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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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.

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(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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

> (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).

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(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 particulars 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;

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(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.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.M., 2024 ONCA 661
DATE: 20240906
DOCKET: C68920 & C68957

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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.

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]

[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.

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[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

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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-

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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.

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[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

his sentence appeal relates to the drug trafficking conviction, I would uphold his four-month sentence in respect of that offence.

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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.

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[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.

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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

[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.

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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 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

[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.

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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

[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.

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view, the new legislation preserved "[t]he balance struck in *Seaboyer* among the interests of justice, the accused and the complainant": at para. 22.

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(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 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:

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[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 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.

> (a) is not being adduced for the purpose of supporting an inference described in subsection (1);
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> (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;
>
> (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

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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*,

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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).

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(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

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[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".

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.

[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

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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.

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(4) The Section 276 Application Decision[8]

[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”.

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[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.

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[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

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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.

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[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

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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.

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[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

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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]

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(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

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[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 *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.

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

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was engaged in the particular 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.

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(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 offences. 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

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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.

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[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 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

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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

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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 involving 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*.

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[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 offences 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

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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

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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 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).

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

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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.

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[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

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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.

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[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

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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.

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[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.

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(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.

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[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

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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

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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.

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[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-

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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.

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(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

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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

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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.

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[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

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the legal error had any impact on the appellants' convictions, 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

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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

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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

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> 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

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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

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sexual services offences because they shed light on the appellants' relationship with A.K.

[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

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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.

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[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

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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

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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 “repost”/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.

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[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

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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.

Released: September 6, 2024 “K.M.v.R.”

“K. van Rensburg J.A.”
“I agree. J. George J.A.”
“I agree. L. Favreau J.A.”

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