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SUPREME COURT OF CANADA

CITATION: R. *v.* A.M., 2026 SCC 33

APPEAL HEARD: February 11, 2026
JUDGMENT RENDERED: October 16, 2026
DOCKET: 41528

BETWEEN:

His Majesty The King
Appellant

and

A.M. and M.P.
Respondents

- and -

Attorney General of British Columbia,
Attorney General of Alberta,
Raoul Wallenberg Centre for Human Rights and
Criminal Lawyers' Association (Ontario)
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 100)

Moreau J. (Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. concurring)

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v.

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2026: February 11; 2026: October 16.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Admissibility — Complainant's sexual

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activity — Accused charged with sexual services and human trafficking offences — Accused applying to cross-examine complainant at trial on previous sex work— Trial judge finding that pre-screening regime in s. 276 of Criminal Code applied to charged offences and precluding accused from cross-examining complainant as requested — Accused convicted of sexual services offences — Whether pre-screening regime applies to sexual services and human trafficking offences — Whether trial judge erred in limiting accused's cross-examination of complainant on previous sex work — Criminal Code, R.S.C. 1985, c. C-46, s. 276.

Two accused were charged with several *Criminal Code* offences, including three sexual services offences and two human trafficking offences, arising from sexual services provided by the complainant. The accused brought an application pursuant to s. 276 of the *Criminal Code* to cross-examine the complainant at trial regarding her previous sex work. They asserted that the focus of the cross-examination would be on the financial and advertising aspects of the complainant's work, rather than its sexual nature.

The trial judge noted that the pre-screening regime in s. 276 applies to proceedings in respect of an offence under certain sections of the *Criminal Code* enumerated in that provision, none of which corresponded to the offences charged against the accused. He then drew on the Court's guidance in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, according to which the s. 276 regime applies to any proceeding in which an enumerated offence in s. 276(1) has "some connection" to the offence

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charged, and concluded that s. 276 applied in the instant case since the charges against the accused engaged the offence of sexual assault. The trial judge precluded the accused from cross-examining the complainant on her previous sex work on the basis that it was irrelevant or suggestive of twin-myth reasoning. Accordingly, the transcript of the complainant's preliminary inquiry testimony, where she was questioned about her previous sex work, was redacted to comply with the trial judge's ruling. Ultimately, the accused were convicted of the sexual services offences and acquitted of the human trafficking offences.

On appeal, the Court of Appeal held that the trial judge erred in applying s. 276, in precluding the accused from pursuing certain lines of questioning in the complainant's cross-examination, and in consequently redacting the complainant's preliminary inquiry evidence. It ordered new trials on the sexual services offences.

Held: The appeal should be dismissed.

A textual, contextual, and purposive statutory analysis does not support the categorical inclusion of sexual services and human trafficking offences in the list of enumerated offences in s. 276(1). To expand the application of s. 276 to proceedings in which a non-enumerated offence was charged, that offence must bear some connection to an offence enumerated in s. 276(1). A connection is demonstrated where an enumerated offence is the predicate offence for, or an included offence of, the offence charged, or where all the elements of an enumerated offence are implicated in the proceeding. Where s. 276 does not apply, it would be inappropriate to extend the

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application of the common law regime established in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, to screen evidence of a complainant's prior sexual history. While evidence of a complainant's prior sex work should not be adduced to show a propensity to engage in sex work or sexual activity generally, such evidence may be relevant for other legitimate inferential purposes, as in the instant case.

To determine whether the pre-screening regime in s. 276 applies categorically to non-enumerated sexual services and human trafficking offences, s. 276 must be interpreted using the modern approach to statutory interpretation. On its face, s. 276 does not expressly apply to all sexual offences. Where an express reference to an offence is expected, Parliament's failure to include the offence can be inferred as a deliberate decision to exclude it. Parliament's choice to exclude the sexual services and human trafficking offences from the list of enumerated offences in s. 276(1) is supported by a contextual analysis of the legislative scheme. When Parliament made substantive amendments to s. 276, the sexual services and human trafficking offences were not added to the list of enumerated offences in s. 276(1). This is telling, given Parliament's inclusion of those offences in neighbouring pre-screening production and admissibility regimes. A purposive analysis of s. 276 reveals that the specific mischief Parliament sought to address was drawing impermissible, discriminatory inferences by reason of the sexual nature of the sexual activity in question. However, not all inferences arising from prior sexual activity will derive from the sexual nature of the activity; some may derive from its commercial nature. This nuance is relevant in the context of sexual services and human trafficking offences, as the requisite elements to

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prove the offences hinge on the nature of the relationship between the complainant and the accused, not a specific sexual act, and thus will not directly engage the twin myths set out in s. 276(1).

In *Barton*, the Court introduced the prospect that s. 276 could apply to proceedings in which a non-enumerated offence was charged, if some connection to an enumerated offence in s. 276(1) could be established using a case-by-case approach. A connection may be obvious or formal, such as where the enumerated offence is the predicate offence for, or an included offence of, the offence charged. A connection may also be demonstrated where the context of the proceeding implicates an enumerated offence. The commission of an enumerated offence must substantively arise on the facts, and there must be more than mere alignment between some requisite elements of the charged offence and the enumerated one. All of the elements of the enumerated offence must be implicated, having regard to the entire circumstances of the proceedings. The sexual services and human trafficking offences are not connected to the enumerated offence of sexual assault on the asserted basis that the former touch on the issue of consent, since, for the procuring offence, proving its necessary elements is different from suggesting that the complainant did not consent to the sexual act.

The extension of the common law *Seaboyer* framework to screen evidence of a complainant's prior sexual history in proceedings involving sexual services and human trafficking offences, as an alternative to the s. 276 regime, would represent an unjustified shift in the common law that is contrary to Parliament's intent. Relying on

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the reasoning in *Barton* to support this extension is misplaced, as that reasoning was underpinned by the idea that the court must guard against twin-myth reasoning irrespective of which party adduces the evidence of a complainant's prior sexual history. Prosecutions involving only sexual services or human trafficking offences generally do not raise the same twin-myth reasoning concerns that are endemic to sexual offences prosecutions. In addition, the ramifications of extending the application of the *Seaboyer* framework are no small matter, having regard to the increasing complexity of sexual offence trials and the pressure to prosecute sexual offences within the prescribed ceilings. Importing the *Seaboyer* framework would also circumvent the clear distinction Parliament drew between s. 276 and the other pre-screening regimes. Parliament's non-inclusion of sexual services and human trafficking offences in s. 276(1) was deliberate; as such, it is not for the courts to read in, as a matter of policy, equivalent procedural safeguards.

Evidence of prior sexual history is not categorically irrelevant or inadmissible, as it may be possible to draw non-prejudicial inferences from the evidence. In some cases, it is legitimate for the defence to lead evidence showing how a complainant's prior experience informs their perspective on the nature and quality of the relationship with the accused. Such evidence advances an inference about a complainant's state of mind or the broader contextual or commercial circumstances that may be relevant in evaluating exploitation. If a proposed cross-examination crossed permissible bounds, the trial judge would have the authority to intervene as the ultimate evidentiary gatekeeper. In the instant case, the evidence sought to be adduced

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was relevant as it related to the commercial nature of the complainant's work, not its sexual nature, and it was being proffered to suggest that the complainant previously pursued work in the sex trade voluntarily, as opposed to being lured or exploited by the accused into working in the industry.

