

NOVA SCOTIA COURT OF APPEAL

Citation: R. v. Hutchinson, 2010 NSCA 3

Date: 20100120

Docket: CAC 307320

Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Craig Jaret Hutchinson

Respondent

Restriction on Publication: Pursuant to s. 486.4(1) of the **Criminal Code**

Judges: The Honourable Justice Roscoe with Bateman J.A. concurring and Beveridge J.A., dissenting.

Appeal Heard: September 29, 2009

Subject: **Criminal Law:** directed verdict, aggravated sexual assault, consent, s. 273.1 of the **Criminal Code**, consent vitiated by fraud, endangerment of life

Summary: Crown appeal from acquittal entered by trial judge who granted a defence motion for directed verdict on a charge of aggravated sexual assault.

The evidence at trial was that the accused deceived his girlfriend by poking holes in the condoms they used when having sex. The complainant gave evidence that she wanted to avoid pregnancy. She became pregnant and after they broke up the accused sent her a series of text messages stating that he wanted a baby with her so badly he had sabotaged the condoms. The complainant subsequently had an abortion. The trial judge found that there was no evidence to support a finding that the complainant had not consented to the sexual intercourse. Furthermore, the evidence did not support a finding that

consent was vitiated by fraud because the risk of serious bodily harm from pregnancy and abortion was remote. See: 2009 NSSC 51.

The Crown appealed the acquittal.

Issues: Did the trial judge err in granting the directed verdict of acquittal? Was there evidence of lack of consent to the sexual activity in question? Was there evidence of serious bodily harm and endangerment of life?

Result: The majority (Roscoe, J.A., Bateman, J.A. concurring) allowed the appeal and ordered a new trial. A properly instructed jury could conclude that there was no voluntary agreement to take part in unprotected sexual intercourse, and therefore no consent to the sexual activity in question (s. 273.1). Alternatively, a properly instructed jury could find that there was consent to the sexual activity but that it was vitiated by fraud. Based on **R. v. Cuerrier**, [1998] 2 S.C.R. 371, there was evidence of actual serious bodily harm to the complainant as a result of the accused's deceit. As well there was evidence upon which a jury could find proof of the element of endangerment of life.

Beveridge, J. A., (dissenting) would dismiss the appeal. The definition of "consent" in s. 273.1(1) of the **Code** cannot be interpreted to import an additional requirement of "informed consent" into the basic condition that consent simply means the voluntary agreement by the complainant to engage in the sexual activity in question. The Crown's reliance on the criteria suggested by Cory J. in **Cuerrier** for vitiating consent – deception or dishonest failure to disclose the existence of a sexually transmitted disease and a significant risk of serious bodily harm is misplaced.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 55 pages.

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Judges: Roscoe, Bateman and Beveridge, J.J.A.

Appeal Heard: September 29, 2009, in Halifax, Nova Scotia

Held: Appeal allowed and a new trial ordered, per reasons for judgment of Roscoe, J.A., Bateman, J.A. concurring, Beveridge, J.A. dissenting.

Counsel: Peter P. Rosinski, for the appellant
The respondent, in person

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

(a) any of the following offences:

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

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

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

Reasons for judgment: (Roscoe, J.A.)

[1] The Crown appeals from the acquittal entered by Justice Gerald R. P. Moir, after granting a defence motion for directed verdict on a charge of aggravated sexual assault. The decision under appeal is reported as: 2009 NSSC 51. The Crown alleged that the respondent endangered the life of the complainant Ms. C. by poking holes in the condoms they used during sexual intercourse which resulted in her pregnancy and abortion.

The evidence at trial

[2] Ms. C. testified that in January 2006 she began an intimate relationship with Mr. Hutchinson which lasted approximately nine months. They maintained separate residences. Condoms were used as contraception whenever they had sexual intercourse except when Ms. C. was menstruating. She testified that she did not believe she could become pregnant during her menstrual period. Ms. C. indicated that during the first five or six months of their relationship Mr. Hutchinson preferred that she put the condoms on him. However, around August 2006 he started doing it himself which she thought was strange. Sometime during the summer, Ms. C. expressed some unhappiness about the relationship and they talked about breaking up.

[3] One day during the summer of 2006, Ms. C. observed Mr. Hutchinson go into her bedroom and close the door. After five or ten minutes she went in to see what he was doing and found him sitting hunched over on the edge of her bed near the bedside table where the condoms were kept. She asked him what he was doing and he said “Nothing, nothing”.

[4] In September 2006 Mr. Hutchinson urged her to take a pregnancy test. She did not think she needed to because they had been using condoms during intercourse. However, since he insisted that she might be pregnant, she did take two tests. The first around September 1st was negative; the second test on September 5th was positive. She said she was shocked but that Mr. Hutchinson was very happy.

[5] A few weeks later Ms. C. told Mr. Hutchinson that she needed “some space”, some time away from him. During that time he phoned her and sent her

text messages several times a day which annoyed her. On November 1, 2006 she told him that their relationship was over. Mr. Hutchinson continued to harass her with phone and text messages which she ignored. After about a week she answered a call from him. He asked her if she had been checking her text messages and she indicated that she had not. He said: "There's something I have to tell you ... you got to throw away your condoms. I poked holes in them all. I don't want you to use them with someone else."

[6] Ms. C. was shocked. She then checked her cell phone and found that Mr. Hutchinson had sent her several text messages about the condoms. An exhibit containing photocopies of the display of her cell phone, depicted the following messages sent from Mr. Hutchinson's cell phone:

To protect you I need to tell you something I did two months ago. ...

Throw your condoms away. I poked holes in them all. I don't want you to get an STD...

... I wanted a baby with you so bad I sabotaged the condoms so now they are not safe. Sorry.

[7] Ms. C. also checked the box of condoms and found that they had all been pierced and were leaking lubricant. She testified that she would not have consented to have sexual intercourse with Mr. Hutchinson if she had been aware of the condition of the condoms.

