. Tayo Tompouba*, 2024 SCC 16, this provision generally applies where there is no reasonable possibility that the verdict would have been different in the absence of the error. This occurs in two cases: first, where the error or irregularity in question is minor or harmless, such that it had no impact on the verdict, or second, where the error or irregularity, despite being serious enough to warrant a new trial, caused no substantial wrong or miscarriage of justice because the evidence against the accused is so overwhelming that a trier of fact would inevitably convict (para. 76). In this case, it is alleged that the trial judge’s error was harmless and had no impact on the verdict.

90 The Crown has the onus of proving, on a balance of probabilities, that the legal error was harmless (*Tayo Tompouba*, at para. 90).

91 I do not believe the Crown has met its persuasive burden. The Crown’s argument that the trial judge’s error was harmless because this evidence would have been found to be admissible effectively asks this Court to speculate about which aspects of this evidence would have been admitted and for what purposes. As this Court stated in *Barton*, this would be “both unwise and practically unworkable” (para. 84). When an appeal arises from a judge-alone trial, the Crown must show that the presumptively inadmissible sexual history evidence played no material role in the trial judge’s reasons for convicting the accused in order for such an error to be treated as harmless (*R. v. O’Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485, at paras. 15-19; *R. v. Leaney*, [1989] 2 S.C.R. 393, at pp. 415-16; see also *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 30). In this case, the trial judge’s reasons were replete with references to the presumptively inadmissible evidence.

92 The trial judge found that Mr. Kinamore’s evidence was incapable of raising a reasonable doubt because it was “amorphous in that it changed each time he was confronted with a fact which did not make sense” (para. 10). To support this characterization, the trial judge relied heavily on the presumptively inadmissible social media messages and the *viva voce* evidence about them. For example, one inconsistency relied on by the trial judge related to Mr. Kinamore’s testimony about the complainant sending him photographs. During his examination-in-chief, Mr. Kinamore was questioned about the message exchange where he requested that the complainant send him a picture of her breasts (A.R., at p.

158). This transitioned to Mr. Kinamore suggesting that he and the complainant had sent nude photographs to one another (p. 161). On cross-examination, the Crown brought Mr. Kinamore back to this testimony and asked him whether he knew the definition of child pornography (p. 195). This subsequently prompted Mr. Kinamore to state that the only nude photographs sent were those he sent of himself (*ibid.*).

⁹³ Another example is the trial judge's reliance on Mr. Kinamore's shifting testimony regarding his interpretation of a message from the complainant in which she stated "I will destroy you". In his examination-in-chief, Mr. Kinamore interpreted the complainant's message as sexual (A.R., at p. 151). On cross-examination, Mr. Kinamore explained that during this conversation the two of them were talking about naked wrestling (p. 207). After highlighting the evolving nature of Mr. Kinamore's testimony, the trial judge found his characterization of the message implausible in light of the complainant's various indications of sexual disinterest within the messages (para. 13).

⁹⁴ In sum, the trial judge's assessment of the credibility of Mr. Kinamore and the complainant was inextricably intertwined with the presumptively inadmissible evidence of sexual history. Given the material role of that evidence in the trial judge's reasons for convicting the accused, the Crown has not proven that the evidentiary error was harmless. A new trial must be ordered.

VI. Conclusion

⁹⁵ All parties in the criminal justice system have an obligation to assist in minimizing unnecessary costs and delay, which currently affect sexual offence trials in this country. These reasons have sought to facilitate this objective by resolving some of the uncertainty that has remained about the evidentiary rules governing a complainant's sexual history. First, sexual inactivity evidence is presumptively inadmissible under s. 276 and the common law because it forms part of a complainant's sexual history and can evoke distinct myths and stereotypes that these rules seek to eliminate. Second, save for two modifications, Crown applications are subject to the same substantive admissibility and procedural requirements that apply to defence-led evidence under the s. 276 regime.

⁹⁶ Since these principles were not adhered to in the trial below, I would allow the appeal, quash the conviction, and order a new trial.

Appeal allowed.

2000 SCC 34, 2000 CSC 34
Supreme Court of Canada

Friedmann Equity Developments Inc. v. Final Note Ltd.

2000 CarswellOnt 2458, 2000 CarswellOnt 2459, 2000 CSC 34, 2000 SCC 34,
2000 J.E. 1445, [2000] 1 S.C.R. 842, [2000] S.C.J. No. 37, 134 O.A.C. 280, 188
D.L.R. (4th) 269, 255 N.R. 80, 34 R.P.R. (3d) 159, 48 O.R. (3d) 800 (headnote
only), 48 O.R. (3d) 800, 7 B.L.R. (3d) 153, 98 A.C.W.S. (3d) 85, J.E. 2000-1445

**Friedmann Equity Developments Inc., Appellant v. Dr. Almas Adatia, also known as
Almas Adatia, Mohamed Rajani, Shorim Investments, in Trust, Shorim Investments
Limited, in Trust, Peter Bortoluzzi, Sultan Lalani, in Trust, 808413 Ontario
Inc., Crown Freight Forwarders Ltd., previously known as 808548 Ontario Inc.,
Respondents and Lionel C. Larry and Robins, Appleby & Taub, Respondents**

Gonthier, Major, Bastarache, Binnie, Arbour JJ.

Heard: January 27, 2000

Judgment: July 20, 2000

Docket: 26971

Proceedings: affirming (1998), 112 O.A.C. 253, 20 R.P.R. (3d) 257, 41 O.R. (3d) 712 (Ont. C.A.);
affirming (February 18, 1997), 94-CQ-56721A, 277/96 (Ont. Div. Ct.); reversing (March 29,
1996), 94-CQ-56721 (Ont. Gen. Div.)

Counsel: *Benjamin Zarnett, Carolyn Silver and Julie Rosenthal*, for Appellant.

Robert D. Malen, for Respondents Dr. Almas Adatia, also known as Almas Adatia, Peter
Bortoluzzi, Sultan Lalani, in Trust, 808413 Ontario Inc. and Crown Freight Forwarders Ltd.,
previously known as 808548 Ontario Inc.

Carl Orbach, Q.C., for Respondents Mohamed Rajani, Shorim Investments, in Trust and Shorim
Investments Limited, In Trust.

Valerie A. Edwards, for Respondents Lionel C. Larry and Robins, Appleby & Taub.

Subject: Property; Corporate and Commercial; Contracts

Related Abridgment Classifications

Business associations

IV Powers, rights and liabilities

IV.9 Contracts by corporations

IV.9.c Corporate seal

Commercial law

I Agency

I.7 Relationship between principal and third person

I.7.b Principal's liability to third person

I.7.b.v Where principal undisclosed

Contracts

XV Contracts under seal

Headnote

Agency --- Relationship between principal and third person — Principal's liability to third person — Where principal undisclosed

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors who represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal — Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed — Appeal dismissed — When contract executed under seal, undisclosed principal can neither sue nor be sued on it — Sealed contract rule is distinct from equitable rule, which may enable undisclosed principal to recover on contract when agent refuses to do so — As no direct legal relationship exists between third party and undisclosed principal, there is no corresponding right for third party to sue beneficiary on contract under seal — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it.

Corporations --- Contracts by corporations — Corporate seal — General

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors that represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal — Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed — Appeal dismissed — Sealed contract rule applies equally to individual agents and corporate agents — Corporation has all capacities and powers of natural person, especially in relation to contract law — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it.

Contracts --- Contracts under seal — Execution — Sealing — What constitutes seal

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors that represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal

— Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed — Appeal dismissed — Section 13(1) of Land Registration Reform Act, 1984 rendered corporation's intention to create sealed contract irrelevant — Words "for all purposes" in section make documents transferring interest in land and charges sealed instruments for all purposes, including application of sealed contract rule — Mortgage was in form prescribed under Act and was subject to its provisions — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it — Land Registration Reform Act, 1984, S.O. 1984, c. 32, s. 13(1).

Contracts --- Contracts under seal — Parties

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors that represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal — Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed and argued that sealed contract rule should be abolished — Appeal dismissed — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it — No change in commercial reality occurred to warrant abolition of rule — Plaintiff did not prove rule caused injustice — Abolition of rule could have unwarranted, far-reaching and complex consequences in contract law and property law — Abolition of rule would amount to fundamental reform of common law as opposed to incremental change — Prospective change in law needed to avoid uncertainty and unfairness to parties who acted in accordance with sealed contract rule — Only legislature has power to create prospective change in law.

Mandat --- Relation entre le mandant et une tierce personne — Responsabilité du mandant à l'égard de la tierce partie — Mandants secrets

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Lorsque le contrat est revêtu d'un sceau, le mandant secret ne peut ni poursuivre ni être poursuivi en vertu de celui-ci — Règle du contrat par acte revêtu d'un sceau est distincte de la règle de l'équité, qui pourrait permettre au mandant secret de recouvrir sur la base du contrat lorsque le mandataire refuse de le faire — Puisqu'il

n'existe pas de relation légale directe entre une tierce partie et un mandant secret, il n'y a pas de droit correspondant pour une tierce partie de poursuivre un bénéficiaire sur un contrat revêtu d'un sceau — Demanderesse ne pouvait maintenir une action contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur lui.

Sociétés par actions --- Contrats par les sociétés par actions — Sceau d'une société par actions — En général

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Règle du contrat par acte scellé s'applique également aux mandataires individuels et ceux constitués en sociétés par actions — Société par actions possède toutes les capacités et les pouvoirs d'une personne naturelle, spécialement en relation avec le droit des contrats — Demanderesse ne pouvait maintenir une action contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur la base de ce dernier.

Contrats --- Contrats revêtus d'un sceau — Exécution — Revêtement du sceau — Ce qui constitue un sceau

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Article 13(1) de la Land Registration Reform Act, 1984 a rendu non pertinente l'intention de la société par actions de créer un contrat revêtu d'un sceau — Mots "pour tous les buts" dans l'article font des documents de transfert d'intérêt de terres et des charges, des instruments revêtus d'un sceau pour tous les buts, incluant l'application de la règle du contrat par acte revêtu d'un sceau — Acte d'hypothèque était dans la forme prévue en vertu de la Loi et était assujéti à ses dispositions — Demanderesse ne pouvait maintenir une action

contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur lui — Land Registration Reform Act, 1984, S.O. 1984, c. 32, s. 13(1).

Contrats --- Contrats revêtus d'un sceau — Parties

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Demanderesse ne pouvait maintenir une action contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur la base de ce dernier — Aucun changement dans la réalité commerciale ne s'est produit pour justifier l'abolition de la règle — Demanderesse n'a pas prouvé que la règle causait de l'injustice — Abolition de la règle pourrait avoir des effets incertains, d'une grande portée et complexes en droit des biens et des contrats — Abolition de la règle amènerait une réforme fondamentale de la common law par opposition au changement graduel — Changement éventuel au droit était nécessaire afin d'éviter l'incertitude et l'injustice pour les parties qui ont agi conformément à la règle du contrat revêtu d'un sceau — Seule une législature possède le pouvoir de créer un changement au droit portant effet pour l'avenir.

A corporation held title to property and entered into a mortgage agreement with the plaintiff as an agent on behalf of undisclosed beneficial owners. None of the beneficial owners were parties to the mortgage. The mortgage was signed by an authorized officer of the corporation under its corporate seal. The corporation defaulted on the mortgage and the plaintiff brought an action on the covenant against the beneficial owners. The beneficial owners brought an action against the solicitors who represented them in the transaction.

The beneficial owners and the third party solicitors brought a motion pursuant to R. 21.01(1)(a) of the Ontario *Rules of Civil Procedure* for a determination of the question of whether they were entitled to a dismissal of the plaintiff's action based on the rule that an undisclosed principal cannot be sued by a third party on an indenture executed by an agent under seal.

The General Division dismissed the motion. The Divisional Court granted an appeal and dismissed the action based on the sealed contract rule. The Court of Appeal affirmed the Divisional Court's judgment. The plaintiff appealed and argued that the sealed contract rule should be abolished.

Held: The appeal was dismissed.

As a general rule, an undisclosed principal may sue or be sued on a simple contract entered into on his or her behalf by an agent. However, when a contract is executed under seal, the undisclosed principal can neither sue nor be sued upon it since only parties to a sealed instrument may have

obligations and rights under it. The rule operates within a system of rules relating to sealed instruments, which are derived from the fact that a sealed instrument is enforceable by virtue of the form of the instrument itself.