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Cases Cited

Considered: *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; **referred to:** *R. v. Kruk*, 2024 SCC 7; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. Gallone*, 2019 ONCA 663, 147 O.R. (3d) 225; *R. v. T.W.W.*, 2024 SCC 19; *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. J.J.*, 2022 SCC 28, [2022] 2 S.C.R. 3; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. Floyd*, 2019 ONSC 7006; *R. v. Maldonado Vallejos*, 2022 ONSC 2753; *R. v. D.A.L.*, 2023 ONSC 124; *R. v. N.G.*, 2023 ONSC 792; *R. v. Williams*, 2020 ONSC 206, 64 C.R. (7th) 226; *R. v. Langford*, 2021 ONSC 4307, 74 C.R. (7th) 147; *R. v. M.D.*, 2020 ONSC 951; *R. v. Powell*, 2021 ONCJ 708; *R. v. Europe*, 2023 ONSC 5322; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Piekut v. Canada (National Revenue)*, 2025 SCC 13; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21; *R. v. Kinamore*, 2025 SCC 19; *Kosicki v. Toronto (City)*, 2025 SCC 28; *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, [2021] 3 S.C.R. 687; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *R. v. Wolfe*, 2024 SCC 34; *R. v. McIntosh*, [1995] 1

S.C.R. 686; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Kloubakov*, 2025 SCC 25; *R. v. Reimer*, 2024 ONCA 519, 173 O.R. (3d) 412; *R. v. Ochrym*, 2021 ONCA 48, 400 C.C.C. (3d) 358; *R. v. Williams*, 2020 ONSC 6347, 396 C.C.C. (3d) 267; *R. v. A.M.*, 2021 ONCJ 266; *R. v. J.C. and D.B.*, 2023 ONSC 6093; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439; *R. v. Lacombe*, 2019 ONCA 938, 383 C.C.C. (3d) 114; *R. v. Boone*, 2016 ONCA 227, 347 O.A.C. 250; *R. v. W.H.*, 2015 ONSC 3087; *R. v. G. (C.M.)*, 2016 ABQB 368, 41 Alta. L.R. (6th) 374; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. A. (A.B.)*, 2019 ONCA 124, 145 O.R. (3d) 634.

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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.

Canadian Charter of Rights and Freedoms.

Criminal Code, R.S.C. 1985, c. C-46, ss. 276, 278.1 to 278.97, 279.01 to 279.03, 286.1 to 286.4, 686(1)(b)(iii).

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APPEAL from a judgment of the Ontario Court of Appeal (van Rensburg, George and Favreau JJ.A.), 2024 ONCA 661, 173 O.R. (3d) 641, 442 C.C.C. (3d) 83, [2024] O.J. No. 4029 (Lexis), 2024 CarswellOnt 13653 (WL), setting aside the convictions entered by McKelvey J. for the sexual services offences, 2020 ONSC 4191, [2020] O.J. No. 3000 (Lexis), 2020 CarswellOnt 9480 (WL), and ordering new trials. Appeal dismissed.

Vallery Bayly and Avene Derwa, for the appellant.

Jeffery Couse and *Arooba Shakeel*, for the respondent A.M.

Jack Gemmell, for the respondent M.P.

Lara Vizsolyi and *Alix Tolliday*, for the intervener Attorney General of British Columbia.

Katherine E. Fraser, for the intervener Attorney General of Alberta.

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Angela Marinos, for the intervener Raoul Wallenberg Centre for Human Rights.

Stephanie DiGiuseppe, for the intervener Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

MOREAU J. —

I. Overview

[1] Over the past few decades, Canadian law has made concerted efforts to prevent discriminatory myths and stereotypes from infecting the operative reasoning in sexual offence cases. While reliance on impermissible stereotypical and myth-based reasoning remains a subtle threat, it is important for trial judges to avoid conflating such reasoning with legitimate inferences (see *R. v. Kruk*, 2024 SCC 7, at paras. 64-65). It is the court's job to balance the elimination of myths and stereotypes in sexual offence cases with the accused's right to full answer and defence. Doing so requires filtering out impermissible lines of reasoning in accordance with specific legal rules and without blanket exclusion of whole categories of evidence.

[2] This appeal requires the Court to determine whether the pre-screening regime in s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, which governs the

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admissibility and use of evidence with respect to a complainant's sexual activity that does not form the subject matter of the charge, applies to non-enumerated sexual services (ss. 286.1 to 286.4) and human trafficking (ss. 279.01 to 279.03) offences.[1] The Crown urges this Court to reach a different result than the Court of Appeal for Ontario and conclude that s. 276 applies categorically to these offences. In the alternative, the Crown argues that the application of the common law rules governing the admission of Crown-led evidence of prior sexual activity should be extended to the impugned offences (see *R. v. Seaboyer*, [1991] 2 S.C.R. 577). Finally, the Crown asserts that the Court of Appeal erred by concluding that it was permissible to draw inferences about the complainant's propensity to voluntarily engage in sex work based on her prior sexual history.

[3] For the reasons that follow, I agree with the respondents, A.M. and M.P., that categorically adding the sexual services and human trafficking offences to the enumerated offences in s. 276(1) would be contrary to Parliament's intent. Moreover, extending the application of the common law pre-screening rules set out in *Seaboyer* would be inappropriate given the foregoing conclusion. Instead, using a case-by-case approach to determine whether s. 276 applies in proceedings involving sexual services and human trafficking offences respects Parliamentary intent and adequately guards against discriminatory lines of reasoning operating against complainants. I also disagree with the Crown that the Court of Appeal engaged in impermissible propensity-

[1] The s. 276 regime was amended by the *Protecting Victims Act*, S.C. 2026, c. 19. The amendments were not in effect at the material time and are not considered in these reasons.

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based reasoning that a complainant is more likely to voluntarily engage in sex work merely because she previously voluntarily engaged in sex work. The Court of Appeal carved out legitimate inferences on which the respondents may rely.

[4] I would dismiss the appeal.

II. Facts

[5] The respondents were charged with the following *Criminal Code* offences arising from sexual services provided by the complainant, A.K.: (1) trafficking a person contrary to s. 279.01(1); (2) receiving a material benefit from trafficking a person contrary to s. 279.02(1); (3) receiving a material benefit from sexual services contrary to s. 286.2(1); (4) procuring a person for the purpose of facilitating the obtaining of sexual services for consideration contrary to s. 286.3(1); and (5) advertising sexual services for consideration contrary to s. 286.4. The first two offences are considered human trafficking offences, while the next three are considered sexual services offences. The respondents were also charged with other offences unrelated to the resolution of this appeal.

[6] The offences were alleged to have taken place between February 1, 2015, and October 25, 2017. A.K. first met A.M. and another male, identified as X, at a bar in Toronto. During this initial meeting, A.K. spoke to both A.M. and X about working for X in the sex trade. Soon after, A.K. travelled to Edmonton to work for X, but this

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arrangement was short-lived. Due to her longstanding issues with substance abuse, X sent A.K. back to Ontario.

[7] About a month following her return to Ontario, A.K. sought assistance from X in finding work. X referred A.K. to A.M., who agreed to arrange sex work for her. With A.M.'s assistance, A.K. began working out of various hotels in the Toronto area, with ads being routinely placed for her services on a website known as Backpage.com. A.K. testified that she initiated contact with A.M. because she needed help attracting clients.

[8] During her work with A.M., A.K. consumed large amounts of alcohol and drugs. She also testified to engaging in a romantic relationship with A.M. that was separate from her work with him.

