

R. v. Barton, [2019] S.C.J. No. 33

Supreme Court of Canada Judgments

Supreme Court of Canada

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

Heard: October 11, 2018;

Judgment: May 24, 2019.

File No.: 37769.

[2019] S.C.J. No. 33 | [2019] A.C.S. no 33 | 2019 SCC 33

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

(262 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Criminal law — Criminal Code offences — Offences against person and reputation — Assaults — Sexual assault — Consent — Honest but mistaken belief — Appeal from judgment setting aside Barton's acquittal and ordering new trial, allowed in part — Barton testified that on night prior to death he and victim engaged in consensual sexual activity "similar" to that which led to death — Trial judge failed to comply with mandatory requirements of s. 276 of Criminal Code, which served crucial screening function where accused's defence relied on complainant's prior sexual activities — Trial judge failed to properly address misleading evidence and mistakes of law arising from Barton's defence — New trial ordered should be restricted to offence of unlawful act manslaughter, as jury had rejected Crown's sharp object theory.

Criminal law — Procedure — Trial judge's duties — Charge or directions — Defences — Appeal from judgment setting aside Barton's acquittal and ordering new trial, allowed in part — Barton testified that on night prior to death he and victim engaged in consensual

sexual activity "similar" to that which led to death — Trial judge failed to comply with mandatory requirements of s. 276 of Criminal Code, which served crucial screening function where accused's defence relied on complainant's prior sexual activities — Trial judge failed to properly address misleading evidence and mistakes of law arising from Barton's defence — New trial ordered should be restricted to offence of unlawful act manslaughter, as jury had rejected Crown's sharp object theory.

Criminal law — Evidence — Admissibility — Appeal from judgment setting aside Barton's acquittal and ordering new trial, allowed in part — Barton testified that on night prior to death he and victim engaged in consensual sexual activity "similar" to that which led to death — Trial judge failed to comply with mandatory requirements of s. 276 of Criminal Code, which served crucial screening function where accused's defence relied on complainant's prior sexual activities — Trial judge failed to properly address misleading evidence and mistakes of law arising from Barton's defence — New trial ordered should be restricted to offence of unlawful act manslaughter, as jury had rejected Crown's sharp object theory.

Appeal from a judgment of the Alberta Court of Appeal setting aside Barton's acquittal and ordering a new trial. Gladue, an Indigenous woman and a sex worker, was found dead in the bathroom of Barton's Edmonton hotel room with an 11 cm wound in her vaginal wall. Barton, who was in town for a moving job, was charged with first degree murder. At trial before a judge and jury, the Crown's theory was that on the night of Gladue's death, during the course of commercial sexual activities and while she was incapacitated by alcohol, Barton cut the inside of her vagina with a sharp object with intent to seriously harm or kill her. He then carried her to the bathroom where she bled to death. This was, in the Crown's submission, murder while committing sexual assault with a weapon. As such, it constituted first degree murder. Alternatively, the Crown took the position that if Barton did not murder Gladue, he committed unlawful act manslaughter by causing her death in the course of a sexual assault. On both occasions, he said, he formed his fingers into a cone and penetrated her vagina, thrusting repeatedly. He claimed that on the second night, after thrusting deeper, more forcefully, and for a longer duration, she started to bleed unexpectedly, at which point the sexual activity came to a halt. Gladue then went into the bathroom and he promptly fell asleep, only to awake the next morning to find her dead in the bathtub. He said that after discovering her lifeless body, he left the hotel in a panic, returned, called 911, and fabricated different versions of a false story. Although he admitted at trial that he tore her vaginal wall and thereby caused her death, he claimed this was a non-culpable "accident". He denied ever using a sharp object and asserted that she consented to the sexual activities in question, or at least he honestly believed she did. At trial, although Barton testified at length about his sexual activity with Gladue on the night before her death, no application was made, and no separate hearing held, to determine the admissibility of that evidence. Nor was the jury given any limiting instruction identifying the purposes for which that evidence could and could not be used, despite the regime under s. 276 of the Criminal Code, which imposed these and other requirements. After having received the trial judge's final charge outlining the legal principles to be applied, the jury acquitted Barton of first degree murder and the included offence of unlawful act manslaughter. The Crown appealed, seeking a new trial. The Alberta Court of Appeal identified a list of errors that it said warranted a new trial. It set aside Barton's acquittal, and ordered a new trial on first degree murder. Barton now appealed. He maintained that he was denied procedural fairness at the Court of Appeal and that the legal errors identified by that court were either non-existent or of no moment. On this basis, he asked that his acquittal be restored. The Crown, for its part, maintained that the Court of Appeal observed the requirements of procedural fairness and that its decision to order a new trial on first degree murder was sound.

HELD: Appeal allowed in part.

While the Crown did not object to Barton's testimony about Gladue's prior sexual activity, its failure to do so was

not fatal. The ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lay squarely with the trial judge, not with the Crown. Before adducing evidence of Gladue's sexual activity on the night before her death, Barton was required to make an application under s. 276.1(1) and (2). Similarly, the trial judge was required to determine whether that evidence was capable of being admitted under s. 276(2) and, if so, hold an in camera hearing to determine the admissibility of that evidence. None of these requirements was observed. The failure to observe the requirements of the s. 276 regime had ripple effects, most acutely in the instructions on the defence that was commonly associated with s. 276: the defence of honest but mistaken belief in communicated consent. To the extent Barton might have honestly perceived Gladue's consent due to a subjective misunderstanding of the law, rather than a misperception of the facts, the defence of honest but mistaken belief in communicated consent could afford him no shelter. The trial judge in this case erred by failing to inoculate the jury against mistakes of law masquerading as mistakes of fact. It was incumbent on the trial judge to caution the jury against acting on these mistakes of law. The absence of such an instruction had an immediate impact on the defence of honest but mistaken belief in communicated consent, as it allowed the defence to proceed while these mistakes of law were left unaddressed, thereby leaving the jurors without the necessary tools to engage in a proper analysis. This error was inextricably linked to the failure to hold a s. 276 hearing, which would have subjected the admissibility and permissible uses of the evidence of Gladue's prior sexual history to rigorous scrutiny and assisted in filtering out the mistakes of law raised by Barton's defence. The trial judge's charge on after-the-fact conduct adequately, albeit imperfectly, conveyed to the jury that they could consider Barton's after-the-fact conduct in assessing guilt and equipped them to do so. In the circumstances of this case, it would be contrary to the principle against double jeopardy, enshrined in s. 11(h) of the Canadian Charter of Rights and Freedoms, to force Barton to face a second trial on first degree murder.

Statutes, Regulations and Rules Cited:

Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,

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

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 11(d), s. 11(h), s. 15

Criminal Code, R.S.C. 1985, c. C46, s. 19, s. 150.1(4), s. 222(5)(a), s. 231(5)(c), s. 234, s. 235, s. 265(2), s. 265(4), s. 271, s. 272, s. 273, s. 273.1(1), s. 273.1(2), s. 273.1(3), s. 273.2, s. 276, s. 276.1-276.4

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Criminal law -- Evidence -- Admissibility -- Complainant's sexual activity -- Accused charged with first degree murder in death of Indigenous sex worker -- Accused testifying at trial about previous sexual activity with deceased without having applied to adduce such evidence -- Evidence going to jury without detailed limiting instruction -- Accused acquitted -- Whether trial judge erred in failing to determine whether evidence of prior sexual activity was admissible -- If so, whether new trial warranted -- Criminal Code, R.S.C. 1985, c. C-46, s. 276.

Criminal law -- Charge to jury -- Mistaken belief in communicated consent -- Accused charged with first degree murder in death of Indigenous sex worker -- Crown alternatively submitting that accused committed unlawful act manslaughter by causing deceased's death in course of sexual assault -- Accused relying on defence of honest but mistaken belief in communicated consent -- Trial judge submitting defence to jury -- Accused acquitted -- Whether trial judge erred in his charge to jury in failing to caution jury on mistakes of law related to defence -- If so, whether new trial warranted.

Court Summary:

The accused was charged with first degree murder in the death of an Indigenous woman and sex worker, who was found dead in the bathroom of the accused's hotel room. The cause of death was determined to be loss of blood due to an 11 cm wound in her vaginal wall. The Crown's theory was that during the course of commercial sexual activities while the deceased was incapacitated by alcohol, the accused cut the inside of her vagina with a sharp object with intent to seriously harm or kill her. Alternatively, the Crown took the position that if the accused did not murder the deceased, he committed the lesser and included offence of unlawful act manslaughter, by causing her death in the course of a sexual assault. The accused, however, maintained his innocence. He testified that he and the deceased engaged in similar consensual sexual activity on both the night leading up to her death and the previous night, and that on both occasions, he penetrated her vagina with his fingers and thrust repeatedly. He claimed that she started to bleed unexpectedly on the second night, bringing the sexual activity to a halt, and he awoke the next morning to find her dead in the bathtub. He then left the hotel in a panic, returned, called 911, and fabricated different versions of a false story. Although he admitted that he caused her death, he claimed that it was a non-culpable accident. He denied using a sharp object and asserted that the deceased consented to the sexual activities in question -- or at least he honestly believed that she did.

In its opening address to the jury, the Crown referred to the deceased as a prostitute and explained that she and the accused struck up a working relationship on the night before her death. In addition, without having submitted an application under ss. 276.1(1) and 276.1(2) of the *Criminal Code* to adduce evidence of the deceased's prior sexual activity, the accused testified at length about his previous sexual activity with the deceased. The Crown did not object, nor did the trial judge order a separate hearing to consider the admissibility and permissible uses of this evidence. The jury acquitted the accused. The Court of Appeal allowed the Crown's appeal, set aside the accused's acquittal, and ordered a new trial on first degree murder.

Held (Wagner C.J. and Abella and Karakatsanis JJ. dissenting in part): The appeal should be allowed in part and a new trial on unlawful act manslaughter ordered.

Per Moldaver, Côté, Brown and Rowe JJ.: The trial judge erred in failing to comply with the mandatory requirements set out in s. 276 of the *Criminal Code*. That error had ripple effects, most acutely in the instructions on the defence of honest but mistaken belief in communicated consent, upon which the accused relied. In particular, non-compliance with the s. 276 regime translated into a failure to expose and properly address misleading evidence and mistakes of law arising from the accused's defence. This resulted in a reversible error warranting a new trial. However, the new trial should be restricted to the offence of unlawful act manslaughter, as it has not been demonstrated that the acquittal on murder was tainted by reversible error.

A. Section 276 and Prior Sexual Activity Evidence

Section 276 of the *Criminal Code* governs the admissibility of evidence about a complainant's prior sexual activities and the uses to which that evidence may be put. The animating purposes behind the s. 276 regime are to protect the integrity of the trial by excluding irrelevant and misleading evidence, protect the accused's right to a fair trial, and encourage the reporting of sexual offences by protecting the security and privacy of complainants. Section 276(1) provides that in proceedings in respect of certain listed offences, evidence of a complainant's

prior sexual activity is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity in question or is less worthy of belief. This section is categorical in nature and applies irrespective of which party led the evidence. Section 276(2) provides that evidence of the complainant's prior sexual activity adduced by or on behalf of the accused is presumptively inadmissible unless, after certain procedures have been followed, the trial judge rules to the contrary. The s. 276 regime applies to any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document. Crown-led prior sexual activity evidence is subject to the common law principles articulated in *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

B. Defence of Honest but Mistaken Belief in Communicated Consent

An accused may respond to a charge of sexual assault by relying on the defence of honest but mistaken belief in communicated consent. Consent is defined in s. 273.1 of the *Criminal Code* as the voluntary agreement of the complainant to engage in the sexual activity in question. For purposes of the *actus reus*, consent means that the complainant in her mind wanted the sexual touching to take place. At this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. For purposes of the *mens rea*, and specifically for the purposes of the defence of honest but mistaken belief in communicated consent, consent means that the complainant had affirmatively communicated by words or conduct her agreement to engage in the sexual activity with the accused. Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed the complainant effectively said "yes" through her words and actions.

While the jurisprudence has consistently referred to the relevant defence as being premised on an honest but mistaken belief in consent, it is clear that in order to make out this defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct. It is therefore appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in *communicated* consent". This refinement is intended to focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent. In seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that the complainant communicated consent to the sexual activity in question at the time it occurred. The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed that she consented.

Honest but mistaken belief in communicated consent is a mistake of fact defence, which operates where the accused mistakenly perceived facts that negate, or raise a reasonable doubt about, the fault element of the offence. By contrast, as a general rule, mistakes of law offer no excuse. Therefore, to the extent an accused's defence of honest but mistaken belief in communicated consent rests on a mistake of law -- including what counts as consent from a legal perspective -- rather than a mistake of fact, the defence is of no avail. For example, it is an error of law -- not fact -- to assume that unless and until a woman says "no", she has implicitly given her consent to any and all sexual activity. Implied consent, which rests on the assumption that unless a woman protests or resists, she should be deemed to consent, has no place in Canadian law. In addition, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is also premised on a mistake of law, not fact. As a further example, an accused's belief that the complainant's prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is again a mistake of law.

The availability of the defence of honest but mistaken belief in communicated consent is not unlimited. The reasonable steps requirement under s. 273.2(b) of the *Criminal Code* imposes a precondition to this defence. This requirement, which rejects the outmoded idea that women can be taken to be consenting unless they say "no", has both objective and subjective dimensions: the accused must take steps to ascertain consent that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time. The reasonable steps inquiry is highly fact-specific. Trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the

accused cannot equate silence, passivity, or ambiguity with the communication of consent. Trial judges and juries should also be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps.

The concept of reasonable steps to ascertain consent under s. 273.2(b) of the *Criminal Code* must be distinguished from the concept of reasonable grounds to support an honest belief in consent under s. 265(4). Where the accused is charged with some form of assault, the presence or absence of reasonable grounds is simply a factor to be considered in assessing the honesty of the accused's asserted belief in consent in accordance with s. 265(4). By contrast, where the accused is charged with a sexual offence under ss. 271, 272, or 273, a failure to take reasonable steps is fatal to the defence of honest but mistaken belief in communicated consent by virtue of s. 273.2(b). In the context of a charge under ss. 271, 272, or 273 where the accused asserts an honest but mistaken belief in communicated consent, if either there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent or the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain consent, then there would be no reason to consider the presence or absence of reasonable grounds to support an honest belief in consent under s. 265(4), since the accused would be legally barred from raising the defence due to the operation of s. 273.2(b).

An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence. If there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, then the defence of honest but mistaken belief in communicated consent has no air of reality and must not be left with the jury. By contrast, if there is an air of reality to the defence of honest but mistaken belief in communicated consent, including the reasonable steps requirement, then the defence should be left with the jury. The onus would then shift to the Crown to negative the defence, which could be achieved by proving beyond a reasonable doubt that the accused failed to take reasonable steps. Where the Crown does not prove beyond a reasonable doubt that the accused failed to take reasonable steps, that does not lead automatically to an acquittal. In those circumstances, the trial judge should instruct the jury that they are required, as a matter of law, to go on to consider whether the Crown has nonetheless proven beyond a reasonable doubt that the accused did not have an honest but mistaken belief in communicated consent. This requirement flows from the fact that the defence is ultimately one of an honest but mistaken belief in communicated consent, not one of reasonable steps. Ultimately, if the Crown fails to disprove the defence beyond a reasonable doubt, then the accused would be entitled to an acquittal.

C. Application

(1) Applicability of the Section 276 Regime

In this case, while the Crown did not object to the accused's testimony about the deceased's prior sexual activity, its failure to do so was not fatal. The ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge, not with the Crown. It is also plain that the proceeding implicated an offence listed in s. 276(1) because the offence charged in this case, first degree murder, was premised on sexual assault with a weapon, which is an offence listed in s. 276(1). It follows that the s. 276 regime was engaged. Furthermore, the limited information conveyed in the Crown's opening address did not exclude the application of s. 276(2) to the accused's detailed testimony about the deceased's sexual activity on the night before her death, which went well beyond the basic narrative recounted by the Crown. Therefore, before adducing evidence of the deceased's sexual activity on the night before her death, the procedural requirements under s. 276 should have been observed, and if any of the evidence was deemed admissible, a careful limiting instruction by the trial judge was essential to instruct the jury on the permissible and impermissible uses of that evidence.

(2) Instructions on the Defence of Honest but Mistaken Belief in Communicated Consent

At trial, the accused relied on the defence of honest but mistaken belief in communicated consent, and his testimony about the deceased's prior sexual activities featured prominently in his defence. The trial judge erred by failing to inoculate the jury against mistakes of law masquerading as mistakes of fact, as the accused's defence raised the spectre of several mistakes of law: a belief that the absence of signs of disagreement could

be substituted for affirmative communication of consent; a belief that prior similar sexual activities between the accused and the deceased, the deceased's status as a sex worker, or the accused's own speculation about what was going through the deceased's mind could be substituted for communicated consent to the sexual activity in question at the time; a belief that the deceased could give broad advance consent to whatever the accused wanted to do to her; and the inference that the deceased's past sexual activities, by reason of their sexual nature, may make it more likely that she consented to the sexual activity in question. It was incumbent on the trial judge to caution the jury against acting on these mistakes of law. The absence of such an instruction had an immediate impact on the defence of honest but mistaken belief in communicated consent, as it allowed the defence to proceed while these mistakes of law were left unaddressed, thereby leaving the jurors without the necessary tools to engage in a proper analysis. This error was inextricably linked to the failure to hold a s. 276 hearing, which would have subjected the admissibility and permissible uses of the evidence of the deceased's prior sexual history to rigorous scrutiny and assisted in filtering out the mistakes of law raised by the accused's defence.

(3) Instructions on Motive

Where motive does not form an essential element of the offence, the necessity of charging a jury on the subject depends upon the course of the trial and the nature and probative value of the evidence adduced. In this case, motive was a relevant consideration bearing upon whether the accused intended to seriously harm or kill the deceased, which would go to the fault element for murder. However, the Crown led no evidence of motive. Since there was neither a proven motive nor a proven absence of motive, it fell within the trial judge's substantial discretion to charge on motive. Further, the charge was not so unbalanced as to amount to misdirection.

