NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Hutchinson***, 2013 NSCA 1

Date: 20130103
Docket: CAC 370497
Registry: Halifax

Between:

Craig Jaret Hutchinson

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on publication: Section 486.4(1) of the *Criminal Code of Canada*

Judges: MacDonald, C.J.N.S.; Oland, Hamilton, Fichaud, Farrar, JJ.A.

Appeal Heard: June 4, 2012, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of MacDonald, C.J.N.S.; Oland, Hamilton and Fichaud, JJ.A. concurring; Farrar, J.A. dissenting on the ground that the complainant did not consent to the sexual activity in question under s. 273.1(1) of the *Criminal Code of Canada*.

Counsel: Luke A. Craggs, for the appellant
James A. Gumpert, Q.C. and Kimberley McOnie, for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(*a*) any of the following offences:

(I) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (*a*)(I) to (iii).

Reasons for judgment:

[1] The appellant, Craig Hutchinson, tried to trick his partner into becoming pregnant by poking holes in the condoms they used during intercourse. He knew full well that she did not want to become pregnant. In fact, she insisted on him wearing the condoms for that very reason. His actions were clearly reprehensible. But were they criminal? That is the main issue in this appeal.

BACKGROUND

[2] In January of 2006, Mr. Hutchinson began an intimate relationship with N.C. They enjoyed sex several times a week. They chose condoms as their method of birth control because N.C. endured negative side effects with birth control pills. So unless N.C. was having her period (during which time she believed she could not get pregnant), she insisted that Mr. Hutchinson wear a condom. Normally she would place it on him; something he enjoyed.

[3] However, by the Summer of 2006, N.C. began to question the future of their relationship. She made Mr. Hutchinson aware of this. This was far from mutual. Instead, Mr. Hutchinson was intent on seeing the relationship continue. He thought that his best chance would be for her to become pregnant. Enter his scheme to sabotage the condoms.

[4] N.C. found it peculiar when Mr. Hutchinson decided that he would start putting the condoms on and then even stranger when he insisted that she not look either when he was putting one on or taking one off. Of course, she was oblivious to his ulterior motive.

[5] Then by late August, N.C. noticed something else very odd. Mr. Hutchinson began encouraging her to take a pregnancy test. She wondered why but, after much persistence, she acceded to his request. It came back as negative. This was September 1. He insisted that she take another. She did so on September 5. It came back as positive. She was shocked. He was delighted.

[6] Mr. Hutchinson's scheme almost worked. N.C. initially decided to keep the baby and try to make the relationship work. They arranged pre-natal classes. But her doubts lingered. So she asked for a "break" to decide what to do. He

overreacted, harassing her constantly. In the end she broke off the relationship. By then it was early November. He was devastated. In fact, he physically passed out upon learning of her decision. He harassed her with many phone calls and text messages, which she tried to ignore but they kept on coming. Eventually, she answered one of his calls. He implored her to read his earlier texts, insisting that they contained some very important information. She relented only to be shocked again. She learned that he had sabotaged the condoms in the hopes she would become pregnant. He confessed more out of fear than guilt. He was afraid that she might use the remaining damaged condoms with a future partner and catch a sexually transmitted disease ("STD"). The texts, which were sent on November 5, 2006, read in part:

> "The anger, I was wrong. I wanted a baby with you so bad, I sabotaged the condoms. Now they are not safe. Sorry for the anger, I was wrong. I wanted a baby with you. Friday, I took clothes. Poked holes in all of them. Don't want you to get an STD. I stepped on the phone charger; I think I broke it. I owe you a new one. Throw away your condoms, I poked holes in them all. Don't want you to get -- to protect you, I need to tell you something I did two months ago. One call is all it will take. Please."
>
> . . .
>
> "To protect you, I need to tell you something I did two months ago. Now I will leave you alone."

[7] Sure enough, when N.C. checked the rest of the condoms (kept in the drawer of her night table), each one had a hole pierced through it. Still in shock, she phoned the police.

[8] On November 16, N.C. had an abortion and endured significant painful complications for at least two weeks thereafter.

[9] Mr. Hutchinson was charged with aggravated sexual assault. In an initial trial, he was acquitted on a directed verdict. Essentially, Moir, J. of the Supreme Court reasoned that, despite his deceptive scheme, Mr. Hutchinson could not be convicted because N.C. had consented to the sexual intercourse in question. However, in a split decision of this court, a new trial was ordered. I will discuss this ruling later in my reasons.

[10] The retrial was heard by Coughlan, J. of the Supreme Court. He acquitted Mr. Hutchinson of aggravated sexual assault and the Crown has not appealed. However, the judge did convict on the included offence of sexual assault, maintaining that while N.C. may have consented to sexual intercourse, she did not consent to *unprotected* sexual intercourse. He explained:

> ¶43 From all the evidence, I find Mr. Hutchinson sabotaged the condoms by poking holes in them, and then had sexual intercourse with [N.C.] using the damaged condoms.
>
> ¶44 There was no voluntary agreement of [N.C.] to the sexual activity in question, which was sexual intercourse without contraception.
>
> . . .
>
> ¶47 Here, Mr. Hutchinson intended to engage in sexual intercourse with [N.C.] using damaged condoms, and he knew [N.C.] did not consent to sexual intercourse without contraception.

[11] The judge then sentenced Mr. Hutchinson to 18 months in jail. Before us, Mr. Hutchinson appeals both his conviction and sentence.

ISSUES

[12] Mr. Hutchinson lists the following grounds of appeal:

1. The Learned Supreme Court Justice misapplied the law of consent as set out in section 273.1 of the Criminal Code;

2. The Learned Supreme Court Justice erred by permitting the Respondent to lead opinion evidence from the abortion Doctor that was outside of the area of expertise of the abortion Doctor and using the opinion evidence in question in his decision to convict the Appellant; [Since abandoned.]

3. The Learned Supreme Court Justice imposed a sentence that was demonstrably harsh and excessive;

> 4. Such other grounds of appeal that may appear from the review of the complete record;

[13] Essentially, in appealing his conviction, Mr. Hutchinson insists that N.C. freely and voluntarily consented to have sexual intercourse with him and his deception over the condoms, however dastardly, was not enough to vitiate this consent. I will refine this issue in the course of my analysis.

[14] In appealing the sentence, Mr. Hutchinson essentially argues that he should have been permitted to serve his sentence in the community as opposed to in jail.

ANALYSIS

Appeal Against Conviction

[15] In resolving this issue, I will first review the relevant statutory regime. Then I will examine this court's decision which overturned Mr. Hutchinson's initial acquittal, resulting in a new trial and the decision now under appeal. It is cited as **R. v. Hutchinson**, 2010 NSCA 3 and I will refer to it as "**Hutchinson #1**". I will then review several cases that have emerged since **Hutchinson #1**. They offer helpful guidance to varying degrees. My conclusion, dismissing the conviction appeal, will follow. I will end with a brief response to my colleague Farrar, J.A.'s dissenting reasons, which I have had an opportunity to review in draft.

The Statutory Provisions

[16] The crime of sexual assault gets its life from the *Criminal Code*'s general assault provisions; an assault including an intentional touching (application of force) without the victim's consent:

> Assault
>
> 265 (1) A person commits an assault when
>
> > (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> Application
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

[17] A key element that the Crown must prove (and at the heart of this appeal) is the complainant's lack of consent. However, even if consent is secured, in certain circumstances such as fraud, it may be deemed vitiated:

> Consent
>
> 265 (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
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> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority.

[18] Turning specifically to sexual assault, the *Code* offers no definition of the offence but case law confirms the obvious. It is an "assault" that is sexual in nature. See**: R. v. Ewanchuk**, [1999] 1 S.C.R. 330 at ¶23-28.

[19] However, in cases of sexual assault, the *Code* does offer a specific definition of consent:

> Meaning of "consent"
>
> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[20] Then, without being exhaustive, the *Code* identifies certain circumstances which will not constitute consent to a sexual assault:

> Where no consent obtained
>
> 273.1(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> > (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.

[21] To summarize then, a sexual assault is a sexually motivated touching of another person without that person's consent. Consent occurs only when the complainant voluntarily agrees to the "sexual activity in question". There are certain defined circumstances, both specific to sexual assault [s. 273.1(2)] and assault generally [s. 265(3)] which do not constitute consent.

[22] Turning to the provisions most pertinent to us, the undisputed facts are that N.C. consented to have sexual intercourse with Mr. Hutchinson but she at no time agreed to have unprotected sex with him. So, the question becomes: Does that constitute consent pursuant to s. 273.1(1)? That, in turn, would depend entirely on

what is meant by “the sexual activity in question”. If it simply means sexual intercourse, as the defence contends, then N.C. clearly consented. In that circumstance, to secure a conviction the Crown would have to prove, pursuant to s. 265(3), that this consent was vitiated by fraud. On the other hand, if unprotected sex were the “sexual activity in question” as the Crown contends, then there would be no consent and this appeal would have to be dismissed.

[23] This very issue was addressed by our court in **Hutchinson # 1**. It would therefore be helpful to have a closer look at that decision.

Hutchinson #1

[24] For the majority, Roscoe, J.A. agreed with the Crown, concluding that unprotected sex represented “the sexual activity in question”, something N.C. at no time consented to. She reasoned:

> ¶34 With respect, the trial judge erred in his treatment of s. 265(1)(a) and s.273.1(1), (see ¶ 45 and 46 quoted herein at ¶ 19). In effect, he found that consent as defined in s. 273.1(1) had the same meaning as consent to the application of force in s. 265(1)(a). I agree with the submission of the Crown that since s. 265 applies to all forms of assault including sexual assault and s. 273.1 applies only to sexual assaults, that the words “voluntary agreement ... to engage in sexual activity in question”, must mean something more than consent to the application of force.
>
> ¶35 I agree with the statements of Paperny, J.A. in **R. v. Ashlee**, 2006 ABCA 244, leave refused [2006] S.C.C.A. No. 415, regarding s. 273.1:
>
> > 12 Section 273.1 of the *Criminal Code* came into force in 1992. It substantially reformed the law of sexual assault. The legislation in its preamble expresses concern about the prevalence of sexual assault against women and children and was intended to ensure the full protection of their *Charter* rights. It was drafted to reinforce the understanding that women have an inherent right of control over their own bodily integrity and that human dignity and equality rights demand nothing less. Parliament recognized that consent was usually the crux of sexual assault trials and therefore what constituted consent required clear legislative definition. For that reason, it unequivocally defined what exactly consent means and when consent cannot be obtained, or if obtained, would be invalid at law.

¶36 Although speaking about s. 265, in **R. v. Saint-Laurent** (1993), 90 C.C.C. (3d) 291, (Que. C.A.), leave to appeal to S.C.C. refused [1994] C.S.C.R. No. 55, Fish, J.A., as he then was, explained that consent entails a reasonably informed choice to participate in the activity, at page 311:

> Mutual agreement is a safeguard of sexual integrity imposed by the state under the threat of penal sanction. In the absence of consent, an act of sex is, at least, *prima facie* an act of assault.
>
> As a matter both of language and of law, consent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity as a result of fraud, force, fear, or violence. Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation.
>
> "Consent" is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will. [emphasis added]

¶37 [N.C.] was entitled to control over her own sexual integrity and to choose whether her sexual activity would include the risk of becoming pregnant through unprotected sex. The evidence of the complainant was that she only consented to protected sex. In **Cuerrier**, the Supreme Court recognized the fundamental difference between protected and unprotected sex as it pertains to the risks associated with the transmission of bodily fluids (¶ 72, 95, 129). A choice to assume the risks associated with protected sex does not necessarily include the risks of unprotected sex. Section 273.1(1) requires that the trier of fact consider whether [N.C.] voluntarily agreed to unprotected sex with Mr. Hutchinson.

¶38 In my view, on the evidence in this case, a trier of fact could conclude that there was consent to the application of force, that is, the sexual intercourse, but there was no “voluntary agreement” to the “sexual activity in question” which was, unbeknownst to the complainant, sexual intercourse without contraception. The sabotaging of the condoms fundamentally altered the nature of the sexual activity in question. Her consent could therefore be found not to be reasonably informed and freely exercised.

[25] Justice Roscoe then went on to address the Crown's alternative argument that even had N.C.'s willingness to engage in sexual intercourse been enough to trigger her "consent" pursuant to s. 273.1, it nonetheless would have been vitiated by fraud pursuant to s. 265(3). In reaching this conclusion, she applied the test laid down by the Supreme Court of Canada in **R. v. Cuerrier**, [1998] 2 S.C.R. 371. There the accused had consensual intercourse with two different women without informing them that he was HIV-positive. He was acquitted at trial of two counts of aggravated assault. These acquittals were upheld by the British Columbia Court of Appeal. However, the Supreme Court of Canada ordered a new trial and in the process directed that to secure a conviction, the Crown would have to establish, among other things, that Mr. Cuerrier's deceitful act exposed his victims to a "significant risk of serious bodily harm". For Roscoe, J.A., a trier of fact could have found that N.C. was so exposed:

> ¶43 As noted above at ¶ 18, when Justice Moir applied the **Cuerrier** test to this case he found that there was evidence of deceit but there was no evidence upon which the trier of fact could find that the deceit exposed the complainant to significant risk of serious bodily harm. He indicated that the complainant was "exposed" to pregnancy and pregnancy itself is not serious bodily harm.
>
> ¶44 One of the difficulties inherent in the application of **Cuerrier** to the facts of this case is that in Cuerrier the complainants did not become infected with HIV nor suffer any other physical harm as a result of the deceit. They were exposed to the virus but did not contract it. In this case [N.C.] was not exposed to pregnancy, she was actually pregnant. As I emphasized in the quotation of ¶ 128 (at ¶ 41 above) of Justice Cory's decision, deprivation may consist of actual harm or risk of harm. The first question in this case therefore is, was there evidence that [N.C.] suffered actual harm as a result of the deceit of Mr. Hutchinson?
>
> ¶45 As indicated by Justice Cory, the harm cannot be something of a minor or trivial nature, such as a scratch or a cold. Guidance on this issue is also provided in the decision of **R. v. McCraw**, [1991] 3 S.C.R. 72, where the court considered the meaning of serious bodily harm and concluded:
>
> > 23 In summary the meaning of "serious bodily harm" for the purposes of the section is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant.

> ¶46 In this case, there was evidence that as a result of the pregnancy the complainant actually suffered morning sickness. Her condition required medical attention on several occasions. Because the pregnancy was unwanted, the complainant also suffered from emotional and psychological distress and was required to face the difficult decision of whether to have an abortion. As a result of the abortion, she actually suffered from bleeding, blood clots and severe pain for a period of two weeks and a serious infection that required antibiotics. Again, medical attention was required on several occasions. The evidence supports a finding that all of this pain and suffering was a direct and foreseeable consequence of the use of the sabotaged condoms. There was actual physical and psychological harm that was not trivial or minor. It was significant. A trier of fact could conclude that the consequences of the deceit caused serious bodily harm to the complainant, thus satisfying the test for fraud vitiating consent.