[8] Shortly after, Ms. C. decided to have an abortion. The procedure took place on November 16th, following which she suffered from extreme bleeding, blood clotting, and severe pain for about two weeks.

[9] Ms. C's family physician, Dr. Rowicka, testified as an expert witness qualified to give opinion evidence on the diagnosis, prognosis and treatment of pregnant women. Dr. Rowicka indicated that she treated Ms. C. during her early pregnancy and referred her for the abortion. She indicated that Ms. C. was quite distraught and was having difficulty making the decision so she also referred her

for counselling. Dr. Rowicka treated Ms. C. for complications following the abortion which included pain, bleeding and infection of the endometrium.

[10] Dr. Rowicka testified that most pregnancies are uncomplicated. However, risks associated with the first trimester of pregnancy include bleeding and miscarriage. A patient may require a blood transfusion after a miscarriage or a dilation and curettage procedure. Another serious complication during the first trimester is the possibility of an ectopic pregnancy, which can lead to the necessity of laproscopic surgery to remove the fallopian tube and ovary.

[11] The doctor also testified that pregnancy predisposes a woman to deep vein thrombosis, hypertension, pregnancy induced diabetes, and eclampsia. Complications of the second and third trimester include premature delivery, bleeding caused by placenta previa, injury to the genital tract if a forceps delivery becomes necessary, caesarian section and complications from that surgery, and in rare circumstances, death. The risks arising from an unplanned pregnancy also include psychological and emotional problems.

[12] On cross-examination Dr. Rowicka indicated that Ms. C. did not suffer any complications arising from her pregnancy. The pain, bleeding and infection she did suffer all arose as a result of the abortion procedure.

[13] The physician who performed the abortion also testified as an expert. She indicated that although abortion is normally a safe surgical procedure, the common potential complications of abortion include haemorrhage, surgical injury to the uterus or the cervix, infection, blood clots, the necessity of a second procedure, infertility and very rarely, death. She testified that an unintended or unplanned pregnancy is a medical condition with potential risks connected with whichever option the woman chooses, continued pregnancy or abortion. It was also her evidence that a pinprick hole in a condom renders it useless as a contraceptive.

[14] Constable Tracy Chambers, who investigated the complaint made by Ms. C. on November 30, 2006, confirmed the contents of the text messages on Ms. C's phone and that they had been sent from Mr. Hutchinson's phone. She indicated that she inspected and took possession of the box of condoms and that each of them had a pinprick hole in the center.

The motion for directed verdict

[15] Trial counsel for the defendant argued that the Crown led no evidence that the condoms in question were in fact used by Mr. Hutchinson and Ms. C., that based on the Supreme Court of Canada decision in **R. v. Cuerrier**, [1998] 2 S.C.R. 371, the Crown had not established that there was a significant risk of serious bodily harm which would vitiate the consent of the complainant, and that there was no evidence that the sexual activity endangered the life of Ms. C.

[16] The Crown submitted that s. 273.1 of the **Code** applied and that there was evidence that the complainant was not consenting to unprotected sex. Alternatively, if there was consent, it was vitiated by the fraud committed by Mr. Hutchinson when he sabotaged the condoms. Furthermore, it was argued that the pregnancy did expose the complainant to significant risk of serious bodily harm which in turn endangered her life.

The decision under appeal

[17] After adjourning for a few hours, Justice Moir delivered an oral decision on the motion for directed verdict. After reviewing the evidence and summarizing the positions of the Crown and defence, he found:

14 In my assessment, the circumstantial evidence, assuming it is accepted, is strong enough that a properly instructed trier of fact, acting reasonably, could conclude that the Crown has proved, beyond a reasonable doubt, that Mr. Hutchinson got the complainant pregnant by wearing a sabotaged condom.

15 There is evidence, to be accepted or rejected by the trier of fact, tending to prove all of the following:

- Mr. Hutchinson made a plan to get the complainant pregnant by using punctured condoms.
- He poked holes in all of the condoms in the box from which he took condoms during sex at her home.
- Sex continued regularly after he sabotaged all the condoms.
- The complainant got pregnant.

[18] The judge then reviewed the medical evidence regarding the risks and complications of pregnancy and abortion. In the next section of the decision starting at paragraph 26 he dealt with the Crown's argument that any consent by the complainant was vitiated by fraud. After discussing **Cuerrier**, Justice Moir concluded:

35 In sexual cases, it must be proved "that the dishonest act ... had the effect of exposing the person consenting to a significant risk of serious bodily harm": para. 128. This limit seems to be an attempt to confine the expanded meaning of fraud, in the context of sexual conduct, to more serious cases. The gravity of sexual assault offences "makes it essential that the conduct merit the consequences of the conviction": para. 132. In *Cuerrier* the risk was high and the bodily harm included death.

36 The deceit element of fraud that vitiates consent is not in issue on the present motion. The issue is whether the deceit exposed the complainant to "a significant risk of serious bodily harm". In my assessment, there is no evidence upon which a trier of fact could reach that conclusion.

37 There is no need to be definitive about what "significant" means in the limit. It does not mean remote, and the evidence presented by the Crown makes it clear that risks of serious bodily harm to which the complainant was exposed were remote.

38 The complainant was exposed to pregnancy. No one suggests that pregnancy is itself "serious bodily harm". That would be as offensive to women as the one-time exclusion from UIC on the basis that pregnancy was a "self-inflicted wound". Rather, the risks to be considered are the risks a woman endures during pregnancy and childbirth, or the risks of abortion if that is chosen.

39 The experts called by the Crown have used the words "rare" or "very rare" to describe the risks of serious complications of pregnancy and abortion. I take them to say that the serious complications are remote.