(4) Instructions on the Objective Fault Element of Unlawful Act Manslaughter

The fault element of unlawful act manslaughter consists of objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. At trial, the defence conceded that the act in question was dangerous, and the Crown accepted that it would be appropriate to instruct the jury that if they were satisfied that the accused committed an unlawful act, then it was implicit that the act was dangerous. In addition, the Crown agreed to the request of the defence that the language of objectively foreseeable bodily harm be removed from the charge. On appeal, the Crown reversed its position, arguing that the instructions on dangerousness were deficient and the trial judge's failure to refer to the objective fault element of unlawful act manslaughter unfairly minimized its expert evidence. The Court of Appeal accepted the Crown's position on appeal. However, it should not have done so, as the Crown had to live with the decision it made at trial.

(5) Instructions on After-the-Fact Conduct

In light of procedural fairness concerns -- namely, the Crown's limited right to appeal an acquittal and the requirements that must be observed by appellate courts when raising new issues -- the Court of Appeal should not have ordered a new trial on the issue of after-the-fact conduct evidence. The Crown was actively involved in drafting the jury charge, and at no point did it request a specific instruction directing the jury to consider the accused's after-the-fact conduct in assessing his credibility. Further, although the Court of Appeal notified the parties at the outset of the hearing that it would raise new issues, it did not specify the precise nature of those issues or indicate whether one or more could result in the accused's acquittal being set aside. It also allowed the Crown to advance certain arguments on after-the-fact conduct for the first time in reply submissions, and at the end of the hearing the court indicated that there was no need for further written argument. Lastly, though it is not necessary to finally decide the issue, there is reason to be skeptical of the Crown's argument that the trial judge's instructions on after-the-fact conduct were so defective as to amount to reversible error. When read fairly and as a whole, the trial judge's charge on after-the-fact conduct adequately, albeit imperfectly, conveyed to the jury that they could consider the accused's after-the-fact conduct in assessing guilt and equipped them to do so.

(6) Instructions on the Defence of Accident

The term "accident" is used to signal one or both of the following: (1) that the act in question was involuntary (i.e., non-volitional), thereby negating the *actus reus* of the offence; or (2) that the accused did not have the requisite *mens rea*. In assessing whether a claim of "accident" may negate *mens rea* in any particular case, it is obviously essential to consider what the relevant *mens rea* requirement is in the first place. In carrying out this

inquiry, it must be kept in mind that *mens rea* requirements vary and include, for example: (1) a subjective intention to bring about a prohibited consequence; (2) a subjective awareness of prohibited circumstances; and (3) objective fault. Where the offence charged requires proof of subjective intent to bring about a particular consequence, the claim that the accused did not intend to bring about that consequence, making it a mere accident, is legally relevant, as it could negate the *mens rea* required for a conviction. By contrast, where the offence only requires a subjective awareness of particular circumstances, an accused's claim that the consequences of his act were unintentional and unexpected, making those consequences a mere accident, is naturally of no assistance. Finally, if the offence requires proof of objective fault -- for instance, that the prohibited consequence was objectively foreseeable -- then a claim of accident could negate that fault element if the prohibited consequence was such a chance occurrence that the trier of fact is left in a state of reasonable doubt as to whether, objectively, it was foreseeable. To avoid confusion in future cases, trial judges should focus on the questions of voluntariness and/or negation of *mens rea*, as appropriate, when instructing jurors on the so-called "defence" of "accident".

(7) Instructions Addressing Prejudice Against Indigenous Women and Girls in Sexual Assault Cases

There is no denying that Indigenous people -- in particular Indigenous women, girls, and sex workers -- have endured serious injustices, including high rates of sexual violence. Furthermore, the Court has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within our criminal justice system. With this in mind, our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous women and sex workers. As an additional safeguard going forward, in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls. However, any such instruction must not privilege the rights of the complainant over those of the accused. The objective would be to identify specific biases, prejudices, and stereotypes that may reasonably be expected to arise in the particular case and attempt to remove them from the jury's deliberative process in a fair, balanced way, without prejudicing the accused.

(8) New Trial

Applying the test set out in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, a new trial on unlawful act manslaughter is warranted. The failure to implement the s. 276 regime carried a significant risk that the jury would, whether consciously or unconsciously, engage in impermissible forms of reasoning on the central questions of whether the deceased subjectively consented to the sexual activity in question and, if not, whether the accused honestly but mistakenly believed she communicated her consent to that sexual activity at the time it occurred. The trial judge's failure to implement the s. 276 regime was exacerbated by, and was inseparable from, the failure to caution the jury against mistakes of law masquerading as mistakes of fact when considering the defence of honest but mistaken belief in communicated consent. It can reasonably be thought that the trial judge's errors had a material bearing on the accused's acquittal for unlawful act manslaughter, and therefore a new trial should be ordered on that offence.

However, a new trial on first degree murder is not warranted. The Crown's case on first degree murder turned primarily on its expert evidence that the deceased's fatal wound was a cut. Evidently, the jury was not persuaded. Moreover, the Crown provided no plausible explanation for how the jury could have used prior sexual activity evidence to improperly reason its way through the first degree murder charge. Furthermore, the Crown acknowledged in the court below that the only ground of appeal implicating the murder charge was the motive issue. However, the motive instructions were not tainted by reversible error. Finally, there was a simple and obvious explanation for why the jury unanimously acquitted the accused of murder that does not require the Court to speculate about the potential influence of conscious or unconscious bias: the Crown's theory simply did not hold up under scrutiny.

Per Wagner C.J. and **Abella** and **Karakatsanis** JJ. (dissenting in part): Section 276 makes evidence of a complainant's prior sexual activity inadmissible unless the accused complies with the criteria and procedures set out in ss. 276, 276.1 and 276.2. In this case, the trial judge permitted the accused to lead such evidence without following the procedure required by s. 276, thereby allowing him to make unrestricted reference to the victim's sexual history. He also failed to give the jurors any kind of limiting instruction to advise them that such evidence

could not be used to show that the victim was more likely to have consented. All of this was compounded by the fact that the trial judge permitted, on dozens of occasions, the deceased to be referred to as a Native prostitute without providing any instruction to guard against potential prejudicial reasoning based on these descriptions. There was thus no filter for the victim's prior sexual history and no specific warning to the jury to avoid drawing prejudicial and stereotypical assumptions about Indigenous women working in the sex trade. This left the jury with an essentially unchallenged version of the accused's interactions with the victim. The trial judge failed to appreciate that the victim's prior sexual conduct, occupation and race required the jury to be specifically alerted to the dangers of discriminatory attitudes toward Indigenous women, particularly those working in the sex trade. He provided no specific instructions crafted to confront the operative social and racial bias potentially at work. This rendered the whole trial unfair.

The devastatingly prejudicial effects of this error cannot be said to be confined to the included offence of manslaughter, but may also have had a material bearing on the jury's reasoning on the charge of first degree murder. The prejudicial impact of the accused's detailed testimony -- without either the screening required by s. 276 or any limiting instructions -- necessarily infected the whole trial and the entirety of the jury's fact-finding process. Indeed, the jury's portrait of the victim was painted almost exclusively through the accused's testimony, which meant that there was a significant possibility that the jury's entire deliberations would have been based on fundamentally flawed -- and prohibited -- legal premises.

The potential for prejudicial reasoning was further exacerbated by the repeated description of the victim as a "prostitute", and as a "Native", without any limiting instruction from the trial judge. Specific safeguards are required in jury trials to prevent the systemic biases that can affect jury deliberations. Trial judges have an important role to play in instructing juries so that they can recognize and set aside racial and other biases, including those against Indigenous peoples and sex-trade workers. Acknowledging, as this Court has for the last two decades, that racial prejudice is a social fact not capable of reasonable dispute, is not an insult to the jury system, it is a wake-up call to trial judges to be acutely attentive to the undisputed reality of pervasive prejudice and to provide the jury instructions required by law. Not only did that not happen here, the opposite occurred: inflammatory terminology was frequent, and was gratuitously used without any corrective intervention by the trial judge.

In summary, the trial judge's failure to apply the requirements in s. 276 created a significant risk that the evidence of the victim's prior sexual conduct not only tainted the jury's perception of her character and conduct, but also fundamentally affected the factual foundation upon which their deliberations were based. This error permeated the entire trial and may have had a material bearing on the jury's deliberations, affecting their verdicts for both murder and manslaughter. Given the prejudicial impact of these references, and the risk that they would affect the jury's assessment of the victim and the accused's credibility, it is difficult to see how it is realistically possible to conclude that their effect was confined to the jury's verdict on manslaughter. The risk of harmful effects on the jury's deliberations on murder would have been no less profound. When a trial with intimately connected issues, such as this one, is riddled with highly prejudicial testimony, it affects the very foundations of a jury's fact-finding function and decision making.

In addition, the trial judge's error in the instruction on after-the-fact-conduct is significant. In his own testimony, the accused admitted to lying, disposing of evidence and providing contradictory exculpatory explanations to numerous people after the victim's death. It was open to the jury to conclude that additional incriminating after-the-fact conduct evidence came from the hotel video camera footage, physical evidence found by the police, and the testimony of numerous individuals. The accused did not call 911 immediately after finding the victim in the bathtub. Instead there was evidence that he attempted to erase his link to the scene by attempting to clean the bathroom, re-arranging the bedding, putting his belongings in his van, checking out of the hotel room, and that he attempted to conceal and destroy evidence by throwing the bloody towel he had used to wipe the victim's blood from his feet and the bathroom floor into a garbage can in the parking lot of the hotel. He also concocted and fabricated multiple stories and excuses. There is a strong possibility that, properly instructed, it would have had a material bearing on the jury's assessment of the accused's testimony and, ultimately, its verdict.

Instead, the jury was given contradictory and confusing directions. In effect, the trial judge did not leave it open to the jury to consider the impact of the after-the-fact conduct evidence, such as the admitted exculpatory lies the

accused told after the victim's death, except when such evidence favoured an acquittal.

Juries, although expected to apply common sense, are above all expected to follow the instructions given by the trial judge. Where those instructions are confusing and contradictory, there is no roadmap for common sense to follow.

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J. and Watson and Martin JJ.A.), 2017 ABCA 216, 55 Alta. L.R. (6th) 1, 38 C.R. (7th) 316, 386 C.R.R. (2d) 104, 354 C.C.C. (3d) 245, [2017] A.J. No. 681 (QL), 2017 CarswellAlta 1167 (WL Can.), setting aside the acquittal of the accused and ordering a new trial. Appeal allowed in part, Wagner C.J. and Abella and Karakatsanis JJ. dissenting in part.

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I. Overview

The judgment of Moldaver, Côté, Brown and Rowe JJ. was delivered by

M.J. MOLDAVER J.

1 We live in a time where myths, stereotypes, and sexual violence against women¹ -- particularly Indigenous women and sex workers -- are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can -- and *must* -- do better.

2 This appeal centres on the death of Cindy Gladue and Bradley Barton's role in that death. Ms. Gladue, an Indigenous woman and a sex worker, was found dead in the bathroom of Mr. Barton's Edmonton hotel room with an 11 cm wound in her vaginal wall. Mr. Barton, who was in town for a moving job, was charged with first degree murder.

3 At trial before a judge and jury, the Crown's theory was that on the night of Ms. Gladue's death, during the course of commercial sexual activities while she was incapacitated by alcohol, Mr. Barton cut the inside of her vagina with a sharp object with intent to seriously harm or kill her. He then carried her to the bathroom where she bled to death. This was, in the Crown's submission, murder while committing sexual assault with a weapon. As such, it constituted first degree murder. Alternatively, the Crown took the position that if Mr. Barton did not murder Ms. Gladue, he committed unlawful act manslaughter by causing her death in the course of a sexual assault.

4 Mr. Barton told a different story. He testified that he and Ms. Gladue engaged in "similar" consensual sexual activity on both the night leading up to her death and the previous night. On both occasions, he said, he formed his fingers into a cone and penetrated her vagina, thrusting repeatedly. He claimed that on the second night, after thrusting deeper, more forcefully, and for a longer duration, she started to bleed unexpectedly, at which point the sexual activity came to a halt. Ms. Gladue then went into the bathroom and he promptly fell asleep, only to awake the next morning to find her dead in the bathtub. He said that after discovering her lifeless body, he

left the hotel in a panic, returned, called 911, and fabricated different versions of a false story. Although he admitted at trial that he tore her vaginal wall and thereby caused her death, he claimed this was a non-culpable "accident". He denied ever using a sharp object and asserted that she consented to the sexual activities in question -- or at least he honestly *believed* she did.

5 At trial, although Mr. Barton testified at length about his sexual activity with Ms. Gladue on the night before her death, no application was made, and no separate hearing held, to determine the admissibility of that evidence. Nor was the jury given any limiting instruction identifying the purposes for which that evidence could and *could not* be used -- this, despite the regime under s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, which imposes these and other requirements.

6 After having received the trial judge's final charge outlining the legal principles to be applied, the jury acquitted Mr. Barton of first degree murder and the included offence of unlawful act manslaughter. The Crown appealed, seeking a new trial.

7 In lengthy and detailed reasons, the Alberta Court of Appeal identified a list of errors that it said warranted a new trial. In addition, the Court of Appeal expressed serious concern that nationally used pattern jury charges on sexual offences contribute to stereotypes, cause persistent analytical problems in applying the law, and exacerbate inequality, leading it to recommend new pattern jury instructions. In the result, the Court of Appeal allowed the Crown's appeal, set aside Mr. Barton's acquittal, and ordered a new trial on first degree murder.

8 Mr. Barton now appeals to this Court. He maintains that he was denied procedural fairness at the Court of Appeal and that the legal errors identified by that court were either non-existent or of no moment. On this basis, he asks that his acquittal be restored. The Crown, for its part, maintains that the Court of Appeal observed the requirements of procedural fairness and its decision to order a new trial on first degree murder was sound.

9 For reasons that follow, I am of the view that a new trial is warranted. The central error committed by the trial judge was his failure to comply with the mandatory requirements set out under the s. 276 regime. That error had ripple effects, most acutely in the instructions on the defence of honest but mistaken belief in communicated consent, upon which Mr. Barton relied.² In particular, non-compliance with the s. 276 regime, which serves a crucial screening function where an accused relies on the complainant's prior sexual activities in support of his defence, translated into a failure to expose and properly address misleading evidence and mistakes of law arising from Mr. Barton's defence. This in turn resulted in reversible error warranting a new trial.

10 That said, I am respectfully of the view that the new trial should be restricted to the offence of unlawful act manslaughter, not murder. As I will develop, in view of the position taken by the Crown at trial, the charge of murder against Mr. Barton hinged on a relatively straightforward factual question: In causing Ms. Gladue's death, did Mr. Barton use a sharp object? If he did, then all that was left to prove was that he had the requisite intent for murder, a proposition which would follow readily from evidence that he used a sharp object. If he did not, then in view of the position taken by the Crown, the charge of murder could not be sustained. Evidently, the jury rejected the Crown's sharp object theory, and as I will demonstrate, none of the legal errors committed in the course of the trial had a material bearing on the murder charge. In the circumstances, I am of the view that it would be inappropriate to require Mr. Barton to face a new trial on first degree murder.

11 Accordingly, I would allow the appeal in part and order a new trial on unlawful act manslaughter.

II. Background

A. *Sexual Activities and Ms. Gladue's Death*

12 In June 2011, Mr. Barton, a large and strong man who works as a mover, rented an Edmonton hotel room for two nights while on a long-haul moving job with two colleagues. On both nights, he engaged in commercial sexual activities with Ms. Gladue, a 36-year-old Indigenous woman of Métis and Cree ancestry and a sex worker. What happened on those two nights was largely contested at trial.

(1) First Night

13 Mr. Barton testified that on the first night, he agreed to pay Ms. Gladue \$60.00 for "everything", which he defined as "intercourse, sex". He said that in his hotel room, she performed oral sex on him, and at the same time he formed his fingers into a cone and inserted his hand into her vagina, thrusting repeatedly "just past the knuckle" for five to ten minutes. He described her body language as being "good" throughout, and he did not notice any "problems or difficulties or disagreement on her part" (A.R., vol. IV, at p. 237). They then had vaginal intercourse, after which they exchanged phone numbers and she left for the night.

(2) Second Night

14 On the second night, Mr. Barton called Ms. Gladue and they agreed to meet at the hotel bar, where Mr. Barton was having drinks with one of his work colleagues. At the bar, Ms. Gladue placed her leg over Mr. Barton's lap and they were acting friendly towards one another, with Mr. Barton touching and stroking Ms. Gladue's leg. She had a couple of drinks while at the bar.

15 After last call, Mr. Barton, Ms. Gladue, and Mr. Barton's work colleague got up and left. On the way back to his room, Mr. Barton asked his colleague if he wanted "a piece" of Ms. Gladue. His colleague declined, so Mr. Barton and Ms. Gladue proceeded to Mr. Barton's room alone.

16 Mr. Barton testified that while he and Ms. Gladue did not discuss what sexual activities would be performed that night in his hotel room, they agreed to the same price as the night before and Ms. Gladue "[knew] what she was coming for" (A.R., vol. IV, at p. 253). He said that after the two each had a beer in his room, he said, "Cindy, let's get at this", to which she replied, "okay". She then went into the bathroom and came out nude, then sat on the corner of the bed. He said he asked her if she was "all good to go and ready" and she replied, "yeah".