[26] Beveridge, J.A. took the opposite view. After a thorough review of the history of s. 273.1, he concluded that "the sexual activity in question" meant sexual intercourse, something N.C. clearly consented to. He explained:

> ¶108 Section 273.1(1) provides that, subject to s. 265(3) and s-s.(2) of s. 273.1, consent means "the voluntary agreement to engage in the sexual activity in question". There is no elaboration as what is meant by "sexual activity in question". My colleague, Roscoe, J.A., would suggest that it is open to charge a jury that this means not just sexual intercourse, but sexual intercourse with a condom, or some other qualifying condition. She concludes that for the respondent to have engaged in sexual intercourse with a sabotaged condom would permit a jury to find that the voluntary agreement was not an informed one and hence there would not be a consent within the meaning of s. 273.1. I am unable to agree.
>
> ¶109 Nothing in the language of the provision, evolution or legislative history would permit such an interpretation. In my opinion, the plain ordinary meaning of the words do not reveal any suggestion that Parliament intended the definition of consent in s. 273.1 to take on a far broader requirement equating or even approaching the concept in tort law of "informed" consent. If it intended to do so, it had every opportunity. Instead, Parliament chose straight-forward language that only speaks of a voluntary agreement to engage in the sexual activity in question.
>
> ¶110 The ordinary meaning of sexual activity in question is simply the touching, oral or otherwise, or type of intercourse as being the sexual activity in question. This ordinary natural meaning is reinforced by the general thrust of s. 276 that prior sexual activity is generally not relevant on the issue whether the complainant consented to the activity that forms the subject matter of the charge. In other

words, simply because a complainant has consented to intimate touching does not mean that she has consented to more or different types of sexual activity. Consent to one activity does not mean that he or she has consented to some other activity.

¶111 This interpretation is also reinforced by the balance of s. 273.1. Section 273.1(2) sets out five circumstances where consent cannot be obtained. Of note is para. (d) that no consent is obtained where the complainant expresses by words or conduct a lack of agreement to engage in the activity; and (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. Together with s. 273.1(1), no means no and yes to one activity does not mean yes to a different one.

. . .

¶122 It is unnecessary to fully analyze the degree to which the provisions of s. 265(3) and s. 273.1 overlap. In my opinion, to adopt the interpretation of s. 273.1 suggested by my colleague, Roscoe, J.A., would be to make moot any issue of fraud vitiating consent because there would never be a voluntary agreement to engage in the sexual activity in question. Any fraud would prevent consent from being reasonably informed. This has never been the law, and would mark an impermissible extension to criminalize almost any dishonest behaviour by either of the apparently consenting participants.

¶123 My colleague, Roscoe, J.A., relies on comments by Fish J.A, as he then was, in *R. v. Saint-Laurent* (1993), 90 C.C.C. (3d) 291 that "consent implies a reasonably informed choice, freely exercised". With respect, I am unable to agree that this one sentence can be extracted as a correct statement of the law with respect to consent in cases of sexual assault.

¶124 The case involved an appeal from a refusal by the Superior Court judge to quash the accused's committal to stand trial on charges of sexual assault. The accused was a psychiatrist. The evidence was that he had sexual relations with two of his patients. The events all took place prior to the enactment of s. 273.1 of the *Code*. Expert evidence had been called about the degree of dependency that can exist in the relationship between a psychiatrist and his or her patients. The Crown relied on s. 265(3)(d), arguing that there was some evidence upon which a jury could find that consent was vitiated by the exercise of authority by the accused. The Crown also raised the issue of fraud. Fish J.A. wrote concurring reasons to dismiss the appeal.

¶125 With respect to the issue of fraud, he wrote (p. 308):

> Though the Crown does mention fraud, I agree with Beauregard J.A. that its case against appellant rests primarily on the allegation that he exercised authority over both complainants in a way that deliberately induced them to "submit" to, or "not resist", sexual relations with him.
>
> In any event, the issue at this stage is whether the magistrate had any basis at all for committing the appellant to trial. I find it unnecessary for that reason to express a detailed opinion on the subsidiary issue of fraud. I would simply say that "fraud", in s. 265(3), does not contemplate every deceit perpetrated in the pursuit of sexual gratification. A man and a woman both act dishonestly and, to that extent, "fraudulently", when they cause one another to embark on an intimate relationship by each claiming falsely to be rich and single. Disingenuous proclamations of love for the same purpose are equally dishonest. The criminal law, however, does not, in my view, characterize conduct of this kind as a sexual assault: not all liars are rapists. There must be something more.
>
> In the context of this case, I would require evidence of deceit that goes to the very nature and quality of the defendant's conduct: see *R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528, 58 C.R. (3d) 320, [1987] 5 W.W.R. 71 (B.C.C.A.), where the British Columbia Court of Appeal held that the type of fraud referred to in s. 265(3)(c) relates to the nature and quality of the act and not to the kind of falsehood alleged in that case (a false representation that the accused intended to pay the victim, a prostitute, for the sexual services obtained).

¶126 After referring to the history of the introduction of s. 265(3)(d) he commented (p. 311):

> Returning, then, to the meaning of "authority" in s. 265(3)(d) of the *Criminal Code*, it seems to me that the purpose of the law in this area has always been to criminalize a coerced sexual relationship. Mutual agreement is a safeguard of sexual integrity imposed by the state under the threat of penal sanction. In the absence of consent, an act of sex is, at least *prima facie*, an act of assault.
>
> As a matter both of language and of law, consent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity as a result of fraud, force, fear, or violence. Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual

> nature of the act, or of realizing that he or she may choose to decline participation.
>
> "Consent" is thus stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will. Putting the matter this way emphasizes the difficulty of distinguishing, otherwise than by reference to vitiating factors, between "consent" and "non-consent" in relation to the offence of assault.

> ¶127 The last paragraph above was subsequently endorsed by the Supreme Court of Canada in *R. v. Ewanchuk, supra* at para. 37. There is nothing remarkable about the balance of the quote, except for his reference "consent implies a reasonably informed choice, freely exercised." If Fish J.A. was intending to expand the scope of what is meant by consent to require it to be reasonably informed, it seems incongruous for him to have earlier affirmed the traditional view articulated by the British Columbia Court of Appeal in *R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528, that for fraud to vitiate consent it must relate to the nature and quality of the act.
>
> ¶128 I would also note that Fish J.A. did not say consent "means" a reasonably informed choice. But that is how my colleague would interpret this comment, and has led her to conclude that, in the case at bar, a jury could find that the complainant's apparent consent was not reasonably informed and hence not "consent" within the meaning of s. 273.1 of the *Code*. With respect, I cannot agree. In my opinion, the evidence was clear, the complainant voluntarily agreed to the sexual activity in question, which was sexual intercourse. It would be an error in law to instruct a jury that they could consider that the sexual activity in question meant sexual intercourse with an intact condom. The consequences of the interpretation suggested by my colleague would lead to complaints and prosecution of individuals of either sex who lie to their spouse or partner about taking effective contraceptives – a result surely not intended by Parliament.

[27] Furthermore, in Justice Beveridge's view, N.C.'s consent (to sexual intercourse) could not have been vitiated by fraud pursuant to s. 265(3). He therefore would have sustained the acquittal.

[28] Bateman, J.A. rounded out the panel. She concurred with Roscoe, J.A. However, she added that the judge also misapplied the test for a directed verdict. Specifically, his task was to determine if there was *any* evidence upon which a properly instructed jury *could* convict. Instead, in her view, the judge *weighed* the

evidence, something that was beyond his mandate at that stage of the proceedings. Therefore, in **Hutchinson #1**, this court produced two very compelling, but opposing, perspectives. In the present appeal, Mr. Hutchinson invites us to adopt Beveridge, J.A.'s dissenting decision. Specifically, he insists that N.C.'s consent to sexual intercourse was consent to "the sexual activity in question" under s. 273.1 and that this deception, like all forms of deception, must therefore be dealt with under s. 265(3) with its requisite "significant risk of serious bodily harm".

Recent Jurisprudence

[29] Since **Hutchinson #1**, three cases have emerged to offer guidance. The first is **R. v. Crangle**, 2010 ONCA 451, [2010] O.J. No. 2587, leave to appeal to SCC refused, [2010] S.C.C.A. No. 300, where the Ontario Court of Appeal considered the meaning of consent in s. 273.1 and its interplay with s. 265(3). Next came **R. v. J.A.**, 2011 SCC 28, [2011] 2 S.C.R. 440 where the Supreme Court of Canada offered helpful guidance on the meaning of consent under s. 273.1. Finally, very recently, in **R. v. Mabior**, 2012 SCC 47, the Supreme Court of Canada revisited its decision in **R. v. Cuerrier** to determine when in HIV-positive cases, consent would be vitiated by fraud pursuant to s. 265(3)(c).

[30] I will now discuss each of these cases in order.

[31] In **Crangle**, the defendant had intercourse with his "identical" twin brother's girlfriend in somewhat bizarre circumstances. After an evening of partying, the victim fell asleep alone in her boyfriend's bed. She woke to what she thought was her boyfriend having sex with her. Then, with shock, she realized that it was not her boyfriend but his twin brother. She then vigorously resisted and he desisted. One of the questions raised on appeal was whether she had consented to the "sexual activity in question" according to s. 273.1(1). Like N.C., in our case, her consent to intercourse was given under a serious misapprehension. Goudge, J.A. found no consent under s. 273.1(1) because sex with her boyfriend represented an "inseparable component" of her consent:

> ¶19 Based on the evidence, the trial judge concluded that while in the beginning the complainant may have been agreeable to the activity because she thought it was with Craig Crangle, at no time did she consent to sexual intercourse

> with the appellant. Thus, at no time did she voluntarily agree to the sexual activity in question.
>
> ¶20 Not only are these findings well grounded in the evidence, in my view, they are entirely reasonable. In the beginning, the complainant mistakenly thought the sexual activity was with someone with whom she had an ongoing consensual sexual relationship. Such a relationship is a deeply personal one in which the identity of the sexual partner is fundamental. It is hardly surprising that, from the complainant's perspective that night, the identity of her sexual partner was an inseparable component of any consent to sexual activity. Subjectively, she did not voluntarily agree to sexual intercourse with anyone other than Craig Crangle. That included the appellant.

[32] Yet, like here, the appellant Crangle argued that the "sexual activity in question" was sexual intercourse and, therefore, again like here, the Crown would have to prove fraud under s. 265(3). Goudge, J.A. rejected that suggestion and in the process considered the interesting interplay between these two provisions:

> ¶21 The appellant argues that the offence of sexual assault could only have been made out if it was found that he had committed fraud so as to vitiate the complainant's consent pursuant to s. 265(3)(c) of the *Code*.
>
> ¶22 It is certainly true that this subsection provides that fraud can vitiate consent for sexual assault, as for all other forms of assault. Moreover, in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, the Supreme Court of Canada decided that one form of fraud that can be found to vitiate consent is fraud pertaining to the identity of the partner. It also made clear however, that fraud was not limited to this, but included fraud pertaining to the nature and quality of the act, or to other acts of dishonesty that on a principled basis can be shown to vitiate consent. In other words, the purpose of s. 265(1)(c) encompasses more than fraud pertaining to identity.
>
> ¶23 More importantly, there is nothing in the language of s. 265(3)(c) or the jurisprudence to suggest that only a mistake as to the identity of the sexual partner that is induced by fraud vitiates consent. Moreover, the appellant suggests no policy reason why an identity mistake caused by something else will not do. Indeed s. 273.1 suggests the opposite. It does not confine consent to voluntary agreement except where that is negated by an identity mistake due to fraud. Where the subjective state of mind of the complainant is that her consent hinged on the identity of her sexual partner, her mistake about that identity renders his conduct non-consensual, whether or not the mistake is induced by fraud. The presence or

> absence of fraud may however be significant to whether the Crown can prove that the accused did not have an honest belief that the complainant was consenting.
>
> ¶24 Where, as here, the complainant's consent to sexual activity depended on it being with a particular person, her mistake about the identity of that person whether induced by fraud or not, necessarily means that subjectively she did not voluntarily agree to the sexual activity that occurred with someone else. That is precisely what the trial judge found happened in this case.

[33] Goudge, J.A.'s conclusion accords nicely with the Supreme Court's directive in **Ewanchuk**, *supra*, that the absence of consent must be considered from the subjective perspective of the complainant. As Major, J. explained in **Ewanchuk**:

> ¶26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.
>
> ¶27 Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators have observed that the notion of consent connotes active behaviour: see, for example, N. Brett, "Sexual Offenses and Consent" (1998), 11 Can. J. Law & Jur. 69, at p. 73. While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the actus reus, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective.

[34] In **J.A.**, the Supreme Court interpreted s. 273.1, albeit from a totally different factual context. There, the complainant K.D. purportedly consented to sexual activity referred to as “erotic asphyxiation”. Specifically, K.D. allowed J.A. to choke her and then perform sexual acts on her. Her purported consent extended to allowing K.D. to continue with the sexual activity even if she were to be rendered unconscious. J.A. did in fact become unconscious but, as agreed, K.D. continued with the sexual activity.

[35] Following an unrelated dispute, K.D. reported this activity to the police. J.A. was charged with sexual assault and convicted at trial. However, he was

acquitted on appeal in light of K.D.'s advance consent. A majority of the Supreme Court of Canada then restored the conviction, rejecting the notion that a complainant can give advance consent to sexual activity. In the process, McLachlin, C.J., for the majority, offered some important guidance regarding the operation of s. 273.1.

[36] For example, the Chief Justice explained that in order to grasp Parliament's true intention, this provision must be read in harmony with the other *Code* provisions dealing with sexual assault (which I have outlined above). By doing so, it becomes clear that consent under s. 273.1(1) "must be specifically directed to each and every sexual act":

> ¶31 The foregoing provisions of the *Criminal Code* indicate that Parliament viewed consent as the conscious agreement of the complainant to engage in every sexual act in a particular encounter.
>
> ¶32 The proper approach to statutory interpretation was summarized in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601: "The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole." The Court emphasized that while "[t]he relative effects of ordinary meaning, context and purpose on the interpretive process may vary, ... in all cases the court must seek to read the provisions of an Act as a harmonious whole" (para. 10).
>
> ¶33 It follows that we must seek to interpret the provisions that deal with consent in a harmonious way. Applying this approach, we see that Parliament defined consent in a way that requires the complainant to be conscious throughout the sexual activity in question. The issue is not whether the Court should identify a new exception that vitiates consent to sexual activity while unconscious (see reasons of Fish J., at para. 95), but whether an unconscious person can qualify as consenting under Parliament's definition.
>
> ¶34 Consent for the purposes of sexual assault is defined in s. 273.1(1) as "the voluntary agreement of the complainant to engage in the sexual activity in question". This suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument [page454] that broad advance consent is what Parliament had in mind. As discussed below, this Court has also interpreted this provision as requiring the complainant to consent to the activity "at the time it occur[s]" (*Ewanchuk*, at para. 26).

