Court File No: 35176

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

CRAIG JARET HUTCHINSON

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT

(CRAIG JARET HUTCHINSON, APPELLANT)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

Overview of facts giving rise to the issues before this court

1. In January of 2006 the Appellant and N.C. began a boyfriend – girlfriend relationship. The couple used both the "rhythm method" and condoms for birth control. They did not believe N.C. could get pregnant when she was menstruating and as such did not use any contraceptive during that time of the month. They used condoms for the rest of the month when they believed she could conceive.

2. By the summer of 2006, N.C. began to question whether she wished to continue the relationship with the Appellant. These doubts were communicated to the Appellant. The Appellant wanted to continue the relationship.

3. Before expressing doubts about the relationship, N.C. would place the condom on the Appellant's penis prior to them having sex; the Appellant expressed his pleasure with N.C. placing the condom on his penis.

4. After N.C. expressed doubts about the relationship, the Appellant discontinued requesting N.C. place the condom on his penis, and told N.C. not to watch him as he put the condom on himself. She found this change unusual.

5. By late August, 2006 the Appellant insisted N.C. take a pregnancy test. She took a home pregnancy test on September 1st which came back negative. She took a second home pregnancy test on September 5th which came back positive. N.C. was shocked; the Appellant was very happy.

6. After the positive home pregnancy test, the couple assumed N.C. was pregnant, continued having sexual relations (albeit less frequently), and discontinued using birth control. The timeframe after the September 5th home pregnancy test became important at the re-trial.

7. N.C. initially planned to keep the baby, but in late September and October of 2006 began to doubt both this decision and her desire to continue the relationship with the Appellant. In early November she took a break from the relationship. The Appellant continued to contact her, and she attempted to ignore him and avoided reciprocating the contact.

8. On November 5th she received a series of text messages from the Appellant telling her he had sabotaged the condoms and urging her not to use them. She checked the remainder of the box of condoms, and discovered pin pricks through the packages with lubricant leaking out. Photographs of these text messages (which had to be written out by one of the investigating officers) were tendered at trial[1].

9. She consulted with her family physician who referred her for an abortion. On November 16th N.C. underwent an abortion procedure which terminated the pregnancy, after which she suffered approximately two weeks of painful complication.

10. The Physician who performed the abortion testified as a witness for the Crown at the trial. She testified she examined the tissue removed from N.C.'s uterus and determined the pregnancy was "exactly nine weeks" along[2].

11. November 16th, 2006 was a Thursday. Exactly nine weeks prior to that was Thursday September 14th. It would appear, therefore, that conception happened in the time frame when the couple unwittingly had unprotected sex after the September 6th pregnancy test led them to believe N.C. was already pregnant.

12. The abortion doctor provided expert testimony about the effectiveness of condoms as a form of birth control and how a pinhole in the condom would reduce its effectiveness. Her evidence was that condoms are generally 80 to 85 percent effective as a form of birth control and that a pin prick would render a condom "less effective." She also acknowledged that the sperm count of the man who ejaculates into the condom would have an effect on the likelihood of conception with a pin-pricked condom[3].

13. Lastly, the medical evidence established that both pregnancy and abortion are generally safe. It was this opinion that left Coughlan J. with reasonable doubt that the pregnancy and subsequent abortion endangered N.C. life, resulting in the acquittal on the more serious charge of aggravated sexual assault. Coughlan J. convicted Mr. Hutchinson of the included offense of sexual assault.

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[1] Exhibit -1: Copy of Text Message [Record Tab 5A]
[2] Evidence of Dr. Moom, at pp. 232 – 233 [Record Tab 4D]
[3] Evidence of Dr. Moom, at pp. 237 – 240 [Record Tab 4D]

History of these proceedings

14. In an Information sworn July 13, 2007, Mr. Hutchinson was charged that he:

> between the 1st day of May, 2006, and the 30th day of November, 2006, at or near Halifax Regional Municipality, in the County of Halifax in the Province of Nova Scotia, did in committing a sexual assault on [N.C.], endanger the life of [N.C.], thereby committing an aggravated sexual assault, contrary to section 273(2)(b) of the Criminal Code.[4]

15. He was arraigned in Halifax Provincial Court on July 24, 2007. His preliminary inquiry was held before Derrick, J.P.C. on May 9 and June 19, 2008. At preliminary inquiry, the Appellant challenged committal on the basis that there was no evidence of lack of consent. Derrick J.P.C. disagreed and he was ordered to stand trial as charged[5]. The essence of Derrick J.P.C.'s decision is at paragraphs 49 and 50:

> **49** Sexual intercourse is a crime if the consent to it has been vitiated by fraud. Fraud in this context must involve dishonesty and deprivation in the form of exposure to a significant risk of serious bodily harm. As Cory, J. held in *Cuerrier*:
>
> > The phrase "significant risk of serious bodily harm" must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated ... The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence. It is difficult to draw clear, bright lines in defining human relations particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated.
>
> **50** Ultimately, it is for the trier of fact at a trial to determine how the clear, bright lines are to be drawn. Cory, J. in *Cuerrier* referred to the evolution of the criminal law to reflect society's attitude toward the true nature of consent *(Cuerrier, supra, at paragraph 123*) and went on to establish that a failure to disclose HIV positive status can constitute fraud that may vitiate consent to sexual intercourse. *Cuerrier* did not contemplate that fraud-vitiated consent would only apply in HIV exposure cases; Cory, J. found that: "The [*Cuerrier*] standard is sufficient to encompass not only the risk of HIV transmission but also other sexually transmitted diseases which constitute a significant risk of serious harm." (*Cuerrier, supra, at paragraph 137*) I am satisfied,

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[4] Information, Provincial Court, dated July 13, 2007 [Record Tab 3A]

[5] *R.* v. *Hutchinson* (decision on committal) [2008] N.S.J. No. 612, 2008 NSPC 79, 179 C.R.R. (2d) 148, 273 N.S.R. (2d) 1 [Book of Authorities ("BA") Tab 5]

> applying the *Sheppard* test, that a reasonable jury, properly instructed, could find that the *Cuerrier* standard, and thereby the criminal law, encompasses the conduct of Mr. Hutchinson and return a verdict of guilty on the charge of aggravated sexual assault. I therefore commit Mr. Hutchinson to stand trial as charged.

16. The first trial was heard by Moir J. on January 19 – 22. At the conclusion of the Crown's evidence counsel for Mr. Hutchinson requested a directed verdict using a similar argument to the one made at the preliminary inquiry. The essence of Moir J's decision is found at paragraphs 49 – 51[6]:

> **49** A trier of fact could not conclude that the complainant's consent was vitiated by fraud because there is no evidence of a significant risk of serious bodily harm.
>
> **50** The evidence indicates that Mr. Hutchinson did something that was not only fraudulent, it was dastardly. But, it does not prove sexual assault. Whether it proves some other crime, I don't know.
>
> **51** I allow the motion for a directed verdict, and will enter an acquittal.

17. The Crown appealed Moir. J's decision. The first decision of the Nova Scotia Court of Appeal setting aside the acquittal is found at [2010] N.S.J. No. 16, 2010 NSCA 3, 251 C.C.C. (3d) 51, 286 N.S.R. (2d) 331, 72 C.R. (6th) 71, 2010 CarswellNS 17[7]. Each member of the panel wrote separate decisions. Roscoe and Bateman JJ.A. disagreed with Moir J's reasoning, with Bateman J.A. agreeing with Roscoe JA's reasons but adding further comments of her own. Beveridge J.A. agreed with Moir J.'s findings and would have upheld the acquittal.

18. The positions of the Justices on the first appeal is summarized by the majority decision in the second appeal at paragraphs 24 – 28[8]:

> [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:

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[6] *R.* v. *Hutchinson* (first trial decision) [2009] N.S.J. No. 96, 2009 NSSC 51, 275 N.S.R. (2d) 128. [BA Tab 6]

[7] R. v. *Hutchinson* (first appeal) [2010] N.S.J. No. 16, 2010 NSCA 3, 251 C.C.C. (3d) 51, 286 N.S.R. (2d) 331, 72 C.R. (6th) 71, 2010 CarswellNS 17 [BA Tab 7]

[8] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013 [Record Tab 2B]

¶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 <u>did not</u> become infected with HIV nor suffer any other physical harm as a result of the deceit. They were <u>exposed</u> to the virus but did not contract it. In this case [N.C.] was not <u>exposed</u> 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 ofactual 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".

19. The re-trial was heard before Coughlan J. on July 4th and August 29th, 2011. The written decision acquitting Mr. Hutchinson of aggravated sexual assault but convicting him of sexual assault *simpliciter* is found at [2011] N.S.J. No. 723, 2011 NSSC 361, 311 N.S.R. (2d) 1[9], Docket: CRH 32850. Coughlan J.'s reasons are summarized at paragraphs 44 – 48.

> **44** There was no voluntary agreement of Ms. C. to the sexual activity in question, which was sexual intercourse without contraception.
>
> **45** Therefore, the *actus reus* of sexual assault has been established.
>
> **46** In dealing with the elements of the *mens rea* of sexual assault, Major, J. stated in *R. v. Ewanchuk, supra,* at para. 42:
>
> > ... As such, the *mens rea* of sexual assault 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. See *Park, supra,* at para. 39.
>
> **47** Here Mr. Hutchinson intended to engage in sexual intercourse with Ms. C. using damaged condoms and he knew Ms. C. did not consent to sexual intercourse without contraception.
>
> **48** Both the *actus reus* and *mens rea* of sexual assault have been established.

