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 RESPONDENT
(HER MAJESTY THE QUEEN)

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PART I

STATEMENT OF FACTS

Overview

1. This appeal concerns the criminal liability of the Appellant who was convicted of sexual assault for surreptitiously poking holes in the condoms he used during numerous acts of sexual intercourse with his girlfriend. His confessed purpose for sabotaging and using the sabotaged condoms was to get his girlfriend pregnant without her consent and against her wishes.

2. The facts, in a nutshell, were that the Appellant, Craig Hutchinson, and his girlfriend, N.C., were in a deteriorating relationship. The Appellant realized this and concluded he could keep N.C. in an ongoing relationship if he got her pregnant and she had a baby fathered by him. N.C. did not want to get pregnant. The Appellant knew this, but placed his personal desires or wishes over N.C.'s bodily autonomy and integrity.

3. N.C. did not want unprotected sexual intercourse with the Appellant during the times she thought she could become pregnant from unprotected intercourse. During any time that she thought she could become pregnant, condoms were used in sexual intercourse. The only consent N.C. gave during these times was to condom protected intercourse. She was not aware until the Appellant later confessed to her, that he had poked holes in the condoms they were using so that he could get her pregnant.

4. It is respectfully submitted that there are important social policy issues at the core of the resolution of this appeal.

5. On the one hand, the law must protect against the exploitation of another human being, especially in the realm of sexual assault. The law must accord with **Charter** values of equality, dignity and autonomy.

6. On the other hand, there is a need for the law to prevent trivialization of circumstances that can found a conviction for the serious offence of sexual assault.

7. It is submitted that the decision of the majority of the Nova Scotia Court of Appeal created a proper balance between these two societal needs. While the deception by the Appellant

was not discovered until much later, the deception actually occurred at the time of the sexual intercourse. It was not a deception regarding the motivation for the sexual act, rather it was a deception regarding the physical sexual act. Discovery of the deception at a later time does not remove the fact that N.C., at the time of intercourse, only consented to protected sex. The majority decision correctly characterizes the consent of the complainant to the "sexual activity in question" for the purposes of s.273.1(1) of the Criminal Code as having been *void ab initio*, rather than vitiated by fraud.

8. The trial judge, the Honourable Justice C. Richard Coughlan of the Supreme Court of Nova Scotia found as a fact that N.C. did not consent to unprotected sexual intercourse with damaged condoms.

9. The trial judge relied on the decision of this Court in **R. v. J.A.**, [2011] 25 S.C.R. 440 in which the majority decision written by McLachlin, C.J.C. held at paragraphs 65 and 66 that the definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of "the sexual activity in question".

10. The trial judge found as a fact that there was no voluntary agreement by N.C. to "the sexual activity in question", which was sexual intercourse without contraception. He also found that the Appellant 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. As noted by the majority of the Court of Appeal at paragraphs 73 and 74 of its decision, these findings of fact were supported by the evidence. The judge made no palpable and overriding error of fact. (Appellant's Record Tab 2B p.50)

12. The majority of the Court of Appeal concluded at paragraph 22 of its decision that the undisputed facts were that N.C. consented to having protected sexual intercourse with the Appellant, but she, at no time, agreed to have unprotected sex with him. (Appellant's Record Tab 2B p.25)

13. At paragraph 22 of the majority's decision the question in issue was phrased as follows: Did the facts show N.C. had consented pursuant to Section 273.1(1) of the **Criminal Code**? The majority concluded that this would depend entirely on what is meant by "the sexual activity in

question". If it simply means sexual intercourse, then N.C. clearly consented. In that case, the Crown would have to prove, pursuant to Section 265(3), that this consent was vitiated by fraud. On the other hand, if unprotected sex was the "sexual activity in question", then there would be no consent. (Appellant's Record Tab 2B pp.25-26)

14. In **Cuerrier**, [1998] 2 S.C.R. 371 Justice Cory, for the majority, at paragraph 135 expressed great concerns about a criminal law policy which would proliferate petty prosecutions by providing that any fraud which induces consent will vitiate that consent. The majority in **Cuerrier** held that the existence of fraud should not vitiate consent unless there is a significant risk of serious harm.