[9] Through her work, A.K. was eventually introduced to the other respondent, M.P., who would occasionally drive her to hotels or clients' homes. There were periods while working with the respondents in which A.K. would regularly stay at her parents' home.

[10] Months before the respondents were arrested, A.K. began working out of a home the respondents rented in Newmarket, Ontario. On September 9, 2017, an altercation broke out between A.M. and A.K., in which A.M. was alleged to have grabbed A.K.'s arm. A.K. testified that following the altercation, the respondents agreed to take her to the bus station, but they stopped at a friend's house along the way.

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Despite being locked in the car, A.K. was able to leave the vehicle and head to a neighbour's house, where she called the police. The police attended and A.K. was taken to the police station, where she subsequently provided a video statement. She then went to live at her parents' home.

[11] Although A.K. did not have any recollection of returning to the Newmarket home, on October 25, 2017, the police found her there and proceeded to arrest the respondents.

III. Decisions Below

A. *Ontario Superior Court of Justice (McKelvey J.)*

(1) Ruling on the Section 276 Application, 2019 ONSC 7293

[12] The Crown's theory was that the respondents were in a position of trust, power, or authority over A.K., having used their positions as drug suppliers to control A.K. and maintain her participation in the sex trade for their benefit. The respondents denied that they held a position of trust over A.K. They maintained that she had substance abuse issues before meeting them and that she continued to independently engage in sex work and use drugs during a temporary period when she stopped working for them.

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[13] Both the Crown and counsel for the respective respondents questioned A.K. about her previous sex work without objection at the preliminary inquiry. She testified that she was approximately 18 years old when she began working in the sex trade and had since worked both independently and for different agencies. She initially posted ads on Backpage.com that were also used during her time working with the respondents. She stated that working for agencies, although requiring an equal split of revenue, was more lucrative than working independently and provided more safety protections.

[14] Eight months before trial, this Court released its decision in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579. The respondents brought an application pursuant to s. 276 of the *Criminal Code* to cross-examine A.K. at trial regarding her sex work, including how she entered the sex trade; how long, often, and for whom she worked in the sex trade; how her earnings were split; whether she could make more money independently; whether she was open with her family about her work; how she met X and what arrangements she made to work with him before working with A.M.; whether she engaged in independent sex work during the period covered by the allegations; and whether she continued with sex work after that period.

[15] The respondents stated that the focus of the cross-examination would be on the financial and advertising aspects of A.K.'s sex work, rather than the sexual nature of her work.

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[16] In referring to the principles applicable to the s. 276 regime, the trial judge drew on *Barton* and *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3. He noted that s. 276 applies to proceedings in respect of an offence under certain sections of the *Criminal Code* enumerated in that provision, none of which corresponded to the offences charged against the respondents.

[17] The trial judge drew on *Barton*'s guidance that the s. 276 regime applies to any proceeding in which an enumerated offence in s. 276(1) has "some connection" to the offence charged, even if that enumerated offence is not particularized in the charging document (para. 16; see *Barton*, at para. 76). He noted that the charges against the respondents "would strike at the heart of the necessary consent for the complainant to engage in the sexual services provided by her at [their] request" (para. 17). As the offence of sexual assault was thereby engaged, s. 276 applied. Given this conclusion, the trial judge precluded the respondents from cross-examining A.K. on other sexual activity before and after the timeframe of the allegations on the basis that such lines of inquiry were irrelevant or suggestive of twin-myth reasoning. The respondents were permitted to cross-examine A.K. only about her meeting with X and arrangements to work with him, and her independent work during the timeframe of the allegations. The s. 276 application was accordingly allowed in part, and the transcript of A.K.'s preliminary inquiry testimony was redacted to comply with the trial judge's ruling.

(2) Reasons for Conviction, 2020 ONSC 4191

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[18] The respondents were convicted of advertising sexual services for consideration contrary to s. 286.4 of the *Criminal Code*. The trial judge found that the respondents intentionally posted ads that offered A.K.'s sexual services. Data from A.M.'s phone showing message conversations with M.P. alluding to re-posting ads supported A.K.'s evidence that the respondents were involved in posting her ads. The ads themselves also listed the respondents' phone numbers.

[19] The respondents were also convicted of procuring a person for the purpose of facilitating the obtaining of sexual services for consideration contrary to s. 286.3(1) of the *Criminal Code*. The trial judge found that the respondents' impugned activities constituted control, direction, or influence over A.K.'s movements (see *R. v. Gallone*, 2019 ONCA 663, 147 O.R. (3d) 225, at para. 47).

[20] Finally, the respondents were convicted of receiving a material benefit from A.K.'s sexual services contrary to s. 286.2(1). Evidence from A.K. suggested that she had to share the proceeds from those services with the respondents in addition to contributing to the rent on the Newmarket home, paying for the drugs the respondents supplied her, and paying for the cost of the hotels where she conducted her work. Data from A.M.'s phone supported A.K.'s evidence that she shared the proceeds from her sexual services with the respondents.

[21] The respondents were acquitted of the human trafficking offence under s. 279.01(1) because the Crown had not proven beyond a reasonable doubt that the purpose of the respondents exercising control, direction, or influence over A.K.'s

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movements was to exploit her. Since the Crown had failed to prove the underlying offence, the respondents were also acquitted of receiving a material benefit from trafficking a person under s. 279.02(1).

B. *Court of Appeal for Ontario, 2024 ONCA 661, 173 O.R. (3d) 641 (van Rensburg, George and Favreau JJ.A.)*

[22] The crux of the respondents' conviction appeals related to the test for applying s. 276 to offences that are not specifically enumerated in that section. In seeking a new trial, the respondents narrowed the scope of their proposed cross-examination to focus on A.K.'s prior work in the sex trade, which included the posting of ads for sexual services. They argued that the trial judge erred in precluding them from cross-examining A.K. about her prior work in the sex trade and in redacting references to that work from her preliminary inquiry testimony. The redacted preliminary inquiry testimony was introduced at trial on the Crown's application.

[23] The Court of Appeal concluded that s. 276 does not categorically apply to all proceedings where an accused person is charged with sexual services or human trafficking offences, but not with an enumerated offence. Section 276 should be applied using a case-by-case approach having regard to the charges, the evidence the Crown proposes to lead, and whether the defence proposes to elicit or lead evidence of an enumerated offence in order to determine whether an enumerated offence is implicated in the proceeding.

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[24] In applying its reasoning to this case, the Court of Appeal held that the trial judge erred in applying s. 276, in precluding the respondents from pursuing certain lines of questioning in A.K.'s cross-examination, and in consequently redacting A.K.'s preliminary inquiry evidence. The Court of Appeal's analysis hinged on two main points. First, s. 276 expressly applies to 14 specific offences and to proceedings "in respect of" those offences. Sexual services and human trafficking offences are not specifically listed among the enumerated offences. Second, the trial judge erred in treating sexual assault as an included offence because the sexual services and human trafficking offences touched on the issue of consent, despite the fact that consent was not a live issue at trial. The Court of Appeal allowed the appeals on the s. 276 ground and ordered new trials on the sexual services offences, but did not address the three other grounds of appeal raised by the respondents.

[25] The Court of Appeal also declined the Crown's invitation to extend the application of the common law rules set out in *Seaboyer* to require a pre-trial screening procedure for the admissibility of evidence relating to A.K.'s prior sex work.