17 Mr. Barton testified that Ms. Gladue, while seated at the corner of the bed, "pulled [him] in" and performed oral sex on him while he was standing, and he then began thrusting his fingers into her vagina (A.R., vol. IV, at p. 255). He admitted that the thrusting on the second night, which he said lasted about ten minutes, was "[a] little harder than the night before. And maybe ... a little farther" -- one or two centimetres past his knuckles (A.R., vol. IV, at p. 256). He said that as he was thrusting, "[c]ommunication was good" and "[t]here was moaning and groaning going on, all good signs, working it really good, thrusting. It was good. All signs were go". He

agreed in chief that she never "express[ed] any disagreement". He also said that she was expressing pleasure through "moans and groans" and that she was making "good moans".

18 Mr. Barton testified that he stopped thrusting and noticed blood on his fingers. He said he asked Ms. Gladue whether she was on her period and she replied, "Maybe I am". He said he was no longer interested in having sex with her and refused to pay her. He then cleaned up in the bathroom, came back, and told her to wash up and leave. He said she then went into the bathroom, after which he promptly fell asleep.

B. Mr. Barton's After-the-Fact Conduct

19 Mr. Barton testified that he awoke to find Ms. Gladue dead in a pool of blood in the bathtub and panicked. He stepped in the blood, grabbed a towel, cleaned his feet and part of the floor, got dressed, and left the room. He threw the bloody towel in a garbage bin outside, where it was later recovered by the police. He put his bag in his van, went back to the hotel, and checked out.

20 Mr. Barton then went back to his van, where he was joined by one of his work colleagues. The colleague told Mr. Barton they were going to have a good day, to which Mr. Barton replied: "Not until the police come". He then told his colleague that there was a girl in his room bleeding. He claimed he did not know her; she had just showed up at his hotel door the night before and asked to take a shower and he let her in. His colleague told him to go back to the hotel and call 911.

21 Mr. Barton returned to the hotel and asked the clerk for a new key card, claiming he had forgotten some papers. He then dialed 911 using the hotel room phone and asked for the police. He told the operator that a girl he did not know knocked on his door the night before and wanted to use his shower, and he went to bed and woke up the next morning to find her dead in his bathtub. He told the operator he was "shaking like crazy" and "scared shitless" (R.R., at pp. 39-40).

22 When the police arrived, Mr. Barton told an officer that "I didn't do anything. I'm married, and I don't do this stuff" (R.R., at p. 35). Later that day, Mr. Barton met up with one of his colleagues at the truck stop and explained that he was "fingering" Ms. Gladue when she started to bleed, at which point he said "that was enough of that" and "passed out" (A.R., vol. III, at p. 125).

23 An autopsy, performed on Ms. Gladue the day after her death, revealed an 11 cm wound that went completely through, and ran almost the full length of, her vaginal wall. Cause of death was determined to be loss of blood due to her injury.

24 The following day, the police arrested Mr. Barton in Calgary and transported him back to Edmonton in a van. While in the van, Mr. Barton initiated a conversation with an undercover officer posing as a fellow prisoner. Mr. Barton said he rented the hotel room but let two guys who were working with him sleep in it while he slept in his truck. He said that he entered the room in the morning to find the room trashed and a girl sitting in the bathtub covered in blood, prompting him to call the police immediately. He denied any wrongdoing.

25 Mr. Barton was charged with first degree murder.

C. Position of the Crown

26 The Crown's case on first degree murder hinged on its submission that Mr. Barton cut Ms. Gladue's vaginal wall using a sharp object, intending to seriously harm or kill her. The Crown maintained that after he cut her, he carried her to the bathroom and placed her in the bathtub where she bled to death. This was, in the Crown's submission, murder while committing sexual assault with a weapon. As such, it constituted first degree murder under ss. 231(5)(c) and 235 of the *Code*. While no "murder weapon" was found, the Crown hypothesized that Mr. Barton might have disposed of it in a grassy area near the hotel.

27 Alternatively, the Crown took the position that if Mr. Barton did not murder Ms. Gladue, he committed unlawful act manslaughter contrary to ss. 222(5)(a) and 234 of the *Code* by causing her death in the course of a sexual assault (see *R. v. Creighton*, [1993] 3 S.C.R. 3). While the Crown spent relatively little time developing this alternative theory at trial, it identified three independent routes to a manslaughter conviction, all of which rested on a finding of sexual assault against Ms. Gladue, which in turn hinged on proof of one of the following: lack of capacity to consent on Ms. Gladue's part due to intoxication; lack of actual consent on her part; or vitiation of consent due to public policy reasons -- namely, because Mr. Barton intentionally caused bodily harm to her in the course of otherwise consensual sexual activities.

28 Two Crown experts testified that the wound which led to Ms. Gladue's death was caused by a sharp object. These experts considered that there was an absence of "bridging" -- that is, small tissue fibres across the mouth of the wound -- that would characterize a laceration (the tearing of soft body tissue) caused by blunt force trauma. The Crown also adduced an opinion from one of its experts that in order to cause Ms. Gladue's injury by insertion of one's fingers and hand into her vagina, it would have taken "extreme", "excessive", or "considerable" force (A.R., vol. IV, at pp. 78-79). The expert defined "considerable" force to mean "an independent witness ... would know ... you're going to hurt that person" (A.R., vol. IV, at p. 78).

29 In addition, the Crown led toxicology evidence showing that Ms. Gladue's blood alcohol concentration at the time of death was 340 mg, over four times the legal limit to drive. Relying on this and other evidence, the Crown theorized that Ms. Gladue was incapacitated and lying in the middle of the bed when Mr. Barton used a sharp object to cut her.

30 The Crown also adduced evidence from an expert bloodstain analyst who noted that while bloodstains were found at the centre of the bed, none were found on the corner of the bed where Mr. Barton said Ms. Gladue was sitting, nor was there any blood on the carpet across which Ms. Gladue would have had to walk to enter the bathroom on her own.

31 Finally, Crown counsel took the position that Mr. Barton's after-the-fact conduct -- that is, the things he said and did after the alleged commission of the offence -- betrayed his consciousness of guilt and belied his claim that Ms. Gladue's death was a mere "accident".

D. Position of the Defence

32 In his defence, Mr. Barton denied using a sharp object. He also relied on the evidence of an expert who, unlike the Crown experts, noticed significant bridging in Ms. Gladue's wound and testified that it was a laceration resulting from blunt force trauma, not a cut. When presented with a hypothetical mirroring the sexual activity Mr. Barton said took place on the second night, the defence expert agreed that such activity could have caused the injury. She further stated

that a number of factors might affect the strength of a woman's vaginal wall (e.g., age, nutrition, alcoholism, frequent sexual activity), and if the kind of sexual activity described by Mr. Barton did in fact occur on the first night, then that too could have weakened Ms. Gladue's vaginal wall on the second night.

33 The defence further took the position that Ms. Gladue was only moderately intoxicated on the second night, relying on video evidence of her walking in the hotel hallway, evidence from various witnesses, and Mr. Barton's own testimony. The defence also maintained that Ms. Gladue consented to the sexual activity that occurred on both nights. In his closing address to the jury, defence counsel submitted that it was evident she consented on the second night because she left her clothes in the bathroom, came out naked, and "[s]he's a prostitute, and she's consenting to the sex" (A.R., vol. V, at p. 205). Counsel maintained that, in any event, "Mr. Barton would have obviously believed that she was consenting to sex" (*ibid.*), and therefore he could rely on the defence of honest but mistaken belief in communicated consent. Counsel stressed that there were "no groans of disagreement, in fact, only groans of agreement" and "there [were] no signs that she was in disagreement" (*ibid.*). Counsel also emphasized that the sexual activity was essentially the same both nights, the only difference being the depth of thrusting, and "Mr. Barton believes she consented night number one, night number two" (*ibid.*).

34 The defence conceded several elements of unlawful act manslaughter -- in particular, the defence conceded that Mr. Barton caused Ms. Gladue's death and the sexual activity in question was inherently dangerous and posed an objectively foreseeable risk that Ms. Gladue would suffer bodily harm. However, the defence maintained that this death was a mere "accident", which he claimed was antithetical to an intention to cause bodily harm and therefore did not amount to a vitiation of consent.

35 Mr. Barton also admitted to virtually all of the after-the-fact conduct revealed in the Crown's case. He acknowledged that he told a string of lies but said he was in a state of shock, panic, and fear that his wife and employer would find out that he was involved with a sex worker. He also said he lied because he was suspicious of everyone with whom he spoke.

III. Decisions Below

A. *Alberta Court of Queen's Bench (Graesser J., Sitting with a Jury)*

36 Mr. Barton was tried before a judge and jury. Crown and defence counsel assisted the trial judge in drafting his final charge to the jury outlining the legal principles to be applied. Following deliberation, the jury acquitted Mr. Barton of first degree murder and the included offence of unlawful act manslaughter.

B. *Alberta Court of Appeal (Fraser C.J.A., Watson and Martin J.J.A.), 2017 ABCA 216, 55 Alta. L.R. (6th) 1*

37 The Crown appealed Mr. Barton's acquittal and sought a new trial. It alleged four errors of law in its notice of appeal and factum before the Court of Appeal: (1) erroneous jury instructions on manslaughter; (2) erroneous jury instructions on motive; (3) the failure to hold a s. 276 hearing; and (4) erroneous jury instructions that a complainant's consent to sexual activity on a previous occasion could support the defence of honest but mistaken belief in communicated consent on a later occasion.

38 Two interveners were granted leave to make submissions on the definition of "sexual activity" under s. 273.1(1), the procedure required under the s. 276 regime, and the meaning of "consent" from a substantive equality perspective (see 2016 ABCA 68, 37 Alta. L.R. (6th) 253, at paras. 12-13).

39 In lengthy and detailed reasons, the Court of Appeal allowed the Crown's appeal, identifying a list of errors that, in its view, each independently warranted a new trial, including: (1) erroneous jury instructions on after-the-fact conduct; (2) erroneous jury instructions on motive; (3) the failure to conduct a s. 276 hearing; (4) the failure to define the "sexual activity in question"; (5) the failure to accurately define the required elements of sexual assault (in particular, consent, honest but mistaken belief in communicated consent, and the reasonable steps requirement); and (6) the failure to define the elements of unlawful act manslaughter (namely, dangerousness and the *mens rea* of objectively foreseeable risk of bodily harm).

40 In addition, the Court of Appeal expressed serious concern that national pattern jury charges on sexual offences contribute to stereotypes, cause persistent analytical problems in applying the law, and exacerbate inequality, leading it to recommend new pattern charges.

41 In the result, the Court of Appeal allowed the Crown's appeal, set aside Mr. Barton's acquittal, and ordered a new trial on first degree murder.

42 Mr. Barton now appeals to this Court.

IV. Issues

43 I would state the main issues on appeal as follows:

- (1) Was Mr. Barton denied procedural fairness at the Court of Appeal?
- (2) Did the trial judge err in failing to apply the s. 276 regime, and if so, what consequences followed?
- (3) Did the trial judge err in his instructions on motive?
- (4) Did the trial judge err in his instructions on the objective fault element of unlawful act manslaughter?
- (5) Did the trial judge err in his instructions on after-the-fact conduct?

44 If one or more error is shown, then the question becomes whether a new trial is warranted, and if so, on what charge.

V. Analysis

A. *Procedural Fairness Principles*

45 Procedural fairness issues weave throughout Mr. Barton's submissions before this Court. Accordingly, I will first provide a brief summary of the relevant law on three sets of procedural fairness principles relied on by Mr. Barton: (1) the Crown's limited right to appeal an acquittal, (2) the requirements that must be observed by appellate courts when raising new issues, and (3)

the proper scope of intervener submissions in criminal appeals. I will then turn to the substantive issues on appeal, considering Mr. Barton's procedural arguments as they arise on an issue-by-issue basis.

(1) The Crown's Limited Right to Appeal an Acquittal

46 In Canada, the Crown's right to appeal an acquittal is broader than in most other common law jurisdictions (see *R. v. Evans*, [1993] 2 S.C.R. 629, at pp. 645-46; *R. v. Varga* (1994), 18 O.R. (3d) 784, at p. 792 (C.A.)). However, as I will explain, it is not without limits.

47 Out of concerns over fairness to the accused and in particular the principle against double jeopardy, which is enshrined in s. 11(h) of the *Canadian Charter of Rights and Freedoms*, the Crown is barred from securing a new trial by advancing a new theory of liability for the first time on appeal (see *Wexler v. The King*, [1939] S.C.R. 350; *Savard v. The King*, [1946] S.C.R. 20, at pp. 33-34, 37 and 49; *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 895-96; *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 481). Moreover, as Doherty J.A. explained in *Varga*, "[d]ouble jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial" (p. 793). In short, "[a] Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial" (*ibid.*).

48 However, the Crown's failure to object to a misdirection in a jury charge does not necessarily preclude an order for a new trial (see *Cullen v. The King*, [1949] S.C.R. 658, at pp. 664-65; *R. v. George*, [1960] S.C.R. 871, at pp. 875-77 and 890). In particular, the passive inadvertence of Crown counsel at trial does not waive the public interest in a verdict untainted by materially deficient jury instructions.

49 But even so, when assessing whether an alleged error in a jury charge warrants appellate intervention, the failure to object "says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection" (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 38; see also *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 58; *R. v. Patel*, 2017 ONCA 702, 356 C.C.C. (3d) 187, at para. 82). This is particularly the case where counsel has specifically endorsed the instruction in question (see *Patel*, at para. 82).

(2) New Issues Raised by Appellate Courts

50 In *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, this Court established guidelines governing the circumstances and manner in which appellate courts may raise new issues. "[N]ew issues" are "legally and factually distinct from the grounds of appeal raised by the parties" and "cannot reasonably be said to stem from the issues as framed by the parties" (para. 30). While appellate courts enjoy jurisdiction to raise new issues, they may do so only to avert the risk of an injustice (para. 43). Where, for example, there is good reason to believe the result at trial would realistically have differed had the error identified by the appellate court not been made, intervention is warranted (para. 45).

51 When an appellate court decides to raise a new issue, it must give notice to the parties and provide them with an opportunity to respond (para. 54). As a general rule, notice should be given "as soon as is practically possible after the issue crystallizes" (para. 57), and the notice must ensure the parties are sufficiently informed so they may prepare and respond (para. 54).

The form of response required "will depend on the particular issue raised by the court. Counsel may wish to address the issue orally, file further written argument, or both" (para. 59). At the end of the day, "the underlying concern should be ensuring that the court receives full submissions on the new issue" (*ibid.*), and the primary considerations are the dictates of natural justice and the rule of *audi alteram partem* -- the duty to hear the other side.

(3) The Proper Scope of Intervener Submissions in Criminal Appeals

52 Finally, there is the role of interveners in criminal appeals. As stated in *R. v. Morgentaler*, [1993] 1 S.C.R. 462, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal" (p. 463). In particular, interveners play a vital role in our justice system by providing unique perspectives and specialized forms of expertise that assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it. These observations remain as true in the criminal context as they are in the civil context.

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

B. *Standard of Review for Reversible Error*

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

C. *Section 276 and Prior Sexual Activity Evidence*

(1) A Brief History of the Section 276 Regime

55 Historically, the *Code* did not place any specific limits on the admissibility of evidence about a complainant's prior sexual activities or the uses to which that evidence could be put. Consequently, there was nothing stopping counsel from adducing such evidence through cross-examination of the complainant and arguing, based on myths and stereotypes that were aided and abetted by the common law, that it undermined her credibility or increased the likelihood that she consented to the sexual activity in question because she had a propensity to consent (see H. C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at s. 7:400.10). In this way, evidence of prior sexual activities was used to "blacken the character of the complainant, distort

the trial process, and undermine the ability of the criminal justice system to effectively and fairly try sexual allegations" (*R. v. L.S.*, 2017 ONCA 685, 40 C.R. (7th) 351, at para. 79).

56 In 1982, however, as part of a broader legislative package aimed at protecting the integrity of the person, protecting children and special groups, safeguarding public decency, and eliminating sexual discrimination, Parliament tabled the first "rape shield" provisions (see House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 77, 1st Sess., 32nd Parl., April 22, 1982, at p. 77:29).³ These provisions restricted the right of defence counsel in proceedings "in respect of" certain sexual offences to adduce evidence of a complainant's sexual conduct on other occasions. One of the core objectives of these provisions was to debunk the "twin myths", being the myths that "unchaste women" are (1) more likely to have consented to the sexual activity in question and (2) less worthy of belief.

57 Almost a decade later, in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, this Court struck down s. 276 of the *Code*, as it then read, which set out a blanket exclusion of sexual activity evidence subject to three exceptions. The Court determined that although the provision had the laudable goals of abolishing the outmoded, sexist use of sexual activity evidence, it "oversho[t] the mark and render[ed] inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial" (p. 625). In its stead, the Court articulated common law principles governing the admissibility of sexual activity evidence.

58 In the wake of *Seaboyer*, Parliament enacted a new s. 276 regime in 1992 through Bill C-49, which ushered in a suite of major reforms to the law on sexual offences in Canada (see *An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38). The animating purposes behind this new regime, aligned with those of its predecessor, were to protect the integrity of the trial by excluding irrelevant and misleading evidence, protect the accused's right to a fair trial, and encourage the reporting of sexual offences by protecting the security and privacy of complainants (see *Seaboyer*, at pp. 605-6; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at paras. 19 and 25). It essentially codified the principles set out by this Court in *Seaboyer* (see *Darrach*, at para. 20) and established substantive rules that prevent evidence of a complainant's sexual activities from being used for improper purposes, backed by procedural requirements designed to enforce these rules. This general framework, which survived a constitutional challenge in *Darrach*, remains in place today, albeit in amended form.