15. The dissenting justice in the case at bar, Farrar, J.A. was quite concerned that the approach of the majority would create a "slippery slope" of unwarranted or trivialized criminalization in sexual assault cases.

16. The Respondent is also concerned that these sound protections against trivialized criminalization set out in **Cuerrier** not be altered.

17. However, as noted by the majority of the Court of Appeal below at paragraph 81, nothing in the majority's approach would criminalize the type of case posited by Justice Cory, eg: where the accused lies about matters like age, employment or wealth. Those deceptions would not involve essential features of the "sexual activity in question". Rather they involve anterior facts outside the bedroom. Those deceptions would only vitiate consent if there is fraud under Section 265.3(c) which involves a significant risk of serious bodily harm according to **Cuerrier**, supra, and **Mabior**, [2012] 2 S.C.R. 584.

18. The majority also noted at paragraphs 65 and 82 that its analysis acknowledged that not every deception voids consent under Section 273.1. Instead Section 273.1 targets only those deceptions, as here, which involve an essential feature of the sexual activity. In the case at bar an untampered condom during the act of intercourse was an essential feature of the "sexual activity in question". (Appellant's Record Tab 2B pp.47, 48 & 51)

19. It is respectfully submitted that the decision of the majority is narrow in breadth regarding criminalization of conduct. It does not create a "slippery slope" of unwarranted or

trivialized criminalization. It properly relies on the interrelationship between Sections 265 and 273 of the **Criminal Code**. An absence of consent to an essential feature of "the sexual activity in question" is precisely what Section 273.1 aims to criminalize.

20. As will be argued later in this factum, the majority's interpretation of consent to an essential feature of "the sexual activity in question" is in harmony with this Court's decisions in **Cuerrier**, **J.A.** and **Mabior**. It is also supported by reasoning in **R. v. Crangle**, 2010 ONCA 451 (Ont.C.A.) and the dissenting opinion in **R. v. Boone**, 2012 ONCA 539 (Ont.C.A.).

History of Proceedings

21. The Respondent agrees with the history of proceedings outlined in paragraphs 14 to 20, 22 and 24 of the Appellant's factum.

22. In regard to paragraphs 21 and 23 of the Appellant's factum, the Respondent says that there is much more to a summary of the respective majority and dissenting reasons than is outlined in those paragraphs. The Respondent will refer to the majority and minority reasons in the argument portion of this factum.

Facts giving rise to the conviction

23. The facts are outlined in paragraphs 2 to 29 of the trial judge's decision (Appellant's Record, Tab 2A, pages 12-16) and are repeated here for case of reference:

> 2 N.C. and Craig Hutchinson were involved in an intimate personal relationship from January, 2006 to October or November, 2006. Ms. 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.
>
> 3 During the summer of 2006, Mr. Hutchinson began putting the condoms on himself and told Ms. C. not to look. She thought that odd. At that time, Ms. C. told Mr. Hutchinson she needed a break -- she was not happy in the relationship.
>
> 4 Mr. Hutchinson was checking her phone calls and text messages. Ms. C. spoke of her unhappiness. Mr. Hutchinson wanted to work their problems out. In July, 2006, a

condom being used by them in sexual intercourse broke. Around August 5, Ms. C. had a menstrual period. The broken condom did not cause a pregnancy.

5 During late August, 2006, Mr. Hutchinson was insistent Ms. C. should have a pregnancy test. She took a home pregnancy test on September 5, 2006, which was positive. She remembered the date as her menstrual period was supposed to start on September 5th. Ms. C. had taken a home pregnancy test about a week earlier, which was negative.

6 Ms. C. thought it was odd as they always used condoms. It did not make sense. Mr. Hutchinson was very happy with the positive test.

7 Ms. C. thought they would deal with the situation, try to work out their relationship. They planned to have the baby.

8 Ms. C. asked Mr. Hutchinson to give her a break so she could decide if they would stay together. Mr. Hutchinson would not leave her alone, texting her.

9 Ms. C. ended the relationship the first of November, 2006. Mr. Hutchinson was at her home in Timberlea, Nova Scotia. Ms. C. told him she was not happy -- the relationship had to end. Mr. Hutchinson was upset. He passed out in the driveway.