[26] The Court of Appeal concluded that the effect of the trial judge's errors in his s. 276 ruling prevented the respondents 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" (para. 117). This evidence was relevant to her relationship with the respondents in regards to the procuring and material benefit charges and to whether the respondents were involved in posting ads

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for her services during the relevant time period. The Court of Appeal agreed with the respondents that their proposed cross-examination of A.K. and related use of her preliminary inquiry evidence would not have engaged prohibited twin-myth reasoning, given their focus on the non-sexual, commercial aspects of her relevant sex work.

[27] Finally, the Court of Appeal concluded that the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* did not apply.

IV. Issues

[28] There are three issues on appeal:

1. Does s. 276 categorically apply to sexual services and human trafficking prosecutions?

2. If s. 276 does not apply, should the common law be extended to screen evidence of a complainant's prior sexual activity in sexual services and human trafficking prosecutions?

3. If evidence of a complainant's prior sexual activity is admissible, what inferences may properly be drawn from that evidence?

[29] I address each issue in turn.

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V. Analysis

A. *Standard of Review*

[30] As set out in s. 278.97 of the *Criminal Code*, the determination to admit or refuse evidence of other sexual activity is a question of law.[2] However, s. 278.97 "only delimits the nature of the issues that can be raised on appeal; it does not prescribe a standard of review" (*R. v. T.W.W.*, 2024 SCC 19, at para. 19). Correctness review applies only to whether "the trial judge applied the correct legal principles, considered all the evidence they should have, did not admit irrelevant evidence, and did not otherwise err in law" (para. 22). Where an appeal raises these issues, no deference is owed. Where the issue concerns the trial judge's assessment of the probative value and prejudicial effects of the evidence, the trial judge's conclusion is owed deference (see paras. 21-22).

[31] Since this appeal turns on the interpretation of s. 276, the operative standard of review is correctness (see *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15, at para. 25).

B. *Background*

[2] Section 278.97 was in force at the material time, but has since been repealed as part of several amendments to the *Criminal Code*, whereby former ss. 278.1 to 278.97 were replaced by ss. 278.1 to 278.38.

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[32] In order to contextualize the following analysis, this section will briefly discuss how s. 276 practically functions during the trial process and its judicial interpretation in *Barton*. This section aims to provide the necessary backdrop for the statutory interpretation analysis below.

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(1) Section 276 Procedure

[33] Section 276 governs the admissibility and use of evidence that a complainant engaged in sexual activity that does not form the subject matter of the charge. Section 276 engages a balancing act of "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).

[34] Section 276(1) provides that in proceedings "in respect of" one of the enumerated offences, evidence that the complainant has engaged in sexual activity is not admissible to support the twin myths. The twin myths, identified in s. 276(1)(a) and (b), represent the historical myths that unchaste women are more likely to consent to the sexual activity forming the subject matter of the charge or are less worthy of belief (see *Barton*, at paras. 56 and 60). Section 276(1) gives effect to the principle that the twin myths are irrelevant and can "severely distort the trial process" (*R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 33; see also *Barton*, at para. 60).

[35] Section 276(2) sets out the conditions for admissibility of evidence that a complainant engaged in sexual activity that does not form the subject matter of the charge. Section 276(3) sets out the factors that a judge must consider in determining whether evidence is admissible under s. 276(2). Section 276(2), informed by the factors listed in s. 276(3), provides a screening mechanism that requires the defence to disclose some aspects of its case because of the potential prejudice that could result from the admission of the evidence (see *R. v. J.J.*, 2022 SCC 28, [2022] 2 S.C.R. 3, at para. 160).

(2) *Barton*

[36] This Court's decision in *Barton* is relevant to this appeal because it introduced the prospect that s. 276 could apply to proceedings in which a non-enumerated offence was charged, so long as an enumerated offence was substantively implicated (see para. 75).

[37] Applying the modern approach to statutory interpretation, Moldaver J. noted that the opening words of s. 276(1) and (2) referred to proceedings "in respect of" an enumerated offence which, he concluded, represented language "of the widest possible scope" akin to "in relation to", "with reference to", or "in connection with" (*Barton*, at para. 72, quoting *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39). Accordingly, "Parliament would not have chosen this exceptionally broad language if it intended to limit the application of the s. 276 regime to proceedings in which a listed offence was expressly charged" (*Barton*, at para. 73).

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[38] Justice Moldaver concluded:

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

[39] Courts in Ontario have reached contrary conclusions regarding the content and application of the "broad relational" or "some connection" test, as described in *Barton*. On one side of the spectrum, there is a line of authorities that suggests s. 276 applies categorically to sexual services and human trafficking offences because, generally speaking, they involve complainants who face biases similar to those that s. 276 seeks to guard against (see, e.g., *R. v. Floyd*, 2019 ONSC 7006, at paras. 4-10; *R. v. Maldonado Vallejos*, 2022 ONSC 2753, at paras. 14-24; *R. v. D.A.L.*, 2023 ONSC 124, at paras. 11-18; *R. v. N.G.*, 2023 ONSC 792, at paras. 7-27). On the other side lies a line of authorities that declines to endorse the categorical inclusion approach, citing Parliament's intent and distinguishing the required elements of the enumerated offences in s. 276(1) and the sexual services and human trafficking offences (see, e.g., *R. v. Williams*, 2020 ONSC 206, 64 C.R. (7th) 226 ("*Williams #1*"), at paras. 26-37; *R. v. Langford*, 2021 ONSC 4307, 74 C.R. (7th) 147, at paras. 7-25; *R. v. M.D.*, 2020 ONSC 951, at paras. 21-46; *R. v. Powell*, 2021 ONCJ 708, at paras. 6-11; *R. v. Europe*, 2023 ONSC 5322, at paras. 10-11 and 21-24).

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[40] This appeal provides an opportunity for this Court to clarify the application of the *Barton* test. I discuss this further in "The *Barton* Test" section.

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C. *Section 276 Does Not Categorically Apply to Sexual Services and Human Trafficking Prosecutions*

(1) The Modern Approach to Statutory Interpretation

[41] Resolution of this appeal first requires this Court to interpret s. 276 using the modern approach to statutory interpretation. It requires courts to read the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Telus Communications Inc.*, at para. 30; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Piekut v. Canada (National Revenue)*, 2025 SCC 13, at para. 42). This approach focuses on the text, context, and purpose of the statutory provision to find a meaning that is harmonious with the statute as a whole (see *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at para. 69). With respect to the interpretation of s. 276 specifically, this Court has "resisted an overly rigid reading of the text of s. 276, noting that it must be read in light of the scheme and broader purposes of the regime" (*R. v. Kinamore*, 2025 SCC 19, at para. 66, citing *Goldfinch*, at para. 53).

(a) *Text*

[42] On its face, s. 276 does not expressly apply to all sexual offences. It is axiomatic that had Parliament intended for s. 276 to apply categorically to sexual services and human trafficking offences, it could have included them in the offences enumerated in s. 276(1). As A.M. notes, this reasoning is buttressed by the principle of implied exclusion, namely, that "if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 8.09[1]; see also *Kosicki v. Toronto (City)*, 2025 SCC 28, at para. 39; *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, [2021] 3 S.C.R. 687, at para. 59; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 42). This principle is of particular relevance because, in enacting s. 276, Parliament essentially codified the common law screening framework from *Seaboyer* (see *Darrach*, at para. 45). However, Parliament departed from *Seaboyer* in an important way: while the *Seaboyer* principles applied "[o]n a trial for a sexual offence", essentially applying to all sexual offence proceedings, Parliament specifically set out a list of enumerated offences to which s. 276 categorically applies (*Seaboyer*, at p. 634).