[19] In the final part of the decision, the judge considered whether or not the Crown had proved lack of consent on the basis that the complainant only consented to having protected sexual intercourse. His analysis of that point is contained in the following passage:

45 Subsection 273.1(1) of the *Criminal Code* defines "consent" in the context of sexual assault to mean "the voluntary agreement of the complainant to engage in the sexual activity in question". It is therefore possible to argue that the "sexual activity in question" in this case was protected sexual intercourse. When Mr. Hutchinson deceitfully put on a condom with a hole in it they were no longer enjoying the consented activity.

46 Mr. MacEwen demonstrated the fallacy in the argument I proposed by referring me to the basics. Paragraph 265(1)(a) of the *Code* provides "A person commits an assault when ... without the consent of another person, he applies force to that other person, directly or indirectly". The consent has to be to the application of force.

47 In the context of sexual assault, the consent is to the *actus reus* of the offence: *R. v. Ewanchuk*, [1999] SCJ 10 at para. 48. Or, to the other two elements of the *actus reus*. The Crown must prove that the complainant did not consent to being touched in a sexual way. That the agreement to have sexual intercourse contained other terms and conditions does not change the consent to the sexual intercourse itself.

[20] The trial judge therefore directed a verdict of acquittal because in his view no trier of fact, properly instructed on the law and acting judicially, could reasonably conclude that there was some evidence of every essential element of the offence of aggravated sexual assault or any included offence.

Issues

[21] Generally, the Crown submits that the trial Judge erred in law in the application of the governing legal principles and the test to be met for a directed verdict of acquittal. Specifically, it is argued that **Cuerrier** is not the proper legal framework for the analysis of this case because Mr. Cuerrier was charged with aggravated assault not sexual assault. Therefore the Supreme Court did not deal with s. 273.1(1) of the **Criminal Code** which is relevant in this case. Furthermore, **Cuerrier** focussed on whether fraud vitiated consent under s. 265(3)(c) and it is alleged that in this case it is not necessary to deal with that issue since there was evidence that could constitute proof of "no consent" to the sexual activity in question.

[22] As an alternative argument, the Crown submits that if the analysis of **Cuerrier** is applicable to this case, the trial judge erred by confusing the two

issues, one being whether there was evidence of significant risk of serious bodily harm, applicable to the question of whether fraud vitiated consent, and the second being whether there was some evidence on the essential element of endangerment to life. It is argued as well that the judge exceeded the scope of his jurisdiction by improperly engaging in a weighing of the evidence when determining whether there was some evidence of significant risk of serious bodily harm.

Standard of review

[23] The issues of law raised by the Crown on this appeal attract the correctness standard of review.

The test for a directed verdict

[24] In **R. v. Monteleone**, [1987] 2 S.C.R. 154, the sole issue before the court was the test to be applied by a trial judge when a motion is made by the defence for a directed verdict of acquittal after the close of the Crown's case and before the defence has elected whether or not to call evidence. McIntyre, J., for the court confirmed at page 161 that the test is:

...Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. It is not the function of the trial judge to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury.

In other words the trial judge may allow a motion for directed verdict of acquittal upon being satisfied that there is no evidence on an essential element of the offence charged or any included offence.

Analysis

The essential elements of aggravated sexual assault

[25] Mr. Hutchinson was charged with sexual assault which endangered the life of Ms. C., thereby committing aggravated sexual assault, contrary to s. 273(1) of the **Criminal Code** which states:

(1) Every one commits an aggravated sexual assault who, in committing sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

[26] For a conviction, in the context of this case, the Crown was therefore required to prove beyond a reasonable doubt:

1. that the accused applied force to the complainant;
2. that the accused intentionally applied the force;
3. that the complainant did not consent to the force that the accused applied;
4. that the accused knew that the complainant did not consent to the force that the accused applied;
5. that the force that the accused applied took place in circumstances of a sexual nature; and
6. that the force that the accused applied to the complainant endangered the life of the complainant.

(see: Canadian Judicial Council Model Jury Instructions:

http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_so_offence273_en.asp)

[27] Of interest, a footnote to these CJC Model Jury Instructions provides that:

69 Where there is evidence of consent to the intentional infliction of bodily harm, the jury must be instructed that, as a rule of public policy, there is no defence of consent. This proposition, derived from *R. v. Jobidon*, [1991] 2 S.C.R. 714, has been applied to offences of sexual assault causing bodily harm: *R. v. Welch*, [1995] O.J. No. 2859. In this circumstance, the instruction relating to knowledge of lack of consent may have to be modified.

[28] Justice David Watt in his *Watt's Manual of Criminal Jury Instructions*, (Toronto: Thomson/Carswell, 2005), maintains that in cases of aggravated sexual assault, the jurors do not have to consider the issue of consent unless they are satisfied beyond a reasonable doubt that there was no bodily harm suffered by the complainant. (see pages 408-411)

[29] In **R. v. Ewanchuk**, [1999] 1 S.C.R. 330, Justice Major, for the majority, discussed the elements of sexual assault at ¶ 23:

23 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

...

25 The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 293.

26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

..

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

security of the person from any non-consensual contact or threats of force.
[emphasis added]

[30] On the application for directed verdict in this case the issue was whether the Crown had tendered some evidence on each of the elements of the offence as charged. The two elements in issue were consent and endangerment. If there was no evidence of endangerment, it was necessary to consider whether there was evidence to support the elements of some lesser but included offence, such as, sexual assault causing bodily harm, sexual assault or assault.

[31] The trial judge found there was consent to the application of force and that a trier of fact could not conclude that consent was vitiated because there was no evidence of a significant risk of serious bodily harm. Although the judge considered the evidence of the two doctors regarding the risks of complications during pregnancy he made no finding as to whether the Crown presented any evidence of endangerment.

Consent

[32] Although as noted above, the issue of endangerment or bodily harm should be considered before that of consent in a jury charge, I will deal with the issue of consent first. Consent is defined in the **Criminal Code** both in terms of its absence and its presence: Section 265 defines the absence of consent:

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

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

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

(c) fraud; or

(d) the exercise of authority.