10 Mr. Hutchinson continued to text messages to Ms. C. a lot. He also called her on her telephone. Ms. C. asked Mr. Hutchinson to stop texting her. She read the messages from Mr. Hutchinson for awhile and then for about a week she did not read his messages. Mr. Hutchinson called her and asked if she was checking his messages. Ms. C. recognized Mr. Hutchinson's voice on the phone and when she checked the messages Mr. Hutchinson's name and telephone number were displayed on her telephone. Ms. C. read the text messages, which stated:

- The Anger I Was Wrong. I Wanted A Baby With U So Bad I Sabotaged The Condoms So Now They R Not Safe. Sory & Craig * (1/2) They Wil B Mailed. Sory 4 The Anger I Was Wrong. I Wanted A Baby With U So
- 11/05 Craig * (2/2) W 1 Fri I Took Clothes Poked Holes In them Al. I Don't Want U 2 Get A STD. I Steped On U Phone Charger I think I Broke It. I Owe U A Ne Craig *(1/2) Throw U Condoms Away I Poked Holes In Them Al. I Don't Want U 2 Get A * 2 Protect U I Need to Tel U Something I Did 2 Months Ago. I 1 Cal & Is Al It Wil Take. pls
- 11/05 2:22 P Craig * 2 Protect U I Need to Tel U Something I Did 2 Months Ago. I
- 11/05 Craig * (2/2) Now I Wil Leave U Alone.
- *[Telephone Number Deleted]*

11 After reading the messages Ms. C. checked the condoms and they all had holes poked in them. Ms. C. thought she gave the box of condoms to Constable Tracy Chambers.

12 Ms. C. was in shock. Poking holes in condoms was the last thing she thought somebody would do. She would not consent to sex with condoms with holes in them.

13 Ms. C. had a number of appointments with her family doctor, Dr. Rowicka.

14 She decided to have an abortion, which took place on November 16, 2006. For the two week period after the abortion, she had extreme pain, lots of severe pain in her abdomen, had blood clots and she missed work. She was three to four days off work at the time she had the abortion. Ms. C. took Ibuprofen. She did not recall if she took antibiotics.

15 Ms. C. was aware condoms were not a hundred percent guarantee against pregnancy. She knew condoms could break, slip or leak.

16 As the relationship went downhill, Mr. Hutchinson and Ms. C. had sexual intercourse less frequently.

17 After the positive pregnancy test of September 5, 2006, Ms. C. and Mr. Hutchinson did not use birth control.

18 Ms. C. consented to sexual intercourse with Mr. Hutchinson.

19 Dr. Margaret Rowicka was qualified as a duly qualified general medical practitioner, licensed to practice medicine in Nova Scotia, and qualified to give opinion evidence on the diagnosis, prognosis and treatment of human beings and, in particular, uncomplicated pregnancies in women.

20 She was Ms. C.'s physician in 2006. Ms. C. saw Dr. Rowicka's colleague on October 17, 2006 and was sent for blood work to confirm her pregnancy. On October 24, 2006, Dr. Rowicka examined Ms. C., who was about seven weeks pregnant. Dr. Rowicka next saw Ms. C. on November 3, 2006. Ms. C. told her she had broken up with her partner one week earlier. She was considering terminating her pregnancy. Dr. Rowicka referred Ms. C. for counselling and scheduled an ultrasound to date the pregnancy. Dr. Rowicka next saw Ms. C. after the abortion, on November 23, 2006. Ms. C. had bleeding and sharp cramps. Dr. Rowicka treated Ms. C. with antibiotics and told her to take Ibuprofen. She diagnosed Ms. C. as having suffered endometriosis, which is an infection of the lining of the uterus, which is treated with oral antibiotics. On November 27, 2006, Dr. Rowicka saw Ms. C., who was better -- the pain was resolving. Ms. C.'s cervical opening was still open, which concerned Dr. Rowicka, as some of the tissue from the abortion could still be in her uterus. Dr. Rowicka again saw Ms. C. on December 1, 2006. Ms. C. was still bleeding and was experiencing sharp pains. Dr. Rowicka was concerned as Ms. C. was still bleeding more than expected. She sent Ms. C. for an ultrasound on an urgent basis to determine if part of the pregnancy was still in Ms. C. On December 8, 2006, Dr. Rowicka saw Ms. C. who was still bleeding -- things were settling down. Dr. Rowicka stated Ms. C. suffered complications from the termination of the pregnancy.