[43] Since Parliament chose not to include sexual services and human trafficking offences in the list of enumerated offences in s. 276(1), it is not for this Court to read these offences in (see *Langford*, at para. 18). Indeed, where express reference to an offence is expected, the court can infer that Parliament's failure to

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include the offence "is the result of a deliberate decision to exclude it" (*R. v. Wolfe*, 2024 SCC 34, at para. 35; see also Sullivan, at § 8.09[1]; *Kosicki*, at para. 39; *Loblaw Financial Holdings Inc.*, at para. 59; *Ulybel Enterprises Ltd.*, at para. 42).

[44] While there is no discrepancy between the English and French versions, it is worth noting that the French version of s. 276(1) uses the following language: "*Dans les poursuites pour une infraction . . . .*" As A.M. observes, the French version of the legislation invites a narrower reading buttressing the conclusion that s. 276(1) does not apply broadly across all sexual offences (see M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2026* (33rd ed. 2026), at para. 40.25). Rather, as the following analysis explains, a more specific nexus is required to come within the ambit of s. 276(1).

[45] A textual analysis of s. 276 therefore strongly points away from the categorical inclusion of sexual services and human trafficking offences in the list of enumerated offences in s. 276(1).

(b) *Context*

[46] A brief review of the surrounding legislative scheme assists in determining whether the sexual services and human trafficking offences share "some connection" with the enumerated offences in s. 276(1).

(i) Broader Legislative Scheme

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[47] The historical development of the broader legislative scheme supports the position that Parliament did not intend for sexual services and human trafficking offences to be categorically included within s. 276(1)'s ambit for two reasons. First, Parliament has made substantive amendments to s. 276, while the sexual services and human trafficking provisions were in force, without amending the enumerated offences in s. 276(1). Second, Parliament has amended and enacted neighbouring pre-screening production and admissibility regimes that include the sexual services and human trafficking offences. I explain these developments below.

[48] The Crown argues that the legislative changes to other provisions that came into force during the period between the hearing and this Court's decision in *Barton*, are not instructive as to the interpretation of s. 276(1). Pointing to these legislative changes is not sufficient to justify giving s. 276(1) a more restrictive interpretation than what this Court afforded in *Barton*.

[49] The respondents disagree, arguing that the coherence of the legislative scheme as a whole supports the interpretation that sexual services and human trafficking offences are not categorically included in s. 276(1).

[50] In December 2018, Parliament substantively amended the s. 276 regime through Bill C-51, *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 (assented to December 13, 2018). However, Parliament did not take this opportunity to amend the enumerated offences in s. 276(1). This is telling, given that Parliament had

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previously turned its mind to amending s. 278.2 of the *Criminal Code* to expand the list of enumerated offences to which the regime in ss. 278.2 to 278.91 governing the production of third-party records applies. Through Bill C-51, Parliament also enacted s. 278.92, which similarly identifies the enumerated offences to which the regime in ss. 278.92 to 278.94 applies. That regime governs the admission into evidence of private records relating to the complainant.[3]

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[51] Like s. 276, the third-party records and private records regimes contain specific pre-screening requirements in sexual offence cases, with those in s. 278.2 relating to the production of third-party records and those in s. 278.92 relating to the admissibility of evidence. In the ss. 278.2 and 278.92 pre-screening regimes, Parliament used the same language as s. 276, with the provisions applying "in respect of" certain enumerated offences. In 2014, Parliament amended s. 278.2 to add the sexual services and human trafficking offences to its list of enumerated offences. In 2018, Parliament enacted s. 278.92 and included the sexual services and human trafficking offences in its list of enumerated offences. The enumerated offences for these records regimes include almost entirely the same 14 offences enumerated in s. 276(1), *as well as* 3 sexual services offences and 4 human trafficking offences.

[52] As M.P. points out, Parliament has conducted four comprehensive reviews of the pre-screening regimes: in 1992, 1997, 2014, and 2018. The offences enumerated in s. 276(1) remain undisturbed. In this regard, "interpreting s. 276 as applying

[3] The third-party records and private records regimes were amended by the *Protecting Victims Act*. The amendments were not in effect at the material time and are not considered in these reasons.

categorically to the sexual services and human trafficking offences would be tantamount to amending s. 276, the role of Parliament and not the courts" (R.F., at para. 71, citing *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26).

[53] The principles of statutory interpretation include a presumption against tautology, namely, that Parliament "uses language carefully and consistently" so that "the same words have the same meaning" in a given statutory scheme (Sullivan, at § 8.04). Had Parliament wished to include the sexual services and human trafficking offences in s. 276(1), it surely would have done so, especially given their parallel inclusion in ss. 278.2 and 278.92 (see *Williams #1*, at para. 35).

[54] Parliament's decision not to add the sexual services and human trafficking offences to the list of enumerated offences in s. 276(1), while amending and enacting the other pre-screening production and admissibility regimes, is entirely consonant with this Court's interpretation of the scope of the interests protected by these regimes. The common thread woven through the three regimes is the "broad remedial goal of advancing the dignity and equality of complainants" and protecting complainants against harmful myths and stereotypes (R.F. (A.M.), at para. 60). However, each regime addresses discrete interests. The s. 276 prior sexual activity regime targets a narrower set of interests: protecting the integrity of the trial by excluding evidence that is misleading (with a particular focus on the twin myths), protecting the rights of the accused, encouraging the reporting of sexual violence, and protecting the security and privacy of witnesses (see *Seaboyer*, at p. 606; *Darrach*, at para. 25). The s. 278.2 third-

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party records regime balances the accused's right to make full answer and defence with the privacy rights of complainants and witnesses in the context of the private records themselves (see *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 17). Specifically, the third-party records regime has a broader focus than just the twin myths, as it is meant to protect myths generally "from forming the entire basis of an otherwise unsubstantiated order for production of private records" (para. 119). Finally, the s. 278.92 private records regime is constructed to mirror the admissibility threshold in s. 276, but extends to a broader array of myths and stereotypes. This Court in *J.J.* noted that while the enumerated records captured by the s. 278.92 regime "do not necessarily engage the twin myths, which relate specifically to prior sexual activity, this Court has recognized that many other problematic myths and stereotypes may be at play" (para. 132).

[55] I conclude that Parliament made a conscious choice to include the sexual services and human trafficking offences in ss. 278.2 and 278.92 and to exclude them from the list of enumerated offences in s. 276(1). The inclusion of these offences in ss. 278.2 and 278.92 aligns with the interests protected by those regimes, which include shielding complainants from harmful myths and stereotypes *beyond* the twin myths. The same cannot be said of s. 276, which has a narrower purpose in specifically addressing and eradicating twin-myth reasoning in relation to complainants.

[56] A contextual analysis of the legislative scheme therefore points strongly away from the categorical inclusion of sexual services and human trafficking offences in the list of enumerated offences in s. 276(1).

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(c) *Purpose*

[57] The Crown argues that the varied nature of the enumerated s. 276(1) offences "demonstrates the intended broad scope of s. 276" (A.F., at para. 48). The through-line among the enumerated offences in s. 276(1) is that they are all sexual offences, albeit their required elements vary. Protecting against the violence and exploitation associated with sex work was one of the purposes identified by Parliament in enacting the sexual services offences (see *R. v. Kloubakov*, 2025 SCC 25, at para. 68). On a purposive reading, because sexual services and human trafficking offences involve sexual exploitation, sexual coercion, and often sexual violence, they have an "intrinsic substantive connection" to the offences enumerated in s. 276(1) (A.F., at para. 49).