The common law sealed contract rule is distinct from the equitable rule, which may enable an undisclosed principal to recover on a contract made for his or her benefit when the agent refuses to do so. The rights enforced under the equitable principle are the rights of the agent. There is no direct legal relationship created between the third party and the undisclosed principal. As a result, there is no corresponding right for a third party to sue a beneficiary on a contract under seal.

The sealed contract rule applies equally to individual agents and corporate agents. To make an exception to the sealed contract rule for corporations that act as agents for undisclosed principals would be contrary both to other court decisions and to the law of business corporations in general. Since a corporation has all the capacities and powers of a natural person, especially in relation to the law of contract, there is no basis upon which to treat corporations acting as agents for undisclosed principals differently than individual agents.

At common law, the affixing of a corporate seal may not in all cases be evidence of an intention to create a sealed contract within the meaning of the sealed contract rule. The intention of the corporation to create a sealed instrument must be evident from the construction of the instrument and the circumstances surrounding its creation before the rule will be applied.

Section 13(1) of the *Land Registration Reform Act, 1984* renders the intention to create a sealed instrument irrelevant. The words "for all purposes" have the effect of making all documents transferring an interest in land, and charges or discharges, sealed instruments for all purposes, including the application of the sealed contract rule. The purpose of the subsection is to preserve the common law substantive consequences associated with traditional forms of conveyancing and mortgages. The mortgage at issue was in the form prescribed under the Act and was subject to its provisions.

A change in the common law must be necessary to keep the common law in step with society, to clarify a legal principle, or to resolve an inconsistency. The change should be incremental, and its consequences must be capable of assessment.

For a court to make an incremental change in the common law, there must be evidence of a change in commercial reality that makes the change necessary. There is no evidence that there has been any change in commercial reality which would warrant the abolition of the sealed contract rule. The plaintiff did not prove that the rule has caused injustice.

To make a change could have unwarranted, far-reaching and complex consequences both in the law of contract and in the law of property. To abolish one of the rules within the system of sealed instrument rules because there no longer appears to be a rationale for it would necessarily call into question the validity of the other rules. The abolition of the sealed contract rule would amount to a fundamental reform of the common law rather than an incremental change. It would create great uncertainty both in commercial relations and in the law itself.

The abolition of the sealed contract rule would have the unfair result of creating uncertainty for those who had relied on the rule in executing their contracts. To avoid uncertainty and unfairness to

parties who have structured their commercial relationships in accordance with the sealed contract rule, any change to the law should operate prospectively. Only the legislature has the power to create a prospective change in the law.

The only parties to the mortgage were the plaintiff and the corporation. Since only the parties to an instrument under seal may be sued upon it, the plaintiff could not maintain an action on the covenant in the mortgage against the beneficial owners.

Une société par actions détenait un titre de propriété et a conclu un acte hypothécaire avec la demanderesse en tant que mandataire secret pour les propriétaires bénéficiaires. Aucun des propriétaires bénéficiaires n'était partie à l'acte hypothécaire. L'acte hypothécaire a été signé par un représentant dûment autorisé de la société par actions sous le sceau de cette dernière. La société par actions a manqué à ses obligations prévues à l'acte d'hypothèque et la demanderesse a entrepris des procédures contre les propriétaires bénéficiaires sur l'engagement. Les propriétaires bénéficiaires ont pris action contre les avocats qui les ont représentés lors de la transaction.

Les propriétaires bénéficiaires de même que les avocats tierces parties ont présenté une requête en vertu de la règle 21.01(1)(a) des *Règles de procédure civile* de l'Ontario pour une détermination sur la question de savoir s'ils avaient droit au rejet de l'action de la demanderesse sur la base de la règle à l'effet qu'un mandant secret ne peut être poursuivi par une tierce partie sur un acte conclu par un mandataire et revêtu d'un sceau.

La Division générale a rejeté la requête. La Cour divisionnaire a accueilli le pourvoi et a rejeté l'action en vertu de la règle du contrat revêtu d'un sceau. La Cour d'appel a confirmé le jugement de la Cour divisionnaire. La demanderesse a formé un pourvoi et a argumenté que la règle du contrat revêtu d'un sceau devait être abolie.

Arrêt: Le pourvoi a été rejeté.

Règle générale, un mandant secret peut poursuivre ou être poursuivi sur un simple contrat conclu en son nom par un mandataire. Toutefois, lorsqu'un contrat revêtu d'un sceau est exécuté, le mandant secret ne peut ni poursuivre ni être poursuivi sur la base de celui-ci puisque seules les parties à l'instrument revêtu d'un sceau peuvent y retrouver des obligations et des droits. La règle s'opère à l'intérieur d'un système de règles concernant des instruments revêtus d'un sceau qui sont dérivés du fait qu'un instrument est exécutoire en vertu de la forme même de cet instrument.

La règle de common law du contrat revêtu d'un sceau est distincte de la règle d'équité qui pourrait permettre à un mandant secret de réclamer sur un contrat fait à son avantage lorsque le mandataire refuse de le faire. Les droits imposés en vertu du principe d'équité sont les droits du mandataire. Il n'y a pas de relation légale directe créée entre la tierce partie et le mandant secret. Comme résultat, il n'y a pas de droit correspondant pour une tierce partie de poursuivre un bénéficiaire sur un contrat revêtu d'un sceau.

La règle du contrat revêtu d'un sceau s'applique également aux mandataires individuels et ceux constitués en sociétés par actions. Faire une exception à la règle du contrat revêtu d'un sceau pour les sociétés par actions qui agissent comme mandataires pour des mandants secrets serait contraire tant aux autres décisions des tribunaux qu'à la législation des affaires des sociétés par actions en général. Puisqu'une société par actions possède toutes les capacités et pouvoirs d'une

personne naturelle, spécialement en relation avec le droit des contrats, il n'y a pas de raison de traiter différemment les sociétés par actions des individus agissant comme mandataires pour des mandants secrets.

En common law, le revêtement d'un sceau de la société par actions peut ne pas être dans tous les cas une preuve de l'intention de créer un contrat au sens de la règle du contrat revêtu d'un sceau. L'intention de la société par actions de créer un instrument revêtu d'un sceau doit être évidente de par la construction de l'instrument et des circonstances entourant sa création avant que la règle ne soit appliquée.

L'article 13(1) de la *Land Registration Reform Act, 1984* rend l'intention de créer un instrument revêtu d'un sceau non pertinente. Les mots "pour tous les buts" font des documents de transfert d'un intérêt dans des terres, et de charges ou de règlements, des instruments revêtus d'un sceau pour tous les buts, incluant l'application de la règle du contrat par acte scellé. Le but de la sous-section est de préserver les conséquences substantielles de la common law associées aux formes traditionnelles d'actes de cession et d'hypothèque. L'acte d'hypothèque en question était dans la forme prévue en vertu de la Loi et était sujette à ses dispositions.

Un changement de la common law doit être nécessaire pour garder la common law en ligne avec la société, pour clarifier un principe légal, ou pour résoudre une incohérence. Le changement devrait être progressif, et ses conséquences doivent être susceptible d'évaluation.

Pour qu'un tribunal procède à un changement progressif de la common law, il doit y avoir preuve d'un changement dans la réalité commerciale qui rend ce changement nécessaire. Il n'y a pas de preuve de changement dans la réalité commerciale qui justifierait l'abolition de la règle du contrat revêtu d'un sceau. La demanderesse n'a pas prouvé que la règle a causé une injustice.

Procéder à un changement pourrait avoir des effets incertains, d'une grande portée et complexes au droit des biens et des contrats. L'abolition de l'une des règles au sein du système des règles des instruments revêtus d'un sceau, parce qu'il ne semble plus y avoir de raisonnement, amènerait nécessairement la question de la validité des autres règles. L'abolition de la règle du contrat revêtu d'un sceau représenterait une réforme fondamentale de la common law plutôt qu'un changement progressif. Ceci créerait une grande incertitude tant dans les relations commerciales qu'en droit.

L'abolition de la règle du contrat revêtu d'un sceau aurait le résultat injuste de créer de l'incertitude pour ceux qui s'étaient fiés sur la règle dans l'exécution de leurs contrats. Afin d'éviter l'incertitude et l'injustice aux parties qui ont structuré leurs relations commerciales conformément avec la règle du contrat revêtu d'un sceau, tout changement au droit devrait s'opérer pour l'avenir. Seule l'instance législative possède le pouvoir de créer un changement pour le futur dans le droit.

Les seules parties à l'acte d'hypothèque étaient la demanderesse et la société par actions. Puisque seules les parties à un instrument revêtu d'un sceau peuvent être poursuivies, la demanderesse ne pouvait maintenir une action hypothécaire contre les propriétaires bénéficiaires.

Table of Authorities

Cases considered by/Jurisprudence citée par Bastarache J.:

Alton Renaissance I v. Talamanca Management Ltd. (1996), 27 B.L.R. (2d) 307, 88 O.A.C. 41, 3 C.P.C. (4th) 229 (Ont. Div. Ct.) — considered

corporation to create a sealed instrument must be evident from the construction of the instrument itself and the circumstances surrounding its creation before the rule will be applied. The intention to create or not to create a sealed instrument will not be relevant if a statutory provision has the effect of deeming the instrument to have all of the effects of an instrument under seal.

VI. Should the Sealed Contract Rule Be Abolished?

40 As is evident from the foregoing analysis, the internal inconsistencies of the sealed contract rule and the inconsistencies in its application are not as glaring as the appellant has argued. However, these inconsistencies are not the only grounds upon which it has based its claim that the sealed contract rule should be abolished. The appellant also asks that this Court abolish the rule because it lacks a present principled justification because the rule is no longer applicable in some other jurisdictions, and because of the force of criticism by academics and some courts.

41 To support its claim that the rule has no present principled justification, the appellant cites the following statement of Baron Martin in *Chesterfield & Midland Silkstone Colliery Co. v. Hawkins* (1865), 3 H. & C. 678, 159 E.R. 698 (Eng. Q.B.), at p. 703:

[The sealed contract] rule is one which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed established rule to be acted upon and only discussed as regards its application...

The appellant also refers to Laskin J.A.'s invitation to this Court to abolish the rule in *Zamikoff v. Lundy, supra*. The appellant submits that some academics have criticized the rule as "anomalous" and as taking the doctrine of privity to "extreme lengths", while others see no particular reason why the rule should continue to exist: see, e.g., S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 268 (n. 40); G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 197; W. A. Seavy "The Rationale of Agency" (1920), 29 *Yale L.J.* 859, at p. 880. The appellant submits that, in response to these criticisms, the abolition of the sealed contract rule is appropriate.

42 Before examining whether the criticisms raised above merit the abolition of the sealed contract rule, it is necessary to understand the principles which govern judicial reform of the common law. In the past, this Court has considered the conditions which must be present to effect a change in the common law in several cases: see, e.g., *R. v. Vetrovec*, [1982] 1 S.C.R. 811 (S.C.C.); *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.); *R. v. Jobidon*, [1991] 2 S.C.R. 714 (S.C.C.); *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.); *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.); *R. v. Robinson*, [1996] 1 S.C.R. 683 (S.C.C.); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.). From these cases, some general principles have emerged. A change in the common law must be necessary to keep the common law in step with the evolution of society (see, e.g., *Salituro*, at p. 670; *Bow Valley*, at para. 93), to clarify a legal principle (see *Vetrovec*, at p. 819), or to resolve an inconsistency (see *Jobidon*, at p. 733). In addition, the change should be incremental, and its consequences must be capable of assessment.

DATE: 20191218

SUPERIOR COURT OF JUSTICE

HEARD: October 18, 2019

Pursuant to s. 278.95(1)(a) and (b) of the *Criminal Code*, the identity of the complainant, the contents of the application record, and the evidence taken and submissions at the hearing of this matter may not be published. Pursuant to s. 278.95(1)(c) of the *Criminal Code* this Ruling may be published in a legal publication or report (online or print).

[1] The defendants in this action are charged with a variety of offences. These include trafficking in persons, contrary to s. 279.01 of the *Criminal Code*, receiving a material benefit from trafficking, contrary to s. 279.02, advertising sexual services, contrary to s.

- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[19] At stage two, if a court determines that the criteria under the first stage have been met, the court is required to consider whether the evidence is admissible taking into account the following criteria:

- (a) the interests of justice including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge of justice considers relevant.

[20] In the present case, due to time constraints, counsel made argument on both the stage one and stage two analysis. It was agreed that I would then deliver my Reasons dealing with the argument on both stage one and stage two issues. No evidence was called by any of the parties on the *voir dire*.

Is the evidence admissible that the complainant has worked previously in the sex trade?