(2) The Section 276 Regime⁴

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

Evidence of complainant's sexual activity

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

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

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

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

Idem

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

(a) is of specific instances of sexual activity;

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

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

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

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

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

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

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

(3) Proceedings Below

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

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

(4) Procedural Fairness Argument

68 Mr. Barton submits that as a matter of procedural fairness, the s. 276 issue was not properly raised before the Court of Appeal. Respectfully, I disagree. While the Crown did not object to Mr. Barton's testimony about Ms. Gladue's prior sexual activity, in my view, its failure to do so was not fatal. The ultimate responsibility for enforcing compliance with the mandatory s. 276 regime

lies squarely with the trial judge, not with the Crown. After all, it is the trial judge, not the Crown, who is the gatekeeper in a criminal trial. Moreover, I simply cannot accept that a complainant's dignity, equality, and privacy rights, which the s. 276 regime is meant to protect, may be waived by mere Crown inadvertence. There is nothing in the record suggesting that the Crown made a deliberate attempt to avoid the application of the s. 276 regime, and indeed it had no reason to. It certainly gained no tactical advantage as a result of non-compliance -- quite the opposite. And in any event, given the important objectives underlying s. 276, the Crown should refrain from commenting on a complainant's prior sexual history unless necessary.

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

(5) The Applicability of the Section 276 Regime

70 The first substantive issue is one of scope: Can the s. 276 regime apply in a case where the offence charged -- here, murder under ss. 231(5)(c) and 235(1) -- is not one of the offences listed in s. 276(1)?

71 This issue raises a question of statutory interpretation. The modern approach to statutory interpretation provides that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

72 Beginning with the text, the opening words of s. 276(1) and (2) -- proceedings "in respect of" a listed offence -- are "of the widest possible scope" and are "probably the widest of any expression intended to convey some connection between two related subject matters" (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39). These words import such meanings as "in relation to", "with reference to", or "in connection with" (*ibid.*).

73 Parliament would not have chosen this exceptionally broad language if it intended to limit the application of the s. 276 regime to proceedings in which a listed offence was expressly charged. Narrower language such as "in a prosecution for" a listed offence or "where a person is charged with" a listed offence was equally available. Yet Parliament declined to adopt those narrower formulations and instead chose a much broader one. That choice must be given effect.

74 Turning to purpose, the s. 276 regime's objects -- which include protecting the integrity of the trial by excluding irrelevant and misleading evidence, protecting the accused's right to a fair trial, and encouraging the reporting of sexual offences by protecting the security and privacy of complainants (see *Seaboyer*, at pp. 605-6; *Darrach*, at paras. 19 and 25) -- are fundamental. Giving the s. 276 regime a broad, generous interpretation that does not unduly restrict the regime's scope of application would best achieve these objects.

75 Moreover, imposing a rigid requirement that a listed offence must be expressly charged before the s. 276 regime can apply would put form over substance. The regime's applicability would turn on the way in which the prosecutor drafts the charging document, not on whether, in substance, a listed offence is implicated in the proceeding. If a listed offence is implicated in the proceeding, surely it makes no difference that the Crown did not particularize that offence in the charging document.

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

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

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

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

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

81 However, the limited information conveyed in the Crown's opening address did not, in my view, exclude s. 276(2)'s application to Mr. Barton's detailed testimony about Ms. Gladue's sexual activity on the night before her death, which went well beyond the basic narrative recounted by the Crown. Nor did the Crown's limited questioning of witnesses on Ms. Gladue's relationship with Mr. Barton and Mr. Barton's question to his colleague about whether he wanted a "piece" of Ms. Gladue have this effect. These were mere drops in the expansive pool of

information Mr. Barton flooded the jury with through his testimony. In short, the Crown did not give him a "free pass" and cloak his evidence with immunity from the s. 276 regime.

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

83 Yet none of these requirements was observed. While this non-compliance may have been advantageous to Mr. Barton, as his evidence was shielded from scrutiny under the s. 276 regime, it came at the expense of Ms. Gladue's dignity and privacy (which continued despite her death), the truth-seeking process, and trial fairness, which must be assessed "from both the perspective of the accused and of society more broadly" (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 22 (emphasis added)). As this Court stated in *Darrach*, an accused does not have the right "to adduce misleading evidence to support illegitimate inferences" and thereby "distort the truth-seeking function of the trial process" (para. 37, citing *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 74).

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

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

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

(1) Legal Principles

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

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

87 A conviction for sexual assault, like any other true crime, requires that the Crown prove

beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea*. A person commits the *actus reus* of sexual assault "if he touches another person in a sexual way without her consent" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The *mens rea* consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42).

88 "Consent" is defined in s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question".⁶ It is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter" (*J.A.*, at para. 31), and it must be freely given (see *Ewanchuk*, at para. 36). This consent must exist at the time the sexual activity in question occurs (*J.A.*, at para. 34, citing *Ewanchuk*, at para. 26), and it can be revoked at any time (see *Code*, s. 273.1(2)(e); *J.A.*, at paras. 40 and 43). Further, as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner", though it does not include "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57 (emphasis deleted)).

89 Consent is treated differently at each stage of the analysis. For purposes of the *actus reus*, "consent" means "that the complainant in her mind wanted the sexual touching to take place" (*Ewanchuk*, at para. 48). Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent -- plain and simple (see *Ewanchuk*, at para. 31). At this point, the *actus reus* is complete. The complainant need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established (see *J.A.*, at para. 37).

90 For purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused" (*Ewanchuk*, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (*ibid.*, at para. 47).

(b) *The Necessity of Having an Honest Belief in Communicated Consent*

91 This Court has consistently referred to the relevant defence as being premised on an "honest but mistaken belief in consent" (see e.g., *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 1; *Ewanchuk*, at para. 43; *Darrach*, at para. 51; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 57; *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627, at para. 32; *J.A.*, at para. 24), and the *Code* itself refers to the accused's "belief in consent" (s. 273.2(b) (heading)). However, this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually *communicated* consent, whether by words or conduct (see *R. v. Park*, [1995] 2 S.C.R. 836, at paras. 39 and 43-44 (per L'Heureux-Dubé J.); *Ewanchuk*, at para. 46; *J.A.*, at paras. 37, 42 and 48). As L'Heureux-Dubé J. stated in *Park*, "[a]s a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of

the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (para. 44 (emphasis in original)).

92 Therefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in *communicated* consent". This refinement is intended to focus all justice system participants on the crucial question of *communication* of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.

93 Focusing on the accused's honest but mistaken belief in the *communication* of consent has practical consequences. Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she *communicated* consent to the sexual activity in question at the time it occurred (see S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. loose-leaf), at s.16:20.50.30). For example, in some cases, prior sexual activities may establish legitimate expectations about how consent is communicated between the parties, thereby shaping the accused's perception of communicated consent to the sexual activity in question at the time it occurred. American scholar Michelle Anderson puts it this way: "prior negotiations between the complainant and the defendant regarding the specific acts at issue or customs and practices about those acts should be admissible. These negotiations, customs, and practices between the parties reveal their legitimate expectations on the incident in question" (M. J. Anderson, "Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armour" (2004), 19:2 *Crim. Just.* 14, at p. 19, cited in Hill, Tanovich and Strezos, at s.16:20.50.30). These "negotiations" would not, however, include an agreement involving broad advance consent to any and all manner of sexual activity. As I will explain, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.

94 However, great care must be taken not to slip into impermissible propensity reasoning (see *Seaboyer*, at p. 615). The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths", which is prohibited under s. 276(1)(a) of the *Code*.

(c) *Mistakes of Law*

95 A mistake of fact defence operates where the accused mistakenly perceived facts that negate, or raise a reasonable doubt about, the fault element of the offence (see *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 148, per Dickson J. (dissenting, but not on this point). Honest but mistaken belief in communicated consent falls within this category of defences (see *Ewanchuk*, at paras. 42-43; *J.A.*, at para. 48).

96 But the law draws a distinction between mistakes of *fact* and mistakes of *law*. As a general rule, the latter offer no excuse (see *Code*, s. 19; *R. v. Forster*, [1992] 1 S.C.R. 339, at p. 346; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 58). As the Court of Appeal in this case put it, "[n]o one in this country is entitled to their own law" (para. 245). Therefore, to the extent an accused's defence of honest but mistaken belief in communicated consent rests on a mistake

of *law* -- including "what counts as consent" from a legal perspective -- rather than a mistake of *fact*, the defence is of no avail (see Stewart, at s. 3:600.30.10).

97 For present purposes, three consent-related mistakes of law are particularly relevant: implied consent, broad advance consent, and propensity to consent. I will address these concepts in turn.

(i) Implied Consent (*Ewanchuk*)

98 The "specious" defence of implied consent "rests on the assumption that unless a woman protests or resists, she should be 'deemed' to consent" (*Ewanchuk*, at para. 103, per McLachlin J. (as she then was)). *Ewanchuk* makes clear that this concept has no place in Canadian law. As Major J. stated for the majority, "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence" (para. 51, citing *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; see also J. Benedet, "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution" (2014), 52 Alta. L. Rev. 127). It is also a mistake of law to infer that "the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant" (*J.A.*, at para. 47). In short, it is an error of law -- not fact -- to assume that unless and until a woman says "no", she has implicitly given her consent to any and all sexual activity.

(ii) Broad Advance Consent (*J.A.*)

99 "Broad advance consent" refers to the legally erroneous notion that the complainant agreed to future sexual activity of an undefined scope (see *J.A.*, at paras. 44-48). As summarized in *J.A.*, the definition of "consent" under s. 273.1(1) "suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind" and "this Court has also interpreted this provision as requiring the complainant to consent to the activity 'at the time it occur[s]'" (para. 34, citing *Ewanchuk*, at para. 26). Thus, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.

(iii) Propensity to Consent (*Seaboyer*)

100 The law prohibits the inference that the complainant's prior sexual activities, by reason of their sexual nature, make it more likely that she consented to the sexual activity in question (see *Code*, s. 276(1)(a); *Seaboyer*). This is the first of the "twin myths". Accordingly, an accused's belief that the complainant's prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is a mistake of law.

(d) *The Reasonable Steps Requirement*

101 Finally, the availability of the defence of honest but mistaken belief in communicated consent is not unlimited. Section 273.2 of the *Code*, which formed part of the 1992 reforms to Canada's sexual assault laws, places important limits on the defence. That section reads:

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

102 As is apparent, s. 273.2 applies in respect of various sexual assault offences: sexual assault under s. 271; sexual assault with a weapon, involving threats to a third party, or causing bodily harm under s. 272; and aggravated sexual assault under s. 273.

103 The jurisprudence on the reasonable steps requirement under s. 273.2(b) remains underdeveloped, and academic commentators have highlighted the need for greater clarity (see e.g., E. A. Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women", in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012); L. Vandervort, "The Prejudicial Effects of 'Reasonable Steps' in Analysis of *Mens Rea* and Sexual Consent: Two Solutions" (2018), 55 *Alta. L. Rev.* 933). With that in mind, although the trial judge's limited instructions on reasonable steps were not raised by the Crown as a ground of appeal from Mr. Barton's acquittal, a few comments and observations are warranted to promote greater clarity in the law and provide guidance for future cases -- including the new trial on unlawful act manslaughter that, for reasons I will explain, is required in this case.

(i) *The Reasonable Steps Requirement as a Precondition with Objective and Subjective Dimensions*

104 Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent -- no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time (see *R. v. Cornejo* (2003), 68 O.R. (3d) 117 (C.A.), at para. 22, leave to appeal refused, [2004] S.C.C.A. No. 32, [2004] 3 S.C.R. vii, citing K. Roach, *Criminal Law* (2nd ed. 2000), at p. 157; see also Sheehy, at pp. 492-93). Notably, however, s. 273.2(b) does not require the accused to take "all" reasonable steps, unlike the analogous restriction on the defence of mistaken belief in legal age imposed under s. 150.1(4) of the *Code*⁷ (see *R. v. Darrach* (1998), 38 O.R. (3d) 1 (C.A.), at p. 24, aff'd 2000 SCC 46, [2000] 2 S.C.R. 443 (without comment on this point)).

(ii) The Purpose of the Reasonable Steps Requirement

105 The purpose of the reasonable steps requirement has been expressed in different ways. The authors of *Manning, Mewett & Sankoff: Criminal Law* state that s. 273.2(b) of the *Code* seeks "to protect the security of the person and equality of women who comprise the huge majority of sexual assault victims by ensuring as much as possible that there is clarity on the part of both participants to a sexual act" (M. Manning and P. Sankoff, *Manning, Mewett &*

Sankoff: Criminal Law (5th ed. 2015), at p. 1094 (footnote omitted)). Abella J.A. (as she then was) wrote in *Cornejo* that the reasonable steps requirement "replaces the assumptions traditionally -- and inappropriately -- associated with passivity and silence" (para. 21). Professor Elizabeth Sheehy puts it this way: "Bill C-49's 'reasonable steps' requirement was intended to criminalize sexual assaults committed by men who claim mistake without any effort to ascertain the woman's consent or whose belief in consent relies on self-serving misogynist beliefs" (p. 492). The common thread running through each of these descriptions is this: the reasonable steps requirement rejects the outmoded idea that women can be taken to be consenting unless they say "no".

(iii) What Can and Cannot Constitute Reasonable Steps

106 Keeping in mind that "consent" is defined under s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question", what can constitute reasonable steps to ascertain consent? In my view, the reasonable steps inquiry is highly fact-specific, and it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps or obscure the words of the statute by supplementing or replacing them with different language.

107 That said, it is possible to identify certain things that clearly are *not* reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk*, at para. 51, citing *M. (M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see Sheehy, at p. 518). Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see Sheehy, at p. 537).

108 It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.

109 Overall, in approaching the reasonable steps analysis, trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Moreover, trial judges and juries should be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Finally, if the reasonable steps requirement is to have any meaningful impact, it must be applied with care -- mere lip service will not do.

(iv) The Distinction Between Reasonable Steps and Reasonable Grounds

110 Finally, the concept of reasonable steps to ascertain consent under s. 273.2(b) of the *Code* must be distinguished from the concept of reasonable grounds to support an honest belief in consent under s. 265(4). The latter section provides that in the context of an alleged assault, whether sexual or otherwise (see s. 265(2)), where the accused claims he believed the complainant consented to the conduct in question and the trial judge is "satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence", the trial judge "shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief". This provision rests on the idea that as the accused's asserted belief in consent becomes less reasonable, it becomes increasingly doubtful that the asserted belief was honestly held (see *Pappajohn*, at pp. 155-56, per Dickson J. (dissenting, but not on this point)).

111 In other words, where the accused is charged with some form of assault, the presence or absence of *reasonable grounds* is simply a factor to be considered in assessing the honesty of the accused's asserted belief in consent in accordance with s. 265(4). By contrast, where the accused is charged with a sexual offence under ss. 271, 272, or 273, a failure to take reasonable steps is fatal to the defence of honest but mistaken belief in communicated consent by virtue of s. 273.2(b).

112 With this in mind, in the context of a charge under ss. 271, 272, or 273 where the accused asserts an honest but mistaken belief in communicated consent, if either (1) there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent or (2) the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain consent, then there would be no reason to consider the presence or absence of reasonable grounds to support an honest belief in consent under s. 265(4), since the accused would be legally barred from raising the defence due to the operation of s. 273.2(b).

113 Finally, while the conceptual distinction between reasonable steps under s. 273.2(b) and reasonable grounds under s. 265(4) remains valid, as a practical matter it is hard to conceive of a situation in which reasonable steps would not also constitute reasonable grounds for the purpose of assessing the honesty of the accused's asserted belief.

(2) Instructions on the Defence of Honest but Mistaken Belief in Communicated Consent

114 At trial, Mr. Barton relied on the defence of honest but mistaken belief in communicated consent. His testimony about Ms. Gladue's prior sexual activities featured prominently in his defence. It was this evidence that formed the foundation for his contention that the sexual activity on the second night was part of a continuing commercial transaction that began with the previous night's supposedly "similar" sexual activity, with an agreement to pay the same price on both nights.

115 The trial judge instructed the jury that there was evidence before them that raised the defence of honest but mistaken belief in communicated consent. He explained that this defence is a mistake of fact defence and noted that they "should consider whether there were any reasonable grounds for [Mr. Barton's] belief" (A.R., vol. VIII, at p. 207). He also told the jury that

in assessing this defence, they should consider, among other things, Mr. Barton's testimony about his perceptions of Ms. Gladue's verbal and non-verbal responses to the activity he said took place on the second night, as well as Mr. Barton's testimony about what occurred on the first night, and in particular his testimony that he and Ms. Gladue had a "similar" sexual encounter on that night. He further instructed the jury on reasonable steps under s. 273.2(b) of the *Code*, stating: "You should consider whether the Crown has proven beyond a reasonable doubt that Mr. Barton failed to take reasonable steps in the circumstances known to him at the time to satisfy himself that Ms. Gladue was consenting to the type of sexual activity he described in his testimony" (A.R., vol. VIII, at p. 210). However, the trial judge did not indicate that the reasonable steps requirement is a precondition to the defence of honest but mistaken belief in communicated consent.

(3) Mistakes of Law in Mr. Barton's Defence

116 To the extent Mr. Barton may have honestly perceived Ms. Gladue's consent due to a subjective misunderstanding of the *law*, rather than a misperception of the *facts*, the defence of honest but mistaken belief in communicated consent would afford him no shelter. As I will develop, in my respectful view, the trial judge in this case erred by failing to inoculate the jury against mistakes of law masquerading as mistakes of fact. In particular, the legally erroneous notions of implied consent, broad advance consent, and propensity to consent discussed above each haunted the courtroom. These were issues raised by the Crown both at trial and before the Court of Appeal, and I am not persuaded that any procedural fairness concerns preclude this Court from addressing them.

117 Mr. Barton's defence rested largely on the notion that the sexual activity he said occurred on the first night led him to believe Ms. Gladue consented on the second night. In particular, he gave evidence that he and Ms. Gladue agreed on the price of \$60 for "everything" on the first night, that they agreed on the same price on the second night, and that "she [knew] what she was coming for". He considered the two nights as forming part of a continuing commercial transaction, with supposedly "similar" sexual activities occurring on both nights. Further, defence counsel stressed that "[s]he's a prostitute, and she's consenting to the sex" and that there were "[n]o groans of disagreement, in fact, only groans of agreement" and "there [were] no signs that she was in disagreement. He reasonably believed that she was consenting." (A.R., vol. V, at p. 205).