[58] The respondents argue that despite its broad objects, s. 276 was designed to eradicate impermissible reasoning stemming from other sexual activity on issues of consent and credibility, as encapsulated by the twin myths, in proceedings that have some connection to one of the enumerated offences. In the respondents' view, this objective is not relevant to the sexual services or human trafficking offences, which capture a wide range of activity that does not converge with s. 276's purposes.

[59] In *Darrach*, this Court recognized that the purposes animating s. 276 are "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" (para. 19; see also *Seaboyer*, at p.

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606). While these objects are indeed broad, the specific mischief Parliament sought to address was drawing impermissible, discriminatory inferences by *reason of the sexual nature of the activity in question*. This Court noted this important nuance in *Darrach*:

> The phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The phrase "by reason of the sexual nature of that activity" has the same effect as the qualification "solely to support the inference" in *Seaboyer* in that it limits the exclusion of evidence to that used to invoke the "twin myths" (p. 635). [Emphasis in original; para. 35.]

[60] Not all inferences arising from prior sexual activity will derive from the sexual nature of the activity — "[p]roceeding on the assumption that they do would render the limiting phrase 'by reason of the sexual activity' meaningless yet it is this limiting phrase that saved s. 276 from being struck down because of unconstitutional overreach" (*R. v. Reimer*, 2024 ONCA 519, 173 O.R. (3d) 412, at para. 78).

[61] This particular nuance is relevant in the context of sexual services and human trafficking offences, as the requisite elements to prove the offences hinge on the nature of the *relationship* between the complainant and the accused, not a specific sexual act, and thus will not directly engage the twin myths set out in s. 276(1) (see, generally, *R. v. Ochrym*, 2021 ONCA 48, 400 C.C.C. (3d) 358, at paras. 33-34; *Kloubakov*, at para. 118; *Gallone*, at para. 50). "What is prohibited", as A.M. notes, "is inferring from the *sexual nature of the evidence* that the complainant is more likely to

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have consented to the activity that forms the subject matter of the charge or is less worthy of belief" (R.F., at para. 54 (emphasis in original)). Drawing inferences from prior sexual activity based on its commercial nature, rather than its sexual nature, is a delicate but necessary exercise, as such inferences are qualitatively distinct. This distinction is illustrative of the careful construction of s. 276 as an evidentiary screening regime compliant with the *Canadian Charter of Rights and Freedoms*.

[62] Moreover, compared to the enumerated offences in s. 276(1), the risks of engaging twin-myth reasoning are not necessarily parallel in the sexual services or human trafficking context. For example, the first twin myth, that sexually active women are more likely to consent to the sexual activity forming the subject matter of the charge, is not directly engaged in sexual services and human trafficking offences, as non-consent is not a requisite element to these offences (see *R. v. Williams*, 2020 ONSC 6347, 396 C.C.C. (3d) 267 ("*Williams #2*"), at para. 44; see also s. 279.01(2)). The second twin myth, that sexually active women are less worthy of belief, is a concern in any sexual services case (see *Williams #2*, at para. 45), but this alone does not justify this Court's intrusion into Parliament's legislative territory.

[63] To be clear, this is not to say that complainants in sexual services or human trafficking prosecutions are undeserving of protections afforded to other complainants. Rather, the question this Court is required to answer is a matter of statutory interpretation, not of policy making. Reasoning that s. 276 applies to sexual services and human trafficking offences solely because the potential exists for twin-myth

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reasoning is "a policy rationale" that "does not answer the statutory interpretation question of whether Parliament so intended" (*Langford*, at para. 24). As will be discussed below, a trial judge's gatekeeping responsibility significantly mitigates the risk of letting the second twin myth infiltrate the reasoning process.

[64] In sum, a purposive analysis of s. 276 points away from the categorical inclusion of sexual services and human trafficking offences in the list of enumerated offences in s. 276(1).

(d) *The Barton Test*

[65] *Barton* described the phrase "in respect of" in s. 276(1) as "exceptionally broad language" that expanded the application of s. 276 to non-enumerated offences bearing "some connection" to the offences enumerated in s. 276(1) (paras. 72-73).

[66] The Crown maintains that sexual services and human trafficking offences always bear "some connection" to the sexual offences enumerated in s. 276(1). The connection is found through four main avenues: the sexual nature of the offences, the implication of some required elements of the enumerated offences in s. 276(1), the risk of misuse of evidence of the complainant's sexual history, and the vulnerability of sex workers as witnesses.

[67] According to the respondents, in *Barton*, Moldaver J. implicitly acknowledged a case-by-case purposive approach to determining the scope and

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application of s. 276. They submit that the Court of Appeal correctly interpreted *Barton*'s "some connection" test and concluded that the allegations they faced did not have the necessary connection to an enumerated offence to satisfy that test.

[68] To satisfy the "some connection" test from *Barton*, the commission of an enumerated offence must substantively arise on the facts, such that it is implicated in the proceeding. As the Court of Appeal pointed out, to engage s. 276 on a case-by-case basis, there must be more than "mere alignment" between some requisite elements of the charged offence and the enumerated one (para. 98, quoting *R. v. A.M.*, 2021 ONCJ 266, at para. 25). If mere alignment were the standard, taken to its logical extreme, it would emulate the categorical approach that the Crown is endorsing. To properly engage s. 276, "the complete constellation of elements comprising a listed offence, rather than some lesser part of it", is required (*A.M.*, at para. 27).

[69] *Barton* requires a case-by-case approach in which "[e]ach case must still be scrutinized on its facts to determine whether the proceeding is 'in respect of' a listed offence" (*Langford*, at para. 16). It follows that the factual allegations in a given case may lead to different results under the *Barton* test even where the offence charged is the same (see *Langford*, at para. 23). For example, as M.P. acknowledges, some human trafficking charges involve allegations of sexual assault or coerced sexual activity as a method of control and exploitation, thereby engaging s. 276. A case-by-case analysis should adequately identify such cases. But ultimately, "[t]he focus is on the individual proceeding, and not the category of offence" (C.A. reasons, at para. 89).

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[70] Showing "some connection" between an enumerated offence and the proceeding may come in different forms. The connection may be obvious or formal, such as where the enumerated offence is the predicate offence for, or an included offence of, the offence charged. In *Barton*, the predicate offence was enumerated in s. 276(1), although it was not specifically charged (see *Barton*, at paras. 76-77; *Langford*, at para. 17). In these circumstances, a s. 276 application should be brought and handled in the usual manner; a preliminary ruling on the applicability of s. 276 is unnecessary.

[71] Additionally, s. 276 is engaged where the context of the proceeding implicates an enumerated offence (see *Barton*, at para. 76; *Langford*, at para. 17). This is a case-by-case assessment that considers whether all of the elements of an enumerated offence are implicated, having regard to the entire circumstances of the proceeding, including: the charges, the Crown's theory of the case, the evidence that the Crown or defence proposes to lead or elicit, the information or indictment, and the evidence from the preliminary inquiry or trial (see C.A. reasons, at para. 91; *Barton*, at para. 76; *Langford*, at para. 17; *R. v. J.C. and D.B.*, 2023 ONSC 6093).

[72] To summarize, the *Barton* test will be satisfied, and s. 276 engaged, in three circumstances: (1) where an enumerated offence is a predicate offence for the offence charged; (2) where an enumerated offence is an included offence of the offence charged; or (3) where, given the charges, the Crown's theory of the case, the evidence that the Crown or defence proposes to lead or elicit, the information or indictment, and

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the evidence from the preliminary inquiry or trial, all the elements of an enumerated offence are implicated in the proceeding.