. . .

> ¶43 The question in this case is whether Parliament defined consent in a way that extends to advance consent to sexual acts committed while the complainant is unconscious. In my view, it did not. J.A.'s contention that advance consent can be given to sexual acts taking place during unconsciousness is not in harmony with the provisions of the Code and their underlying policies. These provisions indicate that Parliament viewed consent as requiring a "capable" or operating mind, able to evaluate each and every sexual act committed. To hold otherwise runs counter to Parliament's clear intent that a person has the right to consent to particular acts and to revoke her consent at any time. Reading these provisions together, I cannot accept the respondent's contention that an individual may consent in advance to sexual activity taking place while she is unconscious.

[37] In other words, consent commands "active actual consent throughout every phase of the sexual activity":

> ¶66 The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*.

[38] In fact, the Chief Justice, when identifying the risks of interpreting s. 273.1(1) too broadly, alluded to a situation very close to the one we face – a man without his partner's express knowledge neglecting to wear a condom:

> ¶58 The respondent also argues that requiring conscious consent to sexual activity may result in absurd outcomes. He cites the example of a person who kisses his sleeping partner. In that situation, [page 462] he argues, the accused would be guilty of sexual assault unless he is permitted to argue that his sleeping partner consented to the kiss in advance.
>
> ¶59 The first difficulty with altering the definition of consent to deal with the respondent's hypothesis is that it would only provide a defence where the complainant specifically turns her mind to consenting to the particular sexual acts that later occur before falling asleep. The respondent's position is that there is no sexual assault in this case because the complainant consented to both being

> rendered unconscious and to engaging in the sexual activity that occurred while she was unconscious. If a hypothetical complainant did not expect her partner to kiss her - or whatever other acts are at issue - while she was asleep, the respondent's approach would not provide a defence.
>
> ¶60 The second difficulty is the risk that the unconscious person's wishes would be innocently misinterpreted by his or her partner. Sexual preferences may be very particular and difficult for individuals to precisely express. *If the accused fails to perform the sexual acts precisely as the complainant would have wanted - by neglecting to wear a condom for instance - the unconscious party will be unintentionally violated*. In addition to the risk of innocent misinterpretation, the respondent's position does not recognize the total vulnerability of the unconscious partner and the need to protect this person from exploitation. The unconscious partner cannot meaningfully control how her person is being touched, leaving her open to abuse: *R. v. Osvath* (1996), 46 C.R. (4th) 124 (Ont. C.A.), per Abella J.A. (as she then was), dissenting.
>
> [Emphasis added.]

[39] This approach to s. 273.1(1), in my view, offers strong support for the Crown in our case. After all, if this provision would prevent an accused from *unintentionally* violating his unconscious partner's requirement for him to wear a condom, then surely it must be seen to prevent an accused from *intentionall*y duping his partner, where a pre-requisite to her consent is that he wear an intact condom.

[40] Therefore, in my respectful view, these passages support the Crown's submission that to consent under s. 273.1(1), the alleged victim must be fully aware of the exact nature of the proposed sexual activity. In our case, the judge found that the proposed sexual activity was protected sex.

[41] In other words, to achieve the overarching goal of preventing sexual exploitation, **J.A.** invites a restricted interpretation of s. 273.1(1) by limiting the occasions when a complainant would be seen to have consented.

[42] Furthermore, other language in s. 273.1, in my view, also supports this approach. For example, as I have noted above, Parliament has enacted s. 265(3) as another means to limit the use of consent as a defence to assault. Note then the opening phrase of s. 273.1, "subject to subsection (2) and subsection 265(3) ...".

Obviously, Parliament was careful to preserve both avenues of recourse for victims of sexual assault. In the same vein, after Parliament prescribed circumstances where consent will not be obtained [s. 273.1(2)], it again carefully directed [in s. 273.1(3)] that nothing in this list "shall be construed as limiting the circumstances in which no consent is obtained". In other words, the consistent theme appears to reflect an effort to prevent sexual exploitation by limiting the circumstances where a victim is said to have consented.

[43] Finally, very recently from the Supreme Court of Canada, we have **R. v. Mabior**, *supra*. Like **Cuerrier**, it involved an accused who had consensual intercourse with several women without notifying them that he was HIV- positive. This provided an opportunity for the Supreme Court to revisit **Cuerrier** in light of medical advancements that could reduce the risks of contracting HIV from sexual partners.

[44] After a thorough analysis, McLachlin, C.J. for a unanimous court found no need to disturb the **Cuerrier** "significant risk of serious bodily harm" test but modified how it might be met in today's HIV context. Specifically, the Court concluded that a "realistic possibility of transmission of HIV" will constitute a "significant risk of serious bodily harm". Further, for Mr. Mabior, his low viral load combined with the use of a condom would be enough to preclude a realistic possibility of transmission.

> ¶104 To summarize, to obtain a conviction under ss. 265(3)(*c*) and 273, the Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. On the evidence before us, a realistic possibility of transmission is negated by evidence that the accused's viral load was low at the time of intercourse and that condom protection was used. However, the general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in the present case are at play.

> ¶105 The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence — a dishonest act and deprivation — beyond a reasonable doubt. Where the Crown has made a *prima facie* case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling evidence that he had a low viral load at the time and that condom protection was used.

[45] In the end, convictions were therefore sustained for those occasions when Mr. Mabior, despite his low viral load, neglected to wear a condom but he was acquitted on the one occasion that, with a low viral load, he wore a condom:

> ¶106 With respect to the four counts before us, the complainants all consented to sexual intercourse with the accused. Each of the complainants testified that they would not have had sex with the accused had they known that he was HIV-positive. The only issue is whether their consent was vitiated because he did not tell them that he had HIV.
>
> ¶107 The trial judge found the accused guilty of aggravated sexual assault on the four counts where it was established that his viral load was not undetectable or no condom was used. The Court of Appeal set aside the convictions on the basis that *either* an undetectable viral load or condom protection would suffice.
>
> ¶108 As set out above, at this point in the development of the common law, a clear test can be laid down. The absence of a realistic possibility of HIV transmission precludes a finding of fraud vitiating consent under s. 265(3)(*c*) of the *Criminal Code*. In the case at hand, no realistic possibility of transmission was established when the accused had a low viral load and wore a condom. It follows that the appeal should be allowed insofar as the decision of the Court of Appeal conflicts with this conclusion.
>
> ¶109 The accused had a low viral load at the time of intercourse with each of S.H., D.C.S. and D.H., but did not use a condom. Consequently, the trial judge's convictions on these counts should be maintained. This leaves K.G. The trial judge convicted on the ground that, although the accused used a condom at the time of the encounter, his viral load "was not suppressed" (para. 128). As discussed, the combination of a low viral load – as opposed to an *undetectable* viral load – and of condom use negates a realistic possibility of transmission, on the evidence in this case. The record shows that the accused's viral load was low at the time of sexual relations with K.G. When combined with condom protection, this low viral load did not expose K.G. to a significant risk of serious bodily harm. The trial judge's conviction on this count must be reversed.

> ¶110 I would allow the appeal in part and restore the convictions in respect of the complaints by S.H., D.C.S. and D.H. I would dismiss the appeal in respect of the complaint by K.G.

Conclusion

[46] Of the three recent decisions, **Crangle** and **J.A.** are more relevant to our circumstances. **Crangle** is particularly persuasive because, like here, the Court was asked to consider the interplay between 273.1 and s. 265(3). Specifically, it found no consent to "the sexual activity in question" under s. 273.1 because the identity of her sexual partner represented an "inseparable component" of her consent to sexual intercourse. I am persuaded by this logic. Put another way, if there is no consent to an essential feature of the sexual act itself, there can be no consent to "the sexual activity in question" pursuant to s. 273.1. Furthermore, it follows that, where there is no consent in the first place, there is no need to construct a s. 265(3) analysis simply because there happened to be a deception. **Crangle**, therefore, belies Mr. Hutchinson's theory that every deception case falls under s. 265(3)(c).

[47] As well, this approach, in my view, is buttressed by the guidance offered in **J.A.** which, as I have noted above, calls for an interpretation of s. 273.1 that would limit the occasions when a complainant would be seen to have consented.

[48] On the other hand, **Mabior** would appear to have limited relevance to our circumstances. It dealt exclusively with s. 265(3) with no reference whatever to s. 273.1. Instead it represented the Supreme Court's opportunity to revisit **Cuerrier** which itself was exclusively a s. 265(3) case. Thus the Court (at ¶11) identified the issue as: "What is the correct interpretation of 'fraud' vitiating consent to sexual activity in s. 265(3)(c) of the *Criminal Code*?" And later added (at ¶56): "This brings us to the nub of the question before us – when, precisely, should non-disclosure of HIV status amount to fraud vitiating consent under s. 265(3)(*c*)?"

[49] Nonetheless, **Mabior** does offer important guidance in two areas. Firstly, it reminds us of the importance of *Charter* values when interpreting legislation. Specifically, the Court noted how the once "restrictive view of how lack of consent to sexual relations could be established" has given way to a more modern

post-*Charter* approach that sees "sexual assault not only as a crime associated with emotional and physical harm to the victim, but as the wrongful exploitation of another human being":

> ¶44 Courts must interpret legislation harmoniously with the constitutional norms enshrined in the *Charter*: *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 33; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 35. *Charter* values are always relevant to the interpretation of a disputed provision of the *Criminal Code*.
>
> ¶45 The *Charter* values of equality, autonomy, liberty, privacy and human dignity are particularly relevant to the interpretation of fraud vitiating consent to sexual relations. The formerly narrow view of consent has been replaced by a view that respects each sexual partner as an autonomous, equal and free person. Our modern understanding of sexual assault is based on the preservation of the right to refuse sexual intercourse: sexual assault is wrong because it denies the victim's dignity as a human being. Fraud in s. 265(3)(*c*) of the *Criminal Code* must be interpreted in light of these values.
>
> ¶46 As we have already seen, prior to the adoption of the *Charter* in 1982 and the reform of sexual offences in 1983, courts took a restrictive view of how lack of consent to sexual relations could be established and how consent could be negated by fraud. Rules of evidence and procedure, like the ancient rule that non-consent must be supported by evidence of a "hue and cry" in the neighbourhood immediately after the alleged sexual assault, or the willingness of judges to infer consent from dress or prior sexual experience, systemically biased the trial process in favour of finding consent. In like fashion, the jurisprudence, post-*Clarence*, took a narrow view of fraud capable of vitiating consent, holding that it went only to the sexual nature of the act, and that it did not apply to married women, who were bound to submit to their husbands in all circumstances.
>
> ¶47 Post-*Charter* Canadian law has repudiated this crabbed view of consent and fraud. Amendments to the *Criminal Code* have removed the evidentiary burdens and presumptions that once made proof of lack of consent difficult. Courts have held that judges may not infer consent from the way the complainant was dressed or the fact that she may have flirted: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. And in 1998, *Cuerrier* signaled a return to a generous interpretation of fraud capable of vitiating consent.
>
> ¶48 In keeping with the *Charter* values of equality and autonomy, we now see sexual assault not only as a crime associated with emotional and physical harm to

> the victim, but as the wrongful exploitation of another human being. To engage in sexual acts without the consent of another person is to treat him or her as an object and negate his or her human dignity. Although the *Charter* is not directly engaged, the values that animate it must be taken into account in interpreting s. 265(3)(*c*) of the *Criminal Code*.

[50] Although these comments were offered in the context of s. 265(3), in my view, they have equal persuasion to s. 273.1.

[51] This too would be consistent with the poignant words of Major, J. in **Ewanchuk**, *supra*, where he reminds us that the goal of sexual assault legislation is to protect the personal integrity of every individual (or its corollary - preventing sexual exploitation):

> ¶28 The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy.

[52] Secondly, **Mabior** offers important guidance when drawing the line between criminal conduct and non criminal conduct. Again, although this was addressed in the context of s. 265(3), the general concepts are equally persuasive to this appeal. Specifically, the court recognized that a person should not be labelled a criminal for every deception surrounding sexual activity. That would set the bar too low. Instead (in highlighting the benefits of its "realistic possibility of transmission of HIV" approach), the Court suggests that only "serious deceptions with serious consequences" should be considered criminal while at the same time "irresponsible, reprehensible conduct" must not be condoned:

> ¶87 Third, as discussed earlier in considering guides to interpretation, a standard of realistic possibility of transmission of HIV avoids setting the bar for criminal conviction too high or too low. A standard of any risk, however small, would arguably set the threshold for criminal conduct too low. On the other hand, to limit s. 265(3)(*c*) to cases where the risk is "high" might condone irresponsible, reprehensible conduct.
>
> ¶88 Fourth, the common law and statutory history of fraud vitiating consent to sexual relations supports viewing "significant risk of serious bodily harm" as requiring a realistic possibility of transmission of HIV. This history suggests that

> only serious deceptions with serious consequences are capable of vitiating consent to sexual relations. Interpreting "significant risk of serious bodily harm" in *Cuerrier* as extending to any risk of transmission would be inconsistent with this. A realistic possibility of transmission arguably strikes the right balance for a disease with the life-altering consequences of HIV.

[53] In summary, from these post-**Hutchinson #1** cases, I glean the following:

- consent under s. 273.1 "must be specifically directed to each and every sexual act" (**J.A.**)

- s. 273.1 is restricted to "active actual consent throughout every phase of the sexual activity" (**J.A.**)

- deception that involves an "inseparable component" of a complainant's consent to sexual intercourse represents no consent under s. 273.1 (**Crangle**)

- sexual assault involves more than "a crime associated with emotional and physical harm to the victim, but as the wrongful exploitation of another human being" (**Mabior**)

- "irresponsible, reprehensible conduct" must not be condoned but at the same time, to be criminal, the deception must minimally be serious with serious consequences (**Mabior**)

[54] Applying these principles to this appeal, it is clear that protected sex was an essential feature of the proposed sexual act and an inseparable component of N.C.'s consent. Furthermore, Mr. Hutchinson's actions represented the "wrongful exploitation of another human being". In fact, his deception was " [very] serious ... with [very] serious consequences".

[55] In short, N.C. did not consent to the sexual activity in question pursuant to s. 273.1 and I would therefore dismiss the appeal against conviction.

[56] However, before leaving this issue, I would like to address two further points raised by Mr. Hutchinson and a third issue that could potentially flow from **Mabior**.

[57] Firstly, Mr. Hutchinson submits that the trial judge's interpretation of s. 273.1(1) would lead to serious unintended consequences. Specifically, he asserts (and the Crown concedes) that had it been Mr. Hutchinson who insisted on protected sex and N.C. who sabotaged the condoms, she very well could have been charged. That may be. However, if such a scenario were to emerge, it would be for Parliament (and not the courts) to resolve. Again, I refer to **J.A.**:

> ¶65 In the end, we are left with this. Parliament has defined sexual assault as sexual touching without consent. It has dealt with consent in a way that makes it clear that ongoing, conscious and present consent to "the sexual activity in question" is required. This concept of consent produces just results in the vast majority of cases. It has proved of great value in combating the stereotypes that historically have surrounded consent to sexual relations and undermined the law's ability to address the crime of sexual assault. In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it is inappropriate for this Court to carve out exceptions when they undermine Parliament's choice. In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.