118 Respectfully, Mr. Barton's defence raised the spectre of several mistakes of law. First of all, a belief that the absence of signs of disagreement could be substituted for affirmative communication of consent is a mistake of law. As already explained, "implied consent" does not exist under Canadian sexual assault law. Further, a belief that prior "similar" sexual activities between the accused and the complainant, the complainant's status as a sex worker, or the accused's own speculation about what was going through the complainant's mind could be substituted for communicated consent to the sexual activity in question at the time is a mistake of law. As a matter of law, consent must be specifically renewed -- and communicated -- for each sexual act. Moreover, a belief that the complainant could give broad advance consent to whatever the accused wanted to do to her is a mistake of law. Finally, the inference that the complainant's past sexual activities, by reason of their sexual nature, may make it more likely that she consented to the sexual activity in question -- the first of the "twin myths" -- is also a mistake of law.

119 With respect, I am of the view that it was incumbent on the trial judge to caution the jury against acting on these mistakes of law. The absence of such an instruction had an immediate impact on the defence of honest but mistaken belief in communicated consent, as it allowed the defence to proceed while these mistakes of law were left unaddressed, thereby leaving the jurors without the necessary tools to engage in a proper analysis. This error was inextricably linked to the failure to hold a s. 276 hearing, which would have subjected the admissibility and permissible uses of the evidence of Ms. Gladue's prior sexual history to rigorous scrutiny and assisted in filtering out the mistakes of law raised by Mr. Barton's defence.

(4) Additional Guidance on Air of Reality Test and Reasonable Steps

120 Strictly speaking, the foregoing analysis is sufficient to demonstrate that the trial judge's instructions on the defence of honest but mistaken belief in communicated consent were deficient. However, in the interest of providing guidance for future cases -- including the new trial on unlawful act manslaughter that, for reasons I will explain later in these reasons, is necessary in this case -- I would add the following brief comments.

121 An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence. This necessarily requires that the trial judge consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent. This Court recently confirmed that where there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, the defence of honest but mistaken belief in communicated consent must not be left with the jury (see *R. v. Gagnon*, 2018 SCC 41). A number of provincial appellate decisions, including the Court of Appeal's decision in this case, have reached the same conclusion (see e.g., *Cornejo*, at para. 19; *R. v. Despins*, 2007 SKCA 119, 228 C.C.C. (3d) 475, at paras. 6 and 11-12; *R. v. Dippel*, 2011 ABCA 129, 281 C.C.C. (3d) 33, at paras. 22-23 and 28; *R. v. Flaviano*, 2013 ABCA 219, 368 D.L.R. (4th) 393, at paras. 41 and 50, aff'd 2014 SCC 14, [2014] 1 S.C.R. 270; C.A. reasons (2017), at para. 250).

122 Accordingly, if there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, then the defence of honest but mistaken belief in communicated consent has no air of reality and must not be left with the jury. This threshold analysis serves an important purpose: it keeps from the jury defences that lack a sufficient evidentiary foundation, thereby avoiding the risk that the jury might improperly give effect to a defective defence. As such, contrary to what occurred at trial in this case,⁸ the air of reality test should not be ignored.

123 By contrast, if there *is* an air of reality to the defence of honest but mistaken belief in communicated consent, including the reasonable steps requirement, then the defence should be left with the jury. The onus would then shift to the Crown to negative the defence, which could be achieved by proving beyond a reasonable doubt that the accused failed to take reasonable steps. The trial judge should instruct the jury as such, making it clear that the reasonable steps requirement is a precondition to the defence. In addition, the trial judge should explain, as a matter of law, the type of evidence that *can* and *cannot* constitute reasonable steps, making sure any steps that are grounded in mistakes of law are relegated to the latter category. Where

the Crown does not prove beyond a reasonable doubt that the accused failed to take reasonable steps, that does not lead automatically to an acquittal. In those circumstances, the trial judge should instruct the jury that they are required, as a matter of law, to go on to consider whether the Crown has nonetheless proven beyond a reasonable doubt that the accused did not have an honest but mistaken belief in communicated consent. This requirement flows from the fact that the defence is ultimately one of an "honest but mistaken belief in communicated consent", not one of "reasonable steps". Ultimately, if the Crown fails to disprove the defence beyond a reasonable doubt, then the accused would be entitled to an acquittal.

(5) Determination of the "Sexual Activity in Question"

124 To provide guidance for future cases, I wish to make several observations on the trial judge's instructions to the jury on the "sexual activity in question".

125 At trial, the defence conceded that Mr. Barton caused Ms. Gladue's death. With that point conceded, a key issue for the jury was *what* sexual activity took place -- that is, what was the "sexual activity in question" under s. 273.1(1) of the *Code*? The answer to that question would then frame the rest of the analysis: Did Ms. Gladue subjectively consent to that particular sexual activity? If not, did Mr. Barton honestly believe she communicated consent to that particular sexual activity at the time it occurred?

126 Several parts of the trial judge's charge suggested to the jury that they were effectively bound to accept Mr. Barton's version of events regarding the "sexual activity in question". For example, the trial judge stated:

* "[f]or there to have been a sexual assault,
you will have to decide if Ms. Gladue
consented ... to the type of sexual activity
described and demonstrated by Mr. Barton in
- his testimony" (A.R., vol. VIII, at pp.
197-98);

* "there is some evidence that Cindy Gladue
consented to the application of some force by
Mr. Barton, including sexual activity and
- to the activity described by Mr. Barton in his
- testimony"

(A.R., vol. VIII, at pp. 198-99 (emphasis added));

* "[y]ou should consider whether the Crown has

proven beyond a reasonable doubt that Mr. Barton failed to take reasonable steps in the circumstances known to him at the time to satisfy himself that Ms. Gladue was consenting to the type of sexual activity he described in his testimony" (A.R., vol. VIII, at p. 210 (emphasis added)); and

- * "[w]hen you are considering whether Mr. Barton honestly believed that Cindy Gladue was capable of consenting ... to the touching described by Mr. Barton in his testimony" (A.R., vol. VIII, at pp. 206-7 (emphasis added)).

127 Respectfully, these instructions were problematic. In particular, rather than suggesting that Mr. Barton's testimony was gospel, the trial judge ought to have clarified for the jury that in determining the "sexual activity in question", they should look to the whole of the evidence, both direct and circumstantial, and they were not bound to accept Mr. Barton's evidence simply because he was the only witness to the sexual activity in question who was alive to testify.

128 With that in mind, there was a sound basis in the evidence to question the veracity of Mr. Barton's account of the sexual activity in question. To cite just three examples:

- * an expert bloodstain analyst noted that while bloodstains were found at the centre of the bed, which was consistent with the Crown's theory that Ms. Gladue was lying in the middle of the bed when the sexual activity in question occurred, none were found on the corner of the bed where Mr. Barton said Ms. Gladue was sitting;
- * toxicology evidence placed Ms. Gladue's blood alcohol concentration at the time of death at over four times the legal limit to drive, which again was consistent with the Crown's theory that she was lying incapacitated in the middle of the bed and inconsistent with Mr.

Barton's evidence that she was only moderately intoxicated; and

- * the sexual activity in question was evidently so forceful and violent as to be lethal, which calls into question whether Ms. Gladue consented and acted in the way Mr. Barton described.

129 However, the Crown did not appeal on this basis, so for reasons of procedural fairness, I will not consider whether the deficient instructions on the "sexual activity in question" amounted to misdirection.

E. *Instructions on Motive*

(1) Motive

130 Motive is ulterior intention -- it is the end for which a crime is committed (see *Lewis v. The Queen*, [1979] 2 S.C.R. 821, at pp. 831-35). In most criminal matters, to establish the mental element of the offence, the Crown need not prove motive. Instead, what it must prove is "intent" (i.e., "the exercise of a free will to use particular means to produce a particular result") (*ibid.*, at p. 831).

131 As explained in *Lewis*, where motive does not form an essential element of the offence, the necessity of charging a jury on motive falls along a continuum. At one end of the continuum are "cases where the evidence as to identity of the [offender] is purely circumstantial and proof of motive on the part of the Crown so essential that reference must be made to motive in charging the jury" (p. 837). At the other end of the continuum are cases where there is a proven absence of motive (see pp. 837-38). In such cases, the trial judge *must* charge on motive, as the proven absence of motive is ordinarily an important factor favouring the accused (see p. 835).

132 But between these two poles, "the necessity to charge on motive depends upon the course of the trial and the nature and probative value of the evidence adduced", and "[i]n these cases, a substantial discretion must be left to the trial judge" (p. 838). Moreover, "motive is always a matter of fact and evidence and, therefore, primarily for the judge and jury rather than the appellate tribunal" and trial judges "must be given reasonable latitude" in charging the jury (p. 847). Accordingly, the trial judge's decision as to whether to charge on motive "should not be lightly reversed" (p. 841). In addition, trial judges have discretion as to how to deal with issues relating to motive, and "there is no formula that must be followed" (*R. v. McMaster* (1998), 37 O.R. (3d) 543 (C.A.), at p. 547).

(2) Proceedings Below

133 At trial, the Crown led no evidence of motive, and the trial judge rejected the defence's submission that there was a proven absence of motive. There was thus no *proven absence* of motive, but rather an *absence of proven* motive.

134 The charge on motive read:

Motive is a reason why somebody does something.

Proof of motive for the commission of an offence may be of assistance in determining whether Mr. Barton is guilty or not guilty of the offence charged or an included offence.

The Crown is not required to prove motive and, it introduced no evidence of motive.

In deciding whether people are guilty of an offence, what generally matters is what they did and whether they did it intentionally, not their reasons for doing it, although motive or the absence of motive may be of assistance in some cases.

It is for you to decide how much or how little you will rely on lack of motive to help you decide this case.

If you conclude that Bradley Barton had no motive to commit a particular offence, it would be an important fact for you to consider. It is a factor that might support Mr. Barton's denial of guilt and raise a reasonable doubt that the Crown has proven its case.

Members of the jury, you should give the evidence of absence of motive the weight you think it deserves. Lack of motive is only a factor that may persuade you one way or the other whether Mr. Barton is guilty or not guilty. You must consider the issue of motive in the context of all of the evidence.

(A.R., vol. VIII, pp. 164-65)

135 The Court of Appeal held that the trial judge should not have given the jury any instruction on motive. The court reasoned that motive was simply irrelevant to the issues in play, and the charge left the jury with the false impression that the Crown's case was deficient because it had failed to prove motive. Moreover, the charge was, in the court's view, "one-sided" (para. 83). It held that the erroneous instructions on motive affected both the charge of first degree murder and the lesser and included offence of manslaughter.

(3) Discussion

136 Respectfully, I cannot accede to the Crown's submission that the trial judge erred in his instructions on motive. Before this Court, the parties have not argued that the absence of proven motive was relevant to the unlawful act manslaughter offence, and I need not comment further on that point. However, in my view, motive was a relevant consideration bearing upon whether Mr. Barton intended to seriously harm or kill Ms. Gladue, which would go to the fault element for murder. In these circumstances, since there was neither a proven motive nor a proven absence of motive, it fell within the trial judge's "substantial discretion" to charge on motive, and therefore this Court should defer to his discretionary decision to do so.

137 Nor, in my view, was the charge on motive so unbalanced as to amount to misdirection. As indicated, the trial judge instructed the jury that if they found a lack of motive, then that would be an "important fact for [them] to consider". However, at the same time, he made it perfectly clear that "the Crown is not required to prove motive", that motive or the absence of motive "may" be of assistance, and that it was up to the jury to decide "how much or how little" it would rely on

lack of motive. In my view, while the motive instructions could have been clearer, when read fairly and as a whole, they were reasonably balanced and did not place undue emphasis on the importance of establishing motive or suggest that proving motive was essential for a conviction.

138 Relatedly, while I am inclined to agree with the Court of Appeal that cases may arise in which the trial judge should explain to the jury how a "generalized purpose or attitude" -- for example, an animus towards sex workers or Indigenous women, including a desire to use sex workers or Indigenous women in an objectifying or dehumanizing manner for personal gratification -- could qualify as a "motive" (para. 81), in my respectful view, this was not one of those cases. I say this because the Crown did not argue at trial that there was any evidence that Mr. Barton held any such "generalized purpose or attitude" on which the jury ought to be instructed.

139 Accordingly, I would not accede to the argument that the trial judge's charge on motive constituted reversible error.

F. *Instructions on the Objective Fault Element of Unlawful Act Manslaughter*

(1) Proceedings Below

140 The fault element of unlawful act manslaughter consists of "objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act" (*Creighton*, at p. 45; see also *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 961). An objectively dangerous act is one that is "likely to subject another person to danger of harm or injury" (*DeSousa*, at p. 961).

141 At trial, the defence conceded that "clearly [the act] was dangerous. It caused death" (A.R., vol. VIII, at p. 95). The Crown accepted that it would be appropriate to instruct the jury that if they are satisfied that Mr. Barton committed an unlawful act, then it was implicit that the act was dangerous. In addition, the defence requested that the language of objectively foreseeable bodily harm be removed from the charge, and the Crown agreed to this language being taken out.

142 However, on appeal, the Crown reversed its position, arguing that the instructions on dangerousness were deficient and the trial judge's failure to refer to the objective fault element of unlawful act manslaughter unfairly minimized its expert evidence, particularly the expert opinion that if Ms. Gladue's injury was caused by insertion of one's fingers and hand up into her vagina, it would have taken such force that "an independent witness ... would know ... you're going to hurt that person" (A.R., vol. IV, at p. 78). The Court of Appeal accepted the Crown's position on appeal.

(2) Discussion

143 Before this Court, Mr. Barton submits that the Court of Appeal should not have entertained the Crown's submission on this point. I agree. In my respectful view, the Crown had to live with the decision it made at trial regarding the instructions on the objective fault element of unlawful act manslaughter.

G. *Instructions on After-the-Fact Conduct*

(1) Proceedings Below

144 At trial, the Crown argued that Mr. Barton's after-the-fact conduct betrayed his consciousness of guilt for having committed an offence and belied his claim that Ms. Gladue's death was a mere "accident", though the Crown conceded that this evidence was irrelevant to whether he had the requisite intent for murder. The alternative inference, urged by Mr. Barton, was that his actions were motivated by his shock, panic, and fear that his wife and employer would discover he was involved with a prostitute. He also maintained that his string of lies was a result of his inability to trust anyone.

145 In his charge on consciousness of guilt, the trial judge instructed the jury not to infer that Mr. Barton "is guilty of any offence as a result of his after-the-fact conduct, but [that conduct] may be used to assess his claim that Cindy Gladue's injury was an accident... . This evidence might only be used to draw an inference relating to Ms. Gladue's injuries being accidental" (A.R., vol. I, pp. 148-49). He did not instruct the jury that they could consider Mr. Barton's after-the-fact conduct in assessing his overall credibility.

146 The Court of Appeal held that these instructions were deficient in several ways, mainly: (1) they failed to instruct the jury to consider Mr. Barton's after-the-fact conduct in evaluating his overall credibility, and (2) they impermissibly confined the permissible uses of the after-the-fact conduct evidence to rebutting the "defence" of "accident".

147 On the latter point, the Court of Appeal considered that a key word was missing from the following sentence in the charge: "You cannot infer that Mr. Barton is guilty of any [specific] offence as a result of his after-the-fact conduct, but it may be used to assess his claim that Cindy Gladue's injury was an accident" (para. 63). The word "specific" was required because the charge was intended to communicate to the jury that they could not infer from Mr. Barton's after-the-fact conduct that he thought he committed *murder*, as opposed to some other offence. The Court of Appeal considered that this omission would have left the jury with the mistaken impression that the after-the-fact conduct evidence could not be used to infer guilt at all.

148 The Court of Appeal held that these two errors warranted a new trial on first degree murder.

(2) Discussion

149 In my respectful view, the Court of Appeal should not have ordered a new trial on the after-the-fact conduct issue. This conclusion flows from two sets of procedural fairness principles reviewed above: (1) the Crown's limited right to appeal an acquittal, and (2) the requirements that must be observed by appellate courts when raising new issues. I will apply these principles in turn.

150 First, the Crown was actively involved in drafting the jury charge and in fact requested an instruction nearly identical to language that, according to the Court of Appeal, amounted to reversible misdirection. Further, at no point did the Crown request a specific instruction directing the jury to consider Mr. Barton's after-the-fact conduct in assessing his credibility. Instead, the Crown actively assisted in drafting the charge, vetted the final draft, and did not object. In short, the Crown not only gave its blessing to the alleged error, it largely created it. As Doherty J.A. wrote in *R. v. Bouchard*, 2013 ONCA 791, (2014) 314 O.A.C. 113, aff'd 2014 SCC 64, [2014] 3

S.C.R. 283, "[w]hen the trial judge's instructions are consistent with the instructions worked out by counsel and the trial judge in the pre-charge conference, and counsel has no objections after the charge is delivered, it is an understatement to describe counsel's silence as merely 'a failure to object'" (para. 38). Moreover, the Crown did not target the instructions on after-the-fact conduct in its notice of appeal or factum before the Court of Appeal. Instead, as I will explain, the Court of Appeal raised the issue on its own motion.

151 Second, although the Court of Appeal notified the parties at the outset of the hearing that it would raise new issues, it did not specify the precise nature of those issues or indicate whether one or more could result in Mr. Barton's acquittal being set aside. Further, although the issues relating to the charge on after-the-fact conduct had evidently crystallized *before* the hearing began, the court did not advise defence counsel of its concerns prior to the hearing. As a result, defence counsel was not in a position to seek an adjournment to consider the issue and potentially provide further written submissions. The court then allowed the Crown to advance certain arguments on after-the-fact conduct for the first time in reply submissions, and at the end of the hearing the court indicated that there was no need for further written argument. In my respectful view, applying *Mian*, this was an instance in which it was necessary to request supplementary written submissions from both parties, whether before or after the hearing, particularly since the after-the-fact conduct issue put Mr. Barton's acquittal on the line.