[73] In that vein, I also agree with the Court of Appeal that the trial judge erred in applying s. 276 on the basis that the impugned offences strike at the heart of the consent necessary for the complainant to provide sexual services, thus finding "some connection" with the sexual assault offence enumerated in s. 276(1). There may be some theoretical and practical overlap between the sexual assault and procuring offences given their sexually exploitative nature. However, proving the necessary elements of the latter offence, which include the exercise of control, direction or influence over a complainant's movements, is different from suggesting that the complainant did not consent to the sexual act — these are two distinct conceptual inquiries (see *Williams #1*, at paras. 27-30).

[74] As a practical matter, while *Barton* contemplates that where there is uncertainty as to the applicability of the s. 276 regime to a proceeding, the trial judge should raise the issue with the parties at the earliest opportunity (see para. 78), the preferable practice is for counsel to identify any potential engagement of s. 276 as early as possible in the proceeding. Prior to trial, the parties are ordinarily best positioned to assess whether the anticipated evidence may give rise to a threshold question concerning the applicability of s. 276. As part of the pre-trial process, it may also be advisable for the pre-trial judge to canvass with counsel whether s. 276 is likely to be engaged. Early identification enables the issue to be addressed in advance, facilitates

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effective case management, and promotes the efficient use of resources by minimizing interruptions once the evidentiary phase of the trial is underway.

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(2) Conclusion

[75] A textual, contextual, and purposive statutory analysis does not support the Crown's position that a categorical approach to including sexual services and human trafficking offences under the ambit of s. 276(1) is warranted. It is not the role of the courts to amend legislation when Parliament made the conscious choice to exclude these offences.

D. *The Common Law Should Not Be Extended to Screen Prior Sexual Activity Evidence in Sexual Services and Human Trafficking Prosecutions*

[76] The Crown argues in the alternative that evidence of a complainant's prior sexual activity should be screened pursuant to the common law rules in *Seaboyer* in proceedings involving sexual services and human trafficking offences. Screening under the common law is a well-established procedure and does not constitute a dramatic shift in the common law, as was similarly the case with extending the application of s. 276 to Crown-led evidence in *Barton*.

[77] The respondents disagree, arguing that extending the scope of *Seaboyer* would be a drastic expansion to the common law. It would circumvent the clear legislative distinction that Parliament drew between s. 276 and the other pre-screening

regimes when it decided that sexual services and human trafficking offences should not be included in s. 276(1).

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(1) Expanding the Common Law

[78] To effect a change in the common law, the change must be necessary to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve an inconsistency (see *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842, at para. 42, citing *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at p. 819; *R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 733). The change must be incremental and its consequences capable of assessment (*Friedmann Equity*, at para. 42).

[79] I am of the view that it would be inappropriate for this Court to extend the application of the *Seaboyer* common law screening framework to this case. Extending the scope of *Seaboyer* to capture an entirely new category of offences in the s. 276 regime is a step that is more than incremental, and the consequences are potentially significant (see *Williams #2*, at para. 32). I say this for three main reasons.

[80] First, the Court's reasoning in *Barton* for applying the common law principles articulated in *Seaboyer* does not extend to nor support the application of those principles to sexual services and human trafficking offences. In *Barton*, Moldaver J. held that the *Seaboyer* principles applied to Crown-led evidence of prior sexual acts,

despite s. 276 referring to evidence adduced by the defence (para. 80). Justice Moldaver came to this conclusion because twin-myth reasoning was a risk regardless of which party led the evidence and the common law *Seaboyer* principles spoke to the general admissibility of prior sexual activity evidence (para. 80). From this perspective, *Barton* simply clarifies "that the common law principles articulated in *Seaboyer* regarding evidence of a complainant's sexual history continue to apply to the Crown in proceedings in respect of a listed offence under s. 276(1)" (*Kinamore*, at para. 33, citing *Barton*, at para. 80; see also *J.J.*, at para. 74). Unlike the offences at issue in this case, which Parliament consciously chose to exclude from s. 276(1), Parliament intended that, for the offences enumerated in s. 276(1), the Crown be obliged to bring a common law application to adduce a complainant's prior sexual history evidence because of the categorical irrelevance of the twin myths with respect to those offences (see *Barton*, at para. 80; *Kinamore*, at para. 74).

[81] Underpinning the Court's reasoning path in *Barton* was the idea that the court must "guard against twin-myth reasoning" irrespective of which party adduces the evidence of a complainant's prior sexual history (*R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 78). As explained above, prosecutions involving only sexual services or human trafficking offences generally "do not raise the same 'twin-myths' reasoning concerns that are endemic to sexual offences prosecutions" (*Williams #2*, at para. 37). The Crown's reliance on this Court's reasoning in *Barton* to support the extension of the *Seaboyer* framework to sexual services and human trafficking offences is therefore misplaced.

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[82] Second, this Court has acknowledged how the "increasing complexity of sexual offence trials in Canada poses a challenge to our overburdened criminal justice system", partially due to the admissibility rules governing evidence of a complainant's sexual history (*Kinamore*, at para. 1). If this Court extends the application of the *Seaboyer* framework to whenever an accused is charged with sexual services or human trafficking offences and the accused wishes to cross-examine the complainant on prior sexual history, a formal pre-trial application would be necessary, the defence would be required to reveal parts of its case and provide a supporting affidavit, counsel would need to be provided to the complainant, and a *voir dire* would be required to determine admissibility (see *Williams #2*, at para. 32). The ramifications of this procedure are no small matter — especially having regard to the increased pressures on the Crown in prosecuting sexual offences within the ceilings prescribed by *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

[83] Finally, importing the *Seaboyer* framework would circumvent the clear distinction Parliament drew between s. 276 and the other pre-screening regimes. Where Parliament has given clear indication that its non-inclusion of sexual services and human trafficking offences in s. 276(1) was deliberate, it is not for the courts to read in, as a matter of policy, equivalent procedural safeguards. While courts do not have "jurisdiction to cure gaps in a legislative scheme" regardless of how compelling the policy reasons may be, there is simply no legislative gap to fill in this case (Sullivan, at § 12.02[1]).

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(2) Conclusion

[84] In sum, I would refrain from extending the application of the common law *Seaboyer* regime to screen evidence of a complainant's prior sexual history in proceedings involving sexual services and human trafficking offences. To do so would represent an unjustified shift in the common law that is contrary to Parliament's intent.

E. *Myths and Stereotypes Should Not Be Conflated With Legitimate Inferences*

[85] The Crown argues that the Court of Appeal revived prohibited myths and stereotypes in its reasons. Specifically, the Crown asserts that inferring from the complainant's prior sexual activity that the complainant was more likely to have voluntarily engaged in sex work because she had voluntarily done so in the past is wrong in law, as it engages twin-myth reasoning.

[86] The respondents submit that the inference that the complainant voluntarily engaged in sex work and that they did not coerce her into sex work arose from the commercial nature of the activity, not its sexual nature. The Crown's argument conflates permissible and impermissible inferences arising from the complainant's prior sexual activity.