21 Dr. Rowicka testified there is a low risk of death in giving birth. Dr. Rowicka did not know if it is possible for a woman to get pregnant during her menstrual period. The pregnancy had no complications for Ms. C. After the abortion, from November 16 to

December 8, 2006, Ms. C. suffered from pain and bleeding. The bleeding worked itself out. Most pregnancies go full term without complications -- there is a very low risk of death.

22 The doctor who performed the abortion was qualified as a duly qualified medical practitioner licensed to practice medicine in Nova Scotia and qualified to give opinion evidence on the diagnosis, prognosis and treatment of human beings, particularly in the areas of pregnancy and its termination.

23 The doctor performed the abortion procedure on Ms. C. on November 16, 2006. At the time, Ms. C. was nine weeks pregnant. The doctor determined the gestation by means of an ultrasound and her examination of Ms. C.

24 The doctor who performed the abortion testified abortion is largely a safe surgical procedure. Complications are uncommon. Possible complications include excessive bleeding, injury to the uterus and cervix, infection, blood clots, infertility and very rarely death. The most common complication is PAS (post abortion syndrome), which includes blood clots, severe cramping and pain, and which occurs in one in 100 cases. Death and allergic reaction occur in just a fraction of cases.

25 Ms. C. received counselling from a social worker.

26 The doctor who performed the abortion testified it is possible for a woman to become pregnant during her menstrual period.

27 The doctor advises people on birth control. If used properly, condoms are an effective birth control method. They are eighty to eighty-five percent effective. A condom would not be effective birth control if there was a pin prick in it. There needs to be a barrier to be effective. There is still a possibility of pregnancy with the use of condoms.

28 Constable Tracy Chambers is a member of the Royal Canadian Mounted Police, who was stationed at the Tantallon, Nova Scotia detachment in 2006. On November 30, 2006 she attended at Ms. C.'s residence. Constable Chambers viewed text messages on Ms. C.'s cell phone and photographed the messages, which photographs were entered into evidence and were the same messages of which Ms. C. testified. Constable Chambers obtained a production order which showed the phone from which the messages were sent was owned by Craig Hutchinson when the messages were sent. During the same visit, Constable Chambers seized the box of condoms which were entered into evidence and identified by Ms. C.

29 I find Craig Jared Hutchinson and N.C. were in an intimate personal relationship from January, 2006 to the end of October, 2006. During most of that period, they engaged in sexual intercourse three to four times a week. Ms. C. consented to sexual intercourse with Mr. Hutchinson. Until Ms. 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 Ms. C. did not want to become pregnant. Ms. C. used contraception (condoms) at times she believed she was at risk of becoming pregnant. Ms. C. did not consent to unprotected sexual intercourse with damaged condoms. [2011 NSSC 361 - paras.2-29]

24. The Respondent notes that at paragraph 44 of the trial judge's decision he found that there was no voluntary agreement by N.C. to "the sexual activity in question" (Appellant's Record Tab 2A page 20). Support for this finding of fact is found in N.C.'s evidence. In particular, N.C. testified that she would not have consented to sex with the Appellant if she had known they were using condoms with holes in them. (Appellant's Record Tab 4B p.132 lines 7-10)

25. The Respondent also notes that at paragraph 47 of the trial judge's decision, he found that the Appellant intended to engage in sexual intercourse with N.C. using sabotaged condoms and he knew N.C. did not consent to sexual intercourse without contraception. (Appellant's Record Tab 2A p.20)

26. Support for these findings is found in the following evidence at trial:

a) N.C. testified that except during periods where she did not believe she could become pregnant from unprotected sex, they always used condoms for birth control. (Appellant's Record Tab 4B p.113 line 9 to p.114 line 18)

b) N.C. testified that the practice of her putting the condoms on the Appellant changed and he insisted on putting them on and taking them off without her seeing. (Appellant's Record Tab 4B p.114 line 19 to p.115 line 13)

c) N.C. testified that on one occasion the Appellant went into her room alone and stayed there with the door shut. When she entered the room she found him hunched over, sitting on her bed, beside the drawer where the condoms were kept. (Supplementary Record of Appellant Tab 1 p.1 line 7 to p.2 line 19)

