SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Webber*, 2018 NSSC 344

Date: 20180913
Docket: CRH 462516
Registry: Halifax

Between:

Her Majesty the Queen

v.

Renee Allison Webber

Voir Dire # 7 – 276 Application
Restriction on Publication: ss. 486.4, 486.5, 517(1) and 539(1) of the *Criminal Code of Canada*

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 12, and 13, 2018, in Halifax, Nova Scotia
Oral Decision:	September 13, 2018, in Halifax, Nova Scotia
Written Release:	June 4, 2019, in Halifax Nova Scotia
Counsel:	Cory Roberts and Erica Koresawa, for the Crown Donald C. Murray, Q.C., for the Defendant

Overview

[1] The accused, Renee Allison Webber, seeks to cross-examine the complainant, M.S. about her alleged prior sexual activity with and alleged sexual assault by a former co-accused, Kyle Leslie Pellow. In order to ensure the trial continued as expediently as possible, I provided my bottom-line decision denying the application with written reasons to follow. These are those reasons.

[2] The Crown submits that the application should be dismissed as it fails to meet the statutory requirements of s. 276.1 of the *Criminal Code*, and the proposed evidence does not have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (s. 276(2)(c); as of December 13, 2018, this is s. 276(2)(d). Sections 276.1 – 276.5 were repealed at the same time, after the trial in this matter: S.C. 2018, c. 29.

[3] I must address the following questions:

1. Has the applicant satisfied the requirements of s. 276.1 to entitle her to an evidentiary hearing?
2. Has the applicant satisfied the Court that the proposed evidence is relevant and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice?

Preconditions for an Evidentiary Hearing

[4] First, let me acknowledge this is an unusual application under s. 276. In most cases, an accused is seeking to admit evidence of prior sexual contact to support a defence of honest but mistaken belief in consent. This is not the purpose of the proposed evidence. Here, the complainant is alleging that the accused:

- Advertised her to provide sexual services;
- Procured her;
- Trafficked her;
- Sexually exploited her; and,
- Sexually assaulted her.

[5] The Defence is seeking the admission of evidence relating to sexual activity with, and sexual assault by, a former co-accused, Mr. Pellow. The Defence argues this evidence could raise a reasonable doubt concerning the control the accused is alleged to have exerted over the complainant.

[6] Section 276(2) states that no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge, unless a judge determines, in accordance with the procedures set out in s. 276.1 and s. 276.2, that the evidence:

(a) Is of specific instances of sexual activity;

(b) Is relevant to an issue at trial; and,

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

[7] Sections 276, 276.1, and 276.2 of the *Criminal Code* impose a two-stage procedure. At the first stage, the accused must make written application in accordance with s. 276.1 for a hearing to determine whether the evidence is admissible. If the application is successful, an evidentiary hearing is held pursuant to s. 276.2. The judge must consider the application for a hearing, in camera, and in the absence of the jury.

The Notice Requirement

[8] Section 276.1 imposes three conditions that must be met by an accused who applies for a hearing. The most basic of these is the mandatory requirement of s. 276.1(2) that counsel seeking to adduce the evidence must prepare a written application, in which detailed particulars of the evidence sought to be adduced are set out, and an articulation of the relevance of the evidence to an issue at trial.

[9] The purpose of a written application is to provide notice to the Crown to allow a review of the information with the complainant, and an opportunity to respond to arguments concerning admissibility. (See, for example, *R. v. Wright*, 2012 ABCA 306). By requiring counsel to articulate relevance, the legislation attempts to guard against unwarranted applications, and the potential admission of evidence that has no legitimate purpose, that is, it does not logically support a defence.

[10] In *R. v. Darrach*, 2000 SCC 46, the Supreme Court of Canada interpreted s. 276.1(2)(a) to require that the defence supply an affidavit containing detailed particulars of the evidence the Defence seeks to adduce.

Timing

[11] Section 276.1(4)(b) requires that the written application for a hearing be served on the prosecutor and the clerk of the court at least seven days prior to the date on which the application is to be considered by the court. The presiding judge may abridge this time period, if the interests of justice so require.

[12] Where the defence fails to bring an application, the judge can simply prohibit defence counsel from questioning the complainant about the activity or adducing the evidence. See *R. v. T.E.P.*, [2004] O.J. No. 1904 (C.A.); *R. v. P.S.*, 2007 ONCA 299, [2007] O.J. No. 1476 (C.A.); *R. v. A.J.B.*, 2007 MBCA 95.

Is s. 276 Engaged?

[13] The Defence argued that s. 276 is not engaged in this case because the questions sought to be posed to the complainant do not relate to the s. 271 and s. 153(1)(a) offences as charged, but to the charges broadly referred to as human trafficking. The Defence argues that the questions seek to elicit admissible evidence concerning Mr. Pellow's alleged control over M.S. at the time of the alleged offences in relation to the accused.

[14] The Crown argues that s. 276 is engaged because the indictment includes charges in relation to s. 271 and s. 153(1)(a).

Law and Analysis

[15] The following sections of the *Criminal Code* are relevant:

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

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

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and,

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

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(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.

Section 276.1

Application for a hearing

276.1(1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

Form and content of application

(2) An application referred to in subsection (1) must be made in writing and set out

(a) detailed particulars of the evidence that the accused seeks to adduce,

and,

(b) the relevance of that evidence to an issue at trial,

and a copy of the application must be given to the prosecutor and to the clerk of the court.

Jury and public excluded

(3) the judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

Judge may decide to hold hearing

(4) Where the judge, provincial court judge or justice is satisfied

(a) that the application was made in accordance with subsection (2),

(b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and

(c) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),

the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

Section 276.2

Jury and public excluded

276.2(1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and public shall be excluded.

Complainant not compellable

(2) the complainant is not a compellable witness at the hearing.

Judge’s determination and reasons

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

(a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

> (b) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and
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> (c) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.
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> Record of reasons
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> (4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

[16] The legislation is clear that to be adduced, this type of evidence (1) requires notice and (2) requires a *voir dire* to consider the relevance of the proposed evidence including the balancing of probative value against any prejudicial effect caused by the introduction of the evidence.

[17] I have reviewed *R. v. Barton*, 2017 ABCA 216[1], and note that Parliament in enacting s. 276 did not limit its application to instances where the listed offences were charged. The Court in *R. v. Barton, supra*, stated as follows:

> [103] …Therefore, reading the broad, flexible wording Parliament chose in its grammatical and ordinary sense, we have concluded that Parliament intended that the mandatory regime under s 276 apply whenever the "proceedings" before the court were in relation to, with reference to, or in connection with a listed offence. In other words, the listed sexual offence need not be the offence charged. It is enough that the proceedings are "in respect of" the sexual offence, which they certainly are when the sexual offence is an underlying, predicate or lesser included offence of the offence charged.
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> …
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> [106] This interpretation is also consistent with the scheme of the provision, its object and Parliament's intention. The legislative purpose behind s 276 is to eradicate from criminal law the "twin myths" that complainants who have had sexual contact with the accused or others are more likely to have consented and are less credible. It is also designed to promote gender equality by removing prejudicial and potentially misleading evidence from the truth seeking process.

[18] The proceedings here are in relation to, with reference to, in connection with a listed offence. Two of the eight count indictment includes a listed offence.

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[1] *R. v. Barton*, 2019 SCC 33, was released as this written decision was finalized, but not available at trial when the bottom-line oral decision was provided. It had not been considered in these reasons.

[19] The requirements of s. 276 should have been followed in this case. The requirements were not followed. That is not the end of the analysis. Next, I must consider whether there were detailed particulars of the evidence given and whether I should exercise my discretion to abridge the time.

Detailed Particulars

[20] The Crown argued other issues prevented a hearing on the evidence in this matter.

[21] I was asked to consider whether the application should fail because the accused did not set forth detailed particulars and instead relied on an "information and belief" affidavit of counsel attaching preliminary inquiry transcripts.

[22] The Crown submits that this motion did not follow the usual course, which would require seven days written notice and an affidavit setting forth the evidence sought to be admitted. In addition, the Crown points to the failure to provide the complainant with time to participate.

[23] This application was not advanced until September 12, 2018. Later, on the same day, the Defence filed a Notice of Application seeking admission of evidence that between October 1, 2015, and May 22, 2016, Mr. Pellow engaged in sexual activity, which was exploitative of M.S. in Halifax, Nova Scotia.

[24] I repeat the language of s. 276.1(2) of the *Criminal Code*:

> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-mater of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
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> (a) is of specific instances of sexual activity;
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> (b) is relevant to an issue at trial; and
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> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[25] The Crown asserts that this application fails because the Crown and Court have not been furnished with detailed particulars of the evidence sought to be introduced as required by s. 276.1(2)(a).

[26] In *R. v. Darrach, supra*, the court held that s. 276.1(2)(a) places a burden on the defence to file an affidavit with "detailed particulars" of the evidence and the affidavit must be a personal affidavit. An information and belief affidavit is inadequate (*Darrach* at para. 53). These requirements, as articulated by the Court in *Darrach, supra*, made it clear that full answer and defence does not include the right to ambush either the Crown or a complainant with this type of evidence.

[27] I have reviewed the cases provided on this issue. In *R. v. Webber*, 2016 BCSC 1178, the accused was allowed to take the stand in the interest of expediency. This case is distinguishable from the matter before me. In *R. v. Webber, supra*, the facts were as follows:

> [5] The accused says the requirements of s. 276.1 of the *Criminal* Code were met because his written application refers to the preliminary inquiry transcript; he relies on a portion of the cross-examination of the complainant in that transcript in lieu of an affidavit. That is inadequate. It does not provide detailed particulars. It is the accused's responsibility to explain both the evidence and its relevance.
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> [6] The Crown's position is that notwithstanding the authenticity of the transcript, an affidavit is still required. Mr. Webber questioned how it can be that he could not rely to the preliminary inquiry testimony which is a record of a court proceeding.
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> [7] In my view, the Crown's position is correct. The reason why an affidavit is necessary is explained clearly in *Darrach*. The accused first has the burden of establishing that the evidence he seeks to admit falls into the broad category of s. 276. He must do so by filing with the court and, for the purpose of giving Crown's notice, detailed particulars of the evidence. Apart from not providing notice, the failure to produce the affidavit deprives the Crown of the right to cross-examine the affiant if it so chooses. In this case that is significant because the complainant is not compellable to give evidence by virtue of s. 276.2(2). By relying on the preliminary inquiry transcript, the accused is trying to adduce through the back door what he is prohibited from bringing in through the front.
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> [13] The evidence the accused wants to adduce is statements the complainant allegedly made to another person, F.S., earlier in the evening. The accused relies on the transcript of the cross-examination of the complainant at the preliminary inquiry. As noted above, in my view, that evidence was not properly before me; but in the event I am mistaken about its admissibility, I have considered it.

[28] In *R. v. Lebrocq*, 2011 ONCA 405, the Ontario Court of Appeal found the trial judge did not err in dismissing the accused's s. 276 application prior to proceeding to a hearing. The trial judge dismissed the s. 276 application because the written materials, including the affidavit, lacked sufficient details and, based on what information was provided, relevance had not been established. The Court of Appeal

held the trial judge was under no obligation to proceed to a hearing as the decision was discretionary and was owed deference.

[29] The Crown submits the application in the case at bar suffers from the same deficiencies and should similarly be dismissed.

[30] The affidavit submitted in this case is an "information and belief" affidavit sworn by counsel. The affidavit references evidence given by the complainant at the preliminary inquiry relating to the accused and the then co-accused, Mr. Pellow. At the preliminary inquiry, M.S. stated that prior to engaging in underaged sex work, she engaged in sexual activity with Kyle Pellow in a vehicle, and later, after her forced participation in underaged sex work began, the allegation is Mr. Pellow sexually assaulted her.

[31] I understand that, based on the information before us, there are two people who were present during an alleged event. The first person is M.S., who is not a compellable witness under s. 276. The second potential witness is Mr. Pellow, who pleaded guilty to some offences, but not to a sexual assault as referred to by the complainant during the preliminary inquiry.

[32] The Crown maintains that they are entitled, and I accept that they are entitled to probe the evidence in terms of relevance and reliability with live witnesses. The Crown says that before this Court considers whether the motion as currently constituted by the Defence is sufficient in the circumstances, there must be evidence that Mr. Pellow is refusing to provide an affidavit and further, refusing to either attend for cross-examination or, once here, refusing to speak. The Crown has said that Mr. Pellow is locatable.

[33] The Defence responds that this is a situation where the Crown is not asserting that the evidence is not reliable because it, in fact, comes from a Crown witness. Further, the Defence suggests that an inference can be drawn respecting Mr. Pellow's co-operation, given that there is no promise that he would not face jeopardy in relation to an admission of criminal conduct if he confirmed the complainant's evidence. The Court must consider *R. v. Webber*, *supra*, and the expediency of moving to an evidential hearing in the middle of trial.

[34] I appreciate that the witness was available to be questioned at the preliminary inquiry. Despite the procedural irregularities, I am convinced, in the circumstances, that we should move to an evidential hearing. I appreciate the impact on the Crown

and quite frankly the impact to the complainant, who has her cross-examination further delayed. This is why these procedural safeguards are in place.

[35] In the circumstances, we have an individual, Mr. Pellow, who is incarcerated and has not pleaded guilty to a significant allegation led in the preliminary inquiry concerning a sexual assault. The Crown has not spoken of prejudice in probing the reliability of the evidence and the Crown does not dispute the accuracy of the sexual assault allegation. In these unique circumstances, I will permit the Defence to move to the evidential hearing.

Abridging the Time

[36] The lack of notice under s. 276 was a result of the late request by the defence to cross-examine the complainant on her past sexual history and a past sexual assault. The first time this was raised was during the complainant's cross-examination.

[37] To be frank, I am not only concerned but very reluctant to even move to the next stage of the analysis, the evidential stage, due to the failure by the Defence to comply with the *Criminal Code* procedures for this type of evidence. It is clear that Parliament intended for good reason, in most cases, for there to be seven days notice.

[38] I could have dismissed the application alone on the basis of lack of notice. In the face of the significant allegations against the accused, however, and out of a concern of potentially impeding full answer and defence without a full evidentiary hearing, I allowed the defence to embark on an evidentiary hearing.

[39] The Defence was required to serve the Crown and Court with the application with seven days notice. (s. 276.1(4)(b)). I reluctantly utilize my discretion to abridge the time. I allow a hearing on the admissibility of the proposed evidence.

Evidential Hearing

[40] As referred to earlier in these reasons, s. 276.1(2) of the *Criminal Code* sets forth the considerations at this stage. I must consider whether the instances of sexual activity proffered by the Defence are:

1. of specific instances of sexual activity;
2. relevant to an issue at trial; and,
3. have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[41] The Defence proffers two separate occasions of sexual activity. One is a kiss in a car with Mr. Pellow and the second, an alleged sexual assault of M.S. by Mr. Pellow, committed at his mother's home in Halifax.

[42] By virtue of s. 276.2(3), a judge is required to consider the three s. 276(2) criteria in determining the admissibility of the evidence. Section 276(2)(a) requires that the evidence be of "specific instances" of sexual activity. This appears to contemplate that the time, place, parties, and nature of the sexual activity be identified. Where the evidence sought to be adduced is of a pre-existing relationship between the complainant and the accused, it may not be possible to describe the prior sexual contacts with such particularity. It may be sufficient that the accused provides information about the sexual character of the prior relationship, as long as there is some degree of particularity beyond a generalized assertion that the parties had sexual relations. (*R. v. P.S.*, 2007 ONCA 299, [2007] O.J. No. 1476 (C.A.).)

[43] The Defence argues these are the specific instances and I accept these as specific instances.

[44] The second criterion, set out in s. 276(2)(b), is that the evidence must be relevant to an issue at trial. An item of evidence is relevant if it renders a fact slightly more probable than it would appear without that evidence.

[45] The third criterion, set out in s. 276(2)(c), is that the evidence must possess "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice".

[46] In *Darrach, supra*, the court held that the requirement of "significant probative value" serves to exclude evidence of trifling relevance that would endanger the proper administration of justice. It is not necessary for the defence to demonstrate strong and compelling reasons for the admission of the evidence.

[47] The judge must take into account the eight factors set out in s. 276(3) in assessing the evidence, and must state which of those factors affected the determination as to admissibility of the sexual conduct evidence.

[48] The consideration is the relevance of the proposed evidence to an issue at trial. The Defence summarized the relevance that:

> Kyle Leslie Pellow subjected [M.S.] to control direction or influence in part by the instrumentality of his exploitative sexual behavior.

[49] This case and this argument is very different than most circumstances that exist in the caselaw I have been provided.

[50] The Defence argues that the evidence of the sexual encounter and the later sexual assault is evidence of the control Mr. Pellow exerted over M.S. The Defence acknowledged the evidence that had been given by M.S. with respect to the level of control Mr. Pellow exerted over her during the time frame set forth in the indictment. These instances of control included:

- Driving M.S. to Toronto in a car for 18 hours;
- Placing M.S. in hotel rooms with no access to food;
- The necessity of M.S. using the bathroom on the side of the road on the way to Toronto;
- M.S. being placed in Mr. Pellow's mother's home for a week;
- Mr. Pellow's cell number being associated to M.S.'s Backpage ads;
- Mr. Pellow receiving calls and/or texts about M.S.'s provision of sexual services;
- Mr. Pellow driving M.S. to and from calls where she was to provide sexual services;
- Mr. Pellow taking any monies she earned for the provision of sexual services;
- Driving M.S. to and from Moncton, New Brunswick to engage in under-aged sex work.