(1) Reliance on Myths and Stereotypes

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[87] Reliance on myths and stereotypes, including those beyond the twin myths, jeopardizes the court's truth-seeking function (see *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439, at para. 2, per L'Heureux-Dubé J., concurring) and has "no place in a rational and just system of law" (*R. v. Lacombe*, 2019 ONCA 938, 383 C.C.C. (3d) 114, at para. 31). This is because myths and stereotypes are predicated on "false logic" (*R. v. Boone*, 2016 ONCA 227, 347 O.A.C. 250, at para. 37, quoting *R. v. W.H.*, 2015 ONSC 3087, at para. 10). The dangers inherent in reliance on myths and stereotypes were canvassed by Martin J., as a trial judge, in *R. v. G. (C.M.)*, 2016 ABQB 368, 41 Alta. L.R. (6th) 374, at para. 60:

> Broadly speaking, myths and stereotypes rest on untested and unstated assumptions about how the world works or how certain people behave in particular situations. They often involve an idealized standard of conduct against which particular individuals are measured.

[88] Myths and stereotypes remain a pernicious threat to the criminal trial process. Despite the risks associated with impermissible reliance on myths and stereotypes, under Canadian law, evidence of prior sexual history is not categorically irrelevant or inadmissible (see L. Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019), 44 *Queen's L.J.* 316, at p. 346). Rather, "the law prohibits stereotypical or discriminatory lines of reasoning flowing from th[is] for[m] of evidence, but acknowledges that [it] may be relevant for other, legitimate inferential purposes" (p. 346; see also L. Dufraimont, "Current Complications in the Law on Myths and Stereotypes" (2021), 99 *Can. Bar Rev.* 536, at p. 550). As this Court stated in *Kruk*, "just because the evidence happens to align with a myth or stereotype does not

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necessarily mean that any inferences that can be drawn from that evidence will be prejudicial" (para. 65).

[89] In this case, the evidence the respondents sought to adduce related to the commercial nature of the complainant's work, not its sexual nature. Contrary to the Crown's argument that the evidence could lead to impermissible twin-myth reasoning, the evidence of A.K.'s previous sex work was being proffered to suggest that she previously pursued work in the sex trade voluntarily and that the respondents did not lure or exploit her into working in the industry. As the intervener the Criminal Lawyers' Association (Ontario) points out, the sexual nature of the complainant's prior sex work does not go to the core of the evidence's function, which is to provide context for A.K.'s level of autonomy, decision-making, and the power dynamics that shaped her relationship with the respondents.

[90] I agree with the Court of Appeal that "evidence of A.K.'s prior working arrangements was relevant to a proper understanding of the true nature of her relationship" with the respondents (para. 118). This evidence could assist in countering the Crown's theory that the respondents capitalized on A.K.'s substance abuse issues in coercing her into sex work. The Court of Appeal correctly noted that the proposed cross-examination of A.K. was not intended to be used for impermissible purposes and that, if it crossed permissible bounds, the trial judge would have the authority to intervene.

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[91] Undoubtedly, in cases such as this, trial judges must be vigilant in ensuring that evidence is not being proffered to advance improper propensity reasoning. Evidence of a complainant's prior sex work should not be adduced to show a propensity to engage in sex work or sexual activity generally. Nor does a voluntary decision to engage in sex work at one point logically lead to the inference that a complainant is therefore less susceptible to exploitation, influence, coercion, or control generally. However, it is legitimate for the defence to lead evidence showing how a complainant's prior experience informs their perspective on the nature and quality of the relationship with the accused. Such evidence is not being proffered to show a propensity to act in a certain way. Rather, it advances an inference about a complainant's state of mind or the broader contextual or commercial circumstances that may be relevant in evaluating exploitation.

(2) The Exercise of the Court's General Discretion

[92] The Crown submits that reliance on the trial judge's general discretion to halt inappropriate cross-examination is an insufficient safeguard that cannot replace s. 276's protective function. Moreover, the trial judge's discretion is insufficient because it is retrospective — trial judges can only intervene once counsel has asked the complainant a question.

[93] The respondents submit that the trial judge's discretion is sufficient to protect the integrity of the trial. Trial judges are well positioned to ensure that

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impermissible myths and stereotypes do not impact the truth-seeking function of the trial.

[94] As this Court noted in *Goldfinch*, trial judges are the "ultimate evidentiary gatekeepers" (para. 75; see also *Barton*, at para. 68; *Kinamore*, at paras. 3 and 44). Using their general discretion to safeguard the truth-seeking function of the trial is a foundational tenet of the criminal process. Importantly, there are several discriminatory myths and stereotypes beyond the twin myths that require trial judges to exercise vigilance in their gatekeeping role, for example, that a complainant's delay in disclosure undermines their credibility (see *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 63), that a complainant's failure to dress modestly indicates they are more likely to consent to sexual activity (see *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 82 and 88-89, per L'Heureux-Dubé J., concurring), or that associating with the accused after an alleged sexual assault suggests there was consent (see *R. v. A. (A.B.)*, 2019 ONCA 124, 145 O.R. (3d) 634, at paras. 6-12; for a broader discussion on myths and stereotypes, see *Kruk*, at paras. 36 and 41).

[95] While several myths and stereotypes do not call for statutory pre-screening, trial judges are required to monitor against impermissible inferences from infecting the reasoning process. The general discretion afforded to trial judges is an important tool to maintain the integrity of the trial process for all participants. If evidence is proffered for the purpose of demeaning the complainant or capitalizing on prejudices against sex

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workers, trial judges should recognize that evidence of that nature is impermissible and put a stop to such questioning (see *Williams #2*, at paras. 57-58).

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[96] Sex workers are subject to many harmful and discriminatory myths and stereotypes. This Court recognized as much in both the majority and dissent in *Barton*. For the majority, Moldaver J. recognized several troubling stereotypical assumptions about Indigenous women involved in sex work, including that they:

> - are not entitled to the same protections the criminal justice system promises other Canadians;
> - are not deserving of respect, humanity, and dignity;
> - are sexual objects for male gratification;
> - need not give consent to sexual activity and are "available for the taking";
> - assume the risk of any harm that befalls them because they engage in a dangerous form of work; and
> - are less credible than other people. [para. 201]

Justices Abella and Karakatsanis expressed a similar concern in their partial dissent (see paras. 230-31). In addition, like all victims of sexual offences, victims of commercial sex trade offences are vulnerable witnesses, for whom testifying can be deeply traumatizing.

[97] In this regard, s. 276 is not the only tool to protect the trial process from impermissible lines of questioning and inferential reasoning. On the contrary, trial judges have a variety of tools at their disposal to advance protection of vulnerable

complainants. For example, it is an important part of the trial judge's role to set appropriate limits on questioning, to intervene where questioning becomes improper, to provide appropriate limiting instructions to the jury to ensure that its deliberations are not infected by discriminatory myths or stereotypes, and to use their case management powers to ensure the permissible use of evidence (see *Langford*, at para. 48).

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[98] As emphasized in *Kinamore*, trial judges should adopt a cautious approach when s. 276 is potentially engaged (para. 44). Where uncertainty exists about the application of s. 276, trial judges should follow the process set out in *Barton*: ". . . 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" (para. 78). As part of that process, it is important for trial judges to consider the defence's purpose in delving into the complainant's prior or subsequent sex work.

(3) Conclusion

[99] The Court of Appeal did not rely on impermissible propensity reasoning that engaged the twin myths in determining the ambit of permissible cross-examination of the complainant in this case.

VI. Disposition

[100] I would dismiss the appeal and affirm the Court of Appeal's decision to quash the respondents' convictions for the offences under ss. 286.2(1), 286.3(1) and 286.4 of the *Criminal Code* and to order new trials.

Appeal dismissed.

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