[58] Furthermore, despite the Crown's concession on this point, I am not convinced that a hypothetical charge against N.C. would stick. After all, the consequences of an unintended pregnancy can be so much more profound for the mother than for the father. For example, Derrick, P.C.J., the preliminary inquiry judge in **Hutchinson #1,** described the mother's perspective:

> ¶37 Biology is not destiny: an unwanted pregnancy intrudes upon a woman's autonomy and leaves her with no option but to assume either the risks associated with it and childbirth or the risks associated with abortion. The fact that the incidence of serious problems in pregnancy, childbirth and abortion, are low does not alter the fact that a pregnant woman faces the possibility of risks to her health and even her life that a non-pregnant woman does not. The evidence supports the reasonable inference that had Mr. Hutchinson not sabotaged the condoms, [N.C.] would not have found herself in a condition that carries with it serious risks she did not choose to assume, faced with choices she should not have had to make. The evidence indicates that [N.C.] had already made an autonomous choice not to

> be pregnant, well before her relationship with Mr. Hutchinson started to unravel. Mr. Hutchinson's conduct deprived [N.C.] of her choice to avoid becoming pregnant and exposed her to all the potential risks associated with pregnancy, including risks that would endanger her life if she was unfortunate enough to develop certain conditions. Furthermore, Mr. Hutchinson's conduct exposed [N.C.] to the risks associated with having an abortion, the only choice she had available to her for ending the pregnancy and returning to her non-pregnant state.

[59] Therefore, while using a condom to avoid pregnancy represented an essential feature of the sexual act and an "inseparable component" of N.C.'s consent to sexual intercourse, it remains an open question as to whether the same would be true for Mr. Hutchinson. That important point is for another case where there would be sufficient facts to illuminate the inquiry.

[60] Secondly, Mr. Hutchinson suggests that to interpret s. 273.1 as the Crown suggests would render s. 265(3)(c) redundant. In other words, he asks rhetorically – could there ever be consent induced by fraud, as s. 265(3)(c) envisages, if there must be complete awareness of the sexual activity for consent to have occurred in the first place?

[61] Respectfully, I have two responses to this concern. Firstly, s. 265 applies to all assaults, while s. 273.1(1) is limited to sexual assaults (granted, the cases where fraud would come into play outside of a sexual context would be rare).

[62] Secondly, and in any case, I ask what really would be the problem with the Crown having two potential avenues available to it to prove a lack of consent? In my respectful view, that is not necessarily a bad thing. Here, I agree with Professor Steve Coughlan in his annotation to **Hutchinson #1**, 2010 Carswell NS 17 at p. 7:

> One of Justice Beveridge's concerns with allowing this type of fraud to mean that there is no consent is that it would render the "vitiation of consent" analysis redundant. If fraud about circumstances beyond the physical nature of the act meant there was no consent, then one would never reach a vitiation analysis: the kind of deception that led to a finding of vitiation would already have led to the result that there was no consent. However, it is not obvious that this is really a terribly concerning result. To ask whether consent has been vitiated amounts, much of the time, to asking whether something that looked like consent was "really" consent. It is, most of the time, simply another way of asking whether there genuinely was consent in all the circumstances. That one should arrive at

> the same result by two methods of analysis should be encouraging, not a cause for concern.

See also: **R. v. D.S.** (2004), 188 C.C.C. (3d) 514, [2004] O.J. No. 3440 (Ont. C.A.) at ¶29 and ¶45-47, aff'd **R. v. Stender**, 2005 SCC 36, [2005] 1 S.C.R. 914.

[63] Therefore, while it remains unnecessary for me to go down the *s. 265 vitiated consent* route, the fact that this might also have been available to the Crown should not change matters.

[64] Finally, there is one lingering issue in **Mabior's** wake. It involves the fact that Mr. Mabior was acquitted of the one charge where he used a condom while also having a low viral load. This may raise several questions. For example, how does one square this acquittal with Mr. Hutchinson's conviction? After all, this complainant testified that had she known the truth about Mr. Mabior's HIV status she would not have consented to sexual intercourse. Would that not have rendered it an essential feature of her consent to sexual intercourse thereby voiding consent "to the sexual activity in question" under s. 273.1? Therefore, should Mr. Mabior not at least have been convicted of the included offence of sexual assault? If so, does his acquittal by the Supreme Court of Canada not place my analysis on shaky ground?

[65] I acknowledge that those would be fair questions. However, for several reasons, I respectfully believe that my analysis survives **Mabior**. Firstly, and as I have noted, **Mabior** was never presented as a s. 273.1 case. As such, it remains impossible to know how significant the trier of fact would have viewed this deception. After all, my analysis acknowledges that not every deception voids consent under s. 273.1. Instead, it targets only those involving an essential feature of the sexual act. Secondly, and as noted above, we learn from **Mabior** that the criminal law targets only those deceptions considered to be "serious ... with serious consequences". With this count, the Court concluded that there was no realistic possibility of HIV transmission. As such, it must be inferred that this deception was not sufficiently serious to warrant a criminal sanction. One might therefore expect the same result on a s. 273.1 analysis. Of course, the same cannot be said for Mr. Hutchinson whose deception, as I have noted, was very serious with very serious consequences. In short, a conviction on this count would not have been inevitable under my interpretation of s. 273.1. Therefore, I do not see

Mr. Hutchinson's conviction as being incongruent with Mr. Mabior's acquittal (on one count).

Farrar, J.A.'s Dissenting Reasons

[66] Before concluding, I would like to briefly address my colleague Farrar, J.A.'s dissenting reasons under two headings. First, I will address his comments regarding the relationship between s. 273.1(1) and s. 265(3)(c). Then I will consider his approach to s. 265(3)(c), had that been the appropriate provision.

1. Relationship of ss. 273.1(1) and 265(3)(c)

[67] **First:** Section 273.1(1) states that, for the charge of sexual assault, "'consent' means ... the voluntary agreement of the complainant to engage in the sexual activity in question". If there is no such consent, then it is unnecessary to consider s. 265(3)(c). If there is such consent, then, in cases of deception, the court moves to s. 265(3)(c) and, if the complainant submitted because of fraud, then what otherwise would be consent is vitiated.

[68] The threshold question is: What does s. 273.1(1) mean by "the sexual activity in question"?

[69] My colleague says "the meaning of 'sexual activity' in s. 273.1(1) simply refers to the physical sex act and not to the conditions or quality of that act". In Mr. Hutchinson's case, that would mean coitus, and nothing else.

[70] In **R. v. J.A.**, *supra*, at ¶66, the Chief Justice for the majority said s. 273.1(1) requires consent "throughout every phase of the sexual activity". In my view, this is broader terminology than just the ultimate act of coitus, nothing else.

[71] As I see it, the concept of "sexual activity in question" embodied by **J.A.**'s direction requires an analysis of the evidence to identify the essential features of whatever phases of sexual activity occurred on the occasion that is the subject of the charge. In one case, the evidence may establish that the only essential feature was intercourse. In another, the essential features may encompass more. The feature must be a component of the sexual activity, and not an extraneous factor that merely affected motive to engage in the sexual activity. What is essential

would depend on what factors affected the complainant's subjective conditions, if any, for consent to that sexual activity. These are factual matters that will vary from case to case.

[72] I respectfully disagree that the "sexual activity in question" under s. 273.1(1) may be legally defined in advance as restricted only to the ultimate vaginal penetration, without regard to the evidence, in the particular case, respecting any other features of the sexual activity that were essential to the complainant's subjective consent. As noted, my view is consistent with Justice Goudge's approach in **R. v. Crangle**, *supra*, leave to appeal refused [2010], S.C.C.A. No. 300, ¶20 and ¶23, and with Justice Major's comments in **R. v. Ewanchuk**, *supra*, ¶26-27, that consent, or its absence, is subjective.

[73] It would be helpful therefore to apply that approach to the findings here. The judge said:

> ¶2 [N.C.] testified she and Mr. Hutchinson had sexual relations three to four times a week. They used condoms during sexual intercourse as birth control to prevent pregnancy. They did not use condoms during her menstrual period as it was her understanding she could not become pregnant while she was menstruating. They always used condoms during the time she could become pregnant. She would put the condoms on Mr. Hutchinson which he enjoyed.
>
> ...
>
> ¶29 ... [N.C.] consented to sexual intercourse with Mr. Hutchinson. Until [N.C.] had the positive result from the home pregnancy test on September 5, 2006, the consent was for sexual intercourse with contraception (condoms) except during her menstrual period each month. During her menstrual periods and after the positive result from the September 5, 2006 home pregnancy test, the consent was for unprotected sexual intercourse. Mr. Hutchinson knew [N.C.] did not want to become pregnant. [N.C.] used contraception (condoms) at times she believed she was at risk of becoming pregnant. Ms. did not consent to unprotected sexual intercourse with damaged condoms.
>
> ...
>
> ¶35 ... [N.C.] did not consent to unprotected sexual intercourse with damaged condoms.

...

> ¶44 There was no voluntary agreement of [N.C.] to the sexual activity in question, which was sexual intercourse without contraception.
>
> ...
>
> ¶47 Here Mr. Hutchinson intended to engage in sexual intercourse with [N.C.] using damaged condoms and he knew [N.C.] did not consent to sexual intercourse without contraception.

[74] The evidence supported these findings. The judge made no palpable and overriding error of fact.

[75] Given those findings, Mr. Hutchinson's wearing of an unsabotaged condom during intercourse was an essential feature of his sexual activity with N.C. N.C. did not consent, within s. 273.1(1), to sexual intercourse with perforated condoms.

[76] **Second:** My colleague frames the question as "which provision of the *Criminal Code* applies to determine the issue of consent" - s. 273.1(1) or s. 265(3)(c) - and concludes that s. 265(3)(c) is "the right home for cases like this". The assumptions appear to be that it is one or the other, and in cases of deception s. 265(3)(c) occupies the field, while s. 273.1(1) is interpreted to recede from view.

[77] I disagree with those assumptions. If there is no "agreement" to the "sexual activity in question" under s. 273.1(1), then there is no "consent" even if deception precipitated the consensual failure. The meaning of "sexual activity in question" does not ebb and flow, case to case, depending on whether or not there was deception. Had Mr. Hutchinson lied to N.C. about something other than the sexual activity in which they engaged - for instance about a background fact such as his age or income - then there would be consent under s. 273.1(1), though subject to vitiation by fraud under s. 265(3)(c) if there was a significant risk of serious bodily harm under **R. v. Cuerrier**, *supra*, ¶135. But Mr. Hutchinson chose a topic for his deception - wearing a condom during the act of intercourse - that was an essential feature of the sexual activity in question. That means he must deal

with both ss. 273.1(1) and 265(3)(c), and cannot cite his deception to jettison s. 273.1(1).

[78] **Third:** My colleague says that "s. 273.1(1) can be relied upon where the complainant's participation was *involuntary*, but there were no voluntariness issues in this case". With respect, this misses the point. Section 273.1(1) requires "voluntary agreement" to the sexual activity in question. The provision requires both voluntariness and agreement. N.C. acted voluntarily. But she did not "agree" to sexual activity with sabotaged condoms.

[79] **Fourth:** Justice Farrar says that "[i]t was only after the fact, when she realized that the appellant had destroyed the condoms, that she decided to change her mind and 'retroactively revoke' her consent". I do not share that view of the trial judge's finding. Before the sexual activity, N.C. made it clear that she was not consenting to unprotected sex. She did not "retroactively revoke" or "change her mind" later. She just learned later that the condition precedent to her consent, from the outset, had not existed.

[80] **Fifth:** My colleague cites the "slippery slope" of unwarranted or trivialized criminalization.

[81] In my opinion, this criticism underestimates the traction of s. 273.1(1). Nothing in my approach would criminalize the type of case posited by Justice Cory in **Cuerrier**, ¶134-5 - *e.g.,* where the accused lies about matters like age, employment or wealth. Those deceptions would not involve essential features of the "sexual activity in question". So they would not impugn consent under s. 273.1(1). Rather, they involve anterior facts outside the bedroom. The complainant's belief in those anterior facts may affect the complainant's motive to engage in the sexual activity. But those deceptions would only vitiate consent if there is fraud under s. 265.3(c), which involves a significant risk of serious bodily harm according to **Cuerrier** and **Mabior**.

[82] An absence of consent to an essential feature of the sexual activity, on the other hand, is precisely what s. 273.1(1) aims to criminalize. An un-tampered condom during the act of intercourse was an essential feature of the sexual activity here.

2. Risk of Serious Bodily Harm under s. 265(3)(c)

[83] At the same time, I agree with Justice Farrar's view that pregnancy could involve a significant risk of serious bodily harm to the mother, as s. 265(3)(c) was interpreted by Justice Cory in **Cuerrier**, ¶135, and by **Mabior**. The trial judge said (¶54) that it was not established beyond a reasonable doubt that Mr. Hutchinson's sabotage of the condoms caused Ms. C's pregnancy. The judge then said (¶57) that there was no evidence as to the frequency of "death of the mother" from pregnancy or abortion, and accordingly it was not established that Mr. Hutchinson's actions "caused a significant risk to her life" or "endangered Ms. C's life", under the definition of "aggravated sexual assault" in s. 273(1). A significant risk of serious "bodily harm" under **Cuerrier** is broader terminology than is endangerment to "life" under s. 273(1). The judge's finding of no significant risk to Ms. C's life does not resolve whether there was a significant risk of serious bodily harm from Mr. Hutchinson's sabotage of the condoms.

[84] If the disposition of Mr. Hutchinson's case were to rest with s. 265(3)(c), then a new trial would be needed because of that undetermined fact.

Appeal Against Sentence

[85] In appealing his sentence, Mr. Hutchinson says that the judge was wrong to reject his request for a community sentence. He explains in his factum:

> ¶29 At sentencing the Appellant argued the court should either suspend the passing of sentence and place Mr. Hutchinson on probation or impose a conditional sentence. By this time, his relationship with N.C. had been over for several years, he had been on some form of judicial interim release for approximately five years, he was in a stable relationship, and continued to be gainfully employed.
>
> ¶30 The Defense argued that this case should be distinguished from *R. v. G.A.L.* 2001 NSCA 29 (cited in at paragraphs 13, 14, and 21). The Learned Trial Judge rejected this argument, stating that this case was similar to someone who had sex with a sleeping complainant unbeknownst to her and against her will, as N.C. in this case had sex with damaged condoms, unbeknownst to her and without her consent.

¶31 Justice Coughlan stressed the importance of general deterrence, relying on *G.A.L*. He found that a conditional sentence is not consistent with the fundamental principles of sentencing in section 718 - 718.2. He stated that this case required a custodial sentence, that incarceration was the only suitable way to express society's condemnation of the conduct.