[9] Decision of the Honourable Justice C. Richard Coughlan, Supreme Court of Nova Scotia, dated November 16, 2011 [Record Tab 2A]

The reasons of the Nova Scotia Court of Appeal on the second appeal

20. The Nova Scotia Court of Appeal convened a five Judge panel to hear the second appeal. MacDonald C.J.N.S wrote the majority decision dismissing the appeal with Oland, Hamilton and Fichaud JJ.A agreeing with his reasons. The sole dissent on the panel was written by Farrar J.A.

Summary of Chief Justice MacDonald's reasons

21. Chief Justice MacDonald's decision can be broken down four segments:

1. Whether the definition of consent in section 273.1 meant there was no consent *in abnitio*;
2. Whether his findings respecting the definition of consent would have the undesirable effect of exposing women who are dishonest about birth control to being prosecuted for sexual assault;
3. Whether his interpretation of the definition of consent made the fraud vitiating consent provision of section 265(1)(c) redundant; and
4. The significance of *Mabior* as it relates to this case.

22. MacDonald C.J.N.S. upheld Mr. Hutchinson's conviction on the basis that "protected sex was an essential feature of the proposed sex act and an inseparable component of N.C.'s consent.[10]"

Summary of Justice Farrar's dissent

23. The nub of the Farrar J.A.'s dispute with the majority is the question about whether section 273.1 imports a type informed consent which rendered N.C.'s consent void *in abnitio*[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**,

[10] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013, at para. 54 [Record Tab 2B].
[11] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013, at para. 120-121 [Record Tab 2B].

> 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. [emphasis in original]

24. Farrar J.A. concluded that the consent vitiated by fraud analysis was the proper approach. He would have ordered a new trial on the basis a trier of fact could conclude that the Appellant's conduct could have established a "significant risk of serious bodily harm" and would have ordered a new trial.

PART II – QUESTION IN ISSUE

25. Did the Nova Scotia Court of Appeal err in law by incorrectly interpreting the definition of consent in section 273.1 of the *Criminal Code of Canada* and the circumstances in which consent is vitiated in section 265(3) of the *Criminal Code of Canada*?

PART III – STATEMENT OF ARGUMENT

Why the majority erred and why this conviction should be set aside.

26. MacDonald C.J.N.S. reviewed the first appeal and agreed with Roscoe J.A.'s reasoning set out therein. He also examined *J.A.*[12], *Crangle*[13], and *Mabior*[14], decisions which had been released since the first appeal. At paragraph 53, MacDonald C.J.N.S. lays out the principles which are drawn from these three decisions to construct the interpretation of section 273.1 which is the subject matter of this appeal. Paragraph 53 states[15]:

> **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.***)

[12] *R.* v. *J.A* [2011] 2 S.C.R. 440 [BA Tab 8]
[13] *Crangle* [2010] O.J. No. 2587 [BA Tab 2]
[14] *Mabior* [2012] S.C.J. No. 47 [BA Tab 9]
[15] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013, at para. 53 [Record Tab 2B].

- 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***)

27. The three cases cited must be examined individually and collectively to determine whether the sum of their parts amounts to MacDonald C.J.N.S.'s expanded interpretation of section 273.1

J.A. is not applicable to this case

28. The majority of the Court of Appeal found the phrase "the sexual activity in question" as interpreted in *J.A.* imported a form of informed consent to each step of the sexual act, including whether or not contraception is used.

29. *J.A.* examined whether the existing statutory provisions allowed a sexual partner to grant advance consent to specific sexual acts. The facts in *J.A.* involved a woman who consented to her partner choking her unconscious. While she was unconscious, he penetrated her anus with a dildo. She complained to police that she consented to being choked unconscious, but did not consent to be anally penetrated with a dildo.

30. *J.A.* centered on whether it was possible to grant advance consent, or more specifically, whether advance consent to perform a sex act while unconscious can later be revoked if the unconscious person changes their mind when they awake. It focused on the whether an unconscious person is "incapable" (to borrow the wording of section 273.1(2)(b)) of consenting to sexual activity.

31. *J.A.* is not a case where the trier of fact must determine whether something that looked like consent was not consent either in law or in fact. *J.A.* ruled on the breadth of section 273.1(2)(b) and examined when a person is "incapable" of consenting to sex.

32. In this case, N.C. was capable of consenting to the sexual activity in question and did consent. Although she was unaware of the fact the condoms had pin holes through them, she was awake and able and willing to say "yes" to the sexual activity in question.

33. *J.A.* has no more application to this case than it does to the line of HIV related cases. Chief Justice MacDonald's methodology does away with the line of reasoning that has been in place since *Cuerrier* and substitutes it with this an incorrectly modified version of this court's decision in *J.A.*.

MacDonald C.J.N.S.'s interpretation of* Crangle *is overly broad

34. *Crangle* is a novel set of facts which reaffirms the common law rule that consent given as a result a misrepresented identity is not consent. The Appellant, Glen Crangle had an identical twin brother, Craig Crangle. Glen slipped into a bed in which his brother's girlfriend slept and initiated sex with her. She put up resistance to the advances on the basis that she was on her period. She thought it odd that the person she believed to be Craig was insisting on having sex over her objections, turned on a light and discovered it was Craig's twin brother Glen.

35. At paragraph 53, MacDonald C.J.N.S. summarizes *Crangle* to stand for the proposition that "deception that involves an "inseparable component" of a complainant's consent to sexual intercourse represents no consent under s. 273.1."[16]

36. A review of *Crangle* reveals the use of the phrase "inseparable component" is used once in the decision. The following excerpt captures how the broad the Court intended the phrase to be[17]:

> **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

[16] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013, at para. 53 [Record Tab 2B]
[17] *R. v. Crangle* [2010] O.J. No. 2587, at para. 19-20 [BA Tab 2]

> 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.

37. The deceit in *Crangle* went to the identity of the perpetrator, which is a form of deceit that is well recognized by the common law. It is trite law to say that a man who persuades a woman to allow him to touch her in a sexual manner on the false pretense he is a physician or masseuse is guilty of sexual assault.

38. With great respect, Chief Justice MacDonald's application of *Crangle* presumes a much broader interpretation of the phrase "inseparable component" than what was intended by the Ontario Court of Appeal. This expanded interpretation is used at paragraph 59 to tie in the use of a condom as an "inseparable component" of N.C.'s consent. The deceitful act of poking holes in the condom meant that N.C. did not consent to the sex *in abnitio.*

39. The Appellant urges this court to not adopt the Nova Scotia Court of Appeal's broad interpretation of *Crangle*. Being deceitful about one's identity is entirely different than being deceitful about the existence or quality of birth control. Pretending one is a doctor, masseuse or one's twin brother to trick somebody into consenting to sexual contact is simply not the same as lying about the status of the birth control that is used in an otherwise consensual sexual act.

Mabior reaffirms the correct approach is section 265(3), not section 273.1

40. In *Mabior* this court unanimously affirmed the key principles set out in *Cuerrier*, in particular that the appropriate framework for the HIV line of cases is section 265(3) and the undesirability of over extension of criminal sanction. Paragraphs 84 – 90 state[18]:

> **84** In my view, a "significant risk of serious bodily harm" connotes a position between the extremes of no risk (the trial judge's test) and "high risk" (the Court of Appeal's test). Where there is a *realistic possibility of transmission of HIV*, a significant risk of serious bodily harm is established, and the deprivation element of the *Cuerrier* test is met. This approach is supported by the following considerations.

[18] *R.* v. *Mabior* [2012] S.C.J. No. 47, at paras.84 – 90 [BA Tab 9]

85 First, "significant risk of serious bodily harm" cannot mean any risk, however small. That would come down to adopting the absolute disclosure approach, with its numerous shortcomings, and would effectively read the word "significant" out of the *Cuerrier* test.

86 Second, a standard of "high" risk does not give adequate weight to the nature of the harm involved in HIV transmission. "Significant risk" in *Cuerrier* is informed both by the risk of contraction of HIV and the seriousness of the disease if contracted. These factors vary inversely. The more serious the nature of the harm, the lower the probability of transmission need be to amount to a "significant risk of serious bodily harm".

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.

89 Fifth, the values of autonomy and equality enshrined in the *Charter* support an approach to fraud vitiating consent that respects the interest of a person to choose whether to consent to sex with a particular person or not. The law must strike a balance between this interest and the need to confine the criminal law to conduct associated with serious wrongs and serious harms. Drawing the line between criminal and non-criminal misconduct at a realistic possibility of transmission arguably strikes an appropriate balance between the complainant's interest in autonomy and equality and the need to prevent over-extension of criminal sanctions.

90 Finally, interpreting "significant risk of serious bodily harm" as entailing a realistic possibility of transmission of HIV is supported by a number of cases. Apart from the trial reasons in this case, we have been referred to no case holding that "significant" means any risk, however small. To be sure, not many cases have considered the point. But the few that have are worth noting. In *R. v. Jones*,

> NBQB 340, [2002] N.B.J. No. 375 (QL), the court held that a risk of transmission of hepatitis C between 1.0 and 2.5 percent was "so low that it cannot be described as significant" (para. 33). And in *R. v. J.A.T.*, 2010 BCSC 766(CanLII), the trial judge stated that "[a] significant risk means a risk that is of a magnitude great enough to be considered important" (para. 56). [emphasis added]

41. In addition to affirming the *Cuerrier* approach, *Mabior* enables courts to weigh in on the details of the analysis of actual bodily harm versus potential bodily harm. *Mabior* recognized a spectrum of risk by acknowledging that a low viral load and the use of condom protection could negate the risk of HIV transmission, even in a case of non-disclosure. It also recognized the need for the common law to adapt as treatment for HIV and AIDS improves.

42. If trial courts should weigh evidence of viral loads when measuring the risk of HIV transmission, would similar considerations apply to the facts in this case? Is a man's sperm count relevant? Is it relevant whether a woman is ovulating? What if the man or the woman is infertile for some reason?

43. These questions are relevant to this case when one considers the extent of the sabotage - that is pin pricks in the condoms, which would have enabled Mr. Hutchinson's semen to seep through the condom. The evidence that spoke to the extent of that seepage was not present, but it presumably would have been much less than had no condom been used.

Two prongs or one?

44. MacDonald C.J.N.S.'s decision sets out a two prong approach to establishing non-consent in cases of sexual assault. The first prong a trier of fact could choose is the s. 265 vitiated consent route; the second prong is the no consent *in abnitio* approach which has already been discussed. The majority of the Court of Appeal took the position that either prong is a satisfactory approach to proving non-consent to a sexual act.

45. In support of this proposition, MacDonald C.J.N.S. cites Professor Richard Coughlan's annotations respecting the first appeal (2010 Carswell NS 17). Part of what Professor Couglan wrote was[19]:

[19] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013, at para. 62 [Record Tab 2B]

> "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."

46. In this case the results would not have been the same. The result of using the no consent *in abnitio* approach was clearly a conviction; the result of using the fraud vitiating consent could have resulted in an acquittal.

47. With respect, this approach disregards the approach to this issue that has been followed by this court since *Cuerrier*. Presumably, if courts could have followed the no consent *in abnitio* approach MacDonald C.J.N.S. espouses, then Canada's criminal courts having been adding an unnecessary extra step in the fifteen years since *Cuerrier* by determining whether the crown has proven a substantial risk of serious bodily harm.

48. The HIV cases dealt with sexual encounters which were consensual at the time, but became nonconsensual when the person subject to the infected bodily fluids became aware of the withheld information. Presumably, the victims in those cases would have been as unlikely to consent *in abnitio* (if not more so) than N.C. in this case had they known their sexual partner was HIV positive.

49. The fraud vitiating consent route was recently approved by the Ontario Court of Appeal in *R.* v. *Boone*[20]. This case reached the Court of Appeal after the Superior Court of Justice conducted a judicial review of the preliminary inquiry judge's decisions on committal and discharge.

50. *Boone* examined the conduct around an HIV positive man who had sexual encounters with eight other young men without disclosing his HIV positive status. The specific acts of these sexual encounters included mutual masturbation, oral sex and anal sex. Relevant to this appeal are the oral sex and mutual masturbation encounters described at paragraphs 45 and 46[21]:

> [45] Two of the three sexual assault complainants testified that they engaged in unprotected oral sex with the appellant – in each case, one act of unprotected

[20] *R.* v. *Boone* 2012 ONCA 539 [BA Tab 1]
[21] *R.* v. *Boone* 2012 ONCA 539, at para. 45-46 [BA Tab 1]

> receptive intercourse without ejaculation and one act of oral inserted intercourse without ejaculation. According to the Crown's expert, this sexual activity was associated with a risk of HIV transmission of one in 909.
>
> [46] The remaining sexual assault complainant testified that he and the appellant engaged in one act of mutual masturbation with each person ejaculating on his own stomach. They also engaged in kissing. The Crown's expert estimated that this sexual activity was associated with a risk of HIV transmission of "essentially zero". However, the Crown's expert also confirmed that pre-ejaculate can transmit the HIV virus.

51. The Crown's approach was similar to that taken by MacDonald C.J.N.S. in this case, that is that there are two ways for the non-consent to be established, one being the no consent *in abnitio* approach, the second being the fraud vitiating consent approach.

52. In a 2-1 decision, the majority consisting of Hoy and Cronk JJ.A. did not endorse this approach, preferring the approach which the Appellant is arguing in this case. Their reasons for doing so are set out in paragraphs 120 to 136. Paragraph 129 summarizes their conclusion that the *Cuerrier* framework is the appropriate approach[22]:

> [129] In my view, having regard to both the question posed by Cory J. in formulating his interpretation of the meaning of "fraud" in s. 265(3), and the interplay of ss. 265(3) and 273.1(1), there is no logical basis for concluding that where the charge is one to which both ss. 265(3) and 273.1(1) apply, non-disclosure of HIV status should be analyzed outside the *Cuerrier* framework.

53. They also cite Beveridge J.A.'s concerns in the first appeal about making section 265(3) redundant (paragraph 130) and express concerns about the "unwarranted criminalization of dishonest conduct[23]"

54. The only place in which the Nova Scotia Court of Appeal's reasoning has been endorsed by this Court is in Justice L'Heureux-Dubé's sole dissent in *Cuerrier*. Without exception, all majority decisions of this court dealing with HIV transmission have endorsed the use of the fraud vitiating consent provisions as the proper approach.

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[22] *R.* v. *Boone, supra,* at para. 129 [BA Tab 1]
[23] *R.* v. *Boone, supra,* at paras. 134 – 136 [BA Tab 1]

55. With the greatest of respect, the majority of the Nova Scotia Court of Appeal sidestepped this court's approach, adopted Justice L'Heureux-Dubé's dissent as valid law, and disregarded analysis this court has endorsed in *Cuerrier, Williams*[24], and most recently the *Mabior* and *D.C*[25]. companion cases.

Slippery Slope

56. The majority of the Court of Appeal's position leave open questions about how these principles would be applied in a future case, in particular whether a woman who lies about being on birth control would be subject to the same criminal sanction Mr. Hutchinson has faced

57. The Crown conceded on appeal that a woman who lied about the status of her birth control would also be guilty of sexual assault if the court agreed with its no consent *in abnitio* argument. The majority was hesitant to accept the Crown's concession, in part because the profound physical changes which flow from a woman becoming pregnant do not flow to a man[26]. Note that this reasoning switches the analysis mid-way and to adopt a *Cuerrier* type "substantial risk of serious bodily harm" requirement which would not apply to a man.

58. The reasoning of the majority of the Court of Appeal would take many other acts which are otherwise the domain of "song, verse, and social censure" (to borrow a phrase from Justice McLachlin's dissent in *Cuerrier*, at para. 47)[27] and bring them into the domain of investigations, trials and imprisonment. For example:

1. A man receiving anal sex from another man requires his sex partner to wear a condom to protect him from disease. His partner surreptitiously removes the condom part way through the act. The condom remover did not have any type of sexually transmitted infection, and the recipient was never exposed to any type of bodily harm.
2. An HIV positive man engages in mutual masturbation with multiple partners without disclosing his HIV status. Non-consent would be proven if these partners later testify they would never have engaged in sex acts with an HIV positive man had they known of his

[24] *R.* v. *Williams* [2003] S.C.J. No. 41 [BA Tab 10]
[25] *D.C.* [2012] S.C.J. No. 48 [BA Tab 4]
[26] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013, at para. 81 [Record Tab 2B]
[27] [BA Tab 3]

status, regardless of the fact they were never actually exposed to any danger. (similar to the facts in *Boone*, *supra*)

3. A woman tells her sexual partner she is "on the pill" but fails to disclose to him that she routinely forgets to take her birth control pill, rendering them much less effective as a form of birth control.

59. None of these scenarios are farfetched or speculative. They happen frequently in the bedrooms of many average people. Like the immediate case, they involve an abuse of the trust that is implicit when two people sex with each other. They are also, according to the Nova Scotia Court of Appeal, crimes which attract the prospect of conviction and imprisonment, despite the fact that the unwitting sex partner was never exposed to bodily harm.

60. The Court of Appeal was asked to consider whether their interpretation of section 273.1 would criminalize a woman who lies about using birth control. The majority touches the surface of this issue, but ultimately does not explore whether N.C. would be subject to similar criminal culpability had the roles been reversed. As stated at paragraph 59[28]:

> [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.

61. By the time this matter is heard by this Honourable Court, Mr. Hutchinson will have been before the courts for over six years. It would be most unfortunate to put another person – perhaps a single mother who had a child with a litigious father – through a similar ordeal in order to find the right facts to illuminate the inquiry.

62. The facts to illuminate the inquiry already exist. All this court need do is imagine Professor Coughlin's imaginary, but entirely realistic, conversation cited at paragraph 172 of Farrar J.A.'s dissent:

He: "Are you on the pill"

She: "Yes"

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[28] Judgment of Nova Scotia Court of Appeal, dated January 3, 2013, at para. 59 [Record Tab 2B]

63. If “She” is not on the pill, “She” would be guilty of sexual assault for the same reason Mr. Hutchinson was guilty of sexual assault.