[21] At paragraph 54 of the applicants' factum it asserts that,

Without permitting the Applicants to put forward evidence to the contrary and to question the complainant on her engagement in the sex trade prior to meeting the Applicants and independently while also working with the Applicants, would put before the courts a skewed interpretation of the nature of the relationship between the complainant and the Applicants.

[22] Both the Crown and the complainant take the position that the complainant's prior sex trade work is not relevant to what took place between the complainant and the

defendants. I agree with this submission. The applicants' position appears to be that because the complainant was already a sex trade worker, she was less likely to be coerced or exploited to perform the specific sex trade work that forms the basis of the charges before the court. In my view, this falls into one of the twin myths set out in s. 276(1) which states that evidence that the complainant has engaged in some other sexual activity is not admissible to support an inference that, by reasons of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or is less worthy of belief. At para. 1 in the *Barton* decision, the Supreme Court notes that we live in a time where myths and sexual violence against women — particularly indigenous women and sex workers are tragically common.

- [23] The fact that the complainant was a sex trade worker and was addicted to drugs previously does not have any relevance to the charges faced by the accused. I have therefore concluded that this proposed area of cross-examination is not relevant to an issue at trial and is therefore inadmissible without any stage two analysis.
- [24] I reach the same conclusion for the same reasons with respect to items (b) and (c) of the proposed areas for cross-examination.

Should the defendants be entitled to cross-examine the complainant about her previously posted ads on backpage.com and the defendants' request to introduce previous ads posted by the complainant unrelated to her relationship with the defendants?

- [25] On the charge under s. 286.4 of the *Criminal Code*, the Crown must prove that the defendants knowingly advertised and offered to provide sexual services for consideration. The defendants' position is that the complainant could have posted the backpage.com advertisements which are the subject matter of the allegations against the defendants. They seek to rely on prior ads that the complainant previously posted on the backpage.com website.
- [26] During argument, the Crown advised that it would agree that the photographs and wording used in the advertisements which are the subject matter of the charge were provided to the defendants by the complainant. They will also agree to the fact that the complainant knew how to post advertisements on the internet.
- [27] In light of the Crown's position, I am of the view that the proposed cross-examination is not relevant. The fact that the complainant may have posted ads in the past adds nothing to the question of who was responsible for posting ads during the time it is alleged that the complainant was working for the defendants. I would note, however, that this issue can be re-visited in the event that the complainant in her evidence makes any suggestion that she was not aware of how to post an ad on the internet. This decision is without prejudice to the right of the defendants to cross-examine the complainant about her knowledge of how to post an ad on the internet.

Can the defendants cross-examine the complainant about her work in the past with agencies and/or independent work?

- [28] This proposed area of cross-examination once again appears to rely on the proposition that the complainant is more likely to have consensually worked for the defendants based on her prior work in the sex trade. This proposed area of examination would therefore appear to violate one of the twin myths which is that the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge based on her prior history of sexual activity. For this reason, I conclude that this evidence is not relevant to an issue at trial and therefore does not require any stage two analysis.
- [29] Similarly, there will not appear to be any relevance to the issue of how the complainant split the money during her previous work experiences and whether she could make more money independently. I also do not see any relevance to the issue of whether the complainant was open with her family about her work in the sex trade.

Should the defendants be able to cross-examine the complainant about her meeting with D. and her arrangements to work with D.?

- [30] The Crown during argument conceded that this evidence was relevant to issues before the court. The Crown wishes to introduce evidence about D. as the meeting with D. is interwoven into the evidence as to how the complainant came to know the defendant A.M. The complainant acknowledges that the discussion at this meeting might be relevant but argues that the evidence about the complainant's working in the sex trade at the time should be excluded based on a balancing of the factors set out in s. 276(3).
- [31] I agree that the evidence of the meeting with D. and the defendant A.M. is relevant and does not engage the twin myths as set out in s. 276(1). This evidence would be relevant to issues at trial including the complainant's motive for approaching the defendant A.M. as well as the negotiations which took place in relation to the alleged proposal to work for D. and the defendant A.M. These discussions would also appear to be relevant to the allegation that the complainant was coerced into working with either D. and/or the defendant A.M.
- [32] I am further satisfied that in determining whether the evidence is properly admissible under the stage two analysis and the balancing of factors under s. 276(3), the balance favours the admission of this evidence at trial. To deny the defence the right to cross-examine on the discussions which took place at the commencement of the relationship would significantly impair the right of the accused to make a full answer and defence. It also appears there is reason to believe the evidence will assist in arriving at a just determination in this case. As this case is not being tried by a jury, there is no basis to believe that the evidence may unduly allow sentiments of prejudice, sympathy or hostility in a jury. With respect to the potential prejudice of the complainant's personal dignity and right of privacy, I have concluded that this potential prejudice has been minimized given that the focus of this evidence will be limited to the circumstances surrounding the discussion with the complainant at the beginning of the relationship. The evidence will not extend to the complainant's previous work in the sex trade.

- [33] Both the Crown and the defence, will, therefore, be entitled to canvass evidence with respect to the initial meeting during the course of the evidence at trial.
- [34] During argument on the Application, the complainant asked that if evidence of any discussions with D. is permitted, that a pseudonym for D. be used and that his name not be referred to in the evidence. This request is based on personal security concerns of the complainant. During the course of argument, both the defence and the Crown agreed that at trial, D. will be referred to by a pseudonym without prejudice to the right of any party to call him as a witness in which event his proper name would become known.

Can the complainant be examined about the independent work she did during the time period of the allegations?

- [35] The Crown concedes that the independent sex trade work the complainant engaged in during the time of the allegations is relevant. The complainant does not agree with the Crown's position in this regard. The complainant takes the position that whether the complainant was working independently as a sex trade worker during the time frame of the allegations, cannot, on its own, have any bearing on whether the complainant was likely to have consented to performing commercial sexual activity at the behest of the defendants in an exploitive or coercive manner.
- [36] I have concluded that this evidence is relevant and does not engage one of the twin myths. The fact that the complainant left the defendants during the time period of the allegations and subsequently returned to work for the defendants is relevant to the question of whether the complainant's work for the defendants was as a result of their alleged coercive or exploitive behaviour. Depending on the evidence adduced at trial, the evidence of the complainant about her independent work during the time of the allegations may have the potential to weaken the Crown's case that the complainant was exploited in the alleged employment by the defendants.
- [37] In considering the factors set out in s. 276(3) I have concluded that the interests of justice, including the right of the accused to make a full answer and defence is engaged and there is a reasonable prospect that this evidence will assist in arriving at a just determination in the case. With respect to the potential prejudice to the complainant's personal dignity and right of privacy, the narrow focus for this evidence should minimize that potential prejudice. In addition, I agree with the Crown that questions in this area ought to be very general in terms of the type and amount of work done by the complainant in this time period. There is no need to go into the details of the sexual activities performed, and in fact, during their argument, the defence indicated they had no intention to delve into these types of details. I therefore conclude that this area of examination and cross-examination is admissible pursuant to s. 276.

Should the defendants be entitled to cross-examine the complainant about her work in the sex trade after the time period of the allegations?

- [38] The Crown position which is adopted by the complainant is that this issue is not relevant.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.M., 2024 ONCA 661

DATE: 20240906

DOCKET: C68920 & C68957

van Rensburg, George and Favreau JJ.A.

DOCKET: C68920

BETWEEN

His Majesty the King

Respondent

and

A.M.

Appellant

DOCKET: C68957

AND BETWEEN

His Majesty the King

Respondent

and

M.P.

Appellant

Jeffery Couse, for the appellant A.M.

Jack Gemmell, for the appellant M.P.

Vallery Bayly, for the respondent

Heard: December 19, 2023

On appeal from the convictions entered by Justice Michael K. McKelvey of the Superior Court of Justice on July 7, 2020, and the sentences imposed on December 17, 2020, with reasons reported at 2020 ONSC 4191 and 2020 ONSC 7919.

s. 276 regime applies to the proceeding in question, the trial judge should raise that issue with the parties at the earliest opportunity and, after giving the parties the opportunity to make submissions, issue a ruling on the matter”: *Barton*, at para. 78. He also noted that, although s. 276(2) applies only to evidence adduced by or on behalf of the accused, trial judges should follow *Seaboyer* to determine the admissibility of Crown-led prior sexual activity evidence in a *voir dire*: *Barton*, at para. 80.

(4) The Section 276 Application Decision⁸

[34] I begin by observing that the trial judge’s decision was one of the first reported decisions to consider a s. 276 application where the accused were not charged with a listed offence. The application was heard in October 2019, a few months after the Supreme Court’s decision in *Barton*. The trial judge was informed that the appellants were bringing the application because counsel had been advised in a judicial pre-trial shortly after the release of *Barton* that they would need to address s. 276.

[35] The parties and the trial judge did not have the benefit of the case law that has since emerged, addressing whether or not s. 276 applies categorically to trials for human trafficking and/or sexual services offences and the factors that would

⁸ The trial judge’s reasons on the s. 276 application are reported at *R. v. A.M.*, 2019 ONSC 7293.

apply on a case-by-case determination of this issue. Defence counsel brought the application on the assumption that s. 276 applied.

[36] The application was heard over the course of two days. The trial judge recognized that he was to use a two-stage approach. First, he had to determine whether the evidence sought to be adduced was capable of being admissible under s. 276(2), and then to the extent that the evidence passed that threshold, to conduct a *voir dire* to determine whether and to what extent to admit the proposed evidence. A.K. was represented by counsel when the matter was first brought before the trial judge. Ultimately the trial judge provided his reasons in respect of both stages in a single set of reasons.

[37] Early in his reasons the trial judge explained briefly why he agreed that the s. 276 application was required. Referring to the test in *Barton* that s. 276 applies to “any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document”, the trial judge reasoned that the listed offence of sexual assault was engaged because the charges “[struck] at the heart of the necessary consent for [A.K.] to engage in the sexual services provided by her at the request of the [appellants]”, and that “[a]s a result, the sexual assault provisions contained in s. 271 of the *Criminal Code* [were] engaged”.

[38] The trial judge identified ten areas for the appellants' proposed cross-examination of A.K.:

- (a) that A.K. had worked previously in the sex trade;
- (b) the details regarding how A.K. entered the sex trade;
- (c) how often/how long A.K. worked in the sex trade;
- (d) that A.K. had previously posted advertisements on Backpage.com (including copies of advertisements she previously posted);
- (e) who A.K. worked with in the past (agency work and independent work);
- (f) what the money split was during her previous work experiences;
- (g) that A.K. could make more money working independently;
- (h) that A.K. was open with her family about her work for safety reasons;
- (i) the meeting with Mr. X and arrangements to work with him;
- (j) A.K.'s independent work during the time of the allegations; and
- (k) that A.K. worked as a sex worker after the time frame for the allegations.

[39] As I mentioned earlier, the appellants had touched on a number of these questions in their cross-examination of A.K. at the preliminary inquiry.

[40] The trial judge concluded that the appellants could cross-examine A.K. about her meeting and arrangements to work with Mr. X (area (i)) and her independent work during the time of the allegations (area (j)), but that they were not permitted to cross-examine A.K. in respect of any of the other areas.

[41] First, the trial judge held that A.K.'s previous work in the sex trade (areas (a), (b) and (c)) was not relevant. He reasoned that the appellants sought to adduce this evidence to suggest that, because A.K. was already a sex worker, she was less likely to be coerced or exploited to perform the specific sex work forming the basis of the charges. According to the trial judge, this fell into one of the twin myths set out in s. 276(1). He stated that "[t]he fact that [A.K.] was a sex trade worker and was addicted to drugs previously does not have any relevance to the charges faced by the accused". He concluded that this proposed area of cross-examination was not relevant to an issue at trial and was therefore inadmissible, with no need for any stage two analysis.

[42] Second, the trial judge concluded that the appellants could not cross-examine A.K. on the advertisements she had previously posted on Backpage.com or introduce those ads into evidence (area (d)). The trial judge noted that the Crown had advised that it would agree that A.K. knew how to post advertisements on the Internet. He thus reasoned that the proposed cross-examination was not relevant because the fact that A.K. posted advertisements in the past added nothing to the question of who posted ads while she was allegedly working for the appellants.

[43] Third, the trial judge held that the appellants could not cross-examine A.K. about who she worked for in the past (area (e)), how she split money during those experiences (area (f)), whether she could make more money working independently (area (g)), and whether she was open with her family about her work

in the sex trade (area (h)). He reasoned that this evidence was not relevant and, with respect to the evidence about past work with agencies and independent work, it “appear[ed] to violate one of the twin myths which is that the complainant [was] more likely to have consented to the sexual activity that form[ed] the subject matter of the charge based on her prior history of sexual activity”.