[33] Section 265 is applicable to all assaults including sexual assaults, but s.273.1 is exclusively relevant to sexual assaults. Section 273.1 defines consent in positive terms and then provides for instances where consent is negated:

(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

...

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. [emphasis added]

[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] Ms. 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 Ms. 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.

Consent vitiated by fraud

[39] Alternatively, if the trier of fact found that there was consent because the sexual activity in question was sexual intercourse, and not specifically protected sexual intercourse, the next step would be to determine whether that consent was vitiated by fraud. In that case the decision in **Cuerrier** would be applicable.

[40] In **Cuerrier**, the accused, who was HIV-positive, engaged in consensual unprotected sexual intercourse with two complainants without disclosing the status of his health. He was charged with aggravated assault. Neither of the complainants had contracted HIV at the time of trial. The trial judge directed a verdict of acquittal on the basis that there was no evidence of lack of consent to the sexual intercourse. In the Supreme Court, Justice Cory for the majority noted that the charge of aggravated assault required proof that the accused's acts endangered the life of the complainants and that he intentionally applied force without her consent. He indicated that the first requirement was satisfied because the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. It was not required that harm actually have resulted (¶ 95).

[41] Since the complainants had consented to sexual intercourse, the issue became whether fraud vitiated their consent. The majority developed a two-part test to determine whether consent was vitiated by fraud. There must be proof of dishonesty and either deprivation or risk of deprivation (¶ 116). At ¶ 128, Justice Cory began the discussion regarding deprivation or risk of deprivation as follows:

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

test. In this case the complainants were exposed to a significant risk of serious harm to their health. Indeed their very survival was placed in jeopardy. It is difficult to imagine a more significant risk or a more grievous bodily harm. [emphasis added]

[42] Justice Cory applied the test to the evidence in that case starting at ¶ 137:

137 It follows that in circumstances such as those presented in this case there must be a significant risk of serious harm if the fraud resulting from non-disclosure is to vitiate the consent to the act of intercourse. For the purposes of this case, it is not necessary to consider every set of circumstances which might come within the proposed guidelines. The standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm. However, the test is not so broad as to trivialize a serious offence.

138 In summary, on facts presented in this case, it would be open to the trier of fact to conclude that the respondent's failure to disclose his HIV-positive status was dishonest; that it resulted in deprivation by putting the complainants at a significant risk of suffering serious bodily harm. If that conclusion is reached, the complainants' consent to sexual intercourse could properly be found to have been vitiated by fraud. It can be seen that applying the proposed standard effectively resolves the issue in this case. However, it is said that the test is too vague. Yet, it cannot be forgotten that all tests or definitions are based on words. They are the building blocks of the law.

139 The phrase "significant risk of serious harm" must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. 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. The proposed test may be helpful to courts in achieving a proper balance when considering whether on the facts presented, the consent given to the sexual act should be vitiated.

[43] As noted above at ¶ 18, when Justice Moir applied the **Cuerrier** test to this case he found that there was evidence of deceit but there was no evidence upon which the trier of fact could find that the deceit exposed the complainant to

significant risk of serious bodily harm. He indicated that the complainant was “exposed” to pregnancy and pregnancy itself is not serious bodily harm.

[44] One of the difficulties inherent in the application of **Cuerrier** to the facts of this case is that in **Cuerrier** the complainants did not become infected with HIV nor suffer any other physical harm as a result of the deceit. They were exposed to the virus but did not contract it. In this case Ms. C. was not exposed to pregnancy, she was actually pregnant. As I emphasized in the quotation of ¶ 128 (at ¶ 41 above) of Justice Cory’s decision, deprivation may consist of actual harm or risk of harm. The first question in this case therefore is, was there evidence that Ms. 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.

[47] In the decision, following the preliminary inquiry in this case, reported as 2008 NSPC 79, Provincial Court Judge Anne Derrick, when dealing with the

defence argument that the complainant was not exposed to a significant risk of bodily harm, wrote:

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

...

40 Although pregnancy is not discussed by Cory, J. in *Cuerrier*, it would not be reasonable to equate his examples of "immoral and reprehensible conduct" that are not criminal with the profound effects of an unwanted pregnancy orchestrated through deceit. In terms of unwanted physical results, unprotected sexual intercourse can lead to infection with disease, or pregnancy. And pregnancy only resolves in a miscarriage, an abortion or childbirth (although not necessarily of a live baby.) These significant effects of unprotected sexual intercourse equate more closely to HIV infection than they do with the disappointment and anger over, for example, a duplicitous proposal of marriage to secure consent to sex.

[48] Although I find it is not necessary to decide whether there was some evidence of risk of harm, because here there was evidence of actual harm, I agree with her comments regarding the effects of an unwanted pregnancy.

Endangerment of life

[49] Another element of the charge of aggravated assault in this case is endangerment. The issue is: was there evidence that the use of the sabotaged condoms endangered the life of the complainant? The trial judge did not determine whether there was some evidence of endangerment.

[50] In **Cuerrier**, there was no doubt that exposing the complainants to the risk of HIV infection endangered their lives, but it was noted that it was not necessary to prove that actual harm resulted from the unprotected sexual intercourse. Endangerment could be proved by evidence of exposure to significant risk to the lives of the complainants (¶ 95).

[51] In another case dealing with a charge of aggravated assault as a result of exposure to the HIV virus, **R. v. Williams**, 2003 SCC 41, Justice Binnie for the court defined “endanger” as “to put in danger ... put in peril incur the risk” (¶ 43). In **R. v. Palombi**, [2007] O.J. No. 2611, 2007 ONCA 486, Justice Rosenberg stated:

14 The term "endangers," within the context of the nuisance offence in s. 180 of the Criminal Code, has been interpreted by this court in *R. v. Thornton* (1991), 1 O.R. (3d) 480 at 487-88, affirmed [1993] 2 S.C.R. 445, as meaning "exposing someone to danger, harm or risk, or putting someone in danger of something untoward occurring."