64. This is an era when people routinely make permanent records of their communication through text messages, email and social networking websites. Most people have mobile phones capable of surreptitiously recording conversations. It is entirely within reason that a father of an unwanted child would gather evidence against the mother and pass that evidence to the police.

65. While the litigious father who didn’t want a child would give the evidence to the police, the Court of Appeal has given the police the law they need to lay a charge of sexual assault against the mother.

Summary

66. It is submitted that the majority of the Nova Scotia Court of Appeal’s definition of section 273.1 blurs the line between immorality and criminality. The result, with great respect, is an erroneous expansion of what constitutes a sex crime. This expansion was not intended by Parliament, is not consistent with this court’s existing jurisprudence, and carries with it undesirable consequences.

67. Therefore, the Appellant requests the conviction be set aside.

PART IV – COSTS

68. The Appellant is not seeking costs.

PART V – ORDERS SOUGHT

69. If this court finds the majority of the Nova Scotia Court of Appeal erred in its interpretation of section 273.1 of the Criminal Code and sets aside Mr. Hutchinson’s conviction, this court must consider whether it is appropriate to enter an acquittal or to order a new trial.

Is the appropriate remedy to order a new trial or an acquittal?

70. The Appellant requests this Honourable Court set aside the conviction and enter an acquittal on the basis the evidence at trial establishes that there is no evidence of a “substantial

risk of serious bodily harm" that would vitiate consent under section 265(3) of the Criminal Code.

71. It is clear from the medical evidence in this case that N.C. became pregnant nine weeks before the November 16th, 2006 abortion, about a week after the couple stopped using birth control as a result of the false positive home pregnancy test of September 5th. Conception would have occurred during the time frame when both the Appellant and N.C. had unprotected sex on the incorrect belief she was already pregnant. Accordingly, there are no facts that would allow a trier of fact to conclude the sabotaged condoms caused N.C.'s pregnancy.

72. The only facts remaining to be weighed at a new trial are whether the elevated risk of pregnancy resulting from the sabotaged condoms was sufficient to vitiate consent. This exercise is complicated by the evidence that condoms are 80 to 85 percent effective as a form of birth control and the ambiguity surrounding the extent to which a pin prick in the condom would reduce its effectiveness.

73. In assessing whether there was a "substantial risk of serious bodily harm", this court must examine the issues that were considered in the first appeal but, as a result of findings that were made by the second trial judge, were not considered at the second appeal. In particular, this court must consider whether exposing one's sexual partner to unplanned pregnancy by sabotaging birth control is a "substantial risk" and whether pregnancy is a type of bodily harm.

74. Before reflecting on this issue, it is worth considering how a positive answer to these questions would affect existing approaches to sexual assault. Would a sexual assault involving full forced intercourse become sexual assault causing bodily harm or aggravated sexual assault the woman became pregnant? If the woman did not become pregnant, would the fact that the perpetrator exposed her to the likelihood of pregnancy be sufficient to constitute a sexual assault causing bodily harm or aggravated sexual assault? What if the woman was not ovulating, or was infertile for some reason?

75. It must also be remembered that Mr. Hutchinson was acquitted of aggravated sexual assault, but convicted of sexual assault *simplicter*. Therefore, the "substantial risk of serious bodily harm" analysis would be applied to the issue of vitiated consent but, paradoxically, not one of the elements of the offense.

"Substantial risk"

76. Measuring risk in a criminal trial requires opinion evidence about the level of danger associated with a particular activity. As discussed above, *Mabior* and *D.C.* both affirm it is appropriate for courts to hear evidence respecting the risk of bodily harm or the likelihood life is endangered by the sexual activity in question.

77. In this case, the abortion doctor gave evidence about the effectiveness of condoms as a form of birth control. She was cross examined on this issue[29]:

> **Q** …but what I'm asking you is that there's a very small pinprick – which is obviously larger than a single sperm – but that pinprick is covered or coated with a spermicidal jelly or lubricant, could that not seal the hole, or prevent sperm from passing through the hole?
>
> **A** Yes, that's possible.
>
> **Q** So to say that your opinion is that a pinprick would render the condom useless, that's not necessarily the case, correct?
>
> **A** I think I said it would be less effective.
>
> **Q** So it would just be less effective? And that would also depend on what the user's – the male's sperm count would be; that would have some effect, would it not? A very low sperm count, you would expect less sperm to go through that hole, would you not?
>
> **A** Yes.

78. It would appear that the evidence speaking to the elevated risk at trial was incomplete and ambiguous. The evidence will be no stronger if the matter proceeds to a third trial.

79. Importantly, the evidence before the trial judge in this case was that pregnancy and abortion are generally considered safe.

"Serious bodily harm"

80. The changes that take place in a pregnant woman's body are in a different category than injuries that are inflicted as a result of a physical assault. Many women will eagerly embrace pregnancy as it carries with it the joy of having a child, provided they are in control of when and with whom they become pregnant.

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[29] Evidence of Ms. Caines, at pages 139 and 140 [Record Tab 4B]

81. While pregnancy undeniably carries with it physical discomfort and child birth which, in all likelihood, will be excruciatingly painful, it is a legal and medical leap to lump the creation of human life in the same category as a broken leg or a serious abrasion. McLachlin J. (as she was then) commented on this issue in her dissent in *Cuerrier*[30].

> **73** This suffices to justify the position of the common law pre-Clarence that deception as to venereal disease may vitiate consent. The question of whether other categories of fraud could be logically added on the basis that deceit as to them also fundamentally alters the nature of the physical act itself, is better left for another day. It is doubtful that natural consequences, like pregnancy, would qualify, as they are the natural concomitant of the sexual act, and do not fundamentally alter its nature.

Conclusion

82. The various judges who have dealt with this case have used a variety of stern adjectives to describe Mr. Hutchinson's actions. The facts in this case are unusual, but the applicable legal principles are well established and very clear. Although there is ample justification for censuring the Appellant, there is no justification for criminalizing his actions. The Nova Scotia Court of Appeal erred in its interpretation of section 273.1 of the *Criminal Code*, and the Appellant respectfully requests this court set aside the conviction and enter an acquittal in its place.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS DAY OF APRIL, 2013.

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Luke A. Craggs
Counsel for the Appellant

[30] *R.* v. *Cuerrier* [1998] 2 S.C.R. 371, at 73 [BA Tab 3]

PART VI – TABLE OF AUTHORITIES

PARA

PART VII – STATUTES CITED

***Criminal Code of Canada*, 1985 R.S.C as amended, s. 265, 271, 273.1**

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.

(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.

(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.

(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.

R.S., c. C-34, s. 244; 1974-75-76, c. 93, s. 21; 1980-81-82-83, c. 125, s. 19.

271. Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding 18 months and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.

R.S., 1985, c. C-46, s. 271; R.S., 1985, c. 19 (3rd Supp.), s. 10; 1994, c. 44, s. 19; 2012, c. 1, s. 25.

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.

(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.

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

1992, c. 38, s. 1.

***Code criminel*, L.R.C. (1985), ch. C-46, s. 265, 271, 273.1**

265. (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas :

a) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;

b) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein;

c) en portant ostensiblement une arme ou une imitation, aborde ou importune une autre personne ou mendie.

(2) Le présent article s'applique à toutes les espèces de voies de fait, y compris les agressions sexuelles, les agressions sexuelles armées, menaces à une tierce personne ou infliction de lésions corporelles et les agressions sexuelles graves.

(3) Pour l'application du présent article, ne constitue pas un consentement le fait pour le plaignant de se soumettre ou de ne pas résister en raison :

a) soit de l'emploi de la force envers le plaignant ou une autre personne;

b) soit des menaces d'emploi de la force ou de la crainte de cet emploi envers le plaignant ou une autre personne;

c) soit de la fraude;

d) soit de l'exercice de l'autorité.

(4) Lorsque l'accusé allègue qu'il croyait que le plaignant avait consenti aux actes sur lesquels l'accusation est fondée, le juge, s'il est convaincu qu'il y a une preuve suffisante et que cette preuve constituerait une défense si elle était acceptée par le jury, demande à ce dernier de prendre en considération, en évaluant l'ensemble de la preuve qui concerne la détermination de la sincérité de la croyance de l'accusé, la présence ou l'absence de motifs raisonnables pour celle-ci.

271. Quiconque commet une agression sexuelle est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an si le plaignant est âgé de moins de seize ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois, la peine minimale étant de quatre-vingt-dix jours si le plaignant est âgé de moins de seize ans.

273.1 (1) Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.

(2) Le consentement du plaignant ne se déduit pas, pour l'application des articles 271, 272 et 273, des cas où :

a) l'accord est manifesté par des paroles ou par le comportement d'un tiers;

b) il est incapable de le former;

c) l'accusé l'incite à l'activité par abus de confiance ou de pouvoir;

d) il manifeste, par ses paroles ou son comportement, l'absence d'accord à l'activité;

e) après avoir consenti à l'activité, il manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci.

(3) Le paragraphe (2) n'a pas pour effet de limiter les circonstances dans lesquelles le consentement ne peut se déduire.