¶32 Justice Coughlan erred in his reliance on *G.A.L*., particularly when both *G.A.L.* and this case involve conduct that is unbeknownst to the complainant and without her consent. With respect, this is not correct. In G.A.L., the complainant was asleep, and had not consented to any sexual activity at all. In this case, the trial judge found that [N.C.] did consent to sexual intercourse, but not unprotected sexual intercourse. This is a fundamental distinction that differentiates the cases.

¶33 The Learned Trial Justice stated that a conditional sentence is not appropriate because this offense required a custodial sentence to fulfil the sentencing purposes of denunciation and deterrence. In doing so, trial judge failed to consider that a conditional sentence under section 742 is a custodial sentence, albeit one that is served in the community. As well, he failed to recognize that the Supreme Court of Canada in *R. v. Proulx* [2000] 1 SCR 61 found that a conditional sentence can provide significant denunciation and deterrence.

¶34 This was a critical error on the part of the trial judge. While it was within the discretion of a trial judge to deny a conditional sentence, in this case it is clear the trial judge did not even consider it to be an option and did not turn his mind to the possibility of such a sentence.

¶35 A conditional sentence was appropriate in this case. Mr. Hutchinson had no prior criminal record and had been employed for 22 years. There is no evidence to suggest that serving the sentence in the community would be a danger to the public or N.C. A conditional sentence would fulfil the requirements of denunciation and deterrence.

¶36 Justice Coughlan only considered the sentencing principles of denunciation and deterrence. He failed to consider section 718(d) and (e), which state:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

> ¶37 Rather than considering the less restrictive sanction, Justice Coughlan immediately moved to the most restrictive sanction. Rather than considering all available sanctions other than imprisonment, Justice Coughlan considered only imprisonment.
>
> ¶38 Under these circumstances, it is clear that the sentence imposed failed to recognize the passage of time, the absence of any threat to public safety posed by the Appellant, and unique circumstances of the conviction. Although denunciation and deterrence are important in domestic assaults of any kind, alternatives to prison cannot be casually brushed aside which, unfortunately, seems to have been the approach taken by the Learned Trial Judge.

[86] The appellants' reference (at ¶34) that the judge "did not even consider [a conditional sentence] to be an option and did not turn his mind to the possibility of such a sentence" is simply without merit. In fact, the judge carefully considered this option:

> ¶15 ... In 2006, s. 742.1 of the *Criminal Code* provided:
>
> > 742.1 Imposing of conditional sentence -- Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
> >
> > (a) imposes a sentence of imprisonment of less than two years, and
> >
> > (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,
> >
> > the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.
>
> ¶16 In this case, the offence is not punishable by a minimum term of imprisonment.

¶17 The *Criminal Code* provides the offence has a maximum sentence of ten years imprisonment, but no minimum.

¶18 I am also satisfied, given the facts of the offence and Mr. Hutchinson, that an appropriate sentence would be less than two years.

¶19 Would a conditional sentence be consistent with the fundamental purpose and principles of sentencing?

¶20 Here, Mr. Hutchinson, while in an intimate personal relationship with Ms. C., had sexual intercourse with her using damaged condoms. He was fully aware Ms. C. did not wish to engage in unprotected sexual intercourse with him during times she thought she could become pregnant. Considering the nature of the assault, general deterrence has to be stressed.

¶21 In dealing with a sentence appeal for sexual assault, Hallett, J.A., in giving the Court's judgment in *R. v. G.A.L., supra*, stated at paras. 60 and 61:

> He (referring to Judge Embree) quoted from the decision of *R. v. G. (T.V.)* (1994), 31 C.R. (4th) 321 where Justice Bateman stated at p. 323:
>
> > In *R. v. M.(G.)*, a decision of the Ontario Court of Appeal dated November 2nd, 1992, [reported at 77 C.C.C. (3d) 310], Justice Abella, writing for the court, explains the role of denunciation in sentencing sexual offenders. She says [at page 131]:
> >
> > > The public can logically be expected to infer from the nature of the sentence the extent to which a court views as serious, certain conduct by a given individual ... Sentences which appear on their face to be exceptionally lenient in the circumstances can be presumed to generate neither deterrence nor denunciation.
>
> Judge Embree stated:
>
> It is clear when sentencing for crimes of sexual assault, the Court has to place particular emphasis on deterrence, both specific and general. General deterrence in particular has to be stressed. [Emphasis added]

> ¶22 Under all of the circumstances of this matter, a conditional sentence here is not consistent with the fundamental purpose and principles of sentencing as set out in s. 718 to 718.2 of the *Criminal Code.*
>
> ¶23 This case requires a custodial sentence. Incarceration is the only suitable way to express society's condemnation of Mr. Hutchinson's conduct.

[87] Therefore, the appellants' submission essentially boils down to no more than an invitation for us to usurp the discretion of the sentencing judge by imposing what we would consider appropriate. However, that is not our role. Instead, we must defer to the discretion of the sentencing judge who has seen the witnesses and heard the evidence. In other words, it was for him to decide whether the sentence should have been served in jail or in the community. Lamer, C.J. in **R. v. Proulx**, [2000] S.C.J. No. 6 explains:

> ¶77 Once the sentencing judge has found the offender guilty of an offence for which there is no minimum term of imprisonment, has rejected both a probationary sentence and a penitentiary term as inappropriate, and is satisfied that the offender would not endanger the community, the judge must then consider whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.
>
> ¶78 A consideration of the principles set out in ss. 718 to 718.2 will determine whether the offender should serve his or her sentence in the community or in jail. The sentencing principles also inform the determination of the duration of these sentences and, if a conditional sentence, the nature of the conditions to be imposed.
>
> . . .
>
> ¶123 In recent years, this Court has repeatedly stated that the sentence imposed by a trial court is entitled to considerable deference from appellate courts: see Shropshire, supra, at paras. 46-50; *M. (C.A.)*, *supra*, at paras. 89-94; *McDonnell*, *supra*, at paras. 15-17 (majority); *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at paras. 18-19. In *M. (C.A.)*, at para. 90, I wrote:
>
> > Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a

> discretion to determine the appropriate degree and kind of punishment under the *Criminal Code.* [Emphasis in original.]

[88] Here, the judge exercised his discretion by ordering an 18-month jail term. In doing so, he neither erred in principle nor issued a disposition that was demonstrably unfit.

DISPOSITION

[89] I would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:
Oland, J.A.
Hamilton, J.A.
Fichaud, J.A.

Dissenting Reasons:

[90] I have had the benefit of reading, in draft, the reasons of the majority penned by Chief Justice Michael MacDonald. With respect, I am unable to agree with his analysis and the disposition of this appeal.

[91] The Chief Justice has reviewed the facts that led to the appellant's conviction. I need not repeat them here other than to say that the appellant was convicted of sexual assault under s. 271 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Mr. Hutchinson surreptitiously poked holes in the condoms he used when he and N.C. engaged in sexual intercourse. She eventually became pregnant and had an abortion. The trial judge found that N.C. "did not consent to unprotected sexual intercourse with damaged condoms" (**R. v. Hutchinson**, 2011NSSC 361, ¶35).

[92] The question on this appeal is which provision of the **Criminal Code** applies to determine the issue of consent: s. 273.1(1) which contains the definition of consent for sexual assaults; or s. 265(3)(c) which applies to all assaults where consent is vitiated by fraud. Chief Justice MacDonald says the appropriate provision is s. 273.1(1) finding that the victim must be fully aware of the exact nature of the proposed sexual activity in order for there to be consent. (*infra*, ¶28) In this case he found the proposed sexual activity was protected sex. This is where we part company. In my view, s. 265(3)(c) is the right home for cases like this. This is not a case where there was a lack of consent to the sexual activity. The issue is whether the consent was vitiated by fraud. In my view, the trial judge's application of s. 273.1(1) to the facts of this case was in error. I would allow the appeal and order a new trial.

Analysis

1. Proving there was no consent: s. 273.1(1) v. s. 265(3)(c)

i. <u>A Review of the Provisions</u>

[93] Sections 273.1 and 273.2 provide:

Meaning of "consent"

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Where no consent obtained

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(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.

Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

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.

Sections 273.1 and 273.2 apply exclusively to sexual assaults. Section 265(3), however, applies to all assaults. It states:

Assault

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, 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.
(Emphasis added)

ii. Defining consent

[94] There isn't one simple meaning for "consent." As Lord Justice Dunn said in **R. v. Olugboja**, [1981] 3 W.L.R. 585 at 592 (C.A.):

> Although 'consent' is an equally common word it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. ...

Alan W. Bryant, in his article "The Issue of Consent in the Crime of Sexual Assault"(1989), 68 Can. Bar Rev. 94 at 105 says, "Consent is best described by examining the factors which negate its existence."

[95] Figuring out whether consent was negated involves normative considerations about the types of conduct we want to criminalize. Alan Wertheimer in his article "What is Consent? and Is It Important?" (1999-2000) 3 Buff. Crim. L. Rev. 557 at 561-62 argues:

> It is a mistake to think that we can resolve the moral and legal issues in which we are interested by an analysis of the "meaning" of consent. No analysis of the meaning of consent will enable us to say, for example, whether A's conduct should be illegal in the variety of cases of extortion and deception that Professor Bryden discusses. We can say, for example, that A commits a criminal offense if he "fails to obtain *meaningful* consent, and continues to engage in sexual activity," or that B's consent must be "voluntary" or "competent," but then we seem to need to know when consent is "meaningful," "voluntary," or "competent." In the final analysis, we have to determine whether the balance of relevant moral reasons are such that A's conduct is impermissible.

[96] He states further: "the question is not whether consent is 'valid' or 'meaningful' or 'genuine' on some absolute scale or by reference to some ideal, but whether the quality of consent is 'valid enough for the behavior to which consent is given to be legitimate' in light of the moral considerations that pull us both ways." (*Ibid.* p. 565)

[97] The competing moral considerations involved in defining consent in this case pull us in different directions. On the one hand are concerns about criminalization, and whether the appellant's conduct, however morally reprehensible and deceptive, deserves the sanction of the criminal law. On the other hand are concerns about the complainant's sexual autonomy and bodily integrity, and her right to reject conduct that does not comport with her expectations.

[98] In my view, s. 265(3)(c) provides the appropriate balance between these competing concerns: it protects accused persons against over-criminalization, and also protects the sexual autonomy of complainants.

[99] Keeping these theoretical perspectives in mind, I will now turn to the mechanics of proving the absence of consent under the **Criminal Code**.

iii. **The lack of consent as part of the *actus reus* and *mens rea***

[100] In **R. v. Ewanchuk**, [1999] 1 S.C.R. 330, the Supreme Court explained the *actus reus* of sexual assault:

> The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. ... (¶ 25)

[101] The Court in **Ewanchuk** explained further:

> The first two of these elements are objective . . .
>
> The absence of consent, however, is *subjective* and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred. (¶ 25-26)

[102] Justice L'Heureux-Dubé's description from **R. v. Park**, [1995] 2 S.C.R. 836 is also helpful:

> . . . consent is, itself, a mental state experienced only by the complainant. ... (¶16)

If the complainant said "no" then in her mind there was no consent in law.

[103] The subjective test for the lack of consent is based on sound policy reasons, again, referring to **Ewanchuk**:

> ... Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal. (¶28)

[104] The lack of consent is also relevant to the *mens rea* for sexual assault, which "contains two elements: 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." Consent in the *mens rea* context "is considered from the perspective of the accused." (**Ewanchuk**, ¶42, 45)

[105] It makes sense, then, that an accused's honest but mistaken belief in consent would come into play at the *mens rea* stage, in an appropriate case: “For the purposes of the *mens rea* analysis, the question is whether the accused believed that ... the complainant effectively said “yes” through her words and/or actions.” (**Ewanchuk**, ¶47)

[106] Hamish Stewart in his article “When Does Fraud Vitiate Consent? A Comment on **R. v. Williams**”, (2004) 49 Crim. L.Q. 144 summarizes:

> While consent for *actus reus* purposes is a purely subjective event in the mind of the complainant, consent for *mens rea* purposes is an event that the accused can, and should, observe." (p. 147)

[107] The debate between s. 273.1(1) and s. 265(3)(c) in this case is a debate about the lack of consent as an element of the *actus reus*, and which provision the Crown should properly use to prove that element. The trial judge's conclusion on *mens rea* is not in issue on this appeal. The trial judge found:

> Here Mr. Hutchinson intended to engage in sexual intercourse with [N.C.] using damaged condoms and he knew [N.C.] did not consent to sexual intercourse without contraception. (¶ 47)

[108] Morris Manning, Q.C. and Peter Sankoff, in their text *Manning, Mewett and Sankoff: Criminal Law*, 4th ed. (Markham, Ont.: LexisNexis Canada, 2009) outline the three main ways the Crown could prove the absence of consent:

> (1) that no consent was provided by the recipient; (2) that consent in the circumstances was not possible as a matter of law; or (3) that the consent was not validly provided, in that it was vitiated by some action of the accused. (p. 804)

[109] The choice in this case is between the first option, whether no consent was provided at all (the Crown's s. 273.1(1) argument), and the third category, whether consent was not *validly* provided because it was vitiated by fraud (the appellant's s. 265(3)(c) argument).

iv. Overlap between the provisions

[110] Sections 265 and 273.1 must be read together. The former acts as a general 'umbrella' provision for all kinds of assault, while s. 273.1 is a more particularized provision applicable only to sexual assaults. There is explicit overlap and cross-referencing between s. 273.1 and s. 265: s. 273.1(1) makes that section subject to s. 265(3), and s. 265(2) makes that section applicable to "all forms of assault, including sexual assault."

[111] It is easy to say that we should not get bogged down in trying to slot the lack of consent into either s. 265(3)(c) or s. 273.1(1), because the end result is the

same: the complainant did not subjectively consent, and as long as the accused had the requisite *mens rea* he will be found guilty of sexual assault.

[112] Steve Coughlan in his Annotation of *R. v. Hutchinson*, 2010 CarswellNS 17 (WL) comments on Justice Beveridge's concern in **Hutchinson #1** that allowing this type of fraud to mean there is no consent would render the vitiation of consent analysis redundant as follows:

> One of Justice Beveridge's concerns with allowing this type of fraud to mean that there is no consent is that it would render the "vitiation of consent" analysis redundant. If fraud about circumstances beyond the physical nature of the act meant there was no consent, then one would never reach a vitiation analysis: the kind of deception that led to a finding of vitiation would already have led to the result that there was no consent. However, it is not obvious that this is really a terribly concerning result. To ask whether consent has been vitiated amounts, much of the time, to asking whether something that looked like consent was "really" consent. It is, most of the time, simply another way of asking whether there genuinely was consent in all the circumstances. That one should arrive at the same result by two methods of analysis should be encouraging, not a cause for concern.

[113] The argument may be about two different routes to arrive at the same destination: the complainant did not consent, whether there was no consent "*ab initio*" or whether there was consent vitiated by fraud.

[114] However, with respect, even though the end result is the same-no consent-there remains a conceptual distinction between the two. Consent that is **void *ab initio*** never existed in the first place: it was "[n]ull from the beginning, as from the first moment when a contract is entered into." (*Black's Law Dictionary*, 9th ed., 2009 at p. 1709). Consent is **vitiated** where it appeared to exist from the beginning, but something happened later that retroactively erased it. *Black's Law Dictionary* defines "vitiate" this way: "To impair; to cause to have no force or effect . . . To make void or voidable; to invalidate either completely or in part." (p. 1708).

[115] The complainant agreed to have sexual intercourse with the appellant, but when she found out later that the condoms were ruined she retroactively removed

the consent that had existed in her mind at the time. In my view, it is artificial to pretend that consent to sexual intercourse never existed in the first place.

[116] I will now turn to where I consider the trial judge to have fallen in error in relying on s. 273.1(1) in finding there was no consent.

2. SECTION 273.1: "voluntary agreement to the sexual activity in question"

[117] I will repeat s. 273.1(1) for convenience:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, **the voluntary agreement of the complainant to engage in the sexual activity in question**.
> (Emphasis added)

[118] The trial judge relied on this definition to find that the complainant did not consent to having unprotected sex with the appellant:

> There was no voluntary agreement of [N.C.] to the sexual activity in question, which was sexual intercourse without contraception.
>
> Therefore, the *actus reus* of sexual assault has been established. (¶44-45)

[119] The Crown supports the trial judge's analysis and asks this Court to adopt it, and also relies on Justice Roscoe's decision in Hutchinson #1 and the Supreme Court's decision in **R. v. J.A.**, 2011 SCC 28. They put it this way in their factum:

> The finding of the trial judge in the case at Bar that N.C. had simply not consented to unprotected sexual intercourse making the Appellant guilty of sexual assault conforms with Justice Roscoe's ruling in **Hutchinson** (2010) and the reasoning of the Supreme Court of Canada in **J.A.**
>
> The trial judge in the case at Bar was correct in deciding that N.C. had simply not consented to unprotected sexual intercourse. The trial judge did not have to conclude that N.C. had consented to sexual intercourse but that the consent was vitiated by the fraud of the Appellant. (Respondent's factum, ¶10-11)

[120] The Crown argues that consent under s. 273.1(1) requires awareness of the "core" elements of the sexual activity, which would include contraception or the lack thereof. The Crown's position is that the complainant must have knowledge of the "significant relevant factors" before she can give valid consent to the sexual activity. Consent must always be *informed*.

[121] I disagree with the Crown's position and the majority decision for four reasons: **First**, the meaning of "sexual activity" in s. 273.1(1) simply refers to the physical sex act and not to the conditions or quality of that act. **Second**, this case is not like **J.A.** **Third**, s. 273.1(1) can be relied on where the complainant's participation was *involuntary*, but there were no voluntariness issues in this case. **Fourth**, confining cases like this to the fraud analysis under s. 265(3)(c) addresses the 'slippery slope' concerns about over-criminalization that exist in the sexual assault arena. I will elaborate further on each of these.

i. **"Sexual activity" is purely physical**

Beveridge, J.A.'s dissent in **Hutchinson #1** concluded that s. 273.1(1) does not support a broader definition of "sexual activity". He set out the detailed legislative history of s. 273.1(1) (see ¶26, **supra**). I will not repeat his reasons other than to quote his conclusions:

> [109] Nothing in the language of the provision, evolution or legislative history would permit such an interpretation. In my opinion, the plain ordinary meaning of the words do not reveal any suggestion that Parliament intended the definition of consent in s. 273.1 to take on a far broader requirement equating or even approaching the concept in tort law of "informed" consent. If it intended to do so, it had every opportunity. Instead, Parliament chose straight-forward language that only speaks of a voluntary agreement to engage in the sexual activity in question.
>
> [110] The ordinary meaning of sexual activity in question is simply the touching, oral or otherwise, or type of intercourse as being the sexual activity in question. This ordinary natural meaning is reinforced by the general thrust of s. 276 that prior sexual activity is generally not relevant on the issue whether the complainant consented to the activity that forms the subject matter of the charge. In other words, simply because a complainant has consented to intimate touching does not mean that she has consented to more or different types of sexual activity. Consent to one activity does not mean that he or she has consented to some other activity.

[123] I agree with the reasons of Beveridge, J.A. The ordinary meaning of the words do not lend themselves to the concept of informed consent as suggested by the majority.

(a) ***The case law has given "sexual activity" a narrow meaning***

[124] The **Criminal Code** does not define "sexual activity," but the phrase appears in multiple provisions in Part V. It has a more restricted meaning in other contexts and there is no reason why a restricted meaning should not apply to s. 273.1(1) as well.

[125] McLachlin, C.J. examined the meaning of "sexual activity" in **R. v. Sharpe**, 2001 SCC 2 in the context of "explicit sexual activity" as part of the definition of child pornography in s. 163.1(1)(a)(i) of the **Code**. She explained:

> .. Sexual activity spans a large spectrum, ranging from the flirtatious glance at one end, through touching of body parts incidentally related to sex, like hair, lips and breasts, to sexual intercourse and touching of the genitals and the anal region.... (¶44)

This is a purely physical, somewhat mechanical definition.

[126] Similarly, the case law on s. 276 also indicates that "sexual activity" should be given a narrow, more mechanical meaning. Section 276 governs the admissibility of "evidence that the complainant has engaged in *sexual activity other than the sexual activity that forms the subject-matter of the charge*." Section 276(2)(a) stipulates that the evidence must be "of specific instances of sexual activity."

[127] In this context, as in **Sharpe**, "sexual activity" and "specific instances of sexual activity" logically refer to actual incidents of physical touching, whether oral sex, or intercourse, or another 'category' of activity, and not to the *conditions* of that touching. The presumption of consistent expression support the conclusion that "sexual activity" in s. 273.1 should likewise be limited to physical acts:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham:LexisNexis Canada, 2008) 214-215)

[128] This interpretation also makes practical sense. It ensures that consent to kissing or touching cannot be taken to mean consent to sexual intercourse; consent doesn't carry through 'foreplay' to cover all other activities that could conceivably ensue. As Beveridge, J.A. pointed out in **Hutchinson #1**:

> ... simply because a complainant has consented to intimate touching does not mean that she has consented to more or different types of sexual activity. Consent to one activity does not mean that he or she has consented to some other activity (¶110)

[129] Justice Beveridge continued:

> This interpretation is also reinforced by the balance of s. 273.1. Section 273.1(2) sets out five circumstances where consent cannot be obtained. Of note is para. (d) that no consent is obtained where the complainant expresses by words or conduct a lack of agreement to engage in the activity; and (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. Together with s. 273.1(1), no means no and yes to one activity does not mean yes to a different one. (¶111)
> (Emphasis added)

[130] This meaning accords with the policy concerns behind the enactment of s. 273.1 and related provisions:

> ... the consent provisions were intended to protect women from sexual violence and to protect and enhance their freedom to choose *when*, and *with whom*, they will engage in *sexual relations of their choice*. (**J.A., supra**, Fish, J. in dissent, ¶110)
> (Emphasis added)

That worthwhile goal will still be achieved if "sexual activity" is given a narrow meaning: it still protects a woman's ability to make decisions about the timing and variety of the sexual act(s) she chooses to engage in, and about the partner with whom it happens.

ii. <u>This case is not like *R. v. J.A.*</u>

[131] The majority relies on the Supreme Court's decision in **J.A., supra**, where the Court reviewed the definition of consent in s. 273.1(1) to determine whether the complainant could consent in advance to sexual activity that occurred while she was unconscious. The relevant evidence in **J.A.** was as follows:

> ... She testified that she consented to J.A. choking her, and understood that she might lose consciousness. She stated that she and J.A. had experimented with erotic asphyxiation, and that she had lost consciousness before.
>
> When K.D. regained consciousness, she was on her knees at the edge of the bed with her hands tied behind her back, and J.A. was inserting a dildo into her anus. ... (¶5-6)

[132] The accused was convicted of sexual assault at trial, but the Court of Appeal overturned his conviction. The Supreme Court allowed the Crown's appeal and restored the accused's conviction for sexual assault.

[133] McLachlin, C.J. for a majority of the Supreme Court considered s. 273.1(1) and held:

> The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*. (¶66)

[134] To get around the fundamental difference between **JA** and **Hutchinson** (the complainant's unconsciousness in **J.A.)** the Crown draws an interesting analogy:

> ... N.C. could not provide actual active consent throughout every phase of the sexual activity in which she engaged with the Appellant. She was effectively

> 'unconscious' to the surreptitious acts of the Appellant which fundamentally altered the nature of the sexual activity. (Respondent's factum, ¶12)

[135] With respect, this analogy stretches **J.A.** too far. The only question at issue in **J.A.** was:

> As a matter of law can a person consent in advance to sexual activity expected to occur when the person is either unconscious or asleep? (**J.A.**, ¶84)

[136] Chief Justice McLachlin's reasons must be read in that context, and applied carefully to cases that are not about (un)consciousness.

[137] For example, Chief Justice McLachlin's treatment of the definition of "sexual activity in question" was inextricably linked to the question of whether consent could carry through unconsciousness:

> Consent for the purposes of sexual assault is defined in s. 273.1(1) as "the voluntary agreement of the complainant to engage in the sexual activity in question". This 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. As discussed below, this Court has also interpreted this provision as requiring the complainant to consent to the activity "at the time it occur[s]" (***Ewanchuk***, at para. 26). (**J.A.**, ¶34, emphasis in original)

[138] In my view, McLachlin, C.J.'s use of the phrase "each and every sexual act" supports the argument that "sexual activity in question" in s. 273.1(1) refers to the exact physical label for the type of sexual touching involved and not the qualitative conditions of that touching.

[139] Section 273.1(2)(b) provides that no consent is obtained where "the complainant is incapable of consenting to the activity." An unconscious complainant cannot consent to the particular sexual touching at the time it occurs, which is why unconscious 'consent' does not meet the definition of consent in s. 273.1(1). The complainant in **J.A.** was not legally able to provide consent from the beginning of the sexual activity in question because, due to her unconsciousness, she did not have the mental capacity – the operating mind-required to do so.

[140] An unconscious complainant is different from a conscious complainant in this respect. There is no question that the complainant in our case was conscious and had an "operating mind" while the sexual acts were occurring, unlike the complainant in **J.A.** She agreed to the particular sexual touching at the time it occurred. It was only much later, *after* the appellant confessed what he had done to the condoms, that she 'revoked' that consent.

[141] In a case like **J.A.**, the complainant is not aware of the sexual experience because she is unconscious, but in this case, the complainant was awake and aware of the actual activity as it happened.

[142] Nothing in **J.A.** requires this Court to adopt an "informed consent" approach to s. 273.1(1).

(b) The appropriate provision may depend on the timing of the complainant's decision not to consent

[143] The timing of the complainant's non-consent may help determine which cases fall within s. 273.1(1) (the "no consent *ab initio*" category) and which cases fall within s. 265(3)(c) (the "consent vitiated by fraud" category). When did the complainant say "no" in her mind: ***before or during*** the sexual activity, or ***after*** the sexual activity? If it was before or during the activity, that may indicate that there was no consent from the beginning, and that the analysis should be conducted under s. 273.1(1).

[144] But if the complainant's state of mind didn't switch from "consent" to "no consent" until after the fact (as in **R. v. Cuerrier**, [1998] 2 S.C.R. 371 and **Mabior**, 2012 SCC 47 regarding the discovery of the accused's HIV status, and as in **Hutchinson** regarding the discovery of the holes poked in the condoms), then the analysis should remain under s. 265(3)(c):

> It was only after the sexual activity that she learned the Appellant withheld information that would have caused her to withhold her consent. Like any fraud, the person who has been duped only learns of his or her mistake until after the fact. (Appellant's factum, ¶18, emphasis in original)

There was consent before and during the sexual activity, but it was later called into question.

[145] Major, J.A.'s reasons in **Ewanchuk, supra**, supports this approach. He said that the absence of consent, as part of the *actus reus* of sexual assault, "is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, *at the time it occurred*." (¶261) At the time of the sexual activity in that case, the complainant's state of mind was one of no consent; she did not want the sexual touching in question to occur.

[146] As Chief Justice McLachlin held in **J.A.**, "The trier of fact must determine what was going on in the mind of the complainant in response to the touching." (¶45, my emphasis)

[147] The English Court of Appeal's proposed jury direction on this issue in **Olugboja, supra**, was similar:

> They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind. (p. 596, emphasis added)

[148] It may appear that **J.A.** is a bit of an anomaly when it comes to the timing of non-consent: the complainant did not say no in her mind until after the sexual activity, when she discovered what happened while she was unconscious. But because she was unconscious, she effectively had no state of mind at all:

> ... When the complainant loses consciousness, she loses the ability to either oppose or consent to the sexual activity that occurs. Finding that such a person is consenting would effectively negate the right of the complainant to change her mind at any point in the sexual encounter. (¶53)

[149] As Chief Justice McLachlin held:

> . . .the absence of consent is established if the complainant was not experiencing the state of mind of consent while the sexual activity was occurring.

> The only relevant period of time for the complainant's consent is while the touching is occurring: *Ewanchuk*, at para. 26. The complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the time but later changes her mind (absent grounds for vitiating consent). Conversely, the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact. (¶45-46)

[150] I agree that s. 273.1(1) was the applicable provision for the Crown to prove no consent in **J.A.** because the complainant was not experiencing the state of mind of consent while the sexual activity was occurring. In this case, however, the complainant "consent[ed] at the time but later change[d] her mind." There may have been grounds for vitiating consent, so an offence could occur pursuant to s. 265(3)(c). I will address that issue later in these reasons.

[151] The complainant's subjective state of mind vis-à-vis the activity did not go from "yes" to "no" until afterwards, which moves the analysis out of s. 273.1(1).

[152] The only way the complainant's "yes" could equate to a "no" in law would be under one of the circumstances in s. 265(3) - in this case, fraud.

3. There was "voluntary agreement" to the sexual activity

[153] Section 273.1(1) requires a "voluntary agreement" to the sexual activity.

[154] The lack of consent in **J.A.** was not decided on the basis that the complainant did not voluntarily agree to engage in the sexual activity in question because she was unconscious. However, I suggest that is one way of looking at the case, and differentiating it from this case. Voluntary action requires a measure of conscious control and will. The complainant in **J.A.** could not voluntarily participate in the sexual activity because she was unconscious and therefore lacked that conscious control. (See **R. v. Stone**, [1999] 2 S.C.R. 290 ¶40 and **R. v. Ruzic**, 2001 SCC 24 ¶42).

[155] In what kinds of other cases could the voluntariness issue arise in order for s. 273.1(1) to be available as a way for the Crown to prove no consent? This depends on how broadly "voluntary" is defined. The Supreme Court considered this issue in **Ruzic, supra** (in the context of a constitutional challenge to the

defence of duress, where the issue was the voluntariness of the accused's actions and not the victim's).

[156] Despite the different context, **Ruzic** is helpful for its expansive definition of voluntariness: even where the actor retains conscious control over her bodily movements, her conduct may still be involuntary if her will is overborne, this time by the threats of another. Her conduct is not, in a realistic way, freely chosen. (**Ruzic**, **supra**, ¶44) I will now return to the sexual assault context with this view of voluntariness in mind.

[157] **Extortion** is one example of conduct by the accused that may render the complainant's agreement to participate in the sexual activity involuntary, if her "will was overborne" and her conduct not "freely chosen." This was the situation in **R. v. D.S.** (2004), 188 C.C.C. (3d) 514 (Ont. C.A.). The accused in **D.S.** threatened to publicize sexual photos of his ex-girlfriend unless she had sex with him. The trial judge acquitted him on two counts of sexual assault, and the Crown appealed.

[158] The Court of Appeal allowed the appeal and entered convictions on the two sexual assault charges, concluding that there was no consent to the sexual activity within the meaning of s. 273.1(1):

> ... The respondent's conduct in threatening to disseminate the photographs unless M.O. had sex with him amounted to extortion as defined in s. 346(1) of the *Criminal Code*. M.O.'s participation in the sexual acts in question was the direct result and the intended consequence of this extortionate conduct. On the facts, it cannot be said that M.O. voluntarily agreed to sexual activity with the respondent.(**D.S.**, ¶8, emphasis added)

It did not matter that the respondent was not charged with extortion:

> ... The fact that he was not charged with extortion or attempted extortion is irrelevant to the issue of whether his extortionate conduct, which would have supported a separate charge of extortion, also precluded voluntary consent by M.O. to the sexual activity demanded by the respondent, so as to make out the offences of sexual assault with which the respondent was actually charged. ... (**D.S.**, ¶57)

[159] Justice Cronk in **D.S.** took a two-step approach to the consent issue: first, was there consent at all under s. 273.1(1)? If so, was the consent vitiated? She stated:

> The main issues on appeal are whether M.O. consented to the sexual acts in question and, if so, whether the respondent's threats to disseminate the nude photographs vitiated her consent under s. 273.1(2)(c) or s. 273.1(3). (¶3)

[160] According to Cronk, J.A. whether the complainant consented at all is a "threshold question," which the trial judge had failed to consider. Confirming her two-step approach, she explained:

> ... Unless M.O.'s sexual activity with the respondent was consensual, the necessity of a s. 273.1(2)(c) analysis did not arise. Expressed somewhat differently, resort to s. 273.1(2)(c) was only required in this case if the trial judge found that M.O. had consented. ... (¶47)

[161] If there was no voluntary agreement, then there was no consent - and no need to consider the vitiation issue. On the facts of **D.S.**, Justice Cronk did not get to the vitiation stage because she found that there was no consent pursuant to the definition in s. 273.1(1) (no consent "*ab initio*", to use the Crown's phrase in this case):

> ... Her alleged consent to sexual activity was not genuine and freely given. Accordingly, it was no consent at all within the meaning of s. 273.1(1) of the **Criminal Code**. (¶57)

[162] The subjective state of mind of the complainant in **D.S.**, *at the time the activity was occurring*, was determinative:

> ... She did not wish the sexual touching to occur, and no actual consent to the touching was ever given. (¶49)

She was coerced from the beginning into the sexual activity and was not a voluntary participant:

> By his threats, he induced M.O. to accede to his demands for sex, thus interfering with her freedom of choice and coercing her into doing something that she clearly testified she would otherwise have chosen not to do.

> M.O. did not believe that the choice to decline participation in sexual intercourse with the respondent was available to her in the circumstances. It cannot be said, therefore, that she was knowledgeable about her options in the face of the respondent's admitted blackmail and that, being aware of her choices, she voluntarily agreed to sexual activity with the respondent. (¶53-54)

[163] Janine Benedet and Isabel Grant, in their article "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief" (2007), 52 McGill L.J. 243 discussed **D.S.**:

> A woman who does not want the sexual activity to take place, but who believes that she has no choice but to participate, is not consenting voluntarily. Believing that one is unable to refuse is not the same as wanting the sexual activity to take place. (p. 284)

[164] **D.S.** supports the conclusion that the distinction between s. 273.1 and s. 265 comes down to the timing of the complainant's subjective determination that she was not consenting. In **D.S.**, she subjectively determined before the sexual activity took place that she did not want it to happen and only went along with it because the accused blackmailed her.

[165] In this case, however, there was nothing at the time the sexual activity occurred that rendered the complainant's agreement to participate involuntary. There were no obvious threats or coercion inducing the complainant to have sex with the appellant. At the time, her state of mind was one of voluntary agreement to have sexual intercourse with the appellant - a state of mind of consent, at least within the terms of s. 273.1(1).

[166] It was only after the fact, when she realized that the appellant had destroyed the condoms, that she decided to change her mind and 'retroactively revoke' her consent. This is the type of situation that s. 265(3)(c) is intended to address: the complainant voluntarily has sex and only later subjectively decides that she would not have consented if she had known about the accused's fraudulent conduct at the time.

[167] Cronk, J.A. used this idea to distinguish **D.S.** from **Cuerrier**:

> . . . in *Cuerrier*, the complainants initially consented to sexual activity. Unlike this case, neither complainant in *Cuerrier* claimed that they had no choice regarding participation in sexual acts with the accused, or that their participation was coerced. The issue in Cuerrier was consensual sexual activity that would not constitute assault, were it not for the effect of fraud. It was only because the complainants' consent in that case was obtained by fraud that it was vitiated: see *Cuerrier* at para 132. That is not this case. (¶59, emphasis added)

[168] Justice Cronk's description of **Cuerrier** also accurately describes this case: the complainant initially consented to have sex with the appellant; she was not coerced. Were it not for the effect of the appellant's fraudulent tampering with the condoms, their sexual activity would not have constituted assault.

[169] The analytical distinction is a chronological one about the timing of the complainant's lack of consent. The end result may be the same. Both routes of finding that no consent existed with respect the complainant's sexual choices, even though the timing of those choices may differ and, therefore, determine which provision applies.

4. Staying within s. 265(3)(c) helps minimize 'slippery slope' concerns

[170] The majority's reasons on s. 273.1(1) have the potential for increased, and potentially unwarranted, criminalization. If unawareness about the effectiveness of contraception is considered such a core part of the sexual activity in question, then anyone who lies about birth control could be found guilty of sexual assault, like a woman who lies about being on the pill because she wants to get pregnant. The Crown conceded this point in oral argument. Recent reforms to sexual assault law have focussed so much on protecting women's sexual autonomy that expanding criminal liability in this way would represent a dramatic step backwards.

[171] Justice Beveridge stated in **Hutchinson #1**:

> ... In my opinion, the evidence was clear, the complainant voluntarily agreed to the sexual activity in question, which was sexual intercourse. It would be an error in law to instruct a jury that they could consider that the sexual activity in question meant sexual intercourse with an intact condom. The consequences of the interpretation suggested by my colleague would lead to complaints and prosecution of individuals of either sex who lie to their spouse or partner about taking effective contraceptives - a result surely not intended by Parliament. (¶128)

[172] Professor Coughlan says that Justice Beveridge's prediction about increased prosecutions "seems correct and is quite worrying":

> Assume that "consent to sex with contraception" does not amount to "consent to sex without contraception" and consider the following conversation:
>
> > He: "Are you on the pill?"
> >
> > She: "Yes."
>
> If that couple then have sexual intercourse and she is in fact not on the pill, then she is guilty of sexual assault. That seems surprising, and indeed wrong, but seems to follow from Justice Roscoe's approach. This does suggest that her approach to absence of consent is broader than it ought to be. (Coughlan, **supra**, emphasis added)

[173] If consent can mean "consent to sex with contraception," how far does that go? Could one form of contraception (a diaphragm, for example) be substituted for the agreed-upon form of contraception (like the pill)? Or would that constitute sexual assault?

[174] An expanded concept of "consent" could also result in a proliferation of prosecutions arising from so-called one-night stands, where the parties voluntarily agree to participate in the act itself but the rest of the details may be overlooked or murky.

[175] **Ewanchuk, supra**, requires consent to be assessed subjectively, but treating consent as informed consent could result in more criminal liability, because the complainant would exclusively get to decide the significance of the factors she would want to inform her consent for it to be legally valid. Letting the complainant define what elements form the "core" of sexual activity would override the limits on criminalization from **Cuerrier**, whereas having objective elements (like those in the **Cuerrier** test) "would eliminate the possibility of convicting where the complainant's reaction to the fraudulent conduct is particularly idiosyncratic or unusual." (Manning & Sankoff, **supra**, p. 879)

[176] It is unclear where we would draw the line regarding which factors are sufficiently relevant to make consent count, without borrowing from the **Cuerrier** approach (as modified by **Mabior** which I will discuss later in these reasons) to such an extent that s. 265(3)(c) would be rendered redundant for sexual assaults: any fraud would prevent consent from being reasonably informed. The appellant made the same point in oral argument: expanding the meaning of consent under s. 273.1(1) to include awareness of relevant factors about the sexual activity would be "just another way of saying there was fraud."

[177] The framework of s. 265(3)(c) and **Cuerrier** helps ensure that the approach to consent where deception is involved and strikes the appropriate balance to ensure that the only conduct truly deserving of the criminal sanction is criminalized, as **Cuerrier** intended. In particular, **Cuerrier**'s requirement that the deception caused a significant risk of serious bodily harm helps limit the scope of criminalization.

[178] Chief Justice McLachlin makes this point in **Mabior** when she confirms that the **Cuerrier** approach is valid:

> While it may be difficult to apply, the *Cuerrier* approach is in principle valid. It carves out an appropriate area for the criminal law — one restricted to "significant risk of serious bodily harm". It reflects the Charter values of autonomy, liberty and equality, and the evolution of the common law, appropriately excluding the Clarence line of authority. The test's approach to consent accepts the wisdom of the common law that not every deception that leads to sexual intercourse should be criminalized, while still according consent meaningful scope. While Cuerrier takes the criminal law further than courts in other common law jurisdictions have, it can be argued other courts have not gone far enough: see *L.H. Leigh*, "Two cases on consent in rape" (2007), 5 Arch. News 6. (¶58)

[179] The requirement of "significant risk of serious bodily harm" would not be met if a female (who does not have HIV or any other STI) was accused of sexual assault for lying about birth control because the male partner would not be subjected to a significant risk of serious bodily harm.

[180] The Crown conceded in oral argument that to follow its argument to its logical conclusion a woman who lied about being on birth control would be guilty of sexual assault.

[181] Chief Justice MacDonald addresses the Crown's concession in ¶58 above where he states:

> Furthermore, despite the Crown's concession on this point, I am not convinced that a hypothetical charge against N.C. would stick. After all the consequences of an unintended pregnancy can be so much more profound for the mother than the father.

[182] With respect, this does not address the issue. The majority's reasoning is that there was no consent to unprotected sex without condoms. That door swings both ways. What difference do the effects of an unintended pregnancy have on the consent to sexual intercourse? There may be profound consequences for a man as well. They may be financial or, indeed, psychological. That is why the **Cuerrier** approach is applicable in these circumstances. In order for the woman to be convicted of a sexual assault it would also be necessary for the complainant to show that her deception caused a significant risk of serious bodily harm.

[183] In these circumstances, regardless of whether N.C. became pregnant, Mr. Hutchinson would be guilty of sexual assault. Whether the consequences of an unintended pregnancy are much more profound for the mother than the father is irrelevant, and it does not inform the analysis in the reasons of the Chief Justice.

[184] I will now explain how **Cuerrier** could apply in these circumstances.

R. v. CUERRIER & S. 265(3)(c): CONSENT VITIATED BY FRAUD

[185] **Cuerrier**, and more recently **Mabior**, are the leading cases on when consent will be vitiated by fraud under s. 265(3)(c). The Chief Justice has already outlined the facts of **Cuerrier**. I will review them, briefly, here. The accused in **Cuerrier** was HIV-positive and had unprotected sex with the two complainants without disclosing his status. He was charged with two counts of aggravated assault under s. 268 of the **Code**.

[186] The trial judge in **Cuerrier** directed a verdict of acquittal, and the British Columbia Court of Appeal upheld that decision. The Supreme Court of Canada

allowed the Crown's appeal and held that the accused could have been convicted of aggravated assault based on the complainants' consent being vitiated by fraud.

[187] The Supreme Court in **Cuerrier** was not faced with the same issue as this Court is in this case. It did not actually have to decide between s. 265(3)(c) and s. 273.1(1); the accused was charged with aggravated assault under s. 268, and not sexual assault or aggravated sexual assault, so the definition of consent in s. 273.1(1) did not apply. Although there is nothing in the judgment to suggest that a charge of aggravated sexual assault could not also have been made out in which case s. 273.1(1) would have applied (the same would go for the included offence of sexual assault). (See Isabel Grant, "The Boundaries of the Criminal Law; the Criminalization of the Non-disclosure of HIV" (2008), 31 Dal. L.J. 133, at p. 14)

1. The meaning of "fraud"

[188] Justice McLachlin, as she then was, explained the state of the law before s. 265(3)(c) was enacted:

> Until 1983, the *Criminal Code* provided that consent to sexual intercourse was vitiated where it was obtained "by false and fraudulent representations as to the ***nature*** and ***quality of the act***". This reflected the common law which confined fraud in assault to the ***nature of the act*** (i.e., was it sexual, or something else) and the ***identity of the partner***. ... (¶30, emphasis added)

[189] Section 265(3)(c) now simply says that consent will be vitiated by "fraud," without defining that word or providing any examples. The Court in **Cuerrier** had to decide whether s. 265(3)(c) expanded the behaviour that could be captured as fraudulent.

[190] Cory, J., for the majority in **Cuerrier**, held that it did. Section 265(3)(c) provided "a more flexible concept of fraud in assault and sexual assault cases," (¶105) one that was not limited to fraud in relation to the nature and quality of the act or the identity of the perpetrator. The difficulty was in creating a "principled approach" to the expanded meaning of fraud in s. 265(3)(c). (¶108)

[191] Borrowing from the commercial context for his principled approach, Cory, J. emphasized the two elements of criminal fraud: **dishonesty**, which can include

non-disclosure of important facts, and **deprivation or risk of deprivation**. He stated the test as follows:

> The Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person to a *significant risk of serious bodily harm*. (¶128)

[192] On the facts of **Cuerrier**, deceit or non-disclosure regarding the accused's HIV-positive status would meet the first part of the test, and the "risk of contracting AIDS as a result of engaging in unprotected intercourse" would meet the second part.

[193] The *Cuerrier* test could also be met on the facts of this case.