d) N.C. testified that the Appellant insisted she take a home pregnancy test. After the first test came back negative the Appellant wanted N.C. to have another test as he was sure she was pregnant. When the test came out positive, N.C. was shocked and the Appellant was happy (Appellant's Record Tab 4B p.119 line 8 to p.122 line 5)

e) The Appellant sent text messages to N.C. in which he admitted to wanting a baby with her so badly that he sabotaged the condoms by poking holes in them. (Appellant's Record Tab 4B p.128 line 14 to p.129 line 12)

f) N.C. and R.C.M.P. Constable Tracy Chambers testified that the left-over condoms, on inspection, had holes poked in them. (Appellant's Record Tab 4B p.130 line 17 to p.131 line 3 and Tab 4E p.254 lines 7-15)

27. The findings of fact made by the trial judge were based on the evidence called by the Crown. The evidence called by the Crown was the entire evidence at the trial as the defence called no evidence.

PART II

QUESTIONS IN ISSUE

28. The Appellant puts the following question in issue (para.25 Appellant's factum):

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

ARGUMENT

29. The Appellant was charged in an Indictment with the offence of aggravated sexual assault contrary to s.273(2)(b) of the **Criminal Code**. (Appellant's Record Tab 3B) At the conclusion of his trial he was found guilty of the included offence of sexual assault. (Appellant's Record Tab 2A p.17)

Ingredients of the Offence of Sexual Assault
– The *Actus Reus* and *Mens Rea* of Sexual Assault was Established

30. In **R. v. J.A.**, [2011] 2 S.C.R. 440; 2011 SCC 28, a majority of this Court described the ingredients of the offence of sexual assault in the following manner at paragraphs 23 and 24:

> 23 A conviction for sexual assault under s. 271(1) of the *Criminal Code* requires proof beyond a reasonable doubt of the *actus reus* and the *mens rea* of the offence. A person commits the *actus reus* if he touches another person in a sexual way without her consent. Consent for this purpose is actual subjective consent in the mind of the complainant at the time of the sexual activity in question: *Ewanchuk*. As discussed below, the Criminal Code, s. 273.1(2), limits this definition by stipulating circumstances where consent is not obtained.
>
> 24 A person has the required mental state, or *mens rea* of the offence, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or wilfully blind to the absence of consent. The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant communicated consent to engage in the sexual activity. However, as discussed below, ss. 273.1(2) and 273.2 limit the cases in which the accused may rely on this defence. For instance, the accused cannot argue that he misinterpreted the complainant saying "no" as meaning "yes" (*Ewanchuk*, at para. 51).

Findings of Fact by Trial Judge in The Case at Bar

31. In the case at bar, the trial judge clearly relied on the decisions of this Court in **J.A.,** supra, and **R. v. Ewanchuk**, [1999] 1 S.C.R. 330 as the law to be applied regarding proof of the *actus reus* and *mens rea* of sexual assault. At paragraphs 34 and 46 of the trial judge's decision he held:

> 34 In giving the majority judgment in *R. v. J.A.,* 2011 SCC 28, McLachlin, C.J. stated, "The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity."
>
> ...
>
> 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.
>
> (Appellant's Record tab 2A pp. 11&12)

32. At paragraph 73 of the majority decision of the Nova Scotia Court of Appeal in the case at bar, the Chief Justice of Nova Scotia refers to findings of fact made by the trial judge:

> [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.
>
> (Appellant's record Tab 2B pp. 49&50)

33. It is respectfully submitted that the trial judge was correct in approaching the issue of consent by finding that N.C. had not consented to this sexual activity, rather than finding consent was vitiated by the fraud of the Appellant.

34. The majority of the Nova Scotia Court of Appeal was correct in ruling that the trial judge's approach to analyzing whether or not sexual assault had occurred was in accordance with the law.

Majority of Nova Scotia Court of Appeal correctly determined the Issue in Case at Bar

35. At paragraph 22 of the majority's decision the Court of Appeal majority held:

> **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.