[52] In the *CJC Model Jury Instructions* referred to above, the suggested instruction on endangerment is;

To "endanger the life" of another person is to put him or her in a situation or condition that could cause that person to die.

[53] In my view there was some evidence here that the complainant’s life was exposed to peril, danger, harm or risk as a result of the accused’s sexual assault. The medical evidence supports a finding that there are numerous serious risks to the health and life of a pregnant woman. Again I agree with Judge Derrick’s analysis in this respect:

43 I find that the evidence in this case is reasonably capable of supporting the inference that Mr. Hutchinson's dishonesty in the form of the surreptitious damage to the condoms exposed Ms. C. to a significant risk of pregnancy, which carries with it the risk of serious bodily harm. Many pregnancies will be

uneventful but the possible harms enumerated by Dr. Rowicha are significant and some of them are life-threatening. As Dr. Rowicha indicated, even common pregnancy-related problems, such as increased blood pressure, bleeding and diabetes, may result in hospitalization. Such conditions as described by Dr. Rowicha cannot be described as anything other than examples of a risk of serious bodily harm. I also note that the former therapeutic abortion provisions of the *Criminal Code*, struck down in *R. v. Morgentaler*, [1988] S.C.J. No. 1 as a violation of a woman's right to life, liberty and security of the person, explicitly recognized that pregnancy could endanger a woman's life and health. (*section 251(4)(c), now repealed*)

...

47 ... However I am satisfied that the medical evidence tendered by the Crown, which I reviewed earlier in these reasons, could cause a reasonable jury, properly instructed, to return a guilty verdict on the charge of aggravated sexual assault on the basis that Mr. Hutchinson's actions endangered Ms. C.' life. It is appropriate to reiterate that in *Cuerrier*, neither of the complainants actually contracted HIV from the accused; criminal responsibility was found on the basis that Mr. Cuerrier had exposed the women to the risk of contracting HIV, and its "potentially lethal consequences." (*Cuerrier, supra, at paragraph 95 per Cory, J.*) Although HIV infection may pose a greater risk of death than pregnancy, the medical evidence in this case has indicated that pregnancy carries the potential to be life-threatening.

[54] As indicated above, if the medical evidence was insufficient to support a finding of endangerment, the next step would be to consider whether there was evidence of bodily harm. As is evident from the discussion above as to whether or not there was deprivation in the form of actual harm to the complainant, in my view, there was some evidence of bodily harm. In either case, since there was some evidence on these points, it ought not to have been weighed at this stage by the trial judge. This was an issue for trial. Since there was some evidence of endangerment or bodily harm, the directed verdict of acquittal should not have been granted.

Conclusion

[55] The trial judge erred in directing a verdict of acquittal. There was some evidence upon which a properly instructed trier of fact could find that there was

lack of consent to sexual activity in question, or alternatively, that any consent was vitiated by fraud. Furthermore, there was some evidence upon which a finding of endangerment or bodily harm could be based. Therefore, the appeal should be allowed, the order of the trial judge should be set aside and there should be an order for new trial.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Dissenting Reasons for Judgment: (Beveridge, J.A.)

[56] The respondent was charged with aggravated sexual assault. He was acquitted at trial as a result of the trial judge granting a motion for a directed verdict on the basis that there was no evidence to convict on the offence charged, or on any lesser and included offence. The Crown appeals alleging the trial judge either did not understand the elements of the substantive offences or misapplied the law, in either case entitling this court to intervene.

[57] I have had the privilege of reading in draft the reasons of my colleague Roscoe, J.A., but with respect, am unable to agree with her analysis and disposition of the appeal.

BACKGROUND

[58] To say the circumstances of this case are unusual would be a serious understatement. Briefly, the respondent hoped that if his girlfriend became pregnant it would improve their deteriorating relationship. He sabotaged the condoms they usually used. She became pregnant. The relationship improved but within a few weeks dissolved. Fearing that she might use the sabotaged condoms with a new partner, he sent her messages warning her of what he had done. She then had an abortion and called the police. The respondent was charged with the most serious non fatal offence relating to the application of force in circumstances of sexuality, aggravated sexual assault, contrary to s. 273(1) of the *Criminal Code*.

[59] The respondent elected trial in Supreme Court by judge alone. A preliminary inquiry was held before Derrick, J.P.C., the result of which he was committed to stand trial (2008 NSPC 79).

[60] The respondent stood his trial before Moir, J. on January 19, 21 and 22, 2009. At the close of the Crown's case, the defence announced an intention to make a motion for a directed verdict. In anticipation of this motion, the Crown had filed a brief. The parties discussed with the trial judge the issues to be canvassed on the motion. Detailed submissions were made on January 22, 2009. Moir, J. delivered oral reasons later that day granting the motion for a directed verdict on the charge of aggravated sexual assault and all lesser and included offences. His

reasons were subsequently signed and released on February 23, 2009 (2009 NSSC 51).

[61] Because the case ended with a motion for a directed verdict, there are no findings of fact or mixed law and fact. There is therefore no deference owed to the trial judge. He must be correct in his identification and application of the appropriate legal principles.

[62] The evidence before Moir, J. was straightforward. The complainant and the respondent were co-workers. They had known each other for about three years. In January 2006 they began a boyfriend-girlfriend relationship that lasted approximately nine months. They maintained separate residences, but were intimate on average, three to four times a week. The complainant chose condoms as her preferred method of birth control. Condoms were not used during her menses as she believed she could not conceive. The sole reason condoms were used was to prevent pregnancy, she had no concern about sexually transmitted disease.

[63] She recounted a time in July 2006 when the condom broke and she was concerned she would become pregnant. Quite apart from that event, the complainant acknowledged that the use of condoms is no guarantee that pregnancy will not occur.

[64] In July to August 2006 the relationship, at least from the complainant's point of view, might not continue. She testified that over the course of the summer she had expressed that she wasn't happy and might not stay with him. The respondent's response was that he really believed they could work it out. Things would get better and they should stick it out. The complainant said thereafter the relationship was sometimes good, sometimes not.

[65] At some point in August 2006 she saw a change in the attitude of the respondent. For the first five or six months of their relationship he had preferred if she got the condom and put it on him. Then he no longer wanted her to put them on him, nor see him taking them off. It was as if he was hiding them from her.

[66] In September the respondent insisted that she take a pregnancy test. She took one around September 1 and it was negative. She was due for her period by

the 5th. Nonetheless, the respondent was still insistent that she take another test. She did so on September 5th and it was positive. The respondent was very happy with this news. The complainant was shocked but figured this happened somehow and maybe they could work it out.

[67] During the first month of pregnancy, the plan was they would try to work out their relationship and have the baby. She had some prenatal appointments. Lingering doubts about the relationship caused her to request some space. She says the respondent did not give that space. She says he bombarded her with calls and messages. It got so bad she called the police.

[68] On November 1, 2006 she told him that the relationship was over. The respondent was very upset. He continued to try to communicate with the complainant. She did not read the text messages he was sending to her. Finally she spoke with him. She says he told her that she had to throw away her condoms as he had poked holes in them, and he was concerned she would use them with someone else. She then checked her text messages. The content was transcribed and admitted on consent. The texts were to the same effect as his telephone conversation. He wanted a baby with her so much that he had sabotaged the condoms "about two months ago".

[69] The complaint checked the box of condoms beside her bed. The box usually contains twelve. It now held nine, two of which were of a different brand. In any event, all had been punctured and were leaking lubricant. Her testimony was that had she known the condoms had been sabotaged she would not have had sexual intercourse with the respondent.

[70] The described revelation by the respondent, and her discovery of the damaged condoms, led to two developments. The first was a call to the police. The second was that whereas she had been uncertain about keeping the baby, this definitely made up her mind. She wanted an abortion.

[71] She underwent a therapeutic abortion on November 16, 2006. Her testimony was that there were some complications from the procedure. She experienced what she called extreme bleeding, clotting and severe pain for a good two weeks. She was off work for three to four days. The complications did not require her to have

any blood transfusions, nor visit the emergency room or be hospitalized. She may have taken some antibiotics and ibuprofen for the pain.

[72] Dr. Rowicka was the complainant's family physician. By consent she was qualified by the trial judge to give opinion evidence on the diagnosis, prognosis and treatment of humans, in particular pregnant women. The doctor, apparently relying on her chart, testified that the complainant had first seen another physician on October 17, 2006 regarding her pregnancy. Dr. Rowicka first saw the complainant on October 24, 2006 for a full physical examination. She put the period of gestation at that point to be seven weeks and one day.

[73] She saw the complainant again on November 3, 2006 when, at the complainant's request, a referral was made for an abortion. The complainant was quite tearful and upset. She had broken up with her boyfriend, and in those circumstances would, due to what she said were "psycho-social reasons", be unable to carry on with the pregnancy.

[74] According to Dr. Rowicka, the complainant had an abortion on November 16. She said this was an uncomplicated procedure. The follow-up appointment after the abortion is usually two weeks later, but Dr. Rowicka saw the complainant after one week due to symptoms being experienced by the complainant. Patients are expected to have some bleeding but it usually subsides within a week. The complainant noticed that the bleeding was initially light, but it had increased in amount, and she was experiencing pelvic pain and cramps.

[75] After examining the complainant, Dr. Rowicka diagnosed her as suffering from one of the possible complications of pregnancy termination, infection of the lining of the uterus. She prescribed oral antibiotics and to use over-the-counter pain medication, ibuprofen. She saw her again on November 27. The complainant reported feeling much better, still bleeding but in decreased amount, and her pains had almost resolved. She was no longer tender on examination and the bleeding was described as not unusual at that point in time. She was seen again a few times due to concern that she might have retained some of the products of conception, but no further treatment was prescribed.

[76] The Crown asked Dr. Rowicka to tell the court about the complications associated with pregnancy. She testified that there are possible complications.

During the first trimester she said the most common complication would be bleeding, which tells the medical professional that the pregnancy is in jeopardy. Most bleeding resolves, but sometimes the pregnancy becomes unviable and it ends in miscarriage. Heavy bleeding can sometimes be associated with miscarriages, necessitating emergency room admission and even blood transfusions. If the uterus is unable to expel the products of conception on its own, it has to be removed by a surgical procedure called Dilation and Curettage.

[77] Dr. Rowicka also described that one of the complications of pregnancy is where the fetus does not develop inside the uterus, but in one of the fallopian tubes. This is known as ectopic pregnancy. She called it a serious complication.

[78] In terms of some of the risks that a pregnant woman faces that a non pregnant woman would not, Dr. Rowicka testified that pregnancy may lead to deep vein thrombosis, hypertension, diabetes, problems during delivery, including the potential to need to deliver by Caesarean section. The Crown asked: “And, ultimately, is there a risk of death from giving birth to a baby?” Her answer was: “Very rare, but there is, yeah. Um-hmm.”

[79] In cross-examination Dr. Rowicka confirmed that, during the eight or nine weeks that the complainant was pregnant, there were no complications from the pregnancy. She also confirmed that, while improbable, it is not impossible for a woman to become pregnant at any time of her cycle, including during her period.

[80] The Crown also called the physician who performed the abortion. By consent, she was permitted to give opinion evidence on the diagnosis, prognosis and treatment of humans, particularly in relation to pregnancy and its termination. During her evidence, the Crown introduced as an exhibit the Consent for Treatment or Operative Procedure form. It was completed by the doctor and the complainant prior to the abortion procedure. The consent form sets out foreseeable risks or potentially serious consequences of the treatment. These included excessive bleeding, perforation of the uterus, cervical laceration, retained tissue, infection, and continued pregnancy. The form also specified that very rarely these complications could require further surgery and/or lead to infertility. It also specified that there could be an allergic reaction to the anaesthesia, post abortion syndrome where blood clots don't pass through the cervix, and death.

[81] Despite the details on the consent form, she was of the opinion that an abortion was a safe procedure. The norm would be an excellent recovery with no further complications. With respect to the complainant, the doctor testified she did very well and the procedure went normally.

[82] My colleague, Roscoe, J.A., has reviewed the analysis by the trial judge that led him to direct a verdict of not guilty. I need not repeat it.

ISSUES

[83] The Crown's Notice of Appeal framed the broad issue as the contention that the trial judge erred in law in the application of the governing legal principles and the test to be met for a directed verdict of acquittal. In its factum, the Crown added flesh to its allegation of error. It says the trial judge erred in not finding there was some evidence upon which a reasonable jury properly instructed and acting reasonably could conclude that the complainant did not consent to unprotected sex. In other words, he failed to allow for the possibility that there was no consent by virtue of s. 273.1(1) of the *Code* that provides, " 'consent' means, . . . the voluntary agreement of the complainant to engage in the sexual activity in question."

[84] The Crown further submits that even if the complainant did consent, there was some evidence of a significant risk of serious bodily harm, and hence it would be open to a trier of fact to find her consent was vitiated by fraud.

SECTION 273.1: THE MEANING OF CONSENT

[85] The full text of s 273.1 is:

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.

[86] The essence of the Crown's argument is that the complainant's apparent consent was not a true consent within the meaning of s. 273.1 as it was not a reasonably informed choice. This argument has been accepted by my colleague, Roscoe, J.A., where she concludes at para. 38 that the sabotage of the condoms fundamentally altered the nature of the sexual activity in question and hence the complainant's consent could be found not to be reasonably informed and freely exercised. With respect, there is nothing in the language or history of this legislative provision that permits such an interpretation.

[87] I will refer later in more detail to the history of what was meant by consent in the area of sexual contact and when it was vitiated by fraud or other factors.

[88] Consent was not defined until s. 273.1 was enacted. This section was part of the legislative package to replace the *Criminal Code* 'rape shield' provisions that had been struck down as unconstitutional by the Supreme Court of Canada in *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

[89] Although it has long been recognized that for sexual contact to be criminal, the Crown must prove beyond a reasonable doubt that the complainant did not consent to the contact, there was little discussion about what was actually meant by "consent". Since the Crown is required to prove its absence, historically most discussion has been about when consent is not present. For example, in the 19th century case of *R. v. Day* (1841), 9 CAR. & P. 722, 173 E.R. 1026, Coleridge J. charged the jury:

There is a difference between consent and submission ; every consent involves a submission ; but it by no means follows that mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting ; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as to justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear, under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the 2nd count of the indictment.

[90] This approach was approved in the much more modern case of *R. v. Olugboja*, [1981] 3 W.L.R. 585 (C.A.). The jury had been instructed that, although the complainant had neither screamed nor struggled and had submitted to sexual intercourse without the accused using force or making any threats, the jury still had to consider if she had consented to sexual intercourse. The appeal from conviction was dismissed on the basis that, as far as the *actus reus* is concerned, the question is simply, at the time of the intercourse, did the complainant consent to it – it was not necessary for the Crown to prove what might otherwise appear to have been consent was in reality mere submission induced by force, fear or fraud. Dunn L.J. for the court went on to comment (p. 592):

Although “consent” is an equally common word it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent.

[91] This approach to the issue of consent has not been without its critics. (See Smith and Hogan, *Criminal Law* (London: Butterworths, 1988), p. 434 and Professor Glanville Williams, *Textbook of Criminal Law*, 2nd ed. (1983) p. 554.

[92] Professor Bryant in his article “*The Issue of Consent in the Crime of Sexual Assault*” (1989), 68 Can. Bar Rev. 94 comments:

Consent is difficult to define. Although adjectives such as “real”, “genuine”, “legal”, “true” or “voluntary” are used in a summing-up to a jury, they do not define consent. Consent is best described by examining the factors which negate its existence. For instance, a consent is not “genuine” or “legal” if obtained by threats of violence. The lack of a suitable legal definition for consent is not solved using the phrase “submits because of [a listed circumstance]” an antonym. Professor Williams states:

It is purely verbal question whether. . . [we say the complainant] consents under compulsion or. . . she does not truly *consent* but gives *submission, acquiescence or complaisance*. However, one expresses it, there is not effective consent in law.

[93] Prior to January 1, 1983, there were a number of sexual offences. The two principal ones were rape and indecent assault. Rape was defined as:

143. A male person commits rape when he has sexual intercourse with a female person, who is not his wife,

(a) without her consent, or

(b) with her consent if the consent

(i) is extorted by threats or fear of bodily harm,

(ii) is obtained by personating her husband, or

(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

[94] Indecent assault was gender specific. Section 149 made it an offence to indecently assault a female person, and s. 156 made it an offence for a male to assault another person with intent to commit buggery or indecently assault another male. The substantive elements were unchanged since Canada’s first Code (S.C. 1892, c. 29). With respect to a female, indecent assault was defined as:

259. Every one is guilty of an indictable offence and liable to two years’ imprisonment, and to be whipped, who –

(a.) indecently assaults any female ; or

(b.) does anything to any female by her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as to the nature and quality of the act.

Assault was defined in s. 258 as follows:

258. An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has, present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud.

[95] The offence of indecent assault involved two elements, an assault and circumstances of indecency (see *R. v. Swietlinski*, [1980] 2 S.C.R. 956).

[96] The one paragraph definition of assault from the 1892 *Code* morphed into it a reworded multi-paragraphed version in the *Code* of 1953-4 (s. 230, S.C. 1953-4, c. 51).

[97] The only substantive change to the assault provision was the addition of paragraph (c) which criminalized impeding and begging while visibly armed, otherwise the basic elements of these sections remained unchanged until the amendments introduced by Bill C-127, which became S.C 1980-81-82-83, c. 125. The offence of rape and indecent assault were abolished and replaced by the crimes of sexual assault, sexual assault causing bodily harm and aggravated sexual assault. The assault section was restructured into its present format.¹ It has since been renumbered to be s. 265, but is otherwise the same to date. It provides:

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;

¹For a detailed analysis of the offences that were introduced, and those that were left, see Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984); and David Watt, *The New Offences Against the Person: The Provisions of Bill C-127* (Toronto: Butterworths, 1984).

(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.

[98] Parliament directed that the provisions of s. 265 apply to all forms of assault, including sexual assaults. Consent was defined only by where it cannot be found to exist. Section 265(3) does not refer to what the complainant subjectively thought or believed, but appears to direct the relevant inquiry to be what he or she did or did not do and why. Consent cannot be obtained where the complainant submitted or did not resist by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority.

[99] One of the clearest definitions of the common law abstract of consent is contained in the dissenting judgment of McLachlin J. (as she then was) in *R. v. Esau*, [1997] 2 S.C.R. 777. *Esau* dealt with the defence of an honest but mistaken belief in consent. Writing for herself and L'Heureux-Dubé J., McLachlin J. stated:

[64] I turn next to the common law concept of consent. Much of the difficulty occasioned by the defence of honest but mistaken belief is related to lack of clarity about what consent entails. Consent in the context of the crime of sexual assault is a legal concept. At law, it connotes voluntary agreement. It embraces the notions of legal and physical capacity to consent, supplemented by voluntary agreement or concurrence in the act in question. Webster's Third New International Dictionary (1986), at p. 482, defines consent as "capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action".

[65] Consent for purposes of sexual assault is found in the communication by a person with the requisite capacity by verbal or non-verbal behaviour to another of permission to perform the sexual act. The actual thought pattern in the mind of the complainant cannot be the focus of an inquiry into consent on a sexual assault trial; direct observation of the complainant's mind is impossible and in any event, the inquiry is into the accused's conduct in the circumstances as they presented themselves to him. When we speak of consent in a sexual assault trial we are talking about the complainant's verbal and non-verbal behaviour and what inferences could be drawn from this behaviour as to her state of mind.

[100] The majority judgment in *Esau*, written by Major J., focused on the interpretation and availability of the defence of honest but mistaken belief in consent, and did not refer to the definition of consent. As discussed later, the suggestion that consent ought to be determined independently of the subjective thoughts of the complainant, was later rejected in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

[101] It is against this backdrop that I now return to the introduction of the definition of consent set out in s. 273.1 of the *Code*. As noted earlier, this section was part of the legislative response by Parliament to the decision of the Supreme Court in *R. v. Seaboyer* that struck down s. 276 of the *Code*. The Court found that the section violated ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* by placing undue restrictions on the ability of an accused to introduce probative and relevant evidence. The date of the decision was August 22, 1991. By December 12, 1991 then Minister of Justice Kim Campbell tabled Bill C-49. It

received third reading and was enacted on June 15, 1992, received Royal Assent on June 23, 1992 and came into force on August 15, 1992.

[102] There are a variety of recognized tools to assist in statutory interpretation. The *Interpretation Act*, R.S.C. 1985, c. I-21 provides that every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. The Supreme Court of Canada has adopted as the preferred approach the modern principle of statutory interpretation first articulated by Elmer Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974) at p. 67 as:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[103] Iacobucci J., writing for the unanimous court in *Bell Express Vu v. The Queen* [2002] 2 S.C.R. 599, put the modern approach in context with some of other principles of interpretation:

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory

scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[28] Other principles of interpretation – such as the strict construction of penal statutes and the "Charter values" presumption – only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "Charter values" principle later in these reasons.)

[104] Courts may also turn to legislative history, Parliamentary debates and similar material to assist in understanding the purpose of an enactment and ultimately, with all other tools, determine the intention of Parliament (see *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (para. 31), *Castillo v. Castillo*, [2005] 3 S.C.R. 870 at para. 23).

[105] Bill C-49 re-enacted the prohibition against discriminatory generalizations that evidence of a complainant's prior sexual history with the accused or any other is admissible to support an inference, by reason of the sexual nature of the activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge, or is less worthy of belief. This is consistent with the conclusion of the Court in *Seaboyer* that such evidence is simply not relevant.

[106] Under s. 276, for prior sexual activity by the complainant to be admissible outside the subject matter of the charge, it must be the subject of a separate proceeding and assessed for admissibility according to the requirements dictated by s. 276(2) and (3). Sections 276.1, .2 and .3 deal with the procedure that must be followed. Section 276.4 requires the judge to specifically address the jury as to the uses they may and may not make of the evidence. Section 276.5 stipulates that a determination by a judge on the issue of admissibility is a question of law, for the purposes of an appeal.

[107] The amendments brought about by ss. 273.1 and 273.2 are part of the same Bill, but are not directly relevant to the initiative by Parliament to re-enact protection against the admissibility of evidence concerning prior sexual activity by a complainant. Section 273.2 limits the ability of an accused to argue that he had an honest but mistaken belief in consent. Section 273.1 defines what is meant by consent, and where consent cannot be found to exist.

[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.

[112] This interpretation is further borne out by what materials are available about the history of the legislation. The details of the consultations that led to Bill C-49 are set out by Sheila McIntyre in “Redefining Reformism: The Consultations that Shaped Bill C-49” in *Confronting Sexual Assault: A Decade of Legal and Social Change* (Julian Roberