



**SUPREME COURT OF CANADA**

**CITATION:** R. v. T.J.F., 2024 SCC  
38

**APPEAL HEARD:** March 27, 2024  
**JUDGMENT RENDERED:**  
November 15, 2024  
**DOCKET:** 40749

**BETWEEN:**

**His Majesty The King**  
Appellant

and

**T.J.F.**  
Respondent

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

**REASONS FOR** O'Bonsawin J. (Wagner C.J. and Karakatsanis, Martin,  
**JUDGMENT:** Kasirer, Jamal and Moreau JJ. concurring)  
(paras. 1 to 120)

**JOINT DISSENTING** Côté and Rowe JJ.  
**REASONS:**  
(paras. 121 to 160)

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**His Majesty The King**

*Appellant*

v.

**T.J.F.**

*Respondent*

**Indexed as: R. v. T.J.F.**

**2024 SCC 38**

File No.: 40749.

2024: March 27; 2024: November 15.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

*Criminal law — Trafficking in persons — Receiving a material benefit from trafficking in persons — Exploitation — Accused charged with trafficking complainant and receiving material benefit — Complainant alleging she provided sexual services for money under threat of violence by accused intimate partner — Complainant's friends and family testifying to violent relationship but not sexual services — Trial judge finding complainant's evidence not credible except as*

*corroborated by other witnesses and acquitting accused — Whether trial judge erred in holding that evidence of violent relationship did not directly address elements of offences — If so, whether error may have had material bearing on acquittal — Criminal Code, R.S.C. 1985, c. C-46, ss. 279.01, 279.02, 279.04.*

*Criminal law — Evidence — Assessment — Past discreditable conduct — Accused charged with trafficking complainant and receiving material benefit — Complainant alleging she provided sexual services for money under threat of violence by accused intimate partner — Complainant's friends and family testifying to violent relationship but not sexual services — Trial judge finding complainant's evidence not credible except as corroborated by other witnesses and acquitting accused — Whether trial judge erred by characterizing evidence of violent relationship as past discreditable conduct evidence — If so, whether error may have had material bearing on acquittal.*

The complainant and the accused were in a common law relationship that spanned from 2004 to 2012. The relationship was plagued by violence and financial difficulties. According to the complainant, the accused suggested they have sex on a webcam for money, and she was unwilling to do this but agreed to avoid the accused's violence. She claimed that the accused persuaded her to dance for men and to offer sexual services for money, and that she participated because of the accused's violence. She also claimed that the accused was involved in posting ads offering sexual services and controlled all proceeds, and that this continued until she left the accused in 2012.

The accused was charged with trafficking the complainant and receiving a material benefit from it, contrary to ss. 279.01(1) and 279.02(1) of the *Criminal Code*. At trial, in addition to the complainant, five other witnesses testified: the complainant's brother, mother and daughter, and two of her friends. These other witnesses did not provide evidence of sexual services, but did provide evidence of the accused's violence towards the complainant. The trial judge acquitted the accused. While he accepted that the complainant found herself in a violent relationship with the accused, he found her testimony lacking in credibility, and had a reasonable doubt about the accused's ties to any prostitution enterprise. The majority of the Court of Appeal upheld the acquittals. It held that the trial judge assessed some of the evidence based on a wrong legal principle by ruling that the accused's violence was past discreditable conduct but that the error had no material bearing on the acquittals. The majority also concluded that the trial judge did not fail to consider all the evidence. The dissenting judge would have ordered a new trial, finding that the trial judge failed to consider all the evidence, and that treating the accused's violence as past discreditable conduct misapprehended its nature and relevance to the *actus reus* and *mens rea* of both offences.

*Held* (Côté and Rowe JJ. dissenting): The appeal should be allowed, the acquittals set aside, and a new trial ordered.

*Per* Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal, **O'Bonsawin** and Moreau JJ.: The trial judge assessed the evidence based on a wrong legal principle by determining that the evidence of violence and threats of violence by the accused

towards the complainant was evidence of past discreditable conduct. This error of law hindered his assessment of the evidence and considerably diminished the evidentiary foundation relevant to the essential elements of the trafficking in persons offence and the definition of exploitation set out in s. 279.04 of the *Criminal Code*. The trial judge's error might have had a material bearing on the acquittals.

The object of the offence of trafficking in persons in s. 279.01(1) is to comprehensively respond to all forms of trafficking. This means criminalizing a wide range of conduct carried out for the purpose of exploitation. The phrase "control, direction or influence" in s. 279.01(1) is disjunctive, and the *actus reus* can be satisfied if the movements of the victim have only been subject to one of the elements. These elements represent a spectrum of power that the accused exerts over the victim's movements. "Control" will regulate or govern the victim such that they will be left with little choice over their movements. "Influence" alters, sways, or affects the victim's will when they decide how to exercise their freedom. "Direction" speaks less to the degree of power the accused exerts over the victim's movements than to the way the accused exerts that power; it means management, guidance, advice, or instruction, and sometimes an authoritative command. It is not enough that the accused has acquired the power or the ability to control, direct, or influence the victim's movements; they must have actualized it in one way or another. The Crown may establish the *actus reus* through evidence of violence and threats of violence by an accused towards a victim and, more generally, a violent relationship between the two, if the effect of that violence is such that the victim's movements have been controlled, directed, or influenced.

The *mens rea* for trafficking in persons requires that the accused engaged in the *actus reus* for the purpose of exploiting the victim or facilitating their exploitation. Those words do not require that actual exploitation occur, but people are usually able to foresee the consequences of their acts, and if the accused is found to have knowingly exploited the victim, then it could be reasonable to infer that the accused acted with the intent to do so. The Crown must nevertheless prove that the accused subjectively intended to exploit the complainant. Exploitation, which is defined in s. 279.04, occurs when the accused engages in any conduct, including regular violence and threats of violence, that both causes the victim to provide or offer labour or a service, and could reasonably be expected to cause the victim to believe that their safety would be threatened if they failed to provide that labour or service. The latter must be assessed using an objective test, having regard to all the circumstances, including the victim's vulnerabilities.

Past discreditable conduct evidence is evidence of the accused's misconduct beyond what is alleged in the indictment, and is generally inadmissible. However, if it is covered by the indictment, the Crown can prove the conduct no matter how badly it may reflect on the character of the accused. In the instant case, the trial judge committed an error of law when he held that the evidence of regular violence and threats of violence by the accused against the complainant was past discreditable conduct evidence. Even though the trial judge admitted the evidence, this mischaracterization meant he did not assess it properly. That evidence could have been relevant to the essential elements of the offence. It could have formed the basis of a

finding that the accused controlled, directed, or influenced the movements of the complainant during the time period specified in the indictment, and a contributing cause of the complainant's engagement in sexual services. The trial judge's incorrect assessment of this critical evidence seriously undermined his credibility assessment of the complainant, which he used as the rationale for acquittal.

Acquittals are not set aside lightly. Even where an error of law is made, the Crown must demonstrate that the error might have had a material bearing on the acquittal. Appellate courts should only set aside an acquittal when the verdict would not necessarily have been the same had the error not occurred. In the instant case, the trial judge's error of law undermines the foundation of the acquittals, and the possibility of a different verdict having been reached is more than abstract or purely hypothetical. The acquittals should be set aside and a new trial ordered.

With respect to the issue of whether the trial judge considered all of the evidence, an appellate court must presume that a trial judge knows the law and deals competently with issues of fact, and must read the reasons as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered. In the present matter, the reasons show that the trial judge considered the complainant's evidence in light of the exhibits and the evidence of other witnesses. No error warrants intervention on this issue.

*Per Côté and Rowe JJ. (dissenting):* The appeal should be dismissed. There is agreement with the majority that the trial judge made a legal error in

characterizing certain evidence as past discreditable conduct evidence, as it was relevant to the *actus reus* of the offence. There is disagreement regarding the effect of this error, which did not have a material bearing on the acquittals. The Crown's burden is a very heavy one that reflects the restricted nature of the Crown's ability to appeal and the double jeopardy associated with a new trial.

To obtain a conviction for trafficking in persons under s. 279.01(1), the Crown must establish the *mens rea* of the offence: that the accused exercised control over the complainant for the purpose of exploiting her. In the instant case, the only evidence relevant to the *mens rea* came from the complainant herself. The trial judge was not persuaded beyond a reasonable doubt by the complainant's testimony. Even if the evidence of the five witnesses was assessed as part of the elements of the offence, their testimony does not link the accused's violent behaviour to the complainant's provision of sexual services. The testimony accepted as credible did not address whether the accused exercised control over the complainant for the purpose of exploiting her.

The trial judge also made detailed credibility findings that shaped his assessment of the evidence of the other witnesses. Credibility findings by trial judges are owed deference on appeal. Though the trial judge mischaracterized the evidence of the other witnesses as past discreditable conduct evidence, he admitted all of it, and tested the complainant's credibility and evidence against it. The trial judge's credibility findings were the basis on which his reasonable doubt rested, and on which the accused



was acquitted. There is no proper basis in law to set aside this conclusion. The majority's reasoning comes perilously close to a ground of appeal of unreasonable acquittal, which is unavailable to the Crown, and may encourage courts to collapse the distinction between the *actus reus* and *mens rea* of the offence.

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By O'Bonsawin J.

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*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717; *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111; *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; *R. v. A. (A.)*, 2015 ONCA 558, 327 C.C.C. (3d) 377; *Chahinian v. R.*, 2022 QCCA 499; *R. v. Sinclair*, 2020 ONCA 61, 384 C.C.C. (3d) 484; *R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Evans*, [1993] 2 S.C.R. 629.

By Côté and Rowe JJ. (dissenting)

*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Hodgson*, 2024 SCC 25; *R. v. Kruk*, 2024 SCC 7; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. Stanton*, 2021 NSCA 57.

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*Criminal Code*, R.S.C. 1985, c. C-46, ss. 279.01(1) [ad. 2005, c. 43, s. 3], (3) [ad. 2015, c. 16, s. 1], 279.011(1), 279.02 [ad. 2005, c. 43, s. 3], 279.03 [*idem*], 279.04 [*idem*], 676(1)(a), 693(1)(a).

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 118.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

## **Treaties and Other International Instruments**

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2237 U.N.T.S. 319, preamble, Articles 2(a), 3.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (Farrar, Bryson and Van den Eynden JJ.A.), 2023 NSCA 28, 425 C.C.C. (3d) 475, 88 C.R. (7th) 172, [2023] N.S.J. No. 148 (Lexis), 2023 CarswellNS 315 (WL), affirming a decision

of Coady J., 2021 NSSC 290, [2021] N.S.J. No. 437 (Lexis), 2021 CarswellNS 792 (WL). Appeal allowed, Côté and Rowe JJ. dissenting.

*Mark A. Scott, K.C., and Glenn Hubbard, for the appellant.*

*David J. Mahoney, K.C., and Michelle James, for the respondent.*

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

O'BONSAWIN J. —

## I. Overview

[1] Between 2004 and 2012, T.J.F. (the “accused”) and J.D. (the “complainant”) were in a common law relationship marked by violence, evictions, and financial difficulties. The couple relocated from Halifax, Nova Scotia, to Fort Saskatchewan, Alberta, then to Edmonton, Alberta, and eventually returned to Halifax. While in Fort Saskatchewan, they started engaging in sexual services for compensation, initially by having sex on a webcam, which then evolved to the provision of sexual services by the complainant.

[2] The accused was charged with trafficking in persons, between November 1, 2006, and December 31, 2011, and receiving a material benefit from it, contrary to ss. 279.01(1) and 279.02(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”).

[3] A six-day trial was held in September 2021 during which the Crown called the complainant and seven other witnesses, and tendered six exhibits. The accused elected not to testify. He was acquitted of both charges.

[4] For the reasons that follow, I conclude that the trial judge assessed the evidence based on a wrong legal principle by determining that the evidence of violence and threats of violence by the accused towards the complainant was evidence of past discreditable conduct, leading to a misapprehension of the evidence. This error of law hindered his overall assessment of the evidence and considerably diminished the evidentiary foundation relevant to the essential elements of the trafficking in persons offence and the definition of exploitation set out in s. 279.04 *Cr. C.* I am satisfied, to a reasonable degree of certainty, that the verdicts of acquittal would not necessarily have been the same had this error not occurred.

[5] I would allow the appeal, set aside the verdicts of acquittal, and order a new trial.

## II. Factual Context

[6] The following summarizes key elements of the evidence of the complainant and the five civilian witnesses (the “five other witnesses” or the “other witnesses”), and exhibits, as detailed by the trial judge in his reasons.

A. *The Evidence of the Complainant*

[7] The trial judge acknowledged that the complainant’s testimony “paints a disturbing case of human exploitation on a grand scale” but cautioned that “[t]his narrative does not represent findings of fact” (2021 NSSC 290, at para. 12).

[8] The complainant and the accused met in Halifax. They were in a common law relationship from 2004 to 2012, during which time they cared for two children and relocated from Halifax to Fort Saskatchewan, then to Edmonton, before returning to Halifax.

[9] The complainant testified that her relationship with the accused was plagued by violence, evictions, and financial difficulties. She worked in various bars, while the accused was rarely employed. The couple was “financially strapped” and were frequently evicted. The accused was also prone to bursts of anger and violence against the complainant (para. 3).

[10] While in Fort Saskatchewan, the complainant was working in a bar while the accused chose not to work. Their financial difficulties were ongoing, and the accused’s violence escalated to a level that was “twice as bad as in Halifax” (para. 4).

Soon after the complainant secured a better-paying job at a strip bar in Edmonton, the accused suggested they have sex on a webcam for money. The complainant was unwilling to do this but agreed to avoid the accused's violence.

[11] Unsatisfied with their financial earnings, the accused persuaded the complainant to dance for men, and eventually, to offer sexual services for money. The complainant did not want to offer sex for money but participated because of the accused's violence and threats towards her.

[12] The complainant testified that the physical abuse she endured "was a daily occurrence" (para. 6). At one point, the accused broke her finger because she refused his request for her to have sex with a woman. The complainant also testified that the accused persuaded her to use cocaine and other hard drugs by threatening her and her children.

[13] The complainant testified that the accused was deeply involved in the sexual services. He posted ads offering sexual services and accompanied her to clients' locations to either watch or listen to the sexual acts requested by clients. All proceeds went to the accused, while the complainant "only received enough to pay a few bills" (para. 8).

[14] The sexual services and violence continued until the complainant left the accused in 2012. Fearing she could lose her children, the complainant never disclosed to anyone what was happening while it was occurring.



B. *The Evidence of the Five Other Witnesses*

[15] The Crown called five other witnesses: the complainant's brother, mother, and daughter, and two of her friends, J.K. and K.L.

[16] The complainant's brother testified that the accused and the complainant fought and that the accused "was always screaming at [the complainant] and broke all kinds of things around him" (trial reasons, at para. 18). He recalled seeing both going out at night, and that the accused had lots of cash.

[17] The complainant's mother did not provide evidence of sexual services or direct evidence of family violence, although parts of her testimony implied a violent home.

[18] The complainant's daughter lived with the complainant and the accused. She testified that the couple fought and that the accused "would break things" in Halifax (para. 28). Once they moved to Alberta, the fighting intensified to a point where the accused and the complainant "fought all the time" (*ibid.*). She recalled seeing her mother's lip "split open" (*ibid.*), and hearing threats to kill and screams. Upon their return to Halifax, she testified seeing the accused "forcefully push [the complainant] into a wall" (para. 30). When asked about the accused and the complainant's late-night outings, the daughter explained that she thought they went out to work.

[19] In addition to family witnesses, the Crown called two of the complainant's friends to testify. The complainant's friend, J.K., lived with the couple when they returned to Halifax from Edmonton. He described the relationship between the accused and the complainant as "nothing out of the ordinary" and testified hearing "a lot of yelling and occasional loud banging" (para. 32). He assumed that when both were out together, which happened a few times per week, they were grocery shopping.

[20] The complainant's other friend, K.L., testified that she saw many disputes and injuries suffered by the complainant. She testified that she drove the couple to hotels and nightclubs, and that she would sometimes pick them up at night. She also lent them her computer regularly. K.L. later discovered the sexual services ads on Craigslist, and confronted the complainant about it, who hung up the phone upset and crying. Shortly after, she received a call from the accused who stated that "if she went to the police, he would have her charged and she would lose her job" (para. 37).

### C. *The Exhibits*

[21] The Crown also tendered six exhibits, four of which are relevant for the purposes of this appeal:

- Medical reports from the Royal Alexandra Hospital in Edmonton, Alberta, detailing that the complainant attended on August 12, 2009, with an "upper extremity injury right finger" with a "possible open dislocation" (trial reasons, at para. 13);

- Medical reports from the Fort Saskatchewan Health Centre, detailing that the complainant attended on January 16, 2008, with a “cut [right] angle of the mouth” (para. 14);
- A Craigslist affidavit enclosing two ads for sexual services, one dated March 31, 2009, and the other dated May 29, 2009, both with a phone number; and
- A Rogers Communications affidavit confirming that the two phone numbers on both Craigslist ads belonged to the accused. The affidavit also confirms that the authorized user phone above the second ad belonged to the complainant.

### III. Judicial History

#### A. *Supreme Court of Nova Scotia, 2021 NSSC 290 (Coady J.)*

[22] The trial judge acquitted the accused. He reasoned that while there was much to suggest that the accused was part of a “prostitution business”, there was not enough to establish proof beyond reasonable doubt (para. 70).

[23] The trial judge found the complainant’s testimony lacking in credibility. As for the evidence of the five other witnesses, he held that they did not directly address

the essential elements of the offences, resting the onus on the complainant to provide direct evidence of such elements.

[24] The trial judge noted that the complainant “was often prone to exaggeration and hyperbole” during her testimony, and sometimes directed her answers at the accused (para. 58). He found that the complainant’s cross-examination further altered her testimony, highlighting numerous incoherencies, inconsistencies, and contradictions with earlier statements.

[25] As for the other witnesses, the trial judge set aside part of their evidence. He held that they “related to [the accused]’s bad character which, usually, is presumptively inadmissible” (para. 42). He still admitted the evidence, given that they “assist[ed] the Court in understanding the relationship between the parties and the context in which the alleged abuse occurred” (para. 44). The trial judge held that the character evidence “establishe[d] a pattern of dominant behaviour by the accused which allows the criminal conduct to exist in that environment; in this case the exploitation of [the complainant]” (para. 43). The character evidence was “a backdrop in which such exploitation could thrive” (para. 57).

[26] While the trial judge accepted that the complainant “found herself trapped in a violent, unhappy, and loveless relationship” with the accused who subjected her to “threats, intimidation, and injury”, he remained troubled by a reasonable doubt about the accused’s ties to any prostitution enterprise (*ibid.*). He acquitted the accused on all charges.

B. *Nova Scotia Court of Appeal, 2023 NSCA 28, 425 C.C.C. (3d) 475*

[27] The Crown appealed the acquittals, alleging that the trial judge committed three errors of law:

- (a) he assessed the evidence based on a wrong legal principle;
  - (b) he failed to consider all relevant evidence; and
  - (c) he erred with respect to the legal effect of factual findings made.
- (A.F., at para. 2)

(1) The Majority (Bryson J.A., Farrar J.A. Concurring)

[28] The majority of the Court of Appeal dismissed the appeal and upheld the acquittals.

[29] First, the majority held that the trial judge assessed some of the evidence based on a wrong legal principle by ruling that the accused's threats, intimidation and violence were past discreditable conduct. However, the error had no material bearing on the acquittals, since the judge still held a reasonable doubt on the essential elements of the offences, namely, that the accused "exploited [the complainant] or benefited from any alleged exploitation of her" (*ibid.*; see also para. 31). The majority opined that evidence of violence alone did not prove exploitation, and, as such, the evidence of the other witnesses, limited to violence, could not establish exploitation. In the

majority's view, only the complainant provided evidence of exploitation, but the trial judge found that she lacked credibility.

[30] Second, the majority concluded that the trial judge did not fail to consider all the evidence. In its view, he did not piecemeal the evidence by treating the complainant's credibility as determinative of the entire case. According to the majority, since the other witnesses' evidence "was reviewed, but did not establish actual or intended exploitation" (para. 48), it could only corroborate the complainant's description of domestic violence. It was therefore adequate for the trial judge to treat the complainant's credibility on the element of exploitation as determinative.

[31] The majority also held that the trial judge adequately grappled with all the evidence even though he did not address the two Craigslist ads and their associated phone numbers in his reasons. The majority opined that the trial judge was alive to this inculpatory evidence "because he recited the evidence describing those numbers" (para. 54). The trial judge simply found the evidence insufficient "to resuscitate [the complainant]'s credibility" (*ibid.*; see also para. 57).

[32] Finally, the majority held that the trial judge did not fail to appreciate the legal effect of his factual findings since none established exploitation. The majority further held that the presumption of s. 279.01(3) *Cr. C.* does not establish exploitation.

(2) The Dissent (Van den Eynden J.A.)

[33] The dissenting judge, Van den Eynden J.A., would have allowed the appeal and ordered a new trial. In her view, all three errors raised by the Crown might have had a material bearing on the acquittals.

[34] First, the dissenting judge agreed with the majority that the trial judge assessed the evidence of the accused's violence based on a wrong legal principle by treating it as evidence of past discreditable conduct (paras. 90-96 and 99).

[35] However, contrary to the majority, the dissenting judge ruled that the trial judge "misapprehended the nature and relevance of the violent acts the [accused] inflicted on the complainant" (para. 94), as they were relevant to establishing exploitation, and the *actus reus* and *mens rea* of both offences.

[36] Second, the dissenting judge found that the trial judge failed to consider all the evidence. In her view, the evidence of the other witnesses on the accused's violent acts could have "strengthen[ed] the credibility and reliability of the complainant's evidence" (para. 104). She also held that the trial judge failed to grapple with the presence of the accused's phone number in the sexual services ads.

[37] Finally, the dissenting judge opined that the trial judge erred regarding the legal effect of his factual findings. She determined that, had the trial judge applied the proper legal framework, "the *actus reus* may well have been established and the presumption [found in s. 279.01(3) *Cr. C.*] would therefore have applied" (para. 111).

#### IV. Issues

[38] This is an appeal as of right and is therefore limited to questions of law on which the judge of the Nova Scotia Court of Appeal dissented (s. 693(1)(a) *Cr. C.*).

[39] The Crown raised two questions in its notice of appeal: (i) whether the trial judge failed to consider all the evidence, and (ii) whether the trial judge erred regarding the legal effect of his factual findings.

[40] Shortly before the hearing, the Crown withdrew its arguments supporting the second question regarding the legal effect of the trial judge's factual findings, leaving only the first question to be decided.

[41] However, a closer reading of the reasons of the Court of Appeal reveals that the dissenting judge disagreed with the majority on whether the mischaracterization of part of the evidence as evidence of past discreditable conduct amounted to a misapprehension of the evidence (paras. 8, 67, 90-96 and 99). While the majority ruled that this error "did not taint [the trial judge's] legal analysis of the elements of the offence" (para. 35), the dissenting judge opined that the trial judge's reasons demonstrated a "lack of understanding" of the concept of past discreditable conduct, which led him to "misapprehen[d] the nature and relevance of the violent acts the [accused] inflicted on the complainant" (para. 94). This is a question of law that requires us to determine whether the trial judge's mischaracterization of the evidence of the other witnesses tainted his analysis of the evidence (see *R. v. J.M.H.*, 2011 SCC



45, [2011] 3 S.C.R. 197, at para. 29, citing *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 295, and *R. v. B. (G.)*, [1990] 2 S.C.R. 57, at p. 75).

[42] Lastly, in a criminal legal system built on the presumption of innocence, acquittals are not set aside lightly. Even when errors of law are made, appellate courts should only set aside an acquittal when “the verdict would not necessarily have been the same had the errors not occurred” (*R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2, citing *Vézéau v. The Queen*, [1977] 2 S.C.R. 277, at pp. 291-92; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). Our Court will thus have to determine if the alleged error(s) of law might have had a material bearing on the verdicts of acquittal (*R. v. Hodgson*, 2024 SCC 25, at para. 36).

[43] In sum, three questions are raised by this appeal:

1. Did the trial judge fail to consider all the evidence?
2. Did the trial judge misapprehend the evidence?
3. Might the error(s) of law, if any, have had a material bearing on the acquittals?

## V. Analysis

[44] My analysis is divided into three parts. First, I will demonstrate that the trial judge considered all the evidence. Second, I will explain that the trial judge

assessed the evidence based on a wrong legal principle, leading to a misapprehension of the evidence. Finally, I will conclude that the error of law the trial judge committed might have had a material bearing on the acquittals.

A. *Did the Trial Judge Fail To Consider All the Evidence?*

[45] The Crown argues that the trial judge failed to consider all the evidence because he “piecemealed” the evidence by subjecting the complainant’s testimony to the criminal standard of proof (A.F., at para. 127), and also ignored the Craigslist ads (para. 130).

[46] The accused responds that the trial judge properly considered the evidence of the other witnesses as well as all documentary evidence (R.F., at para. 83; see also para. 91). I agree.

[47] When an appellate court reviews reasons for errors of law, it must be “rigorous in its assessment”, approaching the review in the same way it would approach allegations of insufficient reasons (*R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 79). It must presume that a trial judge “know[s] the law . . . and deal[s] competently with the issues of fact” (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 32 and 55; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 54; *G.F.*, at para. 74; *R. v. Gerrard*, 2022 SCC 13, at para. 2; *R. v. Kruk*, 2024 SCC 7, at para. 84). It is not enough to suspect the trial judge erred in law; the appellate court must be satisfied that the trial court erred having given its reasons “a fair reading”

(*J.M.H.*, at paras. 20, 23 and 31). That is, having read them “as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered” (*R.E.M.*, at para. 16; see, in the context of an appeal from an acquittal, *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 18, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at pp. 203-4).

[48] Applying these principles to the present matter, the trial judge devoted five paragraphs to the framework through which he would assess the credibility and reliability of the complainant (paras. 52-56). Within this framework, he wrote explicitly that “[w]here the Crown’s case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant’s evidence be tested in the context of all the rest of the evidence” (para. 53, citing *R. v. Stanton*, 2021 NSCA 57, at para. 67). He did just that. The reasons show that the trial judge considered the complainant’s evidence in light of the exhibits and the evidence of other witnesses.

[49] I see no error that warrants our intervention on this issue. The trial judge considered all the evidence. The fact that he did not discuss in greater detail the influence that specific evidence had on his reasoning is not an error of law. The trial judge was not required to “set out every finding or conclusion in the process of arriving at the verdict”, nor did he have to detail his finding on each piece of evidence before him (*R.E.M.*, at paras. 18 and 20).

[50] Crucially, however, the consideration of evidence must not be confused with the assessment of evidence. As I will explain below, even if the trial judge considered all the evidence in his reasons, he assessed the evidence of the other witnesses based on a wrong legal principle. This error of law hindered his overall assessment of the evidence.

B. *Did the Trial Judge Misapprehend the Evidence?*

[51] Before addressing the trial judge's assessment of the evidence based on a wrong legal principle, I will interpret s. 279.01 *Cr. C.* This provision establishes the offence of trafficking in persons.

(1) Interpretation of Section 279.01 *Cr. C.*

[52] Criminal law is no exception to the basic rule of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 16, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at pp. 411-14).

[53] Bill C-49, *An Act to amend the Criminal Code (trafficking in persons)*, 1st Sess., 38th Parl., 2004-2005, came into force on November 25, 2005 (*An Act to amend the Criminal Code (trafficking in persons)*, S.C. 2005, c. 43). Bill C-49 created the offences of trafficking in persons (s. 279.01 *Cr. C.*), material benefit (s. 279.02 *Cr. C.*), and withholding or destroying documents (s. 279.03 *Cr. C.*). It also defined “exploitation” (s. 279.04 *Cr. C.*). To this date, our Court has never had the opportunity to interpret those provisions.<sup>1</sup>

[54] For ease of reference, ss. 279.01, 279.02, and 279.04 *Cr. C.* are reproduced below as they read during the time period specified in the indictment at issue:

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

(a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than fourteen years in any other case.

(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

**279.02** Every person who receives a financial or other material benefit, knowing that it results from the commission of an offence under subsection 279.01(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than ten years.

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<sup>1</sup> I note that Parliament has since enacted a presumption under s. 279.01(3) *Cr. C.* that was not in force during the period of time covered by the indictment.

**279.04** For the purposes of sections 279.01 to 279.03, a person exploits another person if they

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

(b) cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

(a) *Object of Section 279.01 Cr. C.*

[55] When Bill C-49 was enacted, the RCMP estimated that approximately 600 women and children were trafficked into Canada each year for sexual exploitation alone, and at least 800 women and children for all domestic markets, including drug trade, domestic work, and labour for garment or other industries (J. Oxman-Martinez, M. Lacroix and J. Hanley, *Victims of Trafficking in Persons: Perspectives from the Canadian Community Sector* (2005), at p. 2; see also *House of Commons Debates*, vol. 140, No. 125, 1st Sess., 38th Parl., September 26, 2005, at p. 7990 (Vic Toews); *House of Commons Debates*, vol. 140, No. 135, 1st Sess., 38th Parl., October 17, 2005, at p. 8631 (Hon. Judy Sgro)).

[56] There was, at the time, an existing prohibition on trafficking in the immigration context (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”), s. 118). Bill C-49 aimed to “broaden the reach of our existing prohibition to comprehensively respond to all forms of human trafficking, whether they occur wholly within Canada or whether they involve some cross-border or international dimension”

*(House of Commons Debates, October 17, 2005, at p. 8620 (Hon. Irwin Cotler); United Nations Convention against Transnational Organized Crime, 2225 U.N.T.S. 209; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 U.N.T.S. 319, Article 3).*

[57] Section 279.01(1) *Cr. C.* broadens the existing prohibition in two ways. First, it criminalizes trafficking in persons beyond the immigration context (s. 118 of the *IRPA*; *Urizar v. R.*, 2013 QCCA 46, at paras. 68, 73 and 77; see also K. Plouffe-Malette, “L’interprétation de la criminalisation de la traite des êtres humains en droit pénal canadien à l’aune du *Protocole de Palerme*: analyse de l’arrêt *Urizar* de la Cour d’appel du Québec” (2014), 44 *R.D.U.S.* 1, at p. 17; H. Gluzman, “Human Trafficking and Prostitution in Canada – Intersections and Challenges” (2018), 66 *C.L.Q.* 109, at p. 123).

[58] Second, s. 279.01(1) *Cr. C.* captures a wide range of conduct under the *actus reus* (see Article 3(a) of the *Protocol*). The broad scope of the *actus reus* is counterbalanced by the requirement that it be carried out “for the purpose of exploiting [the victim] or facilitating their exploitation”. This tailors the offence to conduct that goes to the heart of trafficking in persons while maintaining the flexibility necessary to respond to all its forms.

[59] Underlying Bill C-49’s object of capturing all forms of trafficking in persons is the concern for the protection of women and children, who are especially

vulnerable to trafficking in persons (see *House of Commons Debates*, September 26, 2005, at p. 7988 (Hon. Paul Harold Macklin); *House of Commons Debates*, October 17, 2005, at p. 8619 (Hon. Irwin Cotler); see also the preamble and Article 2(a) of the *Protocol*).

[60] Our Court’s jurisprudence, national commissions and inquiries, and research echo this concern and recognize that women and children, including Indigenous women and girls, are “disproportionately subjected to sexual violence” (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 68 and 70; see also *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 198; Statistics Canada, *Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces* (December 2019); Statistics Canada, *Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada* (April 2022); Public Inquiry Commission on relations between Indigenous Peoples and certain public services, *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress – Final report* (2019), at pp. 120-21; *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at pp. 226-27; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019); E. Snyder, V. Napoleon and J. Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015), 48 *U.B.C. L. Rev.* 593).



[61] Five years after the enactment of Bill C-49, Bill C-268, *An Act to amend the Criminal Code (minimum sentence for offences involving trafficking of persons under the age of eighteen years)*, 3rd Sess., 40th Parl., 2010 (enacted as S.C. 2010, c. 3, s. 2), created a new offence criminalizing the trafficking of persons under the age of 18, punishable by mandatory minimum sentences, and increased the maximum sentence to life imprisonment where especially violent acts have been committed against a child victim (s. 279.011(1) *Cr. C.*).

[62] In sum, the object of s. 279.01(1) *Cr. C.* is to comprehensively respond to all forms of trafficking in persons with a focus on women and children, who are more commonly affected. This means criminalizing a wide range of conduct carried out with the purpose of exploiting or facilitating the exploitation of one or many victims. Undoubtedly, regular violence and threats of violence by an accused towards a victim and, more generally, a violent relationship with a victim, can be the means of perpetuating such conduct.

(b) *Text and Context of Section 279.01 Cr. C.*

[63] Our Court has not yet had the opportunity to interpret the meaning of the phrase “control, direction or influence”. Both the Court of Appeal of Quebec in *Urizar* and the Court of Appeal for Ontario in *R. v. Gallone*, 2019 ONCA 663, 147 O.R. (3d) 225, relied on *R. v. Perreault* (1996), 113 C.C.C. (3d) 573 (Que. C.A.), to discern its meaning. There, the Court of Appeal of Quebec interpreted the meaning of the phrase “exercises control, direction or influence over the movements of a person” in the

context of the procuring offence codified at s. 286.3(1) *Cr. C.* (formerly s. 212(1)(h) *Cr. C.*) to mean that:

The element of control refers to invasive behaviour, to ascendancy which leaves little choice to the person controlled. This therefore includes acts of direction and influence. There is the exercise of direction over the movements of a person when rules or behaviours are imposed. The exercise of direction does not exclude the person being directed from having a certain latitude or margin for initiative. The exercise of influence includes less constricting actions. Any action exercised over a person with a view to aiding, abetting or compelling that person to engage in or carry on prostitution would be considered influence. [Emphasis deleted; pp. 575-76.]

[64] The Court of Appeal for Ontario summarizes exercising control as being “like giving an order that the person has little choice but to obey, and exercising direction is like imposing a rule that the person should follow, then exercising influence is like proposing an idea and persuading the person to adopt it” (*Gallone*, at para. 47).

[65] What first emerges from those interpretations is a spectrum of power that the accused exerts over the victim’s ability to move freely and their actual movements. On one end of the spectrum, the accused will exercise “control” over the victim’s movements; the former will “regulate or govern” the latter (*Black’s Law Dictionary* (12th ed. 2024), at p. 418), such that the victim will be left with little choice over their movements. On the other end, the accused will exercise “influence” over the victim’s movements when they will, at minimum, “induce action or change the decisions or acts of [the victim]” about their movements (p. 928). This means that the victim is free to

move wherever they like, but that when they decide how to exercise their freedom, the accused “alter[s], sway[s], or affect[s] [their] will” (p. 928).

[66] Contrary to “control” and “influence”, “direction” speaks less to the degree of power the accused exerts over the victim’s movements than to the way the accused exerts that power. “Direction” means “[m]anagement, guidance, advice or instruction”, and can sometimes refer to an “authoritative command” (*The Dictionary of Canadian Law* (5th ed. 2020), at p. 319, citing *R. v. Bazinet* (1986), 25 C.C.C. (3d) 273 (Ont. C.A.), at p. 284), and the verb “to direct” is defined as “[t]o guide”, “to govern”, and “[t]o instruct (someone) with authority” (*Black’s Law Dictionary*, at p. 576). While direction will often overlap with control or influence, it can be found to have occurred even where the victim’s movements have not been controlled or influenced. Since the enumeration “control, direction or influence” is disjunctive, the *actus reus* can be satisfied if the movements of the victims have only been subject to the accused’s direction.

[67] Section 279.01(1) *Cr. C.* specifies that control, direction, or influence must be “exercise[d]”. According to the *Black’s Law Dictionary*, the verb “exercise” (in French, “*exercer*”) implies the realization of something: “1. To make use of; to put into action <exercise the right to vote>. 2. To implement the terms of; to execute <exercise the option to buy the commodities>” (p. 716). It is then not enough that the accused has acquired the power or the ability to control, direct, or influence the victim’s

movements. They must have actualized it in one way or another, such that the victim's movements have been controlled, directed, or influenced by the accused.

[68] It follows that nothing in the text of the provision bars the Crown from establishing the *actus reus* through evidence of violence and threats of violence by an accused towards a victim and, more generally, a violent relationship between the two, if the effect of that violence is such that the victim's movements have been controlled, directed, or influenced.

[69] Control, direction, or influence exercised by the accused over the victim's movements can persist over time, thus creating a situation or a relationship throughout which the victim's movements are being controlled, directed, or influenced regularly.

(c) *Conclusion*

[70] The text, context, and purpose of s. 279.01 *Cr. C.* all support the position that the Crown can adduce evidence showing an accused's violent relationship with a victim, or regular violence and threats of violence against the victim, in an effort to establish the *actus reus* of the trafficking in persons offence. Such conduct can amount to exercising control, direction, or influence over their movements during a period of time, provided that the effect of that violence is that the victim's movements have been effectively controlled, directed, or influenced during that time.

[71] With this in mind, I will explain how the trial judge assessed the evidence based on a wrong legal principle, leading to a misapprehension of the evidence.

(2) The Trial Judge Assessed the Evidence Based on a Wrong Legal Principle

[72] The accused, the Crown, and the Nova Scotia Court of Appeal agree that the trial judge mischaracterized some of the evidence of the other witnesses as evidence of the accused's past discreditable conduct (A.F., at para. 75; R.F., at para. 8; C.A. reasons, at paras. 8 and 86). However, they disagree on whether this mischaracterization amounted to a misapprehension of the evidence.

[73] When facing Crown appeals of acquittals, appellate courts have an obligation to "articulate with precision how the trial judge erred in law" (*Hodgson*, at para. 40). To articulate with precision the trial judge's error of law, I will first define past discreditable conduct evidence, then identify what conduct the trial judge characterized as past discreditable conduct, and finally, assess whether the trial judge was correct to characterize it as such.

(a) *Past Discreditable Conduct Evidence and Its Exclusionary Rule*

[74] Generally, when judging whether an accused is guilty of an offence, all relevant evidence is admissible unless it is barred by a specific exclusionary rule (*R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 30; *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 941; *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38). Relevant evidence

is evidence that has “some tendency as a matter of logic and human experience” to make the fact in issue for which it is advanced more likely than it would be in the absence of that evidence (*R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 36, citing D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31; see also *R. v. Schneider*, 2022 SCC 34, at para. 39; *R. v. Watson*, 50 C.R. (4th) 245 (Ont. C.A.), at para. 33).

[75] Past discreditable conduct evidence is evidence of the accused’s misconduct beyond what is alleged in the indictment (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 31). It can be subsumed under the general category of evidence that reflects badly on the accused’s character (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 66; see also M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2024* (31st ed. 2024), at paras. 40.50-40.52).

[76] Bad character evidence is generally inadmissible (*R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 732), because it risks triggering general propensity inferences, which are impermissible (p. 744, per Sopinka J., dissenting; Vauclair, Desjardins and Lachance, at para. 40.51). This exclusionary rule also seeks to guard against a related human tendency to “punish the accused for past misconduct by finding that accused guilty of the offence charged”, and to avoid deflecting the attention of the trier of fact “from the main purpose of their deliberations which is the transaction charged” (*R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, at p. 128).

[77] Not all discreditable conduct evidence is subject to the exclusionary rule. Bad character evidence, and especially discreditable conduct evidence, must go beyond what is alleged in the indictment to be presumptively inadmissible (*Handy*, at para. 31; see also *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57 (P.C.), at p. 65; M. Gourlay et al., *Modern Criminal Evidence* (2022), at p. 282). If it is covered by the indictment, the Crown can prove it “no matter how badly this may reflect on the character of the accused” (Paciocco, Paciocco and Stuesser, at p. 66).

[78] Based on these principles, I will review the trial judge’s characterization of some of the accused’s conduct as past discreditable conduct.

(b) *The Trial Judge’s Characterization of the Accused’s Conduct as Past Discreditable Conduct*

[79] The trial judge did not explicitly mention what conduct he characterized as past discreditable conduct, but a fair reading of his reasons shows it was the regular violence and threats of violence by the accused towards the complainant and, more generally, their violent relationship. Both paras. 42 and 57 of his reasons are revealing:

Much of the testimony of the above four witnesses related to events that, for the most part, did not directly address the charges before this Court. That testimony related to [the accused]’s bad character which, usually, is presumptively inadmissible. It can trigger propensity reasoning and amount to oath-helping. Such evidence must be considered through the probative/prejudicial effect lens. . . .

. . .

I am satisfied from all of the evidence that [the complainant] found herself trapped in a violent, unhappy, and loveless relationship with [the accused]. However, the charges before this Court do not directly address the threats, intimidation, and injury that I accept as proven facts. The question before me is whether the Crown has proven these charges beyond a reasonable doubt. The past discreditable evidence certainly creates a backdrop in which such exploitation could thrive. [Emphasis added.]

[80] When the trial judge writes “[t]he past discreditable evidence”, he refers to the evidence establishing that the complainant had “found herself trapped in a violent, unhappy, and loveless relationship with [the accused]” and that she was subjected to “threats, intimidation, and injury”.

[81] The trial judge also concluded that such evidence does not “directly address” (paras. 42 and 57) or “directly support” (para. 31) the charges, and that evidence about the relationship between the accused and the complainant “offered little concerning the charges” (para. 41). I disagree.

[82] In the following subsection, I will explain why the evidence of the other witnesses about the accused’s violence towards the complainant, while certainly discreditable to the accused, was covered by the indictment and could not, in this case, be characterized as evidence of past discreditable conduct.

(c) *Regular Violence and Threats of Violence by the Accused Were Covered by the Indictment*



[83] The Crown filed a two-count indictment. Since the two counts are linked, and the trial judge acquitted the accused on the second count based on the same reasons he acquitted the accused on the first count, my reasons will focus exclusively on the trafficking in persons count:

[T]hat he between the 1<sup>st</sup> day of November, 2006 and the 31<sup>st</sup> day of December, 2011, at and near Fort Saskatchewan and Edmonton, Alberta, and Halifax, Nova Scotia, did unlawfully recruit, exercise control or direction or influence over the movements of [the complainant], for the purpose of exploiting them or facilitating their exploitation, contrary to Section 279.01(1) of the *Criminal Code*.

(A.R., vol. I, at p. 5)

[84] The time period spans over five years between November 1, 2006, when the accused and the complainant first moved to Fort Saskatchewan (A.R., vol. III, at pp. 197-98 and 202), and December 31, 2011, not long before they separated. During that time period, the accused and the complainant moved from Fort Saskatchewan to Edmonton and then back to Halifax, all of which are covered by the indictment (trial reasons, at paras. 4, 7 and 10).

[85] The trial judge could not ignore that the regular violence and threats of violence as provided in the evidence by the other witnesses took place within the specified time period, at the specified locations, and was directed towards the complainant.

[86] The trial judge did not conclude that the accused’s regular violence and threats of violence against the complainant fell outside the factual parameters of the indictment. Rather, he held, as a matter of law, that the regular violence and threats of violence by the accused towards the complainant was not an element of the *actus reus* of the trafficking in persons offence, nor the definition of exploitation. This is why it “fell to” the complainant to provide that evidence.

[87] This interpretation finds support in para. 45 of the trial judge’s reasons:

Given that the . . . prior witnesses could not provide direct evidence of the elements of these offences, it fell to [the complainant] to provide that testimony. Consequently, her credibility comes into play.

[88] Read in isolation, this sentence reveals an error of law. Evidence can be direct or circumstantial, and both types of evidence can satisfy a judge beyond reasonable doubt that a fact in issue is true (D. Watt, *Watt’s Manual of Criminal Evidence* (2024), at §§ 1:17-1:18). Read contextually, this sentence reflects the trial judge’s concern that the evidence of the other witnesses on the accused’s violence did not “directly address” (paras. 42 and 57), or “directly support” (para. 31) the charges.

[89] At trial, although the accused never argued that the other witnesses’ evidence was past discreditable conduct evidence, he argued that very little evidence related to the actual substance of the allegation, and referred to evidence of the accused’s violence as evidence of surrounding circumstances evidence that only “takes you so far” (A.R., vol. III, at p. 405). Later in oral submissions, defence counsel argued

that the complainant was “the only one who can speak to several of the essential elements in terms of the control and the alleged forcing into the sex trade”, and who can tell the trial judge that the accused exploited her (p. 431; see also pp. 406 and 432).

[90] The trial judge’s conclusion thus rejects the Crown’s theory of the case, which sought to establish that the accused had controlled, directed, or influenced the movements of the complainant “through the overwhelming evidence that [the complainant] was in a relationship that was physically and psychologically abusive and controlling” (A.R., vol. III, at pp. 393-94).

(d) *Regular Violence and Threats of Violence by an Accused Can Be Relevant and Material to the Actus Reus*

[91] Regular violence and threats of violence by an accused against a victim and, more generally, their violent relationship, can amount to exercising control, direction, or influence over their movements during a period of time, provided that the effect of that violence is that the victim’s movements have been effectively controlled, directed, or influenced during that time. Violence is also relevant and material to the definition of exploitation, as this definition is met when the accused engages in any conduct, including regular violence and threats of violence, that both causes the victim to provide (or offer to provide) labour or a service, and could be reasonably expected to cause the victim to believe that their safety (or the safety of a person known to them) would be threatened if they failed to provide that labour or service.

[92] As I stated earlier, the range of conduct captured under s. 279.01(1) *Cr. C.* is broad. It captures “[e]very person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation”. The use of the word “or” indicates that the *actus reus* is disjunctive. This element of the offence is made out if the Crown establishes that the accused engaged in any conduct set out in the provision (*R. v. A. (A.)*, 2015 ONCA 558, 327 C.C.C. (3d) 377, at para. 80; *Gallone*, at para. 33; *Urizar*, at para. 72).

[93] Section 279.01(1) *Cr. C.* captures two clusters of conduct. The first includes specific actions: “. . . recruits, transports, transfers, receives, holds, conceals or harbours . . . .” The second captures accused who “exercise control, direction or influence over the movements of a person”. In the present case, the Crown relies on this second cluster of conduct to demonstrate that the accused committed the *actus reus*. It submits that regular violence and threats of violence by an accused against a victim, and their violent relationship, can amount to exercising control, direction, or influence over their movements over a period of time. I agree.

[94] As detailed earlier, s. 279.01(1) aims to broaden the prior existing prohibition and respond to all forms of trafficking in persons, with a focus on protecting women and children who are “disproportionately subjected to sexual violence” (*Friesen*, at paras. 68 and 70; see also *Barton*, at para. 198). This provision prohibits a person from preventing another person from moving freely through the exercise of

control, influence or direction. The Crown can establish the *actus reus* through evidence of regular violence and threats of violence by an accused towards a victim and, more generally, a violent relationship between the two, that prevents the victim's movements because they are controlled, directed, or influenced.

[95] Whether regular violence and threats of violence by an accused against a victim and, more generally, their violent relationship, can be relevant and material to both the *actus reus* of the trafficking in persons offence and the definition of exploitation is a question of law that must be answered in the affirmative.

(e) *The Mens Rea Can Be Inferred From a Finding of Exploitation and Regular Violence and Threats of Violence by an Accused Against a Victim Can Be Relevant and Material to the Definition of Exploitation*

[96] The trial judge's characterization of regular violence and threats of violence by the accused against the complainant as past discreditable conduct also suggests that he concluded that this type of conduct could not meet the definition of exploitation set out in s. 279.04 *Cr. C.* At trial, the Crown argued that accused's *mens rea* could be inferred from a finding of exploitation (A.R., vol. III, at pp. 394-95). The Crown further submitted that the complainant was exploited by the accused in part through evidence showing "the presence of physical violence and threats of violence . . . testified to by multiple witnesses" (p. 399).

[97] Before this Court, the Crown also argues that a finding that the accused exploited the complainant pursuant to s. 279.04 *Cr. C.*, while not required under

s. 279.01(1) *Cr. C.*, can lead to a finding that the accused “must have acted with the *purpose* of exploiting the complainant” (A.F., at para. 108 (emphasis in original), citing *A. (A.)*, at para. 87). Building on this, the Crown submits that regular violence and threats of violence by the accused against the complainant is relevant to establishing that the accused exploited the complainant. I agree.

[98] The accused’s purpose to exploit or facilitate the exploitation of a victim, depending on the circumstances, can be inferred from a finding that the accused exploited the victim in the first place. Further, evidence of regular violence and threats of violence by the accused against the victim, when paired with other evidence establishing that the victim engaged in labour or offered labor during the time they were subjected to the accused’s regular violence, can be relevant to establishing exploitation. I explain each conclusion in the paragraphs that follow.

[99] To secure a conviction under s. 279.01(1) *Cr. C.*, the Crown must establish that the accused engaged in the *actus reus* “for the purpose of exploiting [the person] or facilitating their exploitation”. Those words do not require that actual exploitation occurs. Exploitation is not an essential element of the offence; only the intention to exploit or facilitate exploitation is an element of the offence (see *A. (A.)*, at para. 85, citing *Urizar*, at para. 69; see also *Chahinian v. R.*, 2022 QCCA 499, at para. 82).

[100] However, the Court of Appeal for Ontario has suggested that the *mens rea* can sometimes be inferred from a finding that exploitation occurred (*A. (A.)*, at para. 87, cited with approval in *Gallone*, at para. 54, and *R. v. Sinclair*, 2020 ONCA 61, 384

C.C.C. (3d) 484, at para. 12). I agree. A finding of actual exploitation could, depending on the evidence, be relevant and material to the key question of whether the accused acted for the purpose of exploiting the complainant.

[101] This inference is grounded in the assumption that “people are usually able to foresee the consequences of their acts” (*R. v. Buzzanga* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), at p. 387, cited with approval in *R. v. Chartrand*, [1994] 2 S.C.R. 864, at p. 890; *Barton*, at para. 167; see also K. Roach, *Criminal Law* (8th ed. 2022), at pp. 214-15). If the accused is found to have knowingly exploited the victim, such that the accused knows that exploitation would result from their conduct, then it could, depending on the circumstances, be reasonable to infer that the accused acted with the intent to exploit the victim. Nonetheless, when looking at evidence as a whole, courts should pay careful attention to evidence that would contradict, even refute, the inference.

[102] Regular violence and threats of violence by an accused against a victim is also captured by the definition of exploitation set out in s. 279.04 *Cr. C.*:

**279.04** For the purposes of sections 279.01 to 279.03, a person exploits another person if they

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

[103] We can extract from this definition two requirements that must be satisfied for exploitation to occur. Exploitation involves conduct that both (i) causes the victim to provide (or offer to provide) labour or a service and (ii) a reasonable expectation that the victim could believe that their safety (or the safety of a person known to them) would be threatened if they failed to provide that labour or service.

[104] The definition does not specify the term “conduct”, which can take many forms, including regular violence and threats of violence towards a victim and, more generally, a violent relationship between the two. This aligns with the object of s. 279.01(1) *Cr. C.* and *An Act to amend the Criminal Code (trafficking in persons)*, S.C. 2012, c. 15, s. 2, which added a list of factors that the courts may consider in determining whether an accused exploits another person:

- (a) used or threatened to use force or another form of coercion;
- (b) used deception; or
- (c) abused a position of trust, power or authority.

[105] In determining whether the accused’s conduct could reasonably be expected to cause the belief, the judge must have regard to all circumstances, which include the victim’s personal characteristics and vulnerabilities, such as their lack of education, prior victimization, socio-economic disadvantage, and social and family isolation, among others. In *Sinclair*, the Court of Appeal for Ontario listed circumstances that might be relevant in the analysis (at para. 15):



- the presence or absence of violence or threats
- coercion, including physical, emotional or psychological
- deception
- abuse of trust, power, or authority
- vulnerability due to age or personal circumstances, such as social or economic disadvantage and victimization from other sources
- isolation of the complainant
- the nature of the relationship between the accused and the complainant
- directive behaviour
- influence exercised over the nature and location services provided
- control over advertising of services
- limitations on the complainant's movement
- control of finances
- financial benefit to the accused, and
- use of social media to assert control or monitor communications with others.

[106] In sum, exploitation occurs when the accused engages in any conduct, including regular violence and threats of violence, that both causes the victim to provide (or offer to provide) labour or a service and could be reasonably expected to cause the victim to believe that their safety (or the safety of a person known to them) would be threatened if they failed to provide that labour or service. The latter must be assessed using an objective test, having regard to all the circumstances, including the victim's vulnerabilities.

[107] If the victim is known to have provided labour (or to have offered to provide labour) during a specified time period, the fact that they were regularly subjected to violence and threats of violence during that time can be the cause of the victim's decision to provide said labour. It could also be inferred from the regular violence that the victim could be reasonably expected, in all the circumstances, to believe that their safety would be threatened if they failed to provide said labour.

[108] Nevertheless, even where the trial judge accepts that actual exploitation occurred, the Crown must still prove beyond a reasonable doubt that the accused subjectively intended to exploit the complainant.

(3) Conclusion and Precise Articulation of the Trial Judge's Error of Law

[109] I conclude that the trial judge committed an error of law when he held that the evidence of regular violence and threats of violence by the accused against the complainant provided by the other witnesses was evidence of past discreditable conduct. To the contrary, this evidence could have been relevant to the essential elements of the offence and could have formed the basis of a finding that the accused controlled, directed, or influenced the movements of the complainant during the time period specified in the indictment. It could also have been found to be a contributing cause of the complainant's provision of sexual services.

(4) The Trial Judge's Mischaracterization of the Evidence Tainted His Legal Analysis

[110] The accused and the majority of the Nova Scotia Court of Appeal suggest that the trial judge's mischaracterization of the evidence did not taint the trial judge's legal analysis (R.F., at paras. 55 and 73; C.A. reasons, at para. 35). They note that despite his error of law, the trial judge admitted the evidence of the other witnesses, including the accused's regular violence towards the complainant and, more generally, their violent relationship. The trial judge concluded that:

In this case, as in *R. v. B. (F.F.)*, [[1993] 1 S.C.R. 697], this type of evidence is admissible in that it establishes a pattern of dominant behaviour by the accused which allows the criminal conduct to exist in that environment; in this case the exploitation of [the complainant]. [Emphasis added; para. 43.]

[111] Based on the above-noted paragraph, the accused submits that the trial judge's error of law "did not affect his legal analysis respecting the *actus reus* of the offence" because the trial judge accepted that the evidence of violence "was admissible . . . and was relevant to the conduct element of the *actus reus*" (R.F., at paras. 55 (emphasis deleted) and 61; see also para. 56). I disagree.

[112] From the moment the trial judge considered the regular violence and threats of violence by the accused towards the complainant as past discreditable conduct, his analysis of the evidence was tainted regarding both the *actus reus* and the *mens rea*. This characterization, in and of itself, indicates that the trial judge dismissed the Crown's theory of the case as implicating impermissible propensity reasoning when it did not. The fact that he nevertheless admitted the evidence cannot cure this misapprehension.

[113] The trial judge found the evidence admissible "in that it establishes a pattern of dominant behaviour by the accused which allow[ed] the criminal conduct to exist in that environment; in this case the exploitation of [the complainant]" (para. 43). This past discreditable conduct evidence "create[d] a backdrop in which such exploitation could thrive" (para. 57). The trial judge thus considered regular violence by the accused towards the complainant (i.e., the "pattern of dominant behaviour") as

distinct from the criminal conduct and exploitation. Such violence merely “allowed” that conduct to “exist” and “thrive”. This interpretation finds further support in the trial judge’s use of the words “environment” (para. 43), “backdrop” (para. 57), and “context” (paras. 44 and 57) to describe the violence. Even though the trial judge admitted that evidence, his mischaracterization meant he could not, and did not, assess it as a possible contributing cause in the complainant’s provision of sexual services.

[114] Having found that the trial judge misapprehended the evidence, I will explain how that error might have had a material bearing on the verdicts of acquittal.

C. *Might the Error of Law Have Had a Material Bearing on the Acquittals?*

[115] Acquittals are not set aside lightly. At the material bearing stage of the analysis, courts are asked to “make a careful judgment as to [the error of law’s] effect” on the trial judge’s reasoning supporting his reasonable doubt (*Graveline*, at para. 29, per LeBel J., dissenting). The burden is a very heavy one and lies on the Crown (*R. v. Evans*, [1993] 2 S.C.R. 629, at p. 645), who must demonstrate that “the verdict would not necessarily have been the same had the errors [of law] not occurred” (*Sutton*, at para. 2, citing *Vézeau*, at p. 292). This standard demands more than “an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law”, but not that “the verdict would necessarily have been different” (*Graveline*, at para. 14; see also *George*, at para. 27; *Hodgson*, at para. 36).

[116] I conclude that the Crown has established that the trial judge's reasonable doubts could have been resolved had the error of law not occurred. As I have explained, the trial judge assessed the evidence of regular violence and threats of violence by the accused towards the complainant and, more generally, their violent relationship, based on a wrong legal principle. Having done so, the trial judge could not assess that evidence as conduct by the accused relevant to the essential elements of the offence and the definition of exploitation. The fact that he nevertheless admitted the evidence could not and did not cure his error.

[117] I consequently agree with the dissenting judge of the Court of Appeal that "the judge's incorrect assessment of this critical evidence seriously undermined his credibility assessment of the complainant, which he used as the rationale for acquittal" (para. 99). In other words, his assessment of the other witnesses' evidence undermined his assessment of the complainant's evidence as it failed to appreciate the interconnectedness between both.

[118] Contrary to my colleagues' assertions, I am not suggesting that the only conclusion that would have been available to the trial judge is that the accused intended to exploit the complainant (para. 159). Rather, had the trial judge not misapprehended the evidence, he could have reached a different conclusion with respect to the essential elements of the offence. I am satisfied with a reasonable degree of certainty that this possibility is more than abstract or purely hypothetical. While I am not persuaded that

the verdict would necessarily have been different, this is not the applicable threshold (*Graveline*, at para. 14; see also *George*, at para. 27; *Hodgson*, at para. 36).

[119] For these reasons, I am of the view that the trial judge's error of law undermines the foundation of the acquittals. This error can reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittals (*Graveline*, at para. 14).

## VI. Conclusion

[120] The trial judge made an error of law in his assessment of the evidence, leading to a misapprehension of the evidence. I am satisfied that the possibility of reaching a different verdict is more than abstract or purely hypothetical. For the foregoing reasons, I would allow the appeal, set aside the verdicts of acquittal, and order a new trial.

The following are the reasons delivered by

CÔTÉ AND ROWE JJ. —

[121] To succeed on appeal, the Crown must show that the trial judge made one or more legal errors that “might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal” (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). The Crown's “burden in this respect is a

very heavy one” that reflects “[t]he restricted nature of the Crown’s ability to appeal” and “the double jeopardy associated with a new trial” (*R. v. Hodgson*, 2024 SCC 25, at paras. 22, 30 and 36).

[122] We agree with our colleague that the Crown has shown that the trial judge made a legal error in characterizing evidence offered by five witnesses at trial as evidence of “past discreditable conduct”. However, despite the trial judge’s mischaracterization of the evidence, there is no basis for this Court to disturb his credibility findings in this Crown appeal. And because we conclude that the Crown has not shown that the error in question had a material bearing on the acquittal, as required by *Graveline*, we would dismiss the appeal.

#### I. Defining the Error of Law in the Present Appeal

[123] We begin by precisely identifying the error of law (*Hodgson*, at para. 40). Our colleague frames the error in the present case as follows, at para. 109 of her reasons:

I conclude that the trial judge committed an error of law when he held that the evidence of regular violence and threats of violence by the [respondent] against the complainant provided by the other witnesses was evidence of past discreditable conduct. To the contrary, this evidence could have been relevant to the essential elements of the offence and could have formed the basis of a finding that the [respondent] controlled, directed, or influenced the movements of the complainant during the time period specified in the indictment. It could also have been found to be a contributing cause of the complainant’s provision of sexual services.

[124] Shortly after articulating this error of law, our colleague adds that “[f]rom the moment the trial judge considered the [respondent’s] regular violence and threats of violence . . . towards the complainant as past discreditable conduct, his analysis of the evidence was tainted regarding both the *actus reus* and the *mens rea*” (para. 112).

[125] While we agree that the trial judge erroneously characterized the evidence provided by the other witnesses as propensity evidence, we respectfully disagree regarding the effect of this error; it does not follow that his entire assessment of the evidence was “tainted” by such a legal error. Indeed, and importantly, our Court has repeatedly emphasized that credibility findings by trial judges are owed deference on appeal (see, e.g., *R. v. Kruk*, 2024 SCC 7, at para. 82; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 10). “Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility” (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 72).

[126] Credibility findings typically do not engage errors of law, as, at their core, they relate to the extent to which a judge has relied on a factor, and how closely that factor is tied to the evidence (*Kruk*, at para. 82). An appellate court cannot “translat[e] its strong opposition to the trial judge’s factual inferences . . . into supposed legal errors” (*R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 17). To do otherwise would risk “expanding the Crown’s right of appeal beyond its proper scope” and “would have a profound impact on the interests of accused persons, especially due to



the considerable anxiety created by the prospect of a new trial after a person has been acquitted” (*Hodgson*, at para. 31).

[127] Indeed, a challenge to the trial judge’s credibility findings is not a proper ground of appeal for the Crown under s. 676(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, which limits the Crown’s right of appeal to a “question of law alone” and not to “question[s] about how to weigh evidence and assess whether it meets the standard of proof” (*Hodgson*, at paras. 32 and 34, citing *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, at para. 10; see also *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 24). No appeal on the basis of an “unreasonable acquittal” is open to the Crown (see *J.M.H.*, at paras. 32-33; *Chung*, at para. 31, per Karakatsanis J., dissenting). We are guided by this Court’s recent admonition that the Crown’s right of appeal of an acquittal is an “extraordinary remedy” that has been variously described as “‘drastic’, ‘exceptional’, ‘special’, ‘unusual’ and ‘limited’ in an ‘extrem[e]’ or ‘narrow’ manner” (*Hodgson*, at para. 24).

[128] We now consider whether this evidence, if properly assessed, could have had a material bearing on the acquittal. In our view, if the appropriate deference is afforded to the trial judge’s findings, the *Graveline* standard is not made out.

## II. The Legal Error Would Not Have a Material Bearing on the Acquittal

[129] The trial judge concluded that the complainant “found herself trapped in a violent, unhappy, and loveless relationship” with the respondent (2021 NSSC 290, at

para. 57). We agree that this finding was relevant to making out the *actus reus* of the offence under s. 279.01(1) of the *Criminal Code*.

[130] However, to obtain a conviction under s. 279.01(1), the Crown must also show that the respondent “exercise[d] control” over the complainant “for the purpose of exploiting” the complainant or facilitating her exploitation. It is not sufficient for the Crown to only establish the *actus reus*; whether the accused “exercise[d] control” over the movements of the complainant is only one of the elements of the offence. Furthermore, the language chosen by Parliament signals that it has chosen to ascribe the “highest level of subjective *mens rea*” to this offence (K. Roach, *Criminal Law* (8th ed. 2022), at p. 213).

[131] The *mens rea* of the offence could have been established in one of three ways in the present case:

- (a) The trial judge could have been persuaded by the testimony of the complainant.
- (b) The trial judge could have inferred the respondent’s intent from the circumstances of control and exploitation, if he found that the evidence established these as facts.
- (c) The trial judge could have relied on some combination of (a) and (b).

[132] The trial judge did not do any of the above, and a proper assessment of the evidence offered by the other witnesses would not have affected this outcome.

A. *The Trial Judge Could Not Have Been Persuaded by the Testimony of the Complainant*

[133] The only evidence relevant to the *mens rea*, whether the respondent acted for the “purpose of” exploiting the complainant, came from the complainant herself. She testified that the respondent abused and exercised violent control over her for the purpose of forcing her into prostitution.

[134] The trial judge was not persuaded beyond a reasonable doubt by the complainant’s testimony, considered in the context of the other evidence. Though he accepted “the threats, intimidation, and injury” by the respondent as facts, he rejected much of the complainant’s evidence because he found that she was “prone to exaggeration and hyperbole” and “fill[ed] in the blanks to comply with her narrative” (paras. 57-58).

[135] The trial judge identified several inconsistencies in the complainant’s testimony that led him to this conclusion. He noted that she admitted on cross-examination to having access to the money garnered through sex work, after initially stating that the respondent “had complete control of the finances” (para. 62). He also highlighted the fact that the complainant agreed, on cross-examination, that she drafted and posted Craigslist ads advertising sexual services (including one featuring a

number that was for her personal use) even though she had “consistently testified that [the respondent] placed all the ads” (paras. 64-68). The trial judge noted other inconsistencies in the complainant’s evidence that called into question, *inter alia*, whether the complainant conducted negotiations with prospective clients, her “street walking”, when her sex work ended, and the amount of money she spent on drugs (paras. 58-68). All of the trial judge’s findings in this regard were relevant to the complainant’s credibility generally and to the alleged purpose for the respondent’s acts.

[136] The fact that the trial judge found the complainant not to be credible precludes us from accepting her narrative as facts. Indeed, the trial judge explicitly stated that the complainant’s narrative “does not represent findings of fact” (para. 12).

[137] Our colleague suggests that the trial judge’s assessment of the complainant’s credibility might have been different if the evidence of the other witnesses was considered as part of the *actus reus* rather than past discreditable conduct. She writes that “[the trial judge’s] assessment of the other witnesses’ evidence undermined his assessment of the complainant’s evidence as it failed to appreciate the interconnectedness between both” (para. 117).

[138] We disagree. Though the trial judge mischaracterized the evidence of the other witnesses as past discreditable conduct, he ultimately admitted all of it (para. 43). The reasons demonstrate that the trial judge tested the complainant’s credibility and evidence against the evidence of the other witnesses. As our colleague acknowledges in her reasons, the trial judge devoted five paragraphs to the framework through which

he would assess the complainant's credibility and reliability (para. 48). It is noteworthy that the trial judge wrote explicitly "[w]here the Crown's case is wholly dependent on the testimony of the complainant it is essential the credibility and reliability of the complainant's evidence be tested in the context of all the rest of the evidence" (para. 53 (emphasis added), citing *R. v. Stanton*, 2021 NSCA 57, at para. 67). From these paragraphs, it is readily apparent that the trial judge knew to test the complainant's evidence against the evidence of the other witnesses, regardless of how it was classified. Indeed, our colleague acknowledges that "[t]he reasons show that the trial judge considered the complainant's evidence in light of the exhibits and the evidence of other witnesses" (para. 48).

[139] Furthermore, at para. 57, the trial judge writes:

I am satisfied from all of the evidence that [the complainant] found herself trapped in a violent, unhappy, and loveless relationship with [the respondent]. However, the charges before this Court do not directly address the threats, intimidation, and injury that I accept as proven facts. The question before me is whether the Crown has proven these charges beyond a reasonable doubt. The past discreditable evidence certainly creates a backdrop in which such exploitation could thrive. However, I cannot just assume from that context evidence that the human trafficking allegations are proven as against [the respondent]. It requires the acceptance of [the complainant]'s evidence as credible and reliable to tie [the respondent] to the prostitution enterprise. [Emphasis added.]

[140] The trial judge concluded that the relationship between the respondent and the complainant was a violent one based on "all of the evidence" before him, not just the evidence from the complainant. This demonstrates that the trial judge did, in fact, turn his mind to how the five witnesses' evidence of "threats, intimidation, and injury"

could corroborate the complainant's evidence. As such, we strongly disagree with our colleague that the trial judge's mischaracterization of the evidence offered by the other witnesses led him to ignore the potential impact they had on the complainant's credibility or to entirely exclude them from this assessment. Our colleague says that "the consideration of evidence must not be confused with the assessment of evidence", suggesting that the other witnesses' evidence may have been *considered*, but was not *assessed* properly (para. 50). Yet, the trial judge's reasons do not support this assertion; just because the evidence was considered past discreditable conduct did not mean it was entirely siloed from the trial judge's credibility analysis.

B. *The Trial Judge Could Not Have Inferred Intent From the Circumstances of Control or Exploitation*

[141] Our colleague also takes the position that due to the trial judge's error of law, he failed to consider the possibility that the violence could be "a contributing cause in the complainant's provision of sexual services" when he assessed the evidence (paras. 109 and 113). Respectfully, our colleague's position is detached from the reality of the trial judge's findings. Moreover, even if a causal link could have been established in this case, the trial judge would not have been able to use this finding to infer that the respondent *intended to exploit* the complainant.

(1) The Five Witnesses Did Not Provide an Evidentiary Basis for Finding Actual Exploitation

[142] To begin, our colleague suggests that the evidence offered by the other witnesses of the respondent's regular violence and threats of violence against the complainant could have potentially been used to find that it was "a contributing cause in the complainant's provision of sexual services" (*ibid.*).

[143] In our view, even if the trial judge considered the evidence of violence as part of the *actus reus* analysis rather than past discreditable conduct, it is unclear how this would lead the trial judge to conclude that the respondent exploited the complainant.

[144] "Exploitation", per s. 279.04 of the *Criminal Code*, requires the Crown to prove conduct by the accused that: (1) causes the victim to provide or offer to provide labour or a service; and (2) could reasonably be expected to cause the victim to believe that their safety (or the safety of person known to them) would be threatened if they failed to provide such a service (majority reasons, at para. 103).

[145] We agree with the Court of Appeal that the trial judge's concern "was never the violent conduct of [the respondent], which he accepted, but rather whether [the complainant] was exploited" (2023 NSCA 28, 425 C.C.C. (3d) 475, at para. 31 (emphasis added)). Critically, while the trial judge accepted that the complainant experienced "threats, intimidation, and injury" in her relationship with the respondent, he was not satisfied that the respondent was *tied* to the sex work enterprise (para. 57). The trial judge found the complainant's testimony not to be credible as to this necessary link (*ibid.*).

[146] Even if the evidence of the five witnesses was assessed as part of the elements of the offence, the analysis would still be devoid of any additional evidence to show that the respondent actually exploited the complainant. This is because, at its highest, the evidence offered by the witnesses was solely about the respondent's violent behaviour towards the complainant. Their testimony does not link this violent behaviour to the complainant's provision of sexual services. Instead, as we explained above, the only evidence given at trial that was capable of establishing this link — the complainant's testimony — raised serious credibility issues in the trial judge's mind.

(2) The Negative Credibility Findings of the Five Witnesses Bar an Inference of "Intent To Exploit"

[147] Our colleague also states that a finding of actual exploitation "could, depending on the evidence, be relevant and material to the key question of whether the accused acted for the purpose of exploiting the complainant" (para. 100), and concludes that the *mens rea* of human trafficking can sometimes be inferred from a finding of exploitation. However, after concluding that the evidence of the five witnesses could have been relevant to establishing actual exploitation, our colleague stops short of explaining how the respondent's intention to exploit could have been inferred *in this case*.

[148] In our view, the trial judge's assessment of the five witnesses' evidence bars this inference from being made in the circumstances. He made detailed credibility



findings that shaped his assessment of the evidence given by each of the other witnesses, and his decision as to whether the Crown had met its burden.

[149] Notably, the trial judge declined to accept testimony from N.R. and K.L. that could have been probative of the respondent's alleged exploitation of the complainant. He noted that N.R. stated that "late-night outings" by the respondent and complainant became more frequent over time (para. 22). However, this evidence was introduced for the first time on cross-examination, was not mentioned in N.R.'s statement or meeting with the Crown, and was not disclosed to the defence (*ibid.*). This may well have contributed to the trial judge's conclusion that N.R. "displayed a somewhat cavalier attitude towards his duties as a sworn witness" (para. 23).

[150] The trial judge also did not accept N.R.'s assertion that the respondent "had lots of cash" could be probative of the respondent's actual exploitation of the complainant (A.R., vol. II, at p. 34). Nor did he accept N.R.'s testimony that the respondent had the cash because "he told [N.R.] he was a collector for a drug dealer" (*ibid.*).

[151] K.L. testified that the respondent and complainant "would go out in the evenings" and that she "drove them to hotels and nightclubs" and would "pick them up late at night" (trial reasons, at para. 35). She also testified that she discovered "prostitution-related" materials saved on a computer she owned and that the complainant and respondent occasionally used (para. 37). She stated that the respondent threatened her when she confronted the complainant (*ibid.*). The trial judge

rejected much of this testimony as well. He noted that K.L.'s "direct testimony varied from her police statements and her cross-examination in several aspects" (para. 38). On cross-examination, she admitted "that only once had she picked up" the complainant and respondent after a night out (*ibid.*). She also backtracked on her statement that she had discovered prostitution-related material saved on her computer (para. 39). These credibility challenges led the trial judge to "carefully scrutiniz[e]" K.L.'s testimony (para. 41). He found that K.L. had "accepted [the complainant]'s narrative and consequently harboured animus towards" the respondent (*ibid.*).

[152] In addition to identifying serious credibility issues with witnesses whose testimony was advanced by the Crown, the trial judge also took express note of countervailing testimony offered by other witnesses that contributed to his conclusion that the Crown had not proven the offences beyond a reasonable doubt.

[153] The complainant's daughter, "a very credible witness" in the trial judge's estimation, offered testimony that night-time outings by the complainant and respondent related to "work in the bars" (para. 31). She also testified about seeing the complainant "getting into a grey vehicle that she did not recognize" shortly before the complainant and respondent separated (para. 69). When she confronted the complainant, she "was told to tell no one" (*ibid.*). The complainant denied that this happened (*ibid.*). Another friend of the complainant, J.K., testified that the complainant and respondent would go out "a couple of times a week" but that it was for grocery shopping (para. 33).

[154] In summary, to find that there was an intent to exploit based on the five witnesses' evidence would require our Court to engage in a total reweighing of the evidence. This would fly in the face of what was said with determination and vigour so recently in *Hodgson*. Simply because there is a path for the trial judge to infer intent to exploit from a pattern of violence by an accused in some cases, does not mean that this Court can uproot the trial judge's credibility findings so as to make out that inference in the present case.

### III. Conclusion

[155] In the “concrete reality of the case at hand”, the trial judge's error in characterizing the testimony of the five witnesses did not have “a material bearing on the acquittal” (*Graveline*, at para. 14). In our view, what is critical is that the five witnesses' testimony was found to be admissible by the trial judge, despite his mischaracterization. And — crucially — the testimony that the trial judge accepted as credible did *not* address whether the respondent exercised control over the complainant *for the purpose of exploiting her*.

[156] The trial judge's credibility findings were the basis on which his reasonable doubt rested, and on which the respondent was acquitted. There is no proper basis in law to set aside the trial judge's conclusion in this regard. The *Criminal Code* does not provide for a ground of appeal of unreasonable acquittal; the majority's reasoning comes perilously close to just that.

[157] There is another way of understanding our colleague's analysis, which is that evidence of violence will *necessarily* give rise to an inference of intent to exploit. Indeed, our colleague acknowledges that "even where the trial judge accepts that actual exploitation occurred, the Crown must still prove beyond a reasonable doubt that the [respondent] subjectively intended to exploit the complainant" (para. 108). However, having made that acknowledgement, it is then not given effect. As we have outlined above, there is no evidentiary basis that could allow for such an inference to be drawn in the present case. In suggesting otherwise, our colleague effectively reasons that because there is a violent relationship between the respondent and the complainant, there is therefore intent to exploit.

[158] One can imagine a scenario where a person that provides sexual services is also in a violent and abusive relationship. Both of these can exist separate and independent of the other. While the abusive partner may in fact control, influence, and direct the other partner in their relationship, they may have nothing to do with the fact that this partner provides sexual services. Our colleague's analysis suggests that the abusive partner may well be guilty of human trafficking in those circumstances, even though the link to sexual services has not been made out. To be clear, the abusive partner in these kinds of cases might be found criminally liable if they were charged with, for example, assault, uttering threats, or criminal harassment. But those offences are not charged here, and they are not equivalent to human trafficking.

[159] In addition, we are concerned that our colleague's reasoning will, in practice, encourage courts to collapse the distinction between the *actus reus* and *mens rea* of the offence, such that it will be unnecessary to determine if intention to exploit has been proven beyond a reasonable doubt in cases involving acts of violence. This is not what Parliament intended as it effectively gives rise to another presumption apart from the one established in s. 279.01(3) of the *Criminal Code*.

[160] The appeal should be dismissed.

*Appeal allowed, CÔTÉ and ROWE JJ. dissenting.*

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