36. At paragraph 51 of its decision the majority notes that its approach to resolving the issue in the case at bar is consistent with the societal value of a person having control over who touches his or her body, and how. (Appellant's Record Tab 2B p.43)

Majority of Nova Scotia Court of Appeal correctly interpreted the Inter-relationship between Sections 265 and 273.1 of the **Criminal Code**

37. At paragraphs 21 and 67 to 72 the majority of the Nova Scotia Court of Appeal held as follows:

> 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.
>
> ...

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 para. 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, para. 20 and para. 23, and with Justice Major's comments in **R. v. Ewanchuk**, *supra*, para. 26-27, that consent, or its absence, is subjective.

(Appellant's Record Tab 2B pp.25, 26, 48 & 49)

38. With respect, the majority was correct in giving more meaning to the words "the sexual activity in question" found in s.273.1(1) than simply consenting to the application of force.

39. The meaning given by the majority to the words "the sexual activity in question" requires a trier of fact to determine if consent was void *ab initio*. This meaning is in accord with the need for the law to ensure a person's right of control over their own bodily integrity.

No Consent to the Sexual Activity in Question

40. The majority held at paragraph 71 that the concept of "the sexual activity in question" 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. The feature must be a component of the sexual activity and not an extraneous factor that merely affects motive to engage in the sexual activity. (Appellant's Record Tab 2B pp.48&49) The majority noted at paragraph 65, that not every deception voids consent under s. 273.1. (Appellant's Record Tab 2B p.47)

41. The Respondent is not asking this Court to trivialize the circumstances that ground a conviction for sexual assault.

42. There is a need to distinguish between lack of consent to sexual activity in question and consent to sexual activity which is vitiated by fraud.

43. It is submitted that the majority's decision makes such a clear distinction in order to prevent the creation of a "slippery slope" of unwarranted or trivialized criminalization. At paragraphs 80 to 82 the majority correctly considered this point and concluded:

> 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*, para. 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.
>
> (Appellant's Record Tab 2B p.51)

Majority of Nova Scotia Court of Appeal's decision is in Accord with this Court's Decision in **J.A.**

44. At paragraphs 28 to 33 of the Appellant's factum it is argued that **J.A.**, supra, has no application to the case at bar. In doing so, the Appellant limits the interpretation of the phrase "the sexual activity in question" to the act of sexual intercourse.

45. It is respectfully submitted that such an interpretation gives no meaning to the major condition attached to N.C.'s consent, namely that the intercourse be condom protected.

46. Condom protection wan not an anterior fact from outside the bedroom. It was not the motivation for the sexual activity in question. Rather, it was an essential feature and characteristic of the sexual activity in this case. It was an inseparable component of N.C.'s consent. The victim did not consent to non-condom protected sex. The Appellant knew that she did not which was the very reason the Appellant decided to intentionally deceive N.C. In these circumstances, the victim's requirement that sex be condom protected cannot be ignored.

47. At paragraph 40 of the majority's decision it held 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 the case at bar the trial judge found that the proposed sexual activity was protected sex. Clearly the victim was not fully aware of the exact nature of the proposed sexual activity.

48. At paragraphs 38 and 39 the majority refers to this Court's decision in **J.A.** as support for the conclusion that s.273.1 prevents an accused from intentionally duping his partner, where a pre-requisite to her consent is that he wear an intact condom. The majority held:

> 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:
>
> > para. 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.

> para. 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.
>
> para. 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 *intentionally* duping his partner, where a pre-requisite to her consent is that he wear an intact condom.

Problems Regarding the Appellant's Position

49. The Appellant's position is based on the dissenting opinion of the Honourable Justice Farrar. It is submitted that this position raises the following problems:

1. Starting the analysis of whether a sexual assault was committed by considering s.265 does not take into account the fact that s.265 deals with all assaults (including sexual assaults) whereas s.273 is specifically the sexual assault section of the **Criminal Code**.

2. Not considering s.273.1 first in the analysis removes consideration as to whether there is consent to the "sexual activity in question". The majority's method of analysis set out at paragraph 77 of its decision removes this problem and gives meaning to the phrase "the sexual activity in question".

3. The dissenting opinion's view that sexual activity simply refers to the physical sex act and not the conditions or quality of that act (dissent, para.121) ignores the reality that condom protected sex is not the same physical activity as unprotected sex. The majority view (at para.75) that the wearing of an unsabotaged condom during intercourse was an essential feature of the proposed sex act acknowledges the reality that unprotected by condom sex and protected by condom sex are different sexual acts.