[44] Fourth, the trial judge held that A.K.’s work in the sex trade after the time period of the allegations was not relevant (area (k)), and he was of the view that it also engaged the myth that the complainant was more likely to have consented to the sexual activity forming the subject matter of the charge because of her subsequent sexual activity. He concluded that the evidence was not relevant to an issue at trial and was not properly admissible, and accordingly that no stage two analysis was required.

[45] The trial judge held that the appellants could cross-examine A.K. about her meeting and arrangements to work with Mr. X (area (i)) and her independent work during the time of the allegations (area (j)). He reasoned that this evidence was relevant to the issues at trial and that to deny the appellants the right to cross-examine A.K. on this evidence would significantly impair their right to make full answer and defence. The trial judge explained that this evidence did not engage the twin myths, and that its narrow focus minimized the potential prejudice to A.K.

[46] Finally, the trial judge observed that he would not permit the appellants to cross-examine A.K. about inconsistencies in her evidence concerning when she started working in the sex trade since, in his view, the inconsistencies were minor, of trifling significance, and related to a period well before the alleged offences.

[47] The trial judge accordingly granted the application in part but noted that his decision was without prejudice to the appellants renewing their application based on additional evidence arising at trial. The transcript of A.K.'s preliminary inquiry was redacted to comply with the trial judge's s. 276 ruling. The appellants did not renew their application.

D. THE TRIAL AND THE CONVICTIONS

[48] The trial judge convicted the appellants of receiving a material benefit from A.K.'s sexual services, procuring (by exercising influence over her movements for the purpose of facilitating obtaining sexual services for consideration), and advertising A.K.'s sexual services. A.M. was also convicted of trafficking MDMA. The appellants were acquitted of human trafficking, receiving a material benefit from human trafficking, and trafficking cocaine and cannabis. M.P. was also acquitted of trafficking MDMA, and A.M. was acquitted of uttering threats and assault.

[49] The trial judge noted that there were serious discrepancies between A.K.'s testimony at trial and her original police statement and preliminary inquiry

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.M., 2024 ONCA 661

DATE: 20240906

DOCKET: C68920 & C68957

van Rensburg, George and Favreau JJ.A.

DOCKET: C68920

BETWEEN

His Majesty the King

Respondent

and

A.M.

Appellant

DOCKET: C68957

AND BETWEEN

His Majesty the King

Respondent

and

M.P.

Appellant

Jeffery Couse, for the appellant A.M.

Jack Gemmell, for the appellant M.P.

Vallery Bayly, for the respondent

Heard: December 19, 2023

On appeal from the convictions entered by Justice Michael K. McKelvey of the Superior Court of Justice on July 7, 2020, and the sentences imposed on December 17, 2020, with reasons reported at 2020 ONSC 4191 and 2020 ONSC 7919.

considered as being “in respect of” a listed offence, stating that the question is whether any of the charged offences have “some connection to” a listed offence, and “whether, in substance, a listed offence is implicated in the proceeding”: at paras. 75-76. The post-*Barton* case law at the trial level in Ontario is divided. Some decisions have taken a categorical approach and held that s. 276 applies whenever an accused is charged with a sexual services or human trafficking offence, as these offences invariably have “some connection” to a listed offence. Other decisions have declined to apply s. 276 after undertaking a fact-specific analysis to determine whether there was “some connection” between the charged offences and a listed offence.

[6] For the reasons that follow, I have concluded that s. 276 does not apply categorically to all proceedings where the accused is charged with a human trafficking or sexual services offence, but not with a listed offence, and that the application of s. 276 to such proceedings must be determined on a case-by-case basis having regard to the charges, the evidence the Crown proposes to lead, and whether the defence proposes to elicit or lead evidence of a listed offence, to assess whether a listed offence, although not charged, is implicated in the proceeding.

[7] I have also concluded that the trial judge erred in this case in applying s. 276, in redacting A.K.’s preliminary inquiry evidence, and in precluding the appellants in advance of the trial from pursuing certain lines of questioning in their cross-

examination of A.K. The effect of the s. 276 ruling was to prevent the appellants from eliciting evidence that was material to their defences to the human trafficking and sexual services offences. I would decline the Crown's invitation to apply the curative proviso to uphold the appellants' convictions for the sexual services offences. The appellants were prevented from making full answer and defence to these charges.

[8] This is sufficient to allow the appeals in respect of the appellants' convictions for the sexual services offences, and it is unnecessary to address the three other grounds of appeal they raise in respect of these convictions. Although the appellants seek an acquittal based on one or more of the other grounds of appeal, if they were successful on any of these grounds they would be entitled only to a new trial.

[9] A.M. also appeals his conviction for trafficking MDMA, asserting that the verdict was unreasonable because the evidence was insufficient to prove the nature of the substance, and he seeks an acquittal on the drug trafficking charge. As I will explain, the trial judge was entitled to find that the substance was MDMA based on A.K.'s testimony and text messages on A.M.'s phone.

[10] I would accordingly allow the appeals in respect of the sexual services offences and direct a new trial on those charges. I would dismiss A.M.'s appeal from his conviction for trafficking MDMA, and, since none of the grounds raised in

(iv) The Effect of the Section 276 Ruling

[116] I have concluded that the trial judge erred in applying the screening mechanism in s. 276 to this case, and by his ruling in advance of the trial that the appellants could not cross-examine A.K. about her prior work in the sex trade, including asking her questions about her experience advertising her services. As a result of the trial judge's errors, A.K.'s evidence at the preliminary inquiry (which was ultimately admitted in evidence at the trial) was redacted to remove relevant evidence about those subjects.

[117] Specifically, the appellants were prevented from cross-examining A.K. on how she conducted her business in the sex trade both independently and while working for agencies, and on her prior posting of ads on Backpage.com. I agree with the appellants that this evidence was relevant to their relationship with A.K., for the procuring and material benefit counts. Also, the evidence that A.K. had posted her own ads in the past – and was continuing to use the same content when she was working with the appellants – was relevant to whether she or the appellants posted ads for her services during the relevant time period, particularly in light of A.K.'s evidence that she needed the appellants' help because she was "not good with words".

[118] The appellants assert that evidence of A.K.'s prior working arrangements was relevant to a proper understanding of the true nature of her relationship with

the appellants, that she would not have required their assistance in posting ads and that she had posted and composed ads herself in the past. The appellants contend that this evidence was critical to avoid mischaracterizing their relationship with A.K. – the evidence countered the Crown’s portrayal of her as a vulnerable woman brought into the sex trade because of a drug dependency, and instead suggested that she sought out the appellants to improve her financial circumstances in part to feed her dependency. The appellants submit that there were no privacy or dignity concerns with the evidence, as they had disclaimed any interest in eliciting sexual activity details and sought to rely not on the sexual nature of A.K.’s activities, but on the pattern of how she carried on the financial and advertising aspects of her work in the past, and during the time she was involved with them.

[119] I agree with the appellants that it was an error for the trial judge to prevent them from eliciting any of this evidence on their cross-examination of A.K. and to redact such evidence from her preliminary inquiry testimony. To the extent that the trial judge ended up accepting A.K.’s preliminary inquiry evidence where it was supported by other evidence, that evidence lacked context about A.K.’s prior work in the sex trade because it had been redacted to remove the impugned areas of cross-examination.

[120] I also agree with the appellants that their proposed use of the evidence would not have engaged prohibited twin myths reasoning. On the s. 276

application the Crown asserted and the trial judge accepted, that the appellants' proposed use of the evidence of A.K.'s other work in the sex trade was founded on impermissible twin myths reasoning about her propensity to engage in sexual activity: that if she had engaged in sex work before and after she worked with the appellants, it was less likely that she was exploited by the appellants.

[121] I disagree. The appellants were not seeking to adduce evidence of A.K.'s sexual activity to support an inference that, by reason of the sexual nature of that activity, she was more likely to have consented to the sexual activity that formed the subject matter of the charges or that she was less worthy of belief. The appellants disclaimed any interest in the specifics of A.K.'s sexual activities and in drawing any inference that she was unworthy of belief because she was a sex worker. Rather, their proposed areas of cross-examination focused on the non-sexual features of the activity, including her experience in and knowledge of the sex trade business, the conduct of her business, and her reasons for seeking A.M.'s help. This evidence was relevant and probative to characterizing A.K.'s relationship with the appellants. It showed that A.K. had voluntarily engaged in sex trade work in the past and it helped to explain why she got involved with the appellants. The evidence was not being proffered to show that A.K. was more likely to have consented to the sexual activity in question or was less worthy of belief, but rather to suggest that she previously pursued work in the sex trade voluntarily and that the appellants did not lure or exploit her into working in the industry.

[122] As the Supreme Court explained in *Darrach*, s. 276 prohibits inferences from the sexual nature of the activity, not inferences from other potentially relevant features of the activity: “If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted”: at para. 35. See also *R. v. Webber*, 2021 NSCA 35, 403 C.C.C. (3d) 239, at paras. 115-19; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at paras. 44, 53-54; and *T.W.W.*, at para. 26. Here, the appellants should have been allowed to cross-examine A.K. about her other sex work and prior posting of advertisements, and references to such evidence that were elicited during the preliminary inquiry ought not to have been redacted from the transcript. I therefore conclude that the trial judge erred by precluding the appellants, in advance of the trial, from cross-examining A.K. about her prior work in the sex trade, including questions about her experience advertising her services, and by redacting such evidence from the preliminary inquiry transcript. This evidence was relevant and not being proffered for impermissible purposes. Further, if the appellants had been permitted to solicit this evidence and strayed beyond permissible bounds, the trial judge would have had the authority and responsibility to exercise his gatekeeping function and to intervene.

(3) The Curative Proviso Does Not Apply

[123] The fact that the trial judge erred in applying s. 276 and in excluding relevant evidence from the trial is not determinative of the appeal. The question is whether



SUPREME COURT OF CANADA

CITATION: R. v. Hussein, 2026
SCC 2

APPEAL HEARD: January 23, 2025

JUDGMENT RENDERED:

January 23, 2026

DOCKET: 41015

BETWEEN:

Awale Hussein

Appellant

and

His Majesty The King

Respondent

- and -

**Director of Public Prosecutions,
Director of Criminal and Penal Prosecutions,
Trial Lawyers Association of British Columbia,
Independent Criminal Defence Advocacy Society,
Canadian Association of Black Lawyers and
Criminal Lawyers' Association (Ontario)**
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

**REASONS FOR
JUDGMENT:**

Wagner C.J. (Karakatsanis, Côté, Martin, Kasirer, O'Bonsawin
and Moreau JJ. concurring)

degrees of relevance, nor does relevance require a “minimum probative value” (*R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38). Evidence must also be material, meaning that it is relevant to a live issue at trial (*Calnen*, at para. 109). Generally speaking, relevant evidence is *prima facie* admissible (*R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at para. 18; *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 20).

[28] Second, a trial judge must determine whether the evidence is subject to any exclusionary rule, which, as discussed below, includes the rule against bad character evidence. Third, when the evidence is led by the Crown, a trial judge must decide whether they should exercise their discretion to exclude the relevant evidence because its prejudicial effect outweighs its probative value. The standard for excluding relevant evidence is heightened when it is led by the defence (see *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 610-11). Probative value refers to “the degree or extent to which the evidence will prove the fact in issue for which it is tendered” (Lederman, Fuerst and Stewart, at ¶2.79). Evidence will have a prejudicial effect where “it is prone to being misused, its reliability cannot be adequately tested, or it may otherwise operate unfairly or produce problematic collateral costs” (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 52).

(1) General Principles of Character Evidence

[29] An accused’s criminal record is a form of character evidence when admitted under s. 12(1) of the *CEA* (*R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.), at p. 461). An overview of the common law principles governing the use of

character evidence in criminal proceedings is therefore necessary in order to properly contextualize the rules governing the admission of an accused's criminal record.

[30] Character evidence is “any proof that is presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour” (Paciocco, Paciocco and Stuesser, at p. 63). This evidence can take different forms. For example, character can be proven directly through statements about an individual's reputation in the community (see, e.g., *R. v. Close* (1982), 38 O.R. (2d) 453 (C.A.), at p. 460; *R. v. Profit*, [1993] 3 S.C.R. 637, at p. 637). In some situations, expert evidence can be relied upon to prove that the perpetrator of a crime or the accused has a distinctive disposition (*Mohan*, at p. 37; see also *McMillan v. The Queen*, [1977] 2 S.C.R. 824, at p. 827). Character can also be established circumstantially, such as through evidence of past actions (see *Morris v. The Queen*, [1979] 1 S.C.R. 405, at pp. 437-39; *R. v. Farrant*, [1983] 1 S.C.R. 124, at p. 145; *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.), at pp. 536-37).