152 For these reasons, I am respectfully of the view that the Court of Appeal should not have ordered a new trial based on the alleged deficiencies in the after-the-fact conduct instructions. Further, I would not entertain the Crown's arguments on the after-the-fact conduct instructions here.

153 Lastly, though I need not finally decide the issue, I am skeptical of the Crown's argument that the trial judge's instructions on after-the-fact conduct were so defective as to amount to reversible error. I say this for three main reasons.

154 First, beginning with the absence of a specific instruction linking Mr. Barton's after-the-fact conduct to his overall credibility, this Court's jurisprudence confirms that after-the-fact conduct can be used to impugn the accused's credibility (see *Jaw*, at para. 39, citing *R. v. White*, [1998] 2 S.C.R. 72, at para. 26). That said, I am not persuaded the jury would have failed to recognize, as a matter of common sense, that the fact Mr. Barton admittedly told a string of lies following Ms. Gladue's death could be considered in assessing his overall credibility. Much of course would depend on the jury's assessment of Mr. Barton's explanations for having told these lies. Assuming his explanations were rejected as untruthful, then in line with the trial judge's general instructions on assessing credibility, the jurors would have recognized that a person who lies is less worthy of belief. To suggest otherwise is to assume jurors leave their common sense at the door when they enter the courtroom. Furthermore, I observe that the Crown never requested a specific instruction linking Mr. Barton's after-the-fact conduct to his credibility, nor has it suggested, whether before this Court or the courts below, that his after-the-fact conduct had any bearing whatsoever on whether he had the requisite intent for murder. To the contrary, Crown counsel stressed at trial: "I want to make sure ... that after-the-fact conduct goes to his ... position that this is an accident, not intention for murder or manslaughter" (A.R., vol. VI, at p. 156 (emphasis added)).

155 Second, while the trial judge's failure to include the word "specific" in his charge was undoubtedly an error, I doubt this omission irreparably tainted the charge. In assessing the seriousness of this error, it must be borne in mind that a charge should not be "endlessly

dissected and subjected to minute scrutiny and criticism" (*R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163); "[a]n appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole" (*Jaw*, at para. 32); and at the end of the day, "[i]t is the overall effect of the charge that matters" (*Daley*, at para. 31). With these principles in mind, I note that the trial judge's charge on after-the fact conduct contained a number of passages that are both clear and free from legal error, including the following:

- * "[t]he Crown's position is that [the after-the-fact conduct] evidence is circumstantial evidence that can lead you to conclude that Mr. Barton is guilty of criminal conduct, as opposed to having caused Ms. Gladue's death by accident" (A.R., vol. VIII, at pp. 169-70);

- * "[y]ou must not infer Mr. Barton's guilt from his after-the-fact conduct unless, when you consider it along with all the other evidence, you are satisfied that it is consistent with his guilt and is inconsistent with any other reasonable conclusion" (*ibid.*, at p. 170);

- * "evidence of after-the-fact conduct has only an indirect bearing on the issue of Mr. Barton's guilt. You must be careful about inferring his guilt from this evidence because there might be other explanations for this conduct" (*ibid.*, at pp. 170-71); and

- * "[y]ou cannot use [the after-the-fact conduct] evidence to draw any conclusion as to which of the available offences Mr. Barton might be guilty of" (*ibid.*, at p. 172).

156 In my view, when read fairly and as a whole, the trial judge's charge on after-the-fact conduct adequately, albeit imperfectly, conveyed to the jury that they could consider Mr. Barton's after-the-fact conduct in assessing guilt and equipped them to do so.

157 Third, it is telling that the Crown not only vetted and approved the instructions on after-the-fact conduct, but also helped shape those instructions. As indicated, when assessing whether an alleged error in a jury charge warrants appellate intervention, the failure to object "says

something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection" (*Jacquard*, at para. 38; see also *Thériault*, at pp. 343-44; *Daley*, at para. 58; *Patel*, at para. 82), and this is particularly the case where counsel has specifically endorsed the instruction in question (see *Patel*, at para. 82). Not only that, but the Crown did not even target the instructions on after-the-fact conduct in its notice of appeal or factum before the Court of Appeal, and when the court raised the matter for the first time, Crown counsel requested additional time to research the issue. In sum, in light of the Crown's conduct in the courts below, it can hardly be said that the alleged errors were glaring and serious.

158 Accordingly, while I need not finally decide the matter, I am inclined to the view that the trial judge's instructions on after-the-fact conduct, while imperfect, were not so defective as to amount to reversible error. Regardless, any deficiencies in those instructions can be rectified by the trial judge presiding over the new trial on unlawful act manslaughter, to which I now turn.

H. *New Trial*

159 Having addressed the key substantive issues on appeal, I come to the question of remedy: Is a new trial warranted? If so, on what offence -- murder, manslaughter, or both?

160 In considering these questions, this Court must keep in mind that a jury acquittal is not set aside lightly (see *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2). To secure a new trial, the Crown bears a heavy burden: it must demonstrate that the error or errors in question "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). A mere hypothetical possibility that the accused would have been convicted but for the error or errors will not suffice (see *ibid.*). However, the Crown is not required to demonstrate that the verdict would necessarily have been different (see *ibid.*).

(1) A New Trial on Unlawful Act Manslaughter Is Warranted

161 To acquit Mr. Barton of unlawful act manslaughter, the jury had to resolve the central questions of whether Ms. Gladue subjectively consented to the "sexual activity in question" in accordance with s. 273.1(1) of the *Code* and, if not, whether Mr. Barton honestly but mistakenly believed she communicated her consent to that sexual activity at the time it occurred.

162 In my view, the failure to implement the s. 276 regime carried a significant risk that the jury would, whether consciously or unconsciously, engage in impermissible forms of reasoning on these central issues, thereby irreparably tainting the truth-seeking process. In the context of this particular case, which involved an Indigenous woman who engaged in sex work and who was not alive to tell the jury her side of the story, this error was particularly grave, as the risk of prior sexual activity evidence being used improperly, thereby compromising the truth-seeking function of the courts, was exceptionally high. Without proper instruction, the jury was left to cobble together its own unstated rules about how it would use this evidence. Furthermore, the trial judge's failure to implement the s. 276 regime was exacerbated by, and was inseparable from, the failure to caution the jury against mistakes of law masquerading as mistakes of fact when considering the defence of honest but mistaken belief in communicated consent -- assuming that defence was available to Mr. Barton at all. That will be a matter for the presiding judge at the new trial.

163 Individually, these errors were serious. Together, they were devastating. They went straight to the heart of the lesser and included offence of unlawful act manslaughter, which was premised on sexual assault. Accordingly, I am satisfied that the Crown has met its heavy burden: in the concrete reality of the case at hand, it can reasonably be thought that the trial judge's errors had a material bearing on Mr. Barton's acquittal for unlawful act manslaughter. Therefore, I would order a new trial on that offence.

164 The only question that remains is whether a new trial on first degree murder is also warranted.

(2) A New Trial on First Degree Murder Is Not Warranted

165 The Crown conceded before the Court of Appeal that the only ground of appeal that would warrant a new trial on first degree murder was the motive issue. Nonetheless, the Court of Appeal held that non-compliance with the s. 276 regime warranted a new trial on first degree murder.

166 Reversing its position from the one it took before the Court of Appeal, the Crown now argues that the entire charge was tainted by the failure to observe the requirements of s. 276. Respectfully, for three main reasons, I cannot agree.

167 First, the Crown's case on first degree murder hinged on a relatively straightforward factual question: Did Mr. Barton cut Ms. Gladue using a sharp object? Indeed, the Crown stressed in its closing submissions to the jury that "[t]he major determination for you in this case is whether Mr. Barton used a knife" (A.R., vol. V, at p. 222). If he did, then the only question was whether he had the requisite mental element for murder, and keeping in mind the common sense inference that a person generally intends the natural and probable consequences of his or her actions (see *Daley*, *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, at para. 3), the trial judge rightly noted that "it [would] not be much of a stretch to conclude that there was an intention to harm or injure her" (A.R., vol. I, at p. 137). However, if the jury was *not* satisfied that Mr. Barton cut Ms. Gladue, then the charge of murder could not be sustained, a point conceded by the Crown at trial.

168 The Crown made a tactical choice to focus its efforts on developing its theory that Mr. Barton cut Ms. Gladue using a sharp object. Absent evidence of a "murder weapon", the Crown's murder case turned primarily on its expert evidence that Ms. Gladue's fatal wound was a cut. Evidently, the jury was not persuaded. This can perhaps be explained by defence counsel's success in casting doubt on the Crown experts' opinion during cross-examination and pitting that evidence against the opinion of his own expert, which contrasted starkly with that of the Crown experts. In short, on the factual question of whether Mr. Barton cut Ms. Gladue, the Crown lost in a battle of experts.

169 Second, and relatedly, the Crown has provided no plausible explanation for how the jury could have used prior sexual activity evidence to improperly reason its way through the first degree murder charge.

170 Third, the Crown acknowledged in the court below that the only ground of appeal implicating the murder charge was the motive issue. However, as I have explained, the motive

instructions were not tainted by reversible error. Accordingly, the Crown has not demonstrated any error spilling over into the murder charge.

171 Assuming however, for the sake of argument, that the trial judge did err by instructing the jury on motive because motive was simply irrelevant to the issues in play, I am not satisfied that the error would meet the stringent *Graveline* threshold. In my respectful view, the mere possibility that the trial judge's instructions might have left the jury with the mistaken impression that the Crown's failure to prove motive was a fundamental flaw in its case is, in the concrete reality of the case at hand, too speculative to meet this stringent threshold. This is particularly so given the trial judge's instruction that "[t]he Crown is not required to prove motive" (A.R., vol. I, at p. 146) and given that, at the end of the day, the murder charge hinged largely on the expert evidence bearing on whether Ms. Gladue's fatal wound was caused by a sharp object.

172 Moreover, as I have already explained, I am inclined to the view that the absence of a specific instruction linking Mr. Barton's after-the-fact conduct to his credibility was of no moment. Further, in relation to the murder charge, I would reiterate that the Crown has not suggested, whether before this Court or the courts below, that Mr. Barton's after-the-fact conduct had any bearing whatsoever on whether he had the requisite intent for murder. To the contrary, Crown counsel stressed at trial: "I want to make sure ... that after-the-fact conduct goes to his ... position that this is an accident, not intention for murder or manslaughter" (A.R., vol. VI, at p. 156).

173 As for the possibility raised by my colleagues Abella and Karakatsanis JJ. that because Ms. Gladue was referred to as a "Native" and a "prostitute" during the trial, the jury might have acquitted Mr. Barton of murder (and inexorably manslaughter as well) on the basis of reasoning that was "tainted by conscious or unconscious racial prejudice or reliance on racist stereotypes" (para. 231), I respectfully take issue with my colleagues' approach.

174 As a matter of procedural fairness, this issue was not raised as a ground of appeal before the Court of Appeal, nor did the Crown request a specific instruction designed to address this matter at trial. In these circumstances, I question the propriety of raising this issue as a basis for ordering a new trial on murder.

175 Be that as it may, while I accept that there is always a risk that conscious or unconscious bias will seep into a juror's analysis, in this case there was a simple and obvious explanation for why the jury unanimously acquitted Mr. Barton of murder that does not require this Court to speculate about the potential influence of conscious or unconscious bias. The Crown chose to rest its theory of murder on the notion that Mr. Barton cut Ms. Gladue using a sharp object. That theory depended largely on the expert evidence it called -- evidence which suffered from gaps and holes which rendered it less than compelling. Hence, this was by no means a case in which we are left wondering how 12 independent jurors could have acquitted Mr. Barton of murder without resorting to reasoning based on conscious or unconscious bias. To the contrary, there was a perfectly legitimate explanation for the acquittal that does not involve impermissible reasoning: the Crown's theory simply did not hold up under scrutiny.

176 I further note that when sworn in, all 12 jurors took an oath that they would perform their duties in a fair, impartial, and unbiased manner, and that they would render a true verdict according to the evidence. The trial judge reminded the jurors of this in his final instructions: he explained that they must examine the evidence "without sympathy or prejudice for or against anyone involved in these proceedings" and that "[this] means you must now make good on your

promise to put aside whatever biases or prejudices you may hold or feel" (A.R., vol. VIII, at pp. 140-41). Admittedly, these safeguards are not a panacea -- and I acknowledge that specific instructions addressing particular types of prejudice can provide an additional layer of protection going forward (see paras. 195-204 below).

177 That said, we should not be too quick to assume that they play no role in fostering impartial and unbiased reasoning. To conclude otherwise would be to assume that such instructions, which have been repeated to juries through the ages, were of no value and amounted to little more than lip service. I refuse to go there. To do so would be to lose sight of the well-established jurisprudence of this Court expressing our strong faith in the institution of the jury and our firmly held belief that juries perform their duties according to the law and the instructions they are given (see *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-93; *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433, at para. 55). This is not a form of blind faith; rather, it is a reflection of the well-earned trust and confidence that has been built up over centuries of experience in courtrooms throughout the Commonwealth. The institution of the jury is a fundamental pillar of our criminal justice system. We erode our confidence in this bedrock institution at our own peril.

178 For these reasons, I conclude that a new trial on the murder charge is not warranted. In my view, in the circumstances of this case, it would be contrary to the principle against double jeopardy, enshrined in s. 11(h) of the *Charter*, to force Mr. Barton to face a second trial on first degree murder.

I. *Other Issues*

179 While the reasons outlined above are sufficient to dispose of the appeal, I wish to make a few brief comments on several additional issues. To be clear, I offer these remarks solely for the purpose of promoting greater clarity in the law and providing guidance for future cases, including the new trial in this case.

(1) Vitiating Consent to Sexual Activity for Public Policy Reasons

180 At trial, one of the issues was whether, even if the jury was satisfied Ms. Gladue consented to the "sexual activity in question", that consent was nonetheless vitiated for public policy reasons. This issue was closely tied to the Ontario Court of Appeal's decision in *R. v. Zhao*, 2013 ONCA 293, 305 O.A.C. 290. There, relying on its previous decision in *R. v. Quashie* (2005), 198 C.C.C. (3d) 337, leave to appeal refused, [2005] S.C.C.A. No. 509, [2006] 1 S.C.R. xiii, the court held that in a case of alleged sexual assault causing bodily harm, consent to sexual activity should be vitiated on public policy grounds where the accused (1) subjectively intended to cause bodily harm and (2) did in fact cause bodily harm (see paras. 106-8; see also *R. v. Nelson*, 2014 ONCA 853, 318 C.C.C. 476, at paras. 24-25). In the present case, the Crown, the defence, and the trial judge all proceeded on the basis that the holding in *Zhao* applied in Alberta. The Court of Appeal, by contrast, declined to rule on the matter.

181 In my view, for a number of reasons, this is not the right case in which to decide whether consent to sexual activity should be vitiated where the accused intentionally caused bodily harm in the course of otherwise consensual sexual activities. First and foremost, the issue has no bearing on the outcome of this appeal, as a new trial on manslaughter will be held in any event. Moreover, the Crown did not appeal on the basis that the trial judge erred in his instructions on the "*Zhao* pathway" to a manslaughter conviction. Furthermore, the record does not provide a

proper foundation for this Court to address the matter: not only did the courts below not grapple with the issue and reach a firm conclusion, but the parties' submissions before this Court on the potential implications of adopting the *Zhao* principle were insufficient to give this important issue the full and comprehensive analysis that it deserves.

182 Accordingly, I would leave this issue for another day.

(2) Instructions on the "Defence" of "Accident"

183 As indicated, at trial, defence counsel maintained that Ms. Gladue's death was a mere "accident", which he said was antithetical to an intention to cause serious harm or death. The trial judge charged the jury on the "defence" of "accident" as follows:

Mr. Barton denies any intention to hurt Ms. Gladue and maintains that the wound to her vaginal wall was accidentally caused during consensual sexual activities.

There is evidence before you that raises the defence of accident. Mr. Barton does not have to prove that this defence applies If you are left with a reasonable doubt about whether this defence applies, the Crown has not proven its case beyond a reasonable doubt, and therefore you must find Mr. Barton not guilty.

In this case it is suggested by the defence that the conduct of Mr. Barton should be excused, and he should be found not guilty of manslaughter because the harm allegedly caused by him to Cindy Gladue was a pure accident for which he is not criminally responsible.

The defence of accident may succeed in these circumstances if, at the time the offences allegedly occurred, Mr. Barton was not engaged in an unlawful act.

For these purposes, an accident is an unintentional and unexpected occurrence that produces hurt or loss.

You must determine from the evidence whether there is a reasonable doubt that the harm to Cindy Gladue came about unintentionally and unexpectedly as a result of the conduct of Bradley Barton. If it did, and if it was not otherwise the product of an unlawful act, he is entitled to be found not guilty.

(A.R., vol. VIII, at pp. 191-93.)

184 The Court of Appeal found these instructions to be deficient in various respects. Among other things, the court noted that Mr. Barton's conduct in repeatedly thrusting his hand into Ms. Gladue's vagina was no "accident"; it was volitional. The court also stressed that in light of the approach taken at trial, Mr. Barton's claim that he did not subjectively intend or foresee Ms. Gladue's death would have gone only to the issue of vitiation of consent for public policy reasons, but the trial judge did not make this clear to the jury.

185 In my view, it is neither necessary nor appropriate for this Court to consider whether the trial judge's instructions on "accident" gave rise to reversible error. Again, the issue has no bearing on the outcome in this appeal, and the Crown did not object to the instructions on "accident" or challenge those instructions as a separate ground of appeal. That said, to provide guidance for future cases, I will offer a few brief comments.

186 The way in which the term "accident" is used in everyday parlance passes over some of

the nuances that characterize the use of that term in the legal context. As the authors of *Manning, Mewett & Sankoff: Criminal Law* explain, "[a]n accident is, in the popular and ordinary sense, a mishap or untoward event not expected or designed" (p. 653; see also E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. loose-leaf), at s. 21:0010). But the term has a more specialized meaning in the criminal law context. In particular, in this context, the term "accident" is used to signal one or both of the following: (1) that the act in question was involuntary (i.e., non-volitional), thereby negating the *actus reus* of the offence; or (2) that the accused did not have the requisite *mens rea* (see *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 48; *R. v. Mathisen*, 2008 ONCA 747, 239 C.C.C. (3d) 63, at paras. 70 and 95; *R. v. Parris*, 2013 ONCA 515, 300 C.C.C. (3d) 41, at paras. 106-8; *R. v. Primeau*, 2017 QCCA 1394, 41 C.R. (7th) 22, at paras. 24-25).

187 With respect to the latter scenario, in assessing whether a claim of "accident" may negate *mens rea* in any particular case, it is obviously essential to consider what the relevant *mens rea* requirement is in the first place. In carrying out this inquiry, it must be kept in mind that *mens rea* requirements vary and include, for example: (1) a subjective intention to bring about a prohibited consequence; (2) a subjective awareness of prohibited circumstances; and (3) objective fault.

188 The classic example of an offence that falls within the first category is murder, which requires "subjective foresight of death in the act of killing" (*Primeau*, at para. 29). As for the second category, the *mens rea* of sexual assault consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched" (*Ewanchuk*, at para. 42). The third category includes, for instance, the *mens rea* of unlawful act manslaughter, which requires "objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act" (*Creighton*, at p. 45; *DeSousa*, at p. 961).

189 Where the offence charged requires proof of subjective intent to bring about a particular consequence, the claim that the accused did not intend to bring about that consequence, making it a mere "accident", is legally relevant, as it could negate the *mens rea* required for a conviction.

190 By contrast, where the offence only requires a subjective awareness of particular circumstances, an accused's claim that the consequences of his act (such as injury to another) were unintentional and unexpected, making those consequences a mere "accident", is naturally of no assistance. In other words, where the offence charged does not require proof of subjective intent to bring about any consequences in the first place, the "accidental" nature of the consequences is legally irrelevant.

191 Finally, if the offence requires proof of objective fault -- for instance, that the prohibited consequence was objectively foreseeable -- then a claim of "accident" could negate that fault element if the prohibited consequence was such a chance occurrence that the trier of fact is left in a state of reasonable doubt as to whether, objectively, it was foreseeable.

192 In the present case, there was no suggestion that Mr. Barton acted without volition. Accordingly, the first type of "accident" -- one that negates the *actus reus* -- was not present. The only potential relevance of Mr. Barton's claim of "accident", therefore, was in respect of *mens rea*. Importantly, however, neither sexual assault nor unlawful act manslaughter requires subjective intent to bring about any particular consequence. Here, Mr. Barton conceded that non-trivial bodily harm was objectively foreseeable and the sexual activity in question was inherently dangerous. Therefore, setting aside the issue of whether intentionally causing bodily

harm in the course of otherwise consensual sexual activities would vitiate consent (i.e., the principle endorsed in *Zhao*), to the extent Mr. Barton claimed that Ms. Gladue's death was an "accident" in the sense that he did not subjectively intend to bring about that consequence, this claim was of no assistance in negating the *mens rea* required for sexual assault or unlawful act manslaughter. On this latter point, recent appellate jurisprudence confirms that if the accused "accidentally" caused the deceased's death in the course of an unlawful act, but it was reasonably foreseeable that the act would result in non-trivial bodily harm to the deceased, then the *mens rea* requirement for unlawful act manslaughter is still met (see *Parris*, at para. 108; *Primeau*, at para. 28).

193 In this case, the trial judge's instructions on "accident" did not make these points clear. Looking ahead, at the new trial on unlawful act manslaughter, the trial judge should observe the foregoing principles when instructing the jury on "accident" so as to avoid leaving the jury with the mistaken impression that so long as Ms. Gladue's death was a "mishap", an acquittal must follow.

194 Finally, to avoid confusion in future cases, I would encourage trial judges to focus on the questions of voluntariness and/or negation of *mens rea*, as appropriate, when instructing jurors on the so-called "defence" of "accident". As the authors of *Manning, Mewett & Sankoff: Criminal Law* point out, "what is relevant from a legal standpoint is not whether the accused is claiming that what happened was an accident, but whether this claim demonstrates the absence of one of the elements of the offence charged" (p. 654).

(3) Instructions Addressing Prejudice Against Indigenous Women and Girls in Sexual Assault Cases

195 When jurors are sworn and empanelled, Canadian society tasks them with a weighty responsibility: deciding whether, on the evidence put before them, the accused is guilty or not. This task is not easy -- it requires patience, judgment, and careful analysis. But most of all, it requires an open mind, one that is free from bias, prejudice, or sympathy.

196 But it would be naïve to assume that the moment the jurors enter the courtroom, they leave their biases, prejudices, and sympathies behind. That reality was openly acknowledged in *R. v. Williams*, [1998] 1 S.C.R. 1128, where this Court discussed the "invasive", "elusive", and "corrosive" nature of one particular type of bias: racism against Indigenous persons (para. 22). Justice McLachlin (as she then was) emphasized that "[t]o suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it" (para. 21).

197 Trial judges, as gatekeepers, play an important role in keeping biases, prejudices, and stereotypes out of the courtroom. In this regard, one of the main tools trial judges have at their disposal is the ability to provide instructions to the jury. Bearing in mind this Court's admonition that "it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice" (*Williams*, at para. 21), such instructions can in my view play a role in exposing biases, prejudices, and stereotypes and encouraging jurors to discharge their duties fairly and impartially. In particular, a carefully crafted instruction can expose biases, prejudices, and stereotypes that lurk beneath the surface, thereby allowing all justice system participants to address them head-on -- openly, honestly, and without fear.

198 Trials do not take place in a historical, cultural, or social vacuum. Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt. There is no denying that Indigenous people -- and in particular Indigenous women, girls, and sex workers -- have endured serious injustices, including high rates of sexual violence against women. The ongoing work of the National Inquiry into Missing and Murdered Indigenous Women and Girls is just one reminder of that painful reality (see Interim Report, *Our Women and Girls Are Sacred* (2017)).

199 Furthermore, this Court has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within our criminal justice system (see e.g., *Williams*, at paras. 54 and 58; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 65; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 59-60 and 67; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 57). For example, in *Williams*, this Court recognized that Indigenous people are the target of hurtful biases, stereotypes, and assumptions, including stereotypes about credibility, worthiness, and criminal propensity, to name just a few (para. 28). Moreover, in *Ewert*, this Court stressed that "discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system" (para. 57). In short, when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done.

200 With this in mind, in my view, our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons -- and in particular Indigenous women and sex workers -- head-on. Turning a blind eye to these biases, prejudices, and stereotypes is not an answer. Accordingly, as an additional safeguard going forward, in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls. This instruction would go beyond a more generic instruction to reason impartially and without sympathy or prejudice.

201 Insofar as the content of such an instruction is concerned, there is no magic formula. In my view, trial judges should be given discretion to tailor the instruction to the particular circumstances, preferably after having consulted with the Crown and the defence. In a case like the present, the trial judge might consider explaining to the jury that Indigenous people in Canada -- and in particular Indigenous women and girls -- have been subjected to a long history of colonization and systemic racism, the effects of which continue to be felt. The trial judge might also dispel a number of troubling stereotypical assumptions about Indigenous women who perform sex work, including that such persons:

- * are not entitled to the same protections the criminal justice system promises other Canadians;
- * are not deserving of respect, humanity, and dignity;

* are sexual objects for male gratification;

* need not give consent to sexual activity and are "available for the taking";

* assume the risk of any harm that befalls them because they engage in a dangerous form of work; and

* are less credible than other people.

202 An instruction of this nature supports several core concepts upon which our justice system rests, including substantive equality, which represents the animating norm of s. 15 of the *Charter* (see *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2); the court's truth-seeking function; the right to an impartial tribunal, protected under ss. 7 and 11(d) of the *Charter*; and, relatedly, trial fairness, which as already indicated must be assessed "from both the perspective of the accused and of society more broadly" (*Bjelland*, at para. 22).

203 With regard to trial fairness, it is worth emphasizing that any instruction given must not privilege the rights of the complainant over those of the accused. The objective would instead be to identify specific biases, prejudices, and stereotypes that may reasonably be expected to arise in the particular case and attempt to remove them from the jury's deliberative process in a fair, balanced way, without prejudicing the accused.

204 In sum, to better ensure Indigenous women and girls receive the full protection and benefit of the law in sexual assault cases, our criminal justice system should take reasonable steps to address biases, prejudices, and stereotypes against Indigenous women and girls openly, honestly, and without fear. While the type of instruction identified above is by no means a perfect solution to ridding our courts -- and Canadian society more broadly -- of biases, prejudices, and stereotypes against Indigenous women and girls, it represents a step forward.

(4) Language Used to Address Ms. Gladue at Trial

205 With the foregoing discussion in mind, I wish to comment briefly on the language used to refer to Ms. Gladue at trial. Witnesses, Crown counsel, and defence counsel all repeatedly referred to Ms. Gladue as a "Native girl" or "Native woman" -- by the Court of Appeal's count, approximately 26 times (para. 124).

206 In my view, while in some cases it may be both necessary and appropriate to establish certain biographical details about an individual such as his or her race, heritage, and ethnicity where that information is relevant to a particular issue at trial, and while witnesses may at times rely on such descriptors without being prompted by counsel, it is almost always preferable to call someone by his or her name. There may be situations where it would be appropriate for the trial judge to intervene to ensure this principle is respected.

207 Being respectful and remaining cognizant of the language used to refer to a person is particularly important in a case like this, where there was no suggestion that Ms. Gladue's status as an Indigenous woman was somehow relevant to the issues at trial. While there is nothing to suggest that it was anyone's deliberate intention in this case to invoke the kind of biases and prejudices against Indigenous women discussed above, the language used at trial was nevertheless problematic. At the end of the day, her name was "Ms. Gladue", not "Native woman", and there was no reason why the former could not have been used consistently as a simple matter of respect.

(5) Intervener Submissions before the Court of Appeal

208 I do not find it necessary to consider whether the interveners before the Court of Appeal overstepped their proper role. I would simply re-emphasize that while interveners play a vital role in our justice system, including our criminal justice system, they must not assume the role of third-party prosecutors and they must not be permitted to widen or add to the issues in dispute, and appellate courts must carefully enforce these restrictions.

(6) Other Issues Considered by the Court of Appeal

209 Finally, the Court of Appeal dealt with a range of other issues in admirable detail. As I have determined that this appeal can be disposed of based on the analysis set out above, I find it unnecessary to comment on these other issues.

VI. Conclusion

210 Our criminal justice system holds out a promise to all Canadians: everyone is equally entitled to the law's full protection and to be treated with dignity, humanity, and respect. Ms. Gladue was no exception. She was a mother, a daughter, a friend, and a member of her community. Her life mattered. She was valued. She was important. She was loved. Her status as an Indigenous woman who performed sex work did not change any of that in the slightest. But as these reasons show, the criminal justice system did not deliver on its promise to afford her the law's full protection, and as a result, it let her down -- indeed, it let us all down.

211 In the result, I would allow the appeal in part and order a new trial on unlawful act manslaughter.

The reasons of Wagner C.J. and Abella and Karakatsanis JJ. were delivered by

R.S. ABELLA AND A. KARAKATSANIS JJ.

212 Section 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, was enacted to preserve the fairness and truth-seeking functions of a trial, as well as the dignity of victims of sexual assault. At the heart of the provision is the prohibition of evidence of prior sexual activity, evidence which could lead the trier of fact to reason, based on this sexual history, that the complainant would have been more likely to consent to the sexual activity in question, or is less worthy of belief in

general. These two prohibited inferences have come to be known as the "twin myths", whose insidious harm to the goals of truth and of dignity has long been recognized by the courts.

213 In addition to prohibiting "twin myths" reasoning, s. 276 makes evidence of a complainant's prior sexual activity inadmissible unless the accused complies with the criteria and procedures set out in ss. 276, 276.1 and 276.2⁹. In this case, the trial judge permitted the accused to lead such evidence without following the procedure required by s. 276, thereby allowing him to make unrestricted reference to the deceased's sexual history. He also failed to give the jurors any kind of limiting instruction to advise them that such evidence could not be used to show that the victim was more likely to have consented. All of this was compounded by the fact that the trial judge permitted, on dozens of occasions, for the deceased to be referred to as "Native" and "prostitute" without providing any instruction to guard against potential prejudicial reasoning based on these descriptions.

214 There was thus no filter for the victim's prior sexual history and no specific warning to the jury to avoid drawing prejudicial and stereotypical assumptions about Indigenous women working in the sex trade. This left the jury with an essentially unchallenged version of the accused's interactions with the deceased. This was the narrative's frame in which the victim's conduct was portrayed and the accused's credibility was assessed, creating an image of the deceased that was unfair and would have permeated the *whole* trial and the jury's deliberations on both murder and manslaughter.

215 To now compartmentalize these significant errors, and to suggest that they only partially affected the way the jury assessed the accused's credibility, ignores what was at issue in this case. With no protection from the trial judge, either in the form of a s. 276 inquiry or a cautionary instruction to resist the kinds of prejudicial inferences a sexual assault trial involving a female Indigenous sex worker can attract, the jurors were left to draw their own unobstructed conclusions about what happened. The trial judge failed to appreciate that the victim's prior sexual conduct, occupation, and race required the jury to be specifically alerted to the dangers of discriminatory attitudes toward Indigenous women, particularly those working in the sex trade. He provided no specific instructions crafted to confront the operative social and racial biases potentially at work. This rendered the whole trial unfair.

I. Background

216 On June 22, 2011, Cindy Gladue was found dead in Bradley Barton's hotel room. She had bled to death from an 11 cm gash inside her vagina. Mr. Barton was arrested and charged with first degree murder.

217 At trial, the Crown advanced the theory that Mr. Barton had hired Ms. Gladue for sex, incapacitated her with alcohol, and intentionally put a sharp object into her, causing the wound that killed her. In the alternative, the Crown argued that he had sexually assaulted her in a manner that could reasonably have been foreseen to cause bodily harm and was therefore guilty of manslaughter.

218 Mr. Barton maintained that all of his interactions with Ms. Gladue were consensual. He testified that he and Ms. Gladue had agreed on a price the night before (\$60 for "everything"), and that she had willingly returned the second night on the same terms. He testified that on the second night, as on the first, he had thrust his fingers vigorously in and out of her vagina, but

had penetrated deeper using more force. He stopped, then saw blood on his hand. Ms. Gladue then went to the bathroom and Mr. Barton fell asleep. He found her dead in the morning. He attempted to clean parts of the room, panicked and left the scene before returning after some time and calling 911. Both before and after being arrested, Mr. Barton made up several false stories regarding what happened.

219 The jury acquitted Mr. Barton of first degree murder and the included offence of manslaughter. On appeal by the Crown, the Alberta Court of Appeal concluded that the trial judge had made several serious errors that had affected the jury's ability to assess the evidence and correctly apply the law to the facts of the case. It allowed the Crown appeal and ordered a re-trial on both first degree murder and manslaughter. Mr. Barton appealed.

220 We would dismiss the appeal. Section 276 is designed to ensure that the jury does not engage in impermissible and prejudicial reasoning about a victim, based on her prior sexual activity. The failure to comply with it caused a cascade of prejudice and errors warranting a new trial on murder as well as manslaughter. It resulted in Mr. Barton's unfiltered testimony going to the jury and infecting the whole trial, and created a significant risk that the jurors would make impermissible inferences based on prejudicial reasoning that would have tainted both their view of Ms. Gladue and their assessment of Mr. Barton's testimony. In our view, these errors would have "had a material bearing on the acquittal[s]" in the "concrete reality" of this case (*R. v. Graveline*, [2006] 1 S.C.R. 609, at para. 14). Because of the inextricably integrated nature and significance of the errors, we agree with the Alberta Court of Appeal that a new trial is required on the charge of both murder and the included offence of manslaughter.

221 Moreover, we would uphold the Court of Appeal's ruling regarding the jury charge on after-the-fact conduct. The fundamental error in the jury charge on this matter also requires that Mr. Barton be re-tried on both murder and manslaughter.

II. Analysis

222 It is precisely because evidence of a complainant's previous sexual activity will be highly prejudicial that Parliament made it presumptively inadmissible. Without being properly filtered and restricted by appropriate limiting instructions, such evidence can lead to propensity reasoning based on the "twin myths" -- namely, that simply because of previous sexual activity, a victim is both more likely to have *consented to the sexual activity at issue* and is *generally less worthy of belief* (*R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 604). The majority has accurately and comprehensively summarized the importance and the legal history of s. 276.

223 The evidence in this case, predominantly tendered through Mr. Barton's own testimony, included detailed descriptions of Ms. Gladue's sexual activity on the night before the events leading to her death. As well, Ms. Gladue was described repeatedly -- by both the Crown and the defence -- as a Native prostitute more than twenty times throughout the trial. Although this evidence clearly fell within the scope of s. 276, the trial judge failed to apply the mandatory admissibility inquiry required by that provision or to give the jury limiting instructions to temper the prejudicial effects of Mr. Barton's testimony. Moreover, the repeated references to the complainant as "Native girl" and the "Native woman" created the potential for further prejudice.

224 It was a critical legal error to admit Mr. Barton's testimony without considering its admissibility pursuant to s. 276 and without providing any limiting instructions to the jury. There

is no doubt that this evidence had ripple effects that prejudiced other parts of the trial, permitting the jury to engage in dangerous and impermissible inferences about key issues that may well have had a material bearing on the acquittals.