4. With respect, the dissenting opinion reduces the liability for the Appellant's actions to social censure as the result of committing a despicable act. Assigning criminal liability to the Appellant's actions would be in line with sexual assault legislation's goal to protect the personal integrity of every individual. As noted by the majority at paragraph 51, **Ewanchuk**, reminds us of the rational underlying the criminalization of assault. 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, is at the core of human dignity and autonomy. The facts in the case at bar require, from a societal policy point of view, more than social censure.

5. The dissenting opinion holds that consent was retroactively revoked once the deception was found out (dissent paras.149-151). However, as noted by the majority at paragraph 79 of its decision, N.C. made it clear before the sexual activity that she was not consenting to unprotected sex. She did not retroactively change her mind later. She simply learned that the condition precedent to her consent from the outset, had not existed. The time of the commission of the sexual assault ought not to be confused with the detection of the crime which occurred when the Appellant confessed.

50. The majority of the Nova Scotia Court of Appeal was correct in deciding that based on the facts in the case at bar, there was no consent *ab initio* to an "inseparable component" of the sexual activity in question, namely unprotected sexual intercourse.

Majority's Decision is in Harmony with **J.A.** and **Crangle**

51. The Appellant argues at paragraph 33 of his factum that **J.A.** does not have application to this case. He also says that the majority's methodology does away with the line of reasoning in place since **R. v. Cuerrier**, [1998] 2 S.C.R. 371, 1998 S.C.J. No. 64.

52. At paragraphs 29 and 34 of **J.A.**, supra, the majority of this Court clearly started its analysis of whether a sexual assault had occurred by referring to s.273.1(1). It was held that 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 at the time it occurs.

53. It was entirely proper for the trial judge in the case at bar to rely on **J.A.** as the starting point to analyze if N.C. had consented. The trial judge found as a fact that the sexual activity to which N.C. had consented was condom protected sexual intercourse. Based on the facts, she had clearly not consented to unprotected sexual intercourse.

54. The majority in **J.A.** at paragraphs 58, 60 and 65 referred to difficulties that could arise from requiring conscious consent to sexual activity. The risk that an unconscious person's wishes would be innocently interpreted for example by not wearing a condom where that was a wish of the complainant could result in an unrealistic concept of consent. However, it was held that it was Parliament that had to alter the law on consent in relation to sexual assault.

55. It is submitted that the trial judge and the majority of the Court of Appeal were correct in holding that in the facts in the present case "sexual activity in question" was condom protected sexual intercourse. Because the Appellant deceived N.C. regarding an essential feature of the sexual act itself, the consent was void *ab initio*. The Appellant's deceit was not based on a motivation for the sex act of the type described in **Cuerrier**, supra.

56. It is submitted that the decision of the majority is also in harmony with the decision of the Ontario Court of Appeal in **Crangle**, supra. In **Crangle** the identity of the sexual partner was an inseparable component of any consent to sexual activity. In the present case, the deceit was not just lying about the use of birth control. Rather the Appellant purposefully used condoms he sabotaged as part of the sex act.

Majority's Decision is in Harmony with **Cuerrier** and **Mabior**

57. It is submitted that the phrase "the voluntary agreement to the sexual activity in question" found in s.273.1(1) of the **Criminal Code** is the proper starting point for the analysis whether N.C. consented.

58. In the case of N.C., she clearly only consented to condom protected sexual intercourse.

59. The deception of the Appellant was to an essential feature of the sexual activity in question and voided N.C.'s consent to an inseparable component of her consent.

60. As was held by the majority at paragraphs 65, 77 and 81:

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).

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, para. 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).

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*, para. 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*.

61. As was held by the majority at paragraph 82, an absence of consent to an essential feature of the sexual activity was 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.

62. At paragraphs 58 of the Appellant's factum he sets out three examples of behaviours which he says would result in conviction for sexual assault following the majority's reasoning.

63. It is submitted that the first example is similar to the situation referred to earlier in this factum at paragraph 49. This is a situation of a type that this Court alluded in **J.A.** may result in criminal liability.