2. Applying the *Cuerrier* test to these facts

[194] First, the appellant's conduct was dishonest: he failed to disclose that he had poked holes in the condoms. Cory, J.'s description of the dishonesty element is directly applicable:

> ... In light of the provisions of s. 265, the dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse. The actions of the accused must be assessed objectively to determine whether a reasonable person would find them to be dishonest. ... (¶126)

[195] The appellant only obtained consent to unprotected intercourse because he deceived the complainant into thinking that the condoms were intact. If she had known that he had poked holes in the condoms, she would not have had sex with him. A reasonable person would find this action dishonest because contraception is such an integral part of sexual relations.

[196] Because the consent was obtained by dishonesty, it was not true consent. In this sense, the appellant's failure to disclose that he had tampered with the condoms would be analogous to the accused's failure to disclose his HIV-positive status in **Cuerrier**:

> ... The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent. The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. To put it in the context of fraud the greater the risk of deprivation the higher the duty of disclosure. . . The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented. (¶127 emphasis added)

[197] Two important points come from this excerpt. First, the test is not limited to dishonesty about one's HIV status but can be applied to other fact patterns. Certainly unprotected sex with a partner who does not have HIV or any other sexually transmitted infection is not as risky as unprotected sex with an infected partner. However, Cory, J.'s framework envisions a spectrum of risks that will trigger a duty to disclose. The risk of an unwanted pregnancy is not trivial, and should, at this stage of the analysis, trigger a duty to disclose that the couple's chosen birth control is likely to be ineffective.

[198] Second, consent must be based on "knowledge of the significant relevant factors" to be valid. This requirement was meant to encompass factors beyond the HIV scenario. Surely the ineffectiveness of condoms would count as a "significant relevant factor" informing the complainant's consent, when her consent to intercourse depended on condom use.

(i) Deprivation: "significant risk of serious bodily harm"

[199] The second part of the *Cuerrier* test is more difficult. According to Justice Cory:

> The second requirement of fraud is that the dishonesty result in deprivation, which may consist of actual harm or simply a risk of harm. Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. For example, the risk of minor scratches or of catching cold would not suffice to establish deprivation. What then should be required? In my view, the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a

> **significant risk of serious bodily harm**. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test. In this case the complainants were exposed to a significant risk of serious harm to their health. Indeed their very survival was placed in jeopardy. It is difficult to imagine a more significant risk or a more grievous bodily harm. (¶128, emphasis added)

[200] There is a wide spectrum of potential harms between minor scratches and catching cold, which would not suffice to establish deprivation, and HIV, which clearly would. The risk of contracting HIV/AIDS would have easily met whatever standard Cory, J. set, so he did not need to determine how other, less serious consequences would fit into the test.

[201] Would the risk of pregnancy meet the "significant risk" and "serious bodily harm" components of the test? The risk of pregnancy from the use of damaged condoms, which is equivalent to not using condoms at all, would be significantly higher than the risk of pregnancy from the proper use of intact condoms. This should establish the "**significant risk**" part of the deprivation test.

[202] The more contentious issue is whether pregnancy can constitute "**serious bodily harm**." In my view it can. The question should not be simply whether pregnancy *on its own* constitutes serious bodily harm *in all cases*, but whether *unwanted* pregnancy constitutes serious bodily harm *on the evidence in the particular case*. This Court does not have to decide that pregnancy always amounts to serious bodily harm; instead, a Court could find that, *on the evidence in any particular case*, the risk of an unwanted pregnancy could meet that test.

[203] The Supreme Court defined "serious bodily harm" in **R. v. McCraw**, [1991] 3 S.C.R. 72. The Court in that case held that letters in which the accused told the recipients he would rape them "amounted to a threat to cause serious bodily harm" contrary to what is now s. 264.1(1)(a). According to Justice Cory:

> . . . "bodily harm" is defined in s. 267(2). That definition is as follows:
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> > For the purposes of this section [assault with a weapon or causing bodily harm] and sections 269 [unlawfully causing bodily harm] and 272 [sexual assault with a weapon, threats to a third party or causing bodily harm], 'bodily harm' means any hurt or injury to the complainant that interferes with the health or comfort of the

> complainant and that is more than merely transient or trifling in nature.

That definition of "bodily harm" can, I think, be properly applied to those words as they appear in s. 264.1(1)(a).

There remains the question then of how the word "serious" ought to be defined. *The Shorter Oxford English Dictionary*, 3d ed. (1987) provides the following definition of "serious":

> *serious*: ...Weighty, important, grave; (of quantity or degree) considerable. b. Attended with danger; giving cause for anxiety.

Giving the word "serious" its appropriate dictionary meaning, I would interpret "serious bodily harm" as being any hurt or injury that interferes in a grave or substantial way with the physical integrity or well-being of the complainant. Thus, "serious bodily harm" does not require proof of the same degree of harm required for aggravated assault described in s. 268 of the *Code*; that is to say the wounding, disfiguring or endangering of the life of the complainant. Yet it requires greater harm than the mere "bodily harm" described in s. 267; that is hurt or injury that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

Does the phrase encompass psychological harm? I think that it must. The term "bodily harm" referred to in s. 267 is defined as "any hurt or injury." Those words are clearly broad enough to include psychological harm. Since 264.1 refers to any "serious" hurt or injury, then any serious or substantial psychological harm must come within its purview. So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase "serious bodily harm." There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm. I can see no principle of interpretation nor any policy reason for excluding psychological harm from the scope of s. 264.1(1)(a) of the *Code*.

In summary, the meaning of "serious bodily harm" for the purposes of the section is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant. ... (pp. 80-81)
(Emphasis added)

(Section 264.1 has been amended since **McCraw** and no longer includes the qualifier "serious" before bodily harm: a threat "to cause death or bodily harm" will suffice.)

[204] Applying the definition from **McCraw** to the facts of **Hutchinson**, I agree with Derrick, P.C.J. (**R. v. Hutchinson**, 2008 NSPC 79, ¶44-46) and Roscoe, J.A. (**Hutchinson #1**, ¶44-46) that an unwanted pregnancy could meet the definition of "serious bodily harm." The Court in **McCraw** was clear that "serious bodily harm" does not require "proof of the same degree of harm" as aggravated assault; it is *something less than* wounding, maiming, disfiguring, or endangering the life of the complainant. Unwanted pregnancy would fit that definition, because it would be considerably more "weighty" than a "merely transient or trifling" interference with the "health or comfort of the complainant," but not necessarily as serious as the consequences of an aggravated assault.

[205] There was plenty of evidence in this case to conclude that the complainant did not want to get pregnant, as Roscoe, J.A. outlined in **Hutchinson #1**, and that serious bodily harm, both physical and psychological, resulted from the unwanted pregnancy:

> In this case [N.C.] was not exposed to pregnancy, she was actually pregnant . . .
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> . . .In this case, there was evidence that as a result of the pregnancy the complainant actually suffered morning sickness. Her condition required medical attention on several occasions. Because the pregnancy was unwanted, the complainant also suffered from emotional and psychological distress and was required to face the difficult decision of whether to have an abortion. As a result of the abortion, she actually suffered from bleeding, blood clots and severe pain for a period of two weeks and a serious infection that required antibiotics. Again, medical attention was required on several occasions. The evidence supports a finding that all of this pain and suffering was a direct and foreseeable consequence of the use of the sabotaged condoms. There was actual physical and psychological harm that was not trivial or minor. It was significant. A trier of fact could conclude that the consequences of the deceit caused serious bodily harm to the complainant, thus satisfying the test for fraud vitiating consent. (¶44-46)

[206] I agree that, at its most basic, biological level, pregnancy is a "natural" consequence for women who have sex, in a way that a disease like HIV is not. But pregnancy does not have to be a natural consequence of sex if effective birth

control is used properly. It is not the consequence of pregnancy on its own that would "fundamentally alter" the nature of the sex act: it is the dishonesty involved in tampering with the condoms combined with the risk of an unwanted pregnancy that would fundamentally alter the activity to which the complainant consented, changing it from *protected sex* to *unprotected sex*.

[207] Judge Derrick made this point quite forcefully:

> ... Pregnancy does not have to be inevitable; it can be mediated by choice. And while it may naturally occur, it is not a benign condition, especially where it is unplanned and unwanted.
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> Biology is not destiny: an unwanted pregnancy intrudes upon a woman's autonomy and leaves her with no option but to assume either the risks associated with it and childbirth or the risks associated with abortion. The fact that the incidence of serious problems in pregnancy, childbirth and abortion, are low does not alter the fact that a pregnant woman faces the possibility of risks to her health and even her life that a non-pregnant woman does not. The evidence supports the reasonable inference that had Mr. Hutchinson not sabotaged the condoms, [N.C.] would not have found herself in a condition that carries with it serious risks she did not choose to assume, faced with choices she should not have had to make. The evidence indicates that [N.C.] had already made an autonomous choice not to be pregnant, well before her relationship with Mr. Hutchinson started to unravel. Mr. Hutchinson's conduct deprived [N.C.] of her choice to avoid becoming pregnant and exposed her to all the potential risks associated with pregnancy, including risks that would endanger her life if she was unfortunate enough to develop certain conditions. Furthermore, Mr. Hutchinson's conduct exposed [N.C.] to the risks associated with having an abortion, the only choice she had available to her for ending the pregnancy and returning to her non-pregnant state. (**Hutchinson** NSPC, ¶36-37)

[208] Judge Derrick's linking of the serious bodily harm element to the sexual autonomy of the complainant is particularly persuasive; as Judge Derrick suggested, when the accused's dishonesty resulted in an unwanted pregnancy, the complainant's choice in the matter is severely constrained. She can either assume the risks associated with pregnancy, or the risks associated with abortion.

[209] A man who tampers with condoms in an effort to make his sexual partner pregnant uses her as a means to an end. This is a clear violation of her sexual and reproductive autonomy.

[210] The wrongfulness of the appellant's conduct is particularly apparent when approached from this perspective: he overrode the complainant's capacity to have a say in what happened to her body in order to achieve his own interests in having a baby and preserving their relationship. This buttresses the conclusion that she did not consent. His conduct was blameworthy enough to constitute fraud.

[211] The Supreme Court of Canada's recent decision in **Mabior** supports the **Cuerrier** approach in cases like this. Like **Cuerrer**, it involved a failure to disclose HIV-positive status before intercourse. Chief Justice McLachlin concluded in **Mabior**:

> ... a person may be found guilty of aggravated sexual assault under s. 273 of the *Criminal Code* if he fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted. If the HIV-positive person has a low viral count as a result of treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met, on the evidence before us. (¶4)

[212] McLachlin, C.J. does not limit the application of **Mabior** (and **Cuerrier**) to the HIV context. After reviewing the "significant risk of serious bodily harm" test she says:

> ... This general proposition does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in this case are at play. (¶95, emphasis added)

[213] The Court goes on to discuss **Mabior** within the two-part **Cuerrier** test for fraud vitiating consent (dishonesty + deprivation).

[214] A deliberate lie or failure to disclose HIV status would suffice for this element of the test, where the complainant would not have consented had he or she known the accused was HIV-positive. In **Mabior** eight of the nine complainants testified that they would not have consented to sex with Mr. Mabior had they known he was HIV-positive. (¶6)

[215] The **Cuerrier** formulation of the deprivation part of the fraud test required the Court to conclude that the accused's deception subjected the complainant to a

significant risk of ***serious harm***. This has been the more contentious part of the **Cuerrier** test because of its potential for uncertainty, and was the part the Court in **Mabior** set out to clarify. As Chief Justice McLachlin remarked:

> The *Cuerrier* test gives rise to two uncertainties - what constitutes 'significant risk' and what constitutes 'serious bodily harm? (¶15)

[216] She continues:

> The *Charter* values of equality, autonomy, liberty, privacy and human dignity are particularly relevant to the interpretation of fraud vitiating consent to sexual relations. The formerly narrow view of consent has been replaced by a view that respects each sexual partner as an autonomous, equal and free person. Our modern understanding of sexual assault is based on the preservation of the right to refuse sexual intercourse: sexual assault is wrong because it denies the victim's dignity as a human being. Fraud in s. 265(3)(c) of the *Criminal Code* must be interpreted in light of these values.
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> ...
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> In keeping with the *Charter* values of equality and autonomy, we now see sexual assault not only as a crime associated with emotional and physical harm to the victim, but as the wrongful exploitation of another human being. To engage in sexual acts without the consent of another person is to treat him or her as an object and negate his or her human dignity. Although the *Charter* is not directly engaged, the values that animate it must be taken into account in interpreting s. 265(3)(c) of the *Criminal Code*. (¶46, ¶48)

[217] Balanced against these **Charter** values, viewed from the perspective of the complainant, are concerns about over-criminalization viewed from the perspective of the accused.

[218] The 'knowability' aspect of criminal law – the idea that the rule of law requires potential accused persons to know in advance whether the conduct they are about to perform is criminalized or not – is relevant to **Hutchinson**. The appellant's conduct in **Hutchinson** could meet the test for conduct properly falling within the scope of the criminal law, defined in **Mabior** as "conduct that is viewed as harmful to society, reprehensible and unacceptable." (¶19) He intentionally deceived the complainant into having unprotected sex.

[219] However, McLachlin, C.J. in her review of the common law cases on fraud vitiating consent specified that a *broader* approach to fraud (under which the accused would be more likely to be found guilty) is appropriate:

> Canadian common law on fraud vitiating consent to sexual relations has now entered a third, post-*Clarence* era. *Charter* values of equality, autonomy, liberty, privacy and human dignity require full recognition of the right to consent or to withhold consent to sexual relations. Fraud under s. 265(3)(c) must be interpreted with these values in mind. The *Clarence* line of jurisprudence, which confined fraud to the question of whether the complainant knew the act was sexual or not, is no longer appropriate in the Canadian context. To hold that a complainant consents to the risk of an undisclosed serious disease because he or she knew the act was sexual affronts contemporary sensibilities and contemporary constitutional values. (¶43)

[220] This passage confirms that a more expansive view of fraud vitiating consent exists under s. 265(3)(c) than existed under much of the pre-s. 265 common law.

[221] The appellant here argues that the trial judge made certain findings of fact that would prevent the Crown from arguing that there was a significant risk of serious bodily harm in this case. In particular, the trial judge's findings "that the conduct did not endanger N.C.'s life should have concluded the analysis and resulted in an acquittal because the endangerment of life required to vitiate consent had not been established." (Appellant's factum, ¶20)

[222] I disagree, endangerment of life is not required to vitiate consent. The trial judge's finding that the appellant's conduct did not endanger the complainant's life was confined to his analysis of aggravated sexual assault (Trial decision, ¶52-57).

[223] Endangerment of life is not an element of sexual assault and does not form part of the test of fraud vitiating consent under s. 265(3)(c). The trial judge's finding would not necessarily preclude a finding that N.C.'s consent was vitiated, in these circumstances.

[224] It is tempting in this case to look at the trial judge's findings of fact and the evidence to determine if it establishes a "significant risk of serious bodily harm".

However, I would decline to do so. In my view, the most appropriate remedy is to order a new trial.

CONCLUSION

[225] I would allow the appeal, set aside the conviction below and order a new trial.

Farrar, J.A.