[31] Character evidence is often introduced to support one or both of the following inferences. The primary inference that can be drawn from character evidence relates to the likelihood that an individual acted in a certain manner. It is a matter of common sense that “the fact that a person has acted in a particular way in the past tends to support the inference that he or she has acted that way again” (*Arp*, at para. 39). The secondary inference that can be drawn from character evidence relates to the likelihood that a particular witness is credible. As this Court explained in *Corbett*, one of the

factors that a trier of fact may consider when assessing the credibility of a witness is their “habits or mode of life” (p. 685; see also *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at pp. 831-32).

[32] Over time, the common law has developed various rules regulating how character evidence may be used in criminal proceedings. For example, the common law rule against oath-helping prohibits parties from introducing character evidence for the sole purpose of bolstering a witness’s credibility unless an opposing party has attempted to undermine that credibility (see *R. v. B  land*, [1987] 2 S.C.R. 398, at pp. 405-8; *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at pp. 729-30). However, the defence can call character witnesses to testify to the good character of the accused, regardless of whether the Crown has impeached the accused’s character (*R. v. Clarke* (1998), 112 O.A.C. 233 (Ont. C.A.), at para. 21). If the accused adduces good character evidence, the trial judge must instruct the jury that it is relevant with respect to both the primary and the secondary inferences (*R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 135).

[33] When evidence of the accused’s good character is introduced through lay witnesses, the witnesses must testify to the accused’s reputation in the community rather than giving statements of personal opinion or evidence concerning past actions (*R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at p. 348). This restriction on the form in which good character evidence can be introduced does not extend to the accused, who is permitted to testify to prior acts of good conduct (*ibid.*; *Close*, at p. 460).

[34] For our purposes, the most pertinent common law rule on character evidence is the rule treating Crown-led evidence of the accused's bad character, other than conduct that forms the subject matter of the charge, as presumptively inadmissible. This rule encompasses any discreditable evidence, including conduct or information about the accused that a reasonable observer would likely find to be morally objectionable or indicative of a reprehensible character (Paciocco, Paciocco and Stuesser, at p. 68; see also Lederman, Fuerst and Stewart, at ¶11.2; *R. v. Robertson*, [1987] 1 S.C.R. 918, at pp. 941-42; *R. v. T.J.F.*, 2024 SCC 38, at paras. 75-77).

[35] The rationale for this rule is not based on relevance. As discussed, character evidence can be relevant to the question of whether the accused acted in a certain manner and to the question of whether the accused is credible. Instead, as this Court explained in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 31-40, the rationale for the exclusionary rule stems from recognition of the fact that bad character evidence often contributes to reasoning prejudice and moral prejudice.

[36] Both forms of prejudice undermine trial fairness (see *Handy*, at para. 148). Reasoning prejudice refers to the risk that bad character evidence will distract the trier of fact from deciding an issue in a reasoned way, perhaps by causing confusion or attracting disproportionate attention (Paciocco, Paciocco and Stuesser, at p. 70; *Handy*, at paras. 144-47). Moral prejudice refers to the risk that bad character evidence will be used by the trier of fact to draw the prohibited "general propensity" inference that the accused is the kind of bad person likely to commit the offence charged (Paciocco,

Paciocco and Stuesser, at pp. 70 and 74; *Handy*, at paras. 31 and 139). The common law has long recognized that this line of reasoning is unfair because it leads to convictions on the basis of “bad personhood”, effectively relieving the Crown of having to prove every element of the offence beyond a reasonable doubt (see *Handy*, at paras. 31-33 and 72).

[37] In *Handy*, this Court repeatedly emphasized the “poisonous” nature of bad character evidence, observing that, when its admission is not tightly circumscribed by trial judges, there is a high likelihood that the trier of fact will, even with a limiting instruction, engage in impermissible propensity reasoning in order to convict the accused (see paras. 40, 58, 138 and 141). When such reasoning is used, the conviction will be wrongfully based on “prejudice rather than proof”, thereby undermining the accused’s right to be presumed innocent and to receive a fair trial (para. 139). It is the absence of the attendant risk of a wrongful conviction that explains why this exclusionary rule does not extend to ordinary witnesses (see *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 32; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 139).

[38] Despite the inherent prejudice that accompanies bad character evidence, the exclusionary rule is not absolute. In exceptional circumstances, the Crown may lead evidence of bad character to support a primary inference on an issue related to the guilt or innocence of the accused (*Handy*, at paras. 62-68). When the Crown seeks to introduce this evidence, the trial judge must be satisfied on a balance of probabilities that “in the context of the particular case the probative value of the evidence in relation

to a particular issue outweighs its potential prejudice and thereby justifies its reception” (para. 55). The test for the admission of bad character evidence is “strict” given that its probative value must be “so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury” (*R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at pp. 729 and 732). Accordingly, the evidence must go beyond showing the general disposition of the accused (*Handy*, at para. 71).

[39] Where the presumption of inadmissibility is successfully rebutted in the manner described above, the Crown is permitted to use bad character evidence to support a primary inference — that the accused likely did or did not act or think in a certain manner. However, there are other situations where the Crown may be permitted to adduce evidence of bad character for a more limited purpose. For example, if the defence puts the character of the accused in issue, the Crown is permitted to introduce evidence of bad character solely for the purposes of rebutting the accused’s evidence of good character and, if the accused has testified to their good character, impugning the accused’s credibility by suggesting that they lied during their testimony (*McNamara (No. 1)*, at p. 350). This rebuttal evidence of bad character cannot be used by the Crown to support a primary inference regarding the guilt or innocence of the accused, and the jury must be instructed on this distinction (*R. v. H. (E.D.)*, 2000 BCCA 523, 38 C.R. (5th) 74, at para. 19; see also *R. v. Chambers*, [1990] 2 S.C.R. 1293, at p. 1311).

[40] Generally speaking, an accused puts their character in issue when they proffer evidence to suggest that they are not the “type” of person to commit the offence in question (*McNamara (No. 1)*, at p. 346). This can occur in situations where the accused comments positively on their disposition or makes statements regarding the absence of past misconduct (see *Farrant*, at p. 145; *Morris*, at pp. 437-38). Even in these circumstances, trial judges retain their discretion to exclude the Crown’s rebuttal evidence of bad character if its prejudicial effect outweighs its probative value (Lederman, Fuerst and Stewart, at ¶10.53).

[41] Similar principles apply when the Crown uses the accused’s criminal record to rebut their evidence of good character. When the accused puts their character in issue, s. 666 of the *Criminal Code*, R.S.C. 1985, c. C-46, permits the Crown to adduce the accused’s criminal record for the limited purposes of rebutting evidence of their good character and, if the accused has testified, impugning their credibility. Under this provision, the Crown may adduce the criminal record regardless of whether the accused testifies (Lederman, Fuerst and Stewart, at ¶10.67). The Crown is also permitted to adduce the facts underlying a particular conviction as part of its efforts to rebut the accused’s evidence of good character (*R. v. L.K.W.* (1999), 126 O.A.C. 39, at para. 66).

(2) Section 12(1) of the *Canada Evidence Act*

[42] Section 12(1) of the *CEA* allows the questioning of any witness, including the accused, about whether they have been convicted of any offence. The sole purpose

Material benefit from sexual services

286.2 (1) Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b)** an offence punishable on summary conviction.

Material benefit from sexual services provided by person under 18 years

(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(2), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

Presumption

(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.

Exception

(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit

- (a)** in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;
- (b)** as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;
- (c)** in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or

(d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

No exception

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;

(d) engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or

(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

Aggravating factor

(6) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that that person received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ochrym, 2021 ONCA 48

DATE: 20210127

DOCKET: C67930

Hoy, Trotter and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Terrell Ochrym

Appellant

Terrell Ochrym, acting in person

Dan Stein, appearing as duty counsel

Nicole Rivers, for the respondent

Heard: December 8, 2020 by video conference

On appeal from the conviction entered on August 21, 2019 and the sentence imposed on December 12, 2019 by Justice Alexander Sosna of the Superior Court of Justice, with reasons at 2019 ONSC 4864.

By the Court:

V. ANALYSIS IN RELATION TO THE CONVICTION UNDER S. 286.3(1)

[29] We agree with duty counsel that the trial judge's factual finding that the appellant "did coordinate and provide [the complainant] with the means to provide sexual services for consideration" does not, of itself, support the conclusion that the appellant exercised control, direction or influence over her movements within the meaning of those terms in s. 286.3(1) of the *Code*. In convicting the appellant under s. 286.3(1) of exercising discretion and influence, the trial judge erred in determining the *actus reus* of the offence by focusing solely on what the appellant did, without regard to the nature of the relationship between the appellant and the complainant, and the impact of the appellant's conduct on the complainant's state of mind. Sometimes, the nature of the relationship and the impact of the accused's conduct on the complainant's state of mind will be evident from what an accused said or did and what the complainant said or did in response. But that is not the case here.

[30] The statement at para. 47 of *Gallone* that "[e]xercising influence over a person's movements means doing anything to affect the person's movements" cannot be read in isolation. The balance of para. 47 and para. 50, reproduced below, indicate that in considering whether what an accused did amounted to exercising control, direction or influence over the movements of a complainant, regard must be had to the nature of the relationship between the accused and complainant:

...all these residual terms – “exercises control, direction or influence” – evoke a scenario in which a person, by virtue of her or his relationship with the complainant, has some power – whether physical, psychological, moral or otherwise – over the complainant and his or her movements. As stated in *A Handbook for Criminal Justice Practitioners on Trafficking in Persons*, (Ottawa: Department of Justice, 2015), which was developed by the Federal/Provincial/Territorial Working Group on Trafficking in Persons, these residual terms characterize “the nature of conduct in terms of the relationship between the accused and the victim in relation to the victim’s mobility”: at p. 20. In other words, by virtue of the relationship between the accused and the complainant, the accused was in a position or had the ability to control, direct or influence the movements of the complainant. However, as already stated, the terms “control”, “direct” and “influence” involve different degrees of coercion[.]

[31] The meaning *Gallone* ascribes to “exercise of control, direction or influence” covers a wide range of intentional conduct and is consistent with the purpose of s. 286.3, as articulated in *Joseph*.

[32] In *Joseph*, the court, among other things, rejected the trial judge’s definition of “harbour” in s. 286.3 as to “secretly shelter and protect”. The court concluded that “harbour” in s. 286.3 includes the simple provision of shelter, whether secretly or not. The court observed, at para. 90, that Parliament enacted s. 286.3 and the other commodification of sexual services provisions “in order to eradicate prostitution to the extent possible while largely immunizing the sellers from prosecution.” However, the interpretation of the section was supported by the statute. The court’s interpretation of “harbour” was consistent with the meaning of

word used in the French version of the section – “héberge” – and, as the court noted at para. 85, supported by the presumption against redundancy. To avoid tautology, the court reasoned, “harbour” must mean something other than “conceals”.

[33] Had Parliament intended s. 286.3(1) to criminalize any conduct affecting a complainant’s movements that facilitates the provision of sexual service for consideration, it would have done so more clearly. For example, s. 286.4 provides that it is an offence to knowingly advertise an offer to provide sexual services for consideration. Parliament did not provide that driving a sex worker to a motel or booking the motel where the worker provides sexual services for consideration is an offence. Rather, as noted above, Parliament used terms which require consideration of whether because of the relationship between the accused and the complainant, the accused was in a position or had the ability to, and did, exercise control, direct or influence the movements of a person who provides sexual services for consideration. Some regard must be had to the nature of the relationship between the accused and the complainant. Yet the trial judge failed to do so.

[34] In convicting the appellant under s. 286.3(1) of exercising direction and influence, the trial judge thereby erred in examining the *actus reus* of the offence by focusing solely on what the appellant did, without regard to the nature of the relationship between the appellant and the complainant.

[35] It is possible that had the trial judge turned his mind to the nature of the relationship he may have found the *actus reus* of the offence to have been satisfied. There was evidence before him about the nature of relationship between the appellant and the complainant. The appellant was a middle-aged man experienced in the selling of sexual services and the complainant was an impressionable and inexperienced teenager. The appellant had some financial means and resources, whereas the complainant had none. The appellant was involved in drug trafficking with Mr. Richards, whom the complainant sought to please and who benefitted financially from the sale of the complainant's sexual services. The appellant's drug customers included sex workers. Arguably, a reasonable inference from the nature of the relationship between the appellant and the complainant is that the appellant's conduct impacted the complainant's state of mind, and the appellant accordingly exercised influence over her movements when he coordinated and provided her with the means to provide sexual services for consideration.

[36] However, this outcome is not assured. The relationship between the complainant, Mr. Richards, and the appellant was – to put it mildly – complex. The trial judge approached the complainant's and Mr. Richards' evidence, minimizing Mr. Richards' involvement and implicating the appellant as the main facilitator of the sex work, with great caution. While the evidence could support a finding that the appellant exercised influence over the movements of the complainant under s.

286.3(1), given the trial judge's finding that the appellant did not encourage the appellant to sell her sexual services for consideration in relation to the separate charge of recruiting, holding, concealing or harbouring the complainant contrary to s. 286.3, and the trial judge's cautious approach to the complainant and Mr. Richards' evidence, it is unclear that, having regard to the nature of the relationship between the appellant and the complainant and the impact of the appellant's conduct on the complainant's state of mind, the trial judge would have found the appellant exercised influence over the movements of the complainant. We say this appreciating that there is a difference between encouraging someone to sell sexual services for consideration and exercising influence over the movements of a person who offers or provides sexual services for consideration.

[37] We turn to the conviction under s. 286.4.

VI. THE CONVICTION UNDER S. 286.4

[38] We agree with duty counsel that the trial judge erred by convicting the appellant under s. 286.4 on a theory of liability disavowed by the Crown, without giving him notice and the opportunity to respond to the appellant, and that this resulted in prejudice.

[39] The closing submissions were made in writing. In its submissions, the Crown argued that the appellant's position that he allowed the complainant and Mr. Richards to use his Backpage account "does not make sense and cannot be

Andrew Scott Darrach *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia, the Women's Legal Education and Action Fund, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network of Canada and the National Action Committee on the Status of Women *Interveners*INDEXED AS: **R. v. DARRACH**Neutral citation: **2000 SCC 46.**

File No.: 26564.

2000: February 23; 2000: October 12.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law — Charter of Rights — Fair trial — Right to make full answer and defence — Sexual assault — Evidence of complainant's sexual activity — Whether substantive aspect of s. 276 of Criminal Code infringing accused's right to make full answer and defence or his right to a fair trial — Canadian Charter of Rights and Freedoms, ss. 7, 11(d) — Criminal Code, R.S.C., 1985, c. C-46, ss. 276(1), (2)(c), 276.2(2).**Constitutional law — Charter of Rights — Right to silence — Right not to be compelled to be a witness in proceedings against oneself — Sexual assault — Evidence of complainant's sexual activity — Whether procedural aspect of s. 276 of Criminal Code infringing accused's right to silence and his right not to be compelled to be a witness in proceedings against him — Canadian Charter of Rights and Freedoms, ss. 7, 11(c)***Andrew Scott Darrach** *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général du Canada, le procureur général du Québec, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le Fonds d'action et d'éducation juridiques pour les femmes, l'Association canadienne des centres contre le viol, le Disabled Women's Network of Canada et le Comité canadien d'action sur le statut de la femme *Intervenants*RÉPERTORIÉ: **R. c. DARRACH**Référence neutre: **2000 CSC 46.**

N° du greffe: 26564.

2000: 23 février; 2000: 12 octobre.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Droit constitutionnel — Charte des droits — Procès équitable — Droit à une défense pleine et entière — Agression sexuelle — Preuve du comportement sexuel de la plaignante — Les dispositions de fond de l'art. 276 du Code criminel portent-elles atteinte au droit de l'accusé à une défense pleine et entière ou à son droit à un procès équitable? — Charte canadienne des droits et libertés, art. 7, 11d) — Code criminel, L.R.C. (1985), ch. C-46, art. 276(1), (2)c), 276.2(2).**Droit constitutionnel — Charte des droits — Droit de garder le silence — Droit de l'accusé de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui — Agression sexuelle — Preuve du comportement sexuel de la plaignante — Les dispositions de l'art. 276 du Code criminel qui énoncent la procédure à suivre portent-elles atteinte au droit de l'accusé de garder le silence et à son droit de ne pas*

In the case at bar, I affirm the reasons in *Seaboyer* and find that none of the accused's rights are infringed by s. 276 as he alleges. *Seaboyer* provides a basic justification for the legislative scheme in s. 276, including the determination of relevance as well as the prejudicial and probative value of the evidence. *Mills* and *White* show how the impact of s. 276 on the principles of fundamental justice relied on by the accused should be assessed in light of the other principles of fundamental justice that s. 276 was designed to protect. The reasons in *Mills* are apposite because they demonstrate how the same principles of equality, privacy and fairness can be reconciled. I shall show below how the procedure created by s. 276 to protect the trial process from distortion and to protect complainants is consistent with the principles of fundamental justice. It is fair to the accused and properly reconciles the divergent interests at play, as the Court suggested in *Seaboyer*.

B. The Substantive Sections

(1) Section 276(1) — The Exclusionary Rule

The accused objects to the exclusionary rule itself in s. 276(1) on the grounds that it is a “blanket exclusion” that prevents him from adducing evidence necessary to make full answer and defence, as guaranteed by ss. 7 and 11(d) of the *Charter*. He is mistaken in his characterization of the rule. Far from being a “blanket exclusion”, s. 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences. These are known as the “twin myths”, namely that a complainant is more likely to have consented or that she is less worthy of belief “by reason of the sexual nature of [the] activity” she once engaged in.

This section gives effect to McLachlin J.'s finding in *Seaboyer* that the “twin myths” are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process. Section 276(1) also clarifies *Seaboyer*

En l'espèce, je confirme les motifs de l'arrêt *Seaboyer* et je conclus qu'aucun des droits de l'accusé n'est violé par l'art. 276 comme il l'allègue. L'arrêt *Seaboyer* fournit une justification fondamentale du régime législatif de l'art. 276, y compris la détermination de la pertinence de même que de l'effet préjudiciable et de la valeur probante de la preuve. Les arrêts *Mills* et *White* montrent comment l'effet de l'art. 276 sur les principes de justice fondamentale invoqués par l'accusé devrait être évalué en fonction des autres principes de justice fondamentale que ledit article est conçu pour protéger. Les motifs de l'arrêt *Mills* sont pertinents parce qu'ils démontrent comment les mêmes principes d'égalité, de vie privée et d'équité sont conciliables. J'examinerai plus loin en quoi la procédure établie par l'art. 276 pour empêcher que le procès ne soit dénaturé et pour protéger les plaignants est conforme aux principes de justice fondamentale. Elle est équitable pour l'accusé et elle concilie les intérêts divergents qui sont en jeu, comme l'a indiqué la Cour dans l'arrêt *Seaboyer*.

B. Les dispositions de fond

(1) Paragraphe 276(1) — La règle d'exclusion

L'accusé s'oppose à la règle même d'exclusion qu'établit le par. 276(1), pour le motif qu'il s'agit d'une «exclusion générale» qui l'empêche de présenter des éléments de preuve nécessaires à une défense pleine et entière, conformément au droit que lui garantissent l'art. 7 et l'al. 11d) de la *Charte*. Sa qualification de la règle est erronée. Loin d'être une «exclusion générale», le par. 276(1) ne fait qu'interdire l'utilisation de la preuve du comportement sexuel antérieur pour étayer deux déductions illégitimes particulières. On les appelle les «deux mythes», à savoir qu'une plaignante est plus susceptible d'avoir consenti ou qu'elle est moins digne de foi en raison «du caractère sexuel de [l']activité» qu'elle a déjà exercée.

Cette disposition fait suite à la conclusion du juge McLachlin dans l'arrêt *Seaboyer* selon laquelle les «deux mythes» ne sont simplement pas pertinents au procès. Ils ne sont pas probants quant au consentement ou à la crédibilité, et ils peuvent

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in several respects. Section 276 applies to all sexual activity, whether with the accused or with someone else. It also applies to non-consensual as well as consensual sexual activity, as this Court found implicitly in *R. v. Crosby*, [1995] 2 S.C.R. 912, at para. 17. Although the *Seaboyer* guidelines referred to “consensual sexual conduct” (pp. 634-35), Parliament enacted the new version of s. 276 without the word “consensual”. Evidence of non-consensual sexual acts can equally defeat the purposes of s. 276 by distorting the trial process when it is used to evoke stereotypes such as that women who have been assaulted must have deserved it and that they are unreliable witnesses, as well as by deterring people from reporting assault by humiliating them in court. The admissibility of evidence of non-consensual sexual activity is determined by the procedures in s. 276. Section 276 also settles any ambiguity about whether the “twin myths” are limited to inferences about “unchaste” women in particular; they are not (as discussed by C. Boyle and M. MacCrimmon, “The Constitutionality of Bill C-49: Analyzing Sexual Assault As If Equality Really Mattered” (1999), 41 *Crim. L.Q.* 198, at pp. 231-32).

dénaturer gravement le procès. Le paragraphe 276(1) clarifie aussi l’arrêt *Seaboyer* à maints égards. Il s’applique à toutes les activités sexuelles, que ce soit avec l’accusé ou avec une autre personne. Il s’applique aussi aux activités sexuelles tant consensuelles que non consensuelles, comme notre Cour l’a conclu implicitement dans l’arrêt *R. c. Crosby*, [1995] 2 R.C.S. 912, au par. 17. Bien que, dans les lignes directrices de l’arrêt *Seaboyer*, l’on parle de «consent[ement] à des rapports sexuels» (p. 635), le législateur n’a pas utilisé le mot «consentement» dans la nouvelle version de l’art. 276. La preuve d’actes sexuels non consensuels peut également aller à l’encontre des objets de l’art. 276 en dénaturant le procès lorsqu’elle sert à évoquer des stéréotypes, comme celui voulant que les femmes qui ont été agressées méritaient d’être agressées et sont des témoins peu dignes de foi, et en dissuadant les gens de dénoncer des agressions en les humiliant devant le tribunal. L’admissibilité de la preuve d’activités sexuelles non consensuelles est déterminée selon la procédure établie à l’art. 276. Cet article élimine aussi toute ambiguïté quant à savoir si les «deux mythes» se limitent aux déductions relatives aux femmes «non chastes» en particulier; ils ne s’y limitent pas (comme l’expliquent C. Boyle et M. MacCrimmon, «The Constitutionality of Bill C-49: Analyzing Sexual Assault As If Equality Really Mattered» (1999), 41 *Crim. L.Q.* 198, aux pp. 231 et 232).

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The *Criminal Code* excludes all discriminatory generalizations about a complainant’s disposition to consent or about her credibility based on the sexual nature of her past sexual activity on the grounds that these are improper lines of reasoning. This was the import of the Court’s findings in *Seaboyer* about how sexist beliefs about women distort the trial process. The text of the exclusionary rule in s. 276(1) diverges very little from the guidelines in *Seaboyer*. The mere fact that the wording differs between the Court’s guidelines and Parliament’s enactment is itself immaterial. In *Mills*, *supra*, the Court affirmed that “[t]o insist on slavish conformity” by Parliament to judicial pronouncements “would belie the mutual respect that underpins the relationship” between the two

Le *Code criminel* exclut, comme étant des raisonnements inappropriés, toutes les généralisations discriminatoires concernant la prédisposition de la plaignante à consentir ou sa crédibilité qui sont fondées sur la nature sexuelle de ses activités sexuelles antérieures. Telle était la portée des conclusions que la Cour a tirées dans l’arrêt *Seaboyer* quant à la manière dont les croyances sexistes relatives aux femmes dénaturent le procès. Le texte de la règle d’exclusion établie au par. 276(1) s’écarte très peu des lignes directrices de l’arrêt *Seaboyer*. Le simple fait que le texte des lignes directrices de la Cour diffère de celui adopté par le législateur est sans importance en soi. Dans l’arrêt *Mills*, précité, la Cour a confirmé qu’«[i]nsister sur une conformité servile» du législateur aux décisions des

institutions (para. 55). In this case, the legislation follows the Court's suggestions very closely.

The phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The phrase "by reason of the sexual nature of that activity" has the same effect as the qualification "solely to support the inference" in *Seaboyer* in that it limits the exclusion of evidence to that used to invoke the "twin myths" (p. 635).

This Court has already had occasion to admit evidence of prior sexual activity under the current version of s. 276. In *Crosby*, *supra*, such evidence was admissible because it was inextricably linked to a prior inconsistent statement that was relevant to the complainant's credibility (at para. 14). This case itself demonstrates that s. 276 does not function in practice as a blanket exclusion, as alleged by the accused. On the contrary, s. 276 controls the admissibility of evidence of sexual activity by providing judges with criteria and procedures to help them exercise their discretion to admit it. I explain below why the procedure to assess relevance is constitutional. Suffice it here to say that it is this procedure that makes the *Seaboyer* guidelines and the current version of s. 276 constitutional where the earlier version of s. 276 was not.

An accused has never had a right to adduce irrelevant evidence. Nor does he have the right to adduce misleading evidence to support illegitimate inferences: "the accused is not permitted to distort the truth-seeking function of the trial process"

tribunaux «irait à l'encontre du respect mutuel qui sous-tend les rapports» entre ces deux institutions (par. 55). En l'espèce, la mesure législative suit de très près les suggestions de la Cour.

Les termes «déduire du caractère sexuel de cette activité» à l'art. 276 sont une précision du législateur que les déductions qui sont interdites sont celles qui sont faites à partir du caractère sexuel de l'activité et non pas celles qui sont faites à partir d'autres caractéristiques éventuellement pertinentes de cette activité. Il peut être permis de produire la preuve d'une activité sexuelle en raison des caractéristiques non sexuelles de cette activité, notamment pour démontrer l'existence d'un mode de comportement ou d'une déclaration antérieure incompatible. Les termes «déduire du caractère sexuel de cette activité» ont le même effet que la réserve «vise uniquement à appuyer l'inférence» formulée dans l'arrêt *Seaboyer*, en ce sens qu'ils limitent l'exclusion des éléments de preuve à ceux qui servent à invoquer les «deux mythes» (p. 635).

Notre Cour a déjà eu l'occasion d'admettre une preuve de comportement sexuel antérieur en vertu du texte actuel de l'art. 276. Dans l'arrêt *Crosby*, précité, une telle preuve était admissible parce qu'elle était inextricablement liée à une déclaration antérieure incompatible qui était pertinente quant à la crédibilité de la plaignante (au par. 14). Cet arrêt lui-même démontre que l'art. 276 ne constitue pas en pratique une exclusion générale, comme l'allègue l'accusé. Au contraire, cet article régit l'admissibilité de la preuve du comportement sexuel en fournissant aux juges les critères et la procédure qui les aideront à exercer leur pouvoir discrétionnaire d'admettre cette preuve. J'explique plus loin pourquoi la procédure qui permet de décider de la pertinence est constitutionnelle. Il suffit de dire pour l'instant que c'est cette procédure qui rend constitutionnels les lignes directrices de l'arrêt *Seaboyer* et le texte actuel de l'art. 276, alors que le texte antérieur de cet article ne l'était pas.

Un accusé n'a jamais eu le droit de produire des éléments de preuve non pertinents. Il n'a pas non plus le droit de produire des éléments de preuve trompeurs pour étayer des déductions illégitimes: «il n'est pas permis à l'accusé de fausser la

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(*Mills, supra*, at para. 74). Because s. 276(1) is an evidentiary rule that only excludes material that is not relevant, it cannot infringe the accused's right to make full answer and defence. Section 276(2) is more complicated, and I turn to it now.

(2) Section 276(2)(c) — “Significant Probative Value”

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If evidence is not barred by s. 276(1) because it is tendered to support a permitted inference, the judge must still weigh its probative value against its prejudicial effect to determine its admissibility. This essentially mirrors the common law guidelines in *Seaboyer* which contained this balancing test (at p. 635). The accused takes issue with the fact that s. 276(2)(c) specifically requires that the evidence have “significant probative value”. The word “significant” was added by Parliament but it does not render the provision unconstitutional by raising the threshold for the admissibility of evidence to the point that it is unfair to the accused.

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It may be noted that the word “significant” is not found in the French text; the law speaks simply of “*valeur probante*”. The rule of equal authenticity and the rule against unconstitutional interpretation require that the two versions be reconciled where possible. The interpretation of “significant” by the Ontario Court of Appeal satisfies this requirement: Morden A.C.J.O. found that “the evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt” (p. 16). At the same time, Morden A.C.J.O. agrees with *R. v. Santocono* (1996), 91 O.A.C. 26 (C.A.), at p. 29, where s. 276(2)(c) was interpreted to mean that “it was not necessary for the appellant to demonstrate ‘strong and compelling’ reasons for admission of the evidence”. This standard is not a departure from the conventional rules of evidence. I agree with the Court of Appeal that the word “significant”, on a textual level, is

fonction de recherche de la vérité du processus judiciaire» (*Mills*, précité, au par. 74). Comme le par. 276(1) établit une règle de preuve qui n'exclut que les éléments de preuve non pertinents, il ne peut pas porter atteinte au droit de l'accusé à une défense pleine et entière. Le paragraphe 276(2) est plus compliqué et je vais maintenant l'examiner.

(2) Alinéa 276(2)c) — «Valeur probante»

Même si un élément de preuve n'est pas interdit par le par. 276(1) parce que sa production vise à étayer une déduction permise, le juge doit néanmoins, pour en déterminer l'admissibilité, évaluer sa valeur probante en fonction de son effet préjudiciable. Cela reflète essentiellement les lignes directrices de common law de l'arrêt *Seaboyer* qui comportaient ce critère d'évaluation (à la p. 635). L'accusé conteste le fait que l'al. 276(2)c) exige expressément que la preuve ait une «valeur probante» («*significant probative value*»). Le législateur a ajouté le mot «*significant*» dans le texte anglais, mais cela ne rend pas la disposition inconstitutionnelle en haussant le critère d'admissibilité de la preuve au point de le rendre injuste pour l'accusé.

On peut souligner que le mot «*significant*» ne se trouve pas dans le texte français; on y utilise simplement l'expression «valeur probante». La règle de l'authenticité égale et celle qui interdit l'interprétation inconstitutionnelle exigent que les deux versions soient harmonisées si possible. L'interprétation du mot «*significant*» par la Cour d'appel de l'Ontario satisfait à cette exigence: le juge en chef adjoint Morden a conclu que [TRADUCTION] «l'élément de preuve ne doit pas être négligeable au point de ne pouvoir soulever aucun doute raisonnable compte tenu de l'ensemble de la preuve» (p. 16). En même temps, le juge en chef adjoint Morden souscrit à l'arrêt *R. c. Santocono* (1996), 91 O.A.C. 26 (C.A.), à la p. 29, dans lequel on a considéré que l'al. 276(2)c) signifiait [TRADUCTION] «[qu']il n'était pas nécessaire que l'appelant démontre l'existence de motifs “solides et impérieux” d'admettre la preuve». Cette norme ne déroge pas aux règles de preuve conventionnelles. Je conviens avec la Cour d'appel que le mot

A ■ K ■ - in-Ch.

there pictures? Words? A combination of?

A. Both. Yeah.

Q. Okay. And the pictures that you used that first time, who were they pictures of?

A. Me.

Q. Okay. And had they been taken - And I'm not asking the circumstances, but were they taken that day or sometime earlier?

A. Earlier.

Q. Okay. And you said there was words as well in those ads? Is that correct?

A. Yes.

Q. And who decided on the words that were going to be in that first ad?

A. I believe I did.

Q. Okay. And who actually went through the process that you need to do in order for that ad to be up on the internet?

A. I did.

Q. Okay.

A. Sometimes it's - Sometimes, it's difficult, though, so I might've asked for a little help.

Q. Okay. And did you see clients that night?

A. Yes. I believe so.

Q. And do you have a sense of how many clients you saw?

A. Maybe just two or something.

Q. With the ad, how does a client go from the ad to somehow getting in contact with you?

A. You put your number in the ad and then they text me or call.

Q. And that night, do you know what - whose number

A ■ K ■ - in-Ch.

actually making the hotel bookings? Who's actually renting the rooms?

A. I don't know if it was both of us or just me.

Q. Who's paying for the hotel rooms?

A. I was.

Q. How were you getting to the different hotel rooms?

A. I had a car at the time.

Q. Did you drive yourself right to the hotels?

A. Yeah.

Q. And was that always the pattern?

A. Sometimes we might leave my car, and he would drive me or something.

Q. The ads that are on Backpage, do you know who was doing the postings?

A. Well, he might help me with them, but it was me. Me doing them.

Q. I'm sorry?

A. It was me doing them. Like overseeing everything, I guess, but sometimes I'd need help. I'm not really good with words.

Q. And what do you mean by "overseeing"? Who's actually - is it being done on a tablet? On a phone?

A. Phone.

Q. Okay. And is it being done on one person's phone or more than one person's phone?

A. I'm not sure if it was just my phone at the time or both. I'm not sure that time.

Q. And who's actually behind the phone to put the ads up? Who's actually pressing the buttons, if you will?

A. Me, I guess.

Q. Okay. Was A ■ ever involved in the postings?

A ■ K ■ - in-Ch.

on and off.

Q. Okay. While you're working at the house, how are you getting clients?

A. Posting the same way.

Q. You're posting?

A. Mhm.

Q. Okay. Where are you posting?

A. Backpage.

Q. Okay. You've described ads before. Are the ads similar to what you described it before?

A. Yes.

Q. And so, there's pictures and there's words in the ads?

A. Yes.

Q. Are they different from the ones that you were using in the hotel? The pictures and the words.

A. The same pictures, probably, and the words might change up once in a while.

Q. Okay. When the words would change, who would decide that?

A. I'd normally - I might have got them to help once in a while.

Q. Okay. When you say "them", who's the "them"?

A. M ■ and A ■.

Q. Where did you consider home while you were working out of the house?

A. My home with my parents.

Q. Okay. So who, in terms of - I'm just moving back to the postings. At that time, who was actually putting the postings up on Backpage?

A. I think all three of us.

Q. Okay. And when you say: All three of us, just

A ■ K ■ - Cr-Ex. by Ms. Lichtman

A ■ K ■: Previously Affirmed, Returns to the Witness Stand.

THE COURT: Yes. We can proceed.

MS. LICHTMAN: That you.

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CROSS-EXAMINATION CONTINUED BY MS. LICHTMAN:

Q. So you received A ■'s number from Mr. X. Is that right?

A. Correct.

10 Q. And no one pushed that information on you. It was something that you were trying to get from Mr. X.

A. Right.

Q. Okay. And you then reached out to A ■.

A. Yeah.

15 Q. And why did you reach out to him?

A. So he could help me.

Q. What did you want his help with?

A. Mainly the postings I was having difficult
[sic] with.

20 Q. Okay. Why were you having problems - Why were you having difficulties with the postings?

A. I don't know. Technology and words combined, something would always go wrong.

25 Q. Was there anything else that you needed help with?

A. No.

Q. And would you agree with me that when you reached out to A ■, it was that you wanted him to work for you?

A. Yes.

30 Q. To assist you because you were having difficulties.

A. Right.

5.

A ■ K ■ - Cr-Ex. by Ms. Lichtman

Q. And you did text with clients using A ■'s phone?

A. Yes.

Q. And you were around A ■ for a lot of different periods of times, and sometimes he'd just hand you his phone.

A. Right.

Q. And he would say things like: Here's a client. You can speak to them.

A. Yeah.

Q. Okay. And I just want to ask a couple of questions about the posting of the ads.

A. Mhm.

Q. So at different points, you've said different things about who was posting and who was posting more often. And who was posting less often. Just, can you clarify that for me how the posting went?

A. I think most of the time, like I said, I needed help with the postings. Technology was never on my side when it came to that. So I think most of the time they were helping me with them, at least, but I like overlooked everything and made sure it was okay.

Q. And it was always at your request, would you agree, that A ■ and M ■ were doing those postings?

A. At my request, yes.

Q. And like you said, you were overlooking everything.

A. Yes.

Q. And again, you also spoke about, in your testimony at trial, as well as in your testimony at the preliminary hearing, some kind of incident that happened between you and A ■ the day that you went to the police station.

A. Right.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.M., 2024 ONCA 661

DATE: 20240906

DOCKET: C68920 & C68957

van Rensburg, George and Favreau JJ.A.

DOCKET: C68920

BETWEEN

His Majesty the King

Respondent

and

A.M.

Appellant

DOCKET: C68957

AND BETWEEN

His Majesty the King

Respondent

and

M.P.

Appellant

Jeffery Couse, for the appellant A.M.

Jack Gemmell, for the appellant M.P.

Vallery Bayly, for the respondent

Heard: December 19, 2023

On appeal from the convictions entered by Justice Michael K. McKelvey of the Superior Court of Justice on July 7, 2020, and the sentences imposed on December 17, 2020, with reasons reported at 2020 ONSC 4191 and 2020 ONSC 7919.

(ii) Section 276 Did Not Apply in the Circumstances of This Case

[93] Having determined that s. 276 does not apply categorically to all prosecutions involving sexual services or human trafficking offences, I turn now to consider whether s. 276 applied in the specific circumstances of this case. This determination must be made on the basis of the circumstances that existed at the time the matter was before the trial judge, and not with hindsight, that is with knowledge of what ultimately transpired at trial: *T.W.W.*, at para. 23.

[94] In this case, the Crown's theory was that the appellants exercised control, direction or influence over A.K.'s movements to facilitate the provision of sexual services for consideration, and that this was for the purpose of her exploitation. The Crown submitted that the appellants had exploited A.K. because she was dependent on them for drugs. The Crown also asserted that the appellants received a material benefit from these offences and that they had advertised her sexual services.

[95] The Crown contends that s. 276 applied in this case because A.K. was forced or coerced into providing sexual services that were not truly voluntary. That is, the appellants were alleged to have exercised control over A.K. and to have exploited a position of trust to force her to provide sexual services.

[96] The trial judge accepted the Crown's argument that the circumstances of the case engaged the question of consent. He concluded that the listed offence of

sexual assault – and therefore s. 276 – was engaged because the human trafficking and sexual services charges “[struck] at the heart of the necessary consent for [A.K.] to engage in the sexual services provided by her at the request of the [appellants]”.

[97] I disagree that s. 276 applied in the circumstances of this case. None of the listed offences was an included offence to the charges in this case, nor was such an offence implicated in the factual circumstances advanced by the Crown. As noted earlier, sexual assault is not an included offence to procuring, even when it is alleged that the accused has committed the offence by exercising control over the complainant’s movements. The requirement that the Crown prove an accused “exercised control, direction or influence” is not the same as saying the complainant did not consent to the sexual act. In a different case it might be alleged that the accused used violence or the threat of violence to compel the complainant to offer her sexual services, implicating the offence of sexual assault: see e.g., *R. v. J.C. and D.B.*, 2023 ONSC 6093. In this case however there was no suggestion that the sexual services A.K. provided were non-consensual. Nor was lack of consent an element of the two counts of human trafficking. For one count (exercising control, direction or influence for the purpose of exploitation contrary to s. 279.01(1)), any consent is statutorily declared to be invalid by s. 279.01(2), and for the other (receiving material benefits from the commission of a s. 279.01(1) offence), consent is irrelevant.

[98] Consent was also not a live issue based on the application record before the trial judge. There was no suggestion that A.K. had been sexually assaulted or that the appellants forced her to work in the sex trade. Rather, the Crown's theory that the appellants exploited A.K. rested on the allegation that they had abused a position of trust, power or authority by taking advantage of her drug and alcohol addiction, and not on any meaningful vitiation of consent. Further, and in any event, while abusing a position of trust, power or authority vitiates consent for the purpose of a sexual assault charge (see *Criminal Code*, s. 273.1(2)(c)), lack of consent is only one element of the sexual assault offence: see. *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 25. As Fraser J. explained in *R. v. A.M.*, 2021 ONCJ 266, at paras. 25 and 27, s. 276 is not engaged "by the mere alignment of 'some elements' of the charged offence and an enumerated offence" but requires "the complete constellation of elements comprising a listed offence". Here that constellation of elements is lacking. Even on the Crown's theory, there was no sexual assault.

[99] Finally, there was nothing in the proposed defence cross-examination that would have elicited evidence of a listed offence.

[100] Accordingly, s. 276 was not engaged in the circumstances of these proceedings.

the appellants, that she would not have required their assistance in posting ads and that she had posted and composed ads herself in the past. The appellants contend that this evidence was critical to avoid mischaracterizing their relationship with A.K. – the evidence countered the Crown’s portrayal of her as a vulnerable woman brought into the sex trade because of a drug dependency, and instead suggested that she sought out the appellants to improve her financial circumstances in part to feed her dependency. The appellants submit that there were no privacy or dignity concerns with the evidence, as they had disclaimed any interest in eliciting sexual activity details and sought to rely not on the sexual nature of A.K.’s activities, but on the pattern of how she carried on the financial and advertising aspects of her work in the past, and during the time she was involved with them.

[119] I agree with the appellants that it was an error for the trial judge to prevent them from eliciting any of this evidence on their cross-examination of A.K. and to redact such evidence from her preliminary inquiry testimony. To the extent that the trial judge ended up accepting A.K.’s preliminary inquiry evidence where it was supported by other evidence, that evidence lacked context about A.K.’s prior work in the sex trade because it had been redacted to remove the impugned areas of cross-examination.

[120] I also agree with the appellants that their proposed use of the evidence would not have engaged prohibited twin myths reasoning. On the s. 276

application the Crown asserted and the trial judge accepted, that the appellants' proposed use of the evidence of A.K.'s other work in the sex trade was founded on impermissible twin myths reasoning about her propensity to engage in sexual activity: that if she had engaged in sex work before and after she worked with the appellants, it was less likely that she was exploited by the appellants.

[121] I disagree. The appellants were not seeking to adduce evidence of A.K.'s sexual activity to support an inference that, by reason of the sexual nature of that activity, she was more likely to have consented to the sexual activity that formed the subject matter of the charges or that she was less worthy of belief. The appellants disclaimed any interest in the specifics of A.K.'s sexual activities and in drawing any inference that she was unworthy of belief because she was a sex worker. Rather, their proposed areas of cross-examination focused on the non-sexual features of the activity, including her experience in and knowledge of the sex trade business, the conduct of her business, and her reasons for seeking A.M.'s help. This evidence was relevant and probative to characterizing A.K.'s relationship with the appellants. It showed that A.K. had voluntarily engaged in sex trade work in the past and it helped to explain why she got involved with the appellants. The evidence was not being proffered to show that A.K. was more likely to have consented to the sexual activity in question or was less worthy of belief, but rather to suggest that she previously pursued work in the sex trade voluntarily and that the appellants did not lure or exploit her into working in the industry.

COURT OF APPEAL FOR ONTARIO

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DATE: 20240906

DOCKET: C68920 & C68957

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result. Moreover, since this evidence at best speaks to A.K.'s relationship with other individuals, not the appellants, it would not have impacted the verdicts.

[127] Second, the Crown argues that the admission of evidence that A.K. previously posted advertisements on Backpage.com would not have affected the result. The trial judge relied not only on A.K.'s testimony to ground the convictions on the advertising sexual services count, but also on confirmatory evidence found both in messages on A.M.'s phone and the content of those ads, which referenced phone numbers that belonged to the appellants. The exclusion of evidence that A.K. previously posted ads on Backpage.com was therefore harmless or trivial.

[128] The Crown argues that the court should accordingly conclude that, as in *R.V.*, no substantial wrong or miscarriage of justice resulted from any improper curtailment of the appellants' cross-examination.

[129] The appellants assert that they were prejudiced by the inability to establish that A.K. had been introduced to escort work through a friend several years before she met them, that she had worked both independently and with agencies before she met Mr. X and the appellants, and that she had booked her own hotel rooms and posted her own advertisements. In short, the appellants allege that evidence of A.K.'s previous sex work strongly suggested that they had minimal influence on her state of mind and her decision to engage in sex work. They argue that the restrictions on cross-examination and the redactions from A.K.'s preliminary

inquiry evidence denied them the ability to make full answer and defence by preventing them from putting before the court the full picture of their relationship with A.K. and how she conducted her business with them.

[130] Rarely will the curative proviso apply where cross-examination has been improperly curtailed: *R.V.*, at para. 86; *R. v. Samaniego*, 2022 SCC 9, 466 D.L.R. (4th) 581, at para. 77. That said, even if a trial judge erroneously restricts the scope of cross-examination following a s. 276 application, the proviso may apply if the errors did not prevent the accused from making full answer and defence: *R.V.*, at para. 87.

[131] For example, in *R.V.* the accused was charged with the listed offences of sexual assault and sexual exploitation. It was alleged that the complainant was a virgin and that she had become pregnant as a result of the assault. The Supreme Court concluded that the trial judge erred in his s. 276 disposition by preventing the accused from putting relevant questions to the complainant in cross-examination about her prior sexual activity during the estimated period of conception. Karakatsanis J., for the majority, emphasized the importance of cross-examination to an accused's right to make full answer and defence. She stated at para. 64:

Simply put, the more important evidence is to the defence, the more weight must be given to the rights of the accused. For example, the need to resort to questions about a complainant's sexual history will be

significantly reduced if the accused can advance a particular theory without referring to the complainant's sexual history. But in other circumstances – where challenging the Crown's evidence of the complainant's sexual history directly implicates the accused's ability to raise a reasonable doubt – cross-examination becomes fundamental to the accused's ability to make full answer and defence and must be allowed in some form: [*R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 71 and 94].

[132] Nevertheless, in that case, the Supreme Court applied the curative proviso to restore the convictions. The court concluded that the accused was not prevented from making full answer and defence and that the error had resulted in no substantial wrong. The defence had been permitted to ask questions at trial that allowed the accused to adequately challenge the inference urged by the Crown that the complainant's pregnancy confirmed his participation in the assault. In particular, counsel was able to advance the theory that the complainant had a boyfriend at the time, and that she had a motive to lie. He was not prevented from exploring the complainant's definition of "virginity" and what she meant when she told her doctor she was not sexually active at the time she became pregnant. After a careful review of the evidence, the court concluded that the errors in the s. 276 ruling were harmless and there was no reasonable possibility that the verdict would have been different.

[133] Given the high bar for invoking the curative proviso, particularly where cross-examination has been wrongly restricted, I am not satisfied that this is an appropriate case in which it should be applied. First, evidence elicited through

cross-examination about how A.K. conducted her business in the past may have supported an inference that A.K. worked independently of the appellants and that they did not exercise influence over the conduct forming the basis for the charges. Second, regarding A.K.'s prior posting of advertisements on Backpage.com, cross-examination in this area may have revealed evidence supporting the appellants' argument that it was A.K., not the appellants, who posted the ads forming the basis of the advertising sexual services charge. As Karakatsanis J. acknowledged in *R.V.*, at para. 86, "[b]ecause it is difficult to predict what lines of questioning counsel might pursue and what evidence may have emerged had cross-examination been permitted, a failure to allow relevant cross-examination will almost always be grounds for a new trial".

[134] The Crown contends that the principal focus of the proposed cross-examination was to respond to the assertion that the appellants had exploited A.K.'s drug dependency to cause her to engage in the sex trade, and that the trial judge rejected this theory and ultimately acquitted the appellants of the human trafficking offences. The Crown argues the convictions for the sexual services offences did not require proof of exploitation and were supported by other evidence. In my view the areas the appellants proposed to explore in cross-examination of A.K. (and evidence that had been excluded in the redactions to the preliminary inquiry transcript) were relevant to the appellants' defences to the



SUPREME COURT OF CANADA

CITATION: R. v. R.V., 2019 SCC 41

APPEAL HEARD: March 20, 2019

JUDGMENT RENDERED: July 31, 2019

DOCKET: 38286

BETWEEN:

Her Majesty The Queen
Appellant

and

R.V.
Respondent

- and -

**Ending Violence Association of Canada and Criminal Lawyers' Association of
Ontario**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe and
Martin JJ.

REASONS FOR JUDGMENT: Karakatsanis J. (Wagner C.J. and Abella, Moldaver and
(paras. 1 to 100) Martin JJ. concurring)

JOINT DISSENTING REASONS: Brown and Rowe JJ.
(paras. 101 to 139)

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is appropriate in two circumstances: (i) where the error is harmless or trivial; or (ii) where the evidence is so overwhelming that the trier of fact would inevitably convict: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34; *Khan*, at paras. 29-31.

[86] Cross-examination is undoubtedly a key element of the right to make full answer and defence. This Court has held that sometimes “there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed”: *Lyttle*, at para. 1 (emphasis in original); see also *Osolin*, at p. 663. Thus, as a general rule, counsel “may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition”: *Lyttle*, at para. 48. Because it is difficult to predict what lines of questioning counsel might pursue and what evidence may have emerged had cross-examination been permitted, a failure to allow relevant cross-examination will almost always be grounds for a new trial: *Shearing*, at para. 151; *Crosby*, at para. 20; *Osolin*, at pp. 674-75.

[87] The key question at this stage is whether the errors in this case prevented R.V. from making full answer and defence. More specifically, is it clear that R.V. was able to adequately challenge the inference that the pregnancy confirmed his participation in the assault? Here, the Court of Appeal did not specifically address the scope of the permissible cross-examination. However, it held that whatever cross-