225 The devastatingly prejudicial effects of this error cannot be said to be confined to the included offence of manslaughter, but may also have had a material bearing on the jury's reasoning on the charge of first degree murder. The prejudicial impact of Mr. Barton's detailed testimony -- without either the screening required by s. 276 or any limiting instructions -- necessarily infected the whole trial and the entirety of the jury's fact-finding process. The admission of this evidence, in contravention of s. 276, may have tainted the jury's view of the deceased and its assessment of the evidence tendered by the accused about the nature of the sexual activity, *including his testimony that he did not use a sharp object*. In short, there was a real risk that the profound prejudice caused by the trial judge's error contaminated the jury's broader fact-finding function, including on murder.

226 In our view, it cannot be said that the murder charge was decided merely on a battle of expert evidence as to whether a sharp object was used. Unless otherwise cautioned, juries are entitled to consider all the evidence they heard at trial in their deliberations. The unfiltered admission of Mr. Barton's testimony, which included extensive details of his sexual encounters with Ms. Gladue in contravention of s. 276, likely tainted the jury's view of Ms. Gladue, and would have been the lens through which the jury assessed what happened. This was especially true since the only other witness to the events was dead.

227 Furthermore, even if the evidence had been properly admitted, the strong possibility that the jury might engage in impermissible "twin myths" reasoning based on Mr. Barton's description of Ms. Gladue's previous sexual activities necessitated a strong limiting instruction. Instead, the trial judge, on a number of occasions, instructed the jury to base its findings of fact on Mr. Barton's version of events. In outlining the offence of sexual assault, for example, the trial judge told the jury to consider whether Ms. Gladue had consented "to the type of sexual activity described and demonstrated by Mr. Barton in his testimony". Later, the trial judge indicated that "there is some evidence that Cindy Gladue consented to the application of some force by Mr. Barton, including sexual activity and the activity described by Mr. Barton in his testimony".

228 The repeated instructions to the jury to consider Mr. Barton's testimony about the events as the basis for further findings of fact amplified the potential for the "twin myths" reasoning prohibited by s. 276(1). Indeed, the jury's portrait of Ms. Gladue was painted almost exclusively through Mr. Barton's testimony, which meant that there was a significant possibility that the jury's *entire* deliberations would have been based on fundamentally flawed -- and prohibited -- legal premises.

229 The potential for prejudicial reasoning was further exacerbated by the repeated description of Ms. Gladue as a "prostitute", and as a "Native", without any limiting instruction from the trial judge.

230 Based on studies that found that "jurors were more likely to convict a defendant accused of raping a woman with a chaste reputation than an identical defendant charged with assaulting a prostitute", this Court in *Seaboyer* expressly warned against the use of the word "prostitute" because the use of this term is intrinsically linked to "twin myths" reasoning and can lead to substantial prejudice in the way the jury assesses the evidence (*Seaboyer*, at pp. 661-65 (emphasis deleted), per L'Heureux-Dubé J., dissenting (but not on this point); see also Yasmin

Jiwani and Mary Lynn Young, "Missing and Murdered Women: Reproducing Marginality in News Discourse" (2006), 31 *Can. J. Communic.*, at p. 902).

231 The undisputed biases against sex-trade workers and against Indigenous peoples can be "as invasive and elusive as they are corrosive" (*R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 22). Indeed, as compellingly explained by the Alberta Court of Appeal in this case, because Ms. Gladue was in effect labelled a "Native prostitute", "the jury would believe she was even more likely to have consented to whatever Barton did and was even less worthy of the law's protection" (354 C.C.C. (3d) 245, at para. 128). These references introduced a risk that the jury's reasoning might be tainted by conscious or unconscious racial prejudice or reliance on racist stereotypes.

232 To guard against eroding public confidence in juries, it is important to address the concerns expressed by the Ontario Court of Appeal in *R. v. Parks* (1993), 84 C.C.C. (3d) 353, and confirmed by this Court in *Williams*, that specific safeguards are required in jury trials to prevent systemic biases that can affect jury deliberations. As McLachlin J. observed in *Williams*, "the evidence of widespread bias against aboriginal people in the community raises a realistic potential of partiality" which creates the risk that the verdict "reflects not the evidence and the law, but juror preconceptions and prejudices" (paras. 11 and 15; see also *R. v. Spence*, [2005] 3 S.C.R. 458).

233 Acknowledging, as this Court has for the last two decades, that racial prejudice is "a social fact not capable of reasonable dispute" (*Spence*, at para. 5), is not an insult to the jury system, it is a wake-up call to trial judges to be acutely attentive to the undisputed reality of pervasive prejudice and to provide the jury instructions required by law. That means that in cases where this reality is relevant, especially in the context of sexual assault, juries need to be carefully instructed on how to approach the evidence with an open mind, and not allow their reasoning to be obstructed by subconscious stereotypes.

234 Trial judges have an important role to play in instructing juries so that they can recognize and set aside racial and other biases, including those against Indigenous peoples and sex-trade workers. Not only did that not happen here, the *opposite* occurred: inflammatory terminology was frequent, and was gratuitously used without any corrective intervention by the trial judge.

235 In summary, the trial judge's failure to apply the requirements in s. 276 created a significant risk that the evidence of Ms. Gladue's prior sexual conduct not only tainted the jury's perception of her character and conduct, but also fundamentally affected the factual foundation upon which their deliberations were based. This error permeated the entire trial and may have had a material bearing on the jury's deliberations, affecting their verdicts for both murder and manslaughter.

236 Given the prejudicial impact of these references, and the risk that they would affect the jury's assessment of Ms. Gladue and Mr. Barton's credibility, it is difficult to see how it is realistically possible to conclude that their effect was confined to the jury's verdict on manslaughter. The risk of harmful effects on the jury's deliberations on murder would have been no less profound. When a trial with intimately connected issues, such as this one, is riddled with highly prejudicial testimony, it affects the very foundations of a jury's fact-finding function and decision making. The trial judge's error in permitting evidence of prior sexual activity to be admitted, in clear contravention of s. 276, could reasonably be thought to have had a material

bearing on the jury's deliberations as a whole. It was a fundamental error, warranting, on its own, a new trial on both murder and manslaughter.

237 Additional highly prejudicial errors by the trial judge exacerbated the harm created by failing to apply the clear requirements of s. 276, namely the errors in his instructions regarding Mr. Barton's after-the-fact conduct. We agree with the Alberta Court of Appeal that the jury instructions on after-the-fact conduct were confusing and misleading.

238 After-the-fact conduct refers to anything said or done by an accused after the commission of the alleged offence. It is a form of circumstantial evidence and its use is highly specific to the factual matrix and context of each case. It can be probative of whether the accused was conscious of having committed an offence and of particular significance in assessing credibility.

239 In his own testimony, Mr. Barton admitted to lying, disposing of evidence and providing contradictory exculpatory explanations to numerous people after Ms. Gladue's death. It was open to the jury to conclude that additional incriminating after-the-fact conduct evidence came from the hotel video camera footage, physical evidence found by the police, and the testimony of numerous individuals. Mr. Barton did not call 911 immediately after finding Ms. Gladue in the bathtub. Instead there was evidence that he sought to erase his link to the scene by attempting to clean the bathroom, re-arranging the bedding, putting his belongings in his van, checking out of the hotel room, and that he attempted to conceal and destroy evidence by throwing the bloody towel he had used to wipe Ms. Gladue's blood from his feet and the bathroom floor into a garbage can in the parking lot of the hotel.

240 He also concocted and fabricated multiple stories and excuses. After checking out of the hotel room, he told the hotel clerk that he had forgotten something in the room in order to get back into the hotel room. Once there, he called 911 from the hotel phone and told the 911 operator that a woman he didn't know knocked on his door the previous night and asked to use the shower and, when he woke up, he had found her covered in blood in the bathtub. He told a similar story to a work colleague. He told the police officers who attended the scene that he did not know Ms. Gladue and had only seen her smoking outside the previous night. He told a completely different story on initiating a conversation with an undercover officer, telling him that he had rented out his hotel room to some "swampers" (movers) and slept in his truck the previous night. At trial, Mr. Barton admitted to these lies claiming, "I lied. But I am not a liar".

241 The potential significance of this after-the-fact conduct is palpable and there is a strong possibility that, properly instructed, it would have had a material bearing on the jury's assessment of Mr. Barton's testimony and, ultimately, its verdict.

242 Instead, the jury was given contradictory and confusing directions. The trial judge correctly told the jury in his charge that post-offence conduct is like "all circumstantial evidence" that can be used "in deciding whether the Crown has proved Mr. Barton's guilt beyond a reasonable doubt." He stated that it was up to the jury to decide what use to make of this evidence, and that they were entitled to consider the evidence of Mr. Barton's admitted lies and discarding of evidence as after-the-fact conduct.

243 Unfortunately, the trial judge also instructed the jury numerous times that it could *not* use the evidence for those very purposes. In effect, the trial judge did not leave it open to the jury to consider the impact of the after-the-fact conduct evidence, such as the admitted exculpatory lies Mr. Barton told after Ms. Gladue's death, except when such evidence favoured an acquittal.

244 In this regard, the jury was told: "[y]ou cannot infer that Mr. Barton is guilty of *any* offence as a result of his after-the-fact conduct, but it may be used to assess his claim that Cindy Gladue's injury was an accident" (emphasis added). This was repeated in the concluding words of this part of the charge: "[y]ou cannot use this evidence to draw *any* conclusion about -- as to which of the available offences Mr. Barton may be guilty of" (emphasis added).

245 The jury was thus precluded from using Mr. Barton's post-offence conduct to question his credibility, or as a means by which to draw any conclusions of guilt. The final instruction the jury was given with regard to after-the-fact conduct evidence was wrong in law and effectively usurped the jury's fact-finding function (*R. v. White*, [1998] 2 S.C.R. 72, at para. 27).

246 Mr. Barton argues that although this particular portion of the charge may have been ambiguous or incomplete, the jury was given correct and complete instructions elsewhere. In our view, the earlier instructions do not mitigate the seriousness of these errors -- quite the opposite. Contradictory instructions do not clarify, they confuse. Taken as a whole, the result was a charge on post-offence conduct "so unnecessarily confusing that it constituted an error of law" (*R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 8).

247 Juries, although expected to apply common sense, are above all expected to follow the instructions given by the trial judge. Where those instructions are confusing and contradictory, there is no roadmap for common sense to follow.

248 We cannot accept Mr. Barton's submission that these errors are unlikely to have affected the outcome of the trial. The jury was told that it could not use the extensive post-offence conduct evidence to find Mr. Barton guilty of "*any* offence". This erroneous instruction undermined the jurors' ability to properly decide whether Mr. Barton's narrative was credible. The error was compounded by the failure to indicate to the jury that after-the-fact conduct evidence may be used, at a general level, "to impugn the accused person's credibility" (*R. v. Jaw*, [2009] 3 S.C.R. 26, at para. 39). Given the inability of a deceased to provide her testimony, the jury heard only Mr. Barton's narrative of the events, making the jury's assessment of Mr. Barton's overall credibility critical to its deliberations on both murder and manslaughter. There can be no doubt that these errors meet the test in *Graveline*, and necessitate a new trial on both murder and manslaughter.

249 After-the-fact conduct evidence was an important part of the Crown's case in attempting to undermine Mr. Barton's credibility as a whole and his narrative that Ms. Gladue's death was an accident, to the murder charge. In fact, after-the-fact conduct evidence was critically linked to the jury's ability to evaluate Mr. Barton's entire testimony, and his credibility in connection with *both* murder and manslaughter. Because the assessment of Mr. Barton's credibility was crucial to the outcome of this trial, this error had a material bearing on the jury's deliberations as a whole.

250 Mr. Barton raised two procedural arguments that he says should preclude a re-trial on this basis. First, he argues that the Crown's failure to object to this portion of the charge should prevent this Court from dealing with this issue. Secondly, he submits that the Court of Appeal improperly raised this as a new issue on appeal and did not afford the accused the opportunity to provide written submissions.

251 We disagree. The fact that the Crown did not specifically object and indeed suggested

some of the language to this portion of the charge is not determinative of the existence of procedural unfairness. The practice of providing written drafts of the charge to counsel, or incorporating suggestions from counsel, does not render a jury charge immune to appeal. Suggestions by counsel are just that -- suggestions. It remains the responsibility of the trial judge to provide the jury with instructions that are coherent and understandable.

252 It is true that the Crown did not identify after-the-fact conduct as one of its grounds of appeal when it filed its notice of appeal after Mr. Barton's acquittal. The Court of Appeal identified these errors to the parties as concerns at the outset of the two-day oral appeal hearing. Both parties were then asked to make oral submissions on the effect of the after-the-fact conduct portions of the charge.

253 Mr. Barton argues that this violated the court's duty of procedural fairness according to the guidelines set out in *R. v. Mian*, [2014] 2 S.C.R. 689. In our view, however, this is the very type of case this Court envisioned in *Mian*, and the procedure followed was well within the guidelines set out in that decision.

254 In *Mian*, this Court concluded that an appellate court's discretion to raise new issues on its own motion should be exercised sparingly and only when failing to do so "would risk an injustice" including "[w]here there is good reason to believe that the result would realistically have differed had the error not been made" (paras. 41-45). The Court sought to balance the concern that appellate courts remain (and are seen to remain) impartial, alongside the court's role in ensuring that justice is done (paras. 40-41).

255 There was a series of glaring, serious legal errors in a critical part of the jury charge which had a material bearing on the verdicts in this case. As such, appellate intervention was clearly justified. Failure to intervene would have "risk[ed] an injustice". We are satisfied that the appropriate balance was struck in this case, and that this is one of the rare cases in which a provincial appellate court was entitled, and even required to raise an issue of its own motion.

256 As a result, in our respectful view, the Court of Appeal properly raised after-the-fact conduct as a new issue. We are persuaded that the Court of Appeal gave counsel fair notice and sufficient opportunity to make submissions. While *Mian* set out broad procedural guidelines to ensure that raising a new issue of sufficient importance does not prejudice either side, it did not set down any *specific* procedures for providing notice and receiving responses from the parties on new issues (paras. 54-59). Rather, the guidance provided in *Mian* is, of necessity, flexible. The Court suggested that the steps taken should be "practical" and "will vary depending on the context and the circumstances in a given case" (para. 55).

257 *Mian* explicitly recognized that appellate courts were best positioned to determine the appropriate procedure for responses to new issues on a case-by-case basis and indicated that "it will often be possible for appellate courts to ensure procedural fairness by adjusting the course of the appellate process" (para. 52). These broad guidelines strike a balance between ensuring that parties are fully aware of new issues and can adequately respond to them, and giving appellate bodies the flexibility to raise critical issues when and as they arise.

258 Allowing an appellate court the flexibility and discretion to adapt its procedure was recently confirmed by this Court in *R. v. Suter*, [2018] 2 S.C.R. 496 (at paras. 29-33), where the Alberta Court of Appeal had raised a new issue during the hearing. The parties were given notice and an opportunity to respond. Mr. Suter appealed on the basis that there should have been more

notice and a chance to make further written and oral submissions. This Court rejected the argument, stating that it had already "explicitly reject[ed] an approach that would require strict procedural standards to be followed [in *Mian*], as such a formalistic approach would 'fail to recognize that the issue may arise in different circumstances in different cases'" (*Suter*, at para. 33, quoting *Mian*, at para. 55).

259 The procedural process in *Suter* closely parallels this case. The panel raised the issue of after-the-fact conduct on the first day of the oral hearing. Although the hearing was initially scheduled for a single day, it was extended to two full days so that both parties could make submissions. Initially, the parties were told they would be afforded the opportunity to provide written submissions, but by the end of the second day, they were told that their answers in oral argument had been sufficient.

260 These procedural decisions by the Court of Appeal were well within the flexible guidance afforded to appellate panels by this Court in *Mian* and affirmed in *Suter*. Notably, counsel for Mr. Barton did not argue -- either at the Court of Appeal or in this Court -- that his submissions would have been materially different given more notice. Nor did he provide written submissions when invited by the Court of Appeal. We have no doubt that adequate procedural fairness was afforded to the parties here, who were given sufficient notice and an adequate opportunity to make submissions.

261 For all these reasons, there should be a new trial on both murder and manslaughter.

262 We would, accordingly, dismiss the appeal.

Appeal allowed in part, WAGNER C.J. and ABELLA and KARAKATSANIS JJ. dissenting in part.

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Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

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Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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- 1 While men also experience sexual violence, women are more likely to be sexually victimized (see J. Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013), 18 Rev. Const. Stud. 161, at p. 165). I note that gender non-binary persons, too, can be sexually victimized.
 - 2 In Part V(D)(1)(d) of these reasons, I will explain why the language "honest but mistaken belief in *communicated* consent" should be preferred over the language "honest but mistaken belief in consent".
 - 3 The term "rape shield" should be avoided for several reasons, including the fact that the relevant provisions do not offer protection against rape, apply to a number of sexual assault offences that do not involve rape, and have purposes going beyond shielding the complainant from the rigours of cross-examination (see *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 604 (per McLachlin J.) and 648 (per L'Heureux-Dubé J.)).
 - 4 On December 13, 2018, various amendments to the s. 276 regime came into force. These reasons deal with the s. 276 regime as it existed before that date.
 - 5 To be clear, s. 276(2) covers evidence of the complainant's sexual activities both before and after the alleged offence took place. However, for convenience, I will use the language "prior sexual activity evidence" in these reasons, as there is obviously no evidence of any post-offence sexual activity in this case.
 - 6 Section 273.1(2) adds that no consent is obtained where:

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- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Section 273.1(3) clarifies that these provisions do not limit the circumstances in which no consent is obtained.

- 7 Section 150.1(4) reads: "It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant".
- 8 While the trial judge did not make an express ruling on whether the defence had an air or reality, the Crown did not object to the defence being left with the jury and has not argued that the defence had no air of reality.
- 9 Amended in December 2018 in Bill C-51, *an Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess., 42nd Parl., 2018. The amendment does not apply to this case.