[51] This is not an exhaustive list, but some of the evidence heard up until the time this application was made.

[52] The Defence argues that the evidence of the kiss and alleged sexual assault are necessary as the sexual assault in particular is substantively more violative of M.S.'s personal dignity. The Defence argues that this evidence is more deeply violative as sexual control than any other evidence.

[53] The Defence argues that this alleged sexual assault and kiss are relevant to the charges in the indictment under ss. 286.3(2) and 279.011(1) and the aspect of control as an element of those offences The Defence argues that the sexual assault is both evidence of Mr. Pellow's control over M.S. and raises a reasonable doubt in regards to the control the accused had over M.S.

[54] The Defence submits that the relevance of this evidence is not outweighed by the prejudice to the proper administration of justice in relation to considerations in s. 276(3)(f) and 276(3)(g). The Defence reminds the Court of the need and the requirement of the Court to take into account s. 276(3)(a) and (c).

[55] The Defence argues that the evidence of prior sexual activity relates to a strictly limited issue – whether it was Mr. Pellow or the accused who was exercising control, influence, or direction over M.S. during the time frame covered by the indictment.

[56] The Defence submits that while the proposed s. 276 evidence could never be determinative of whether Mr. Pellow was solely responsible for exercising control, influence, or direction of M.S., it could be of some use to the trier of fact in evaluating the Crown's evidence on Counts 4 and 5 of the indictment.

[57] The Defence further argues that the proposed evidence does not support either of the impermissible inferences: either that M.S. was more likely to have consented or that she is less worthy of belief because of the sexual nature of the activity with Mr. Pellow.

[58] The Defence says, in short, that the purpose of leading the evidence of sexual activity would be to provide the jury with an evidentiary basis to conclude – if the jury accepts the evidence – that M.S. was not only financially and physically exploited by Mr. Pellow (evidence which M.S. has already presented to the jury), but was intimately and sexually exploited as well. It is evidence of a level of domination by Mr. Pellow.

[59] The Crown argues that the evidence sought to be adduced could raise an impermissible inference, that being that the complainant is less worthy of belief. It is possible that the evidence could be used by the jury when considering the s. 271 and s. 153 offences.

[60] The Crown submits that no limiting instruction would cure the impermissible inferences.

[61] The Crown also argues that, even if it is relevant to the control element of the offences, the evidence of the kiss or of the alleged sexual assault is not significantly probative of the issue of control, and could not raise a reasonable doubt as to the accused's control. The Crown argues the Defence's argument is premised on the presumption that control, as alleged in these offences, is a zero sum game. That is, the more control one person has the less control another has.

[62] In order to be permitted to lead evidence of other sexual activity, s. 276(2) requires that the evidence be relevant to an anticipated issue at trial. The evidence is thus required to be relevant in the same sense of "relevance" as it was described by Justice Sopinka in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at 345 – 346:

> …If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor…

[63] The Defence argues there is evidence that Mr. Pellow exercised exploitative sexual contact with M.S. as a means of persuasion and control in order to facilitate his trafficking of her during the same time frame as the Crown alleges that the accused was exercising that control.

[64] Section 276(3) sets out the factors the Court must take into account in determining whether the evidence is admissible under subsection (2):

> (3) In determining whether the evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (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;
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> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
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> (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.

[65] The Supreme Court in *Darrach, supra*, provided guidance as to what is meant by "significant probative value". The interpretation of "significant" means "the

evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt" but "it [is] not necessary for the appellant to demonstrate 'strong and compelling' reasons for admission of the evidence" (par. 39). At the same time, the requirement of significant probative value serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice". The Supreme Court reiterated in *Darrach*, supra, that there are inherent "dangers and disadvantages presented by the admission of such evidence". Consequently, evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect.

[66] I have concluded the proposed evidence is not significantly probative. It is difficult to understand how the alleged sexual assault by Mr. Pellow, or the kiss, could raise a reasonable doubt as to the accused's control over M.S. In addition, I have real concern that the evidence engages one of the twin myths, that by reason of the sexual nature of the activity, the complainant is less worthy of belief. That is, by accepting that a sexual assault occurred at the hands of Mr. Pellow, and that the sexual assault was indicative of control by Mr. Pellow, M.S. is less likely of belief in relation to her evidence that she was also controlled by the accused.