64. The second example is one similar to the situation in **Boone**, supra. In the Honourable Justice Simmons dissent it was held at paragraph 96 (Appellant's Book of Authorities Tab 1) that a sexual partner's HIV status is an inseparable component of consent to sexual relations. It is unlike extraneous factors of false promises of gifts, marriage, professional status. Rather it changes the very character of the sexual conduct.

65. It must be remembered that the deception in the case at bar was not a promise regarding matters apart from the physical act. The deception was the physical act of using sabotaged condoms. The deception was not discovered until later. At the time of sexual intercourse, an essential feature of the act which was an inseparable component of N.C.'s subjective consent was removed.

66. The third example sets out acts of forgetfulness, not intention to deceive regarding an essential feature of the sex act.

67. Whatever may be the criminal liability of persons in the scenarios posited by the Appellant in paragraph 58 of his factum, in the case at bar the Appellant made deliberate, deceptive physical acts which took away the actual subjective consent of N.C. at the times of the sexual intercourse.

68. Therefore, the appeal should be dismissed for the reasons given by the majority of the Court of Appeal.

Disposition

69. The Crown asks that the appeal be dismissed. The Appellant asks this Court to overturn the conviction and enter an acquittal.

70. However, Farrar, J.A. did not dissent on a question of law in regard to the remedy of acquittal that the Appellant now seeks. Section 691(1)(a) of the **Criminal Code** does not permit the Appellant to present argument on this point because his appeal is limited to the dissent on a question of law. Section 691(1)(a) states:

> 691. (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada
>
> (a) on any question of law on which a judge of the court of appeal dissents;

In fact, far from dissenting on the matter, Farrar, J.A. rejected the Appellant's submissions in this regard. There was no dissent on this point. Therefore, s.691(1)(a) precludes argument of this point.

71. At paragraphs 200, 201, 208, 109 and 220 to 223 Farrar, J.A. , the dissenting judge, held as follows:

> 200 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.
>
> 201 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.
>
> 208 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.
>
> 209 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.
>
> 220 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, para. 20)
>
> 221 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, para. 52-57).
>
> 222 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.
>
> 223 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.
>
> (Appellant's Record Tab 2B pp.85, 88, 91&92)

72. The majority held at paragraphs 83 and 84 that if the disposition of the case rested with s.265(3)(c) a new trial would be needed. At a new trial the issue of whether the Appellant's actions caused a "significant risk of serious bodily harm" would have to be determined. The dissenting judge agreed in this hypothetical. There is no dissent on a question of law.

73. Because Justice Farrar did not dissent on a question of law by directing an acquittal on this ground, s.691(1)(a) of the **Criminal Code** does not permit an appeal to this Court on the issue of acquittal versus re-trial.

PART IV

SUBMISSIONS WITH RESPECT TO COSTS

74. This is a criminal case and therefore the Respondent is not seeking costs.

PART V

ORDER SOUGHT

75. The Respondent asks this Court to dismiss the appeal or in the alternative order a new trial.

76. ALL OF WHICH IS RESPECTFULLY SUBMITTED.

James A. Gumpert, Q.C.
Counsel for the Respondent

Timothy S. O'Leary
Counsel for the Respondent

May 15, 2013
Halifax, Nova Scotia

PART VI

TABLE OF AUTHORITIES

CASES		Paragraph Reference	Tab
1.	**R. v. J.A.**, [2011] 25 S.C.R. 440	9, 30	1
2.	**R. v. Boone**, 2012 ONCA 539 (Ont.C.A.)	20	2
3.	**R. v. Crangle**, 2010 ONCA 451 (Ont.C.A.)	20	3
4.	**R. v. Cuerrier**, [1998] 2 S.C.R. 371	14, 51	4
5.	**R. v. Ewanchuk**, [1999] 1 S.C.R. 330	31	5
6.	**R. v. Mabior**, [2012] 2 S.C.R. 584	17	6

PART VII

APPENDIX OF STATUTORY REFERENCES

Statutes referred to by the Respondent.

Criminal Code of Canada, R.S.C. 1985, c.C-46 -- Section 265:

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

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

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.

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.

Criminal Code of Canada, R.S.C. 1985, c.C-46 -- Section 271:

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.

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.

Criminal Code of Canada, R.S.C. 1985, c.C-46 -- Section 273.1:

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;

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*) 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.

- *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.