[67] I have not been satisfied how evidence of non-consensual activity or a kiss with Mr. Pellow is significantly probative of the control the accused had over M.S.

[68] I have considered all of the factors in s. 276(3)(a) to (h) in regards to the admissibility of the evidence.

[69] I am cognizant of the paramount focus, the right of the accused to make full answer and defence.

[70] I am also alive to other factors, including the issue of the complainant's personal dignity.

[71] I appreciate that counsel for the defence has offered to pose one question to the complainant as a way of minimizing the issues of concern raised by the Crown. The proposal is to put a question to the complainant for the purpose of having her agree that she would ride in a car with Mr. Pellow, who kissed her and eventually sexually assaulted her. However, it is unclear how many questions will be needed to elicit this evidence. It also does not affect my relevance analysis.

[72] The concern is that the evidence of a sexual assault by Mr. Pellow, while not explicitly offered to suggest that M.S. is less worthy of belief, is implicitly offered

to draw that conclusion. The proposition is that because of the sexual assault, Mr. Pellow had control over the complainant and therefore, when M.S. says the accused had control as well, she is less worthy of belief in relation to that allegation.

[73] As the Court stated in *R. v. M.T.*, 2012 ONCA 511:

> [29] Section 276 of the *Criminal Code* creates a statutory rule of admissibility. Enacted in negative terms, the section, like other admissibility rules, is exclusionary; it precludes the admission of certain evidence. The exclusionary effect of the rule only becomes engaged when three requirements have been met. For discussion purposes, these requirements, which are cumulative, may be characterized as:
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> i. offence charged;
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> ii. subject-matter; and
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> iii. purpose.
>
> The exclusionary rule prohibits the person charged from introducing certain evidence (subject-matter) for a specific use (purpose) in proceedings for a listed crime (offence).
>
> [30] The "offence" requirement is satisfied where the proceedings in which evidence is tendered relate to a listed offence. Among the listed offences are the crimes charged here: sexual assault, sexual interference, and invitation to sexual touching.
>
> [31] The "subject-matter" requirement, which appears in both sections 276(1) and (2), is best expressed in the language of subsection (2):
>
> > Evidence … 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.
>
> If the subject-matter of the proposed evidence falls outside the statutory language, the exclusionary terms of the provision do not apply. On the other hand, satisfaction of the subject-matter requirement, on its own, will not necessitate exclusion; the "purpose" requirement must also be satisfied.
>
> [32] The "purpose" requirement is crucial to the operation of this exclusionary rule, just as it is with the common law hearsay rule. To engage the exclusionary rule of s. 276, the proposed evidence must be offered to support either of two prohibited inferences grounded on the sexual nature of the activity:
>
> i. that the complainant is more likely to have consented to the conduct charged; or
>
> ii. that the complainant is less worthy of belief.

> Where the purpose underlying the introduction of the evidence of extrinsic sexual activity is neither of those prohibited by s. 276(1), this exclusionary rule is not engaged.
>
> [33] Section 276(2) provides an exception to the exclusionary rule. To gain entry under this exception, evidence of the complainant's extrinsic sexual activity must:
>
> i. be of specific instances of sexual activity;
>
> ii. be relevant to an issue at trial; and
>
> iii. have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> To determine whether the evidence should be admitted under this exception, the presiding judge must follow the procedure described in ss. 276.1 and 276.2 and consider the factors listed in s. 276(3).

Conclusion

[74] The charges in this matter relate to control, influence and direction. Control can be exerted in many ways by many people. Control is invasive contact, a power that leaves a controlled person with little choice. Direction is exercised over the movements of a person and influence includes less constraining conduct.

[75] A sexual assault is an assault that violates the sexual integrity of the victim. The Defence submits that the cross-examination of the complainant about an alleged sexual assault by another person – *albeit* a former co-accused – is probative of the level of control the accused had over the complainant. That is, the sexual assault by Mr. Pellow would somehow raise a reasonable doubt as to whether the accused exerted control over the complainant in regards to the human trafficking allegations.

[76] There has been no explanation how an act of violence by another could raise a reasonable doubt concerning the accused's guilt in relation to the charged offences. There was no satisfactory explanation connecting the two.

[77] Based on the foregoing, I deny the Defence's application.

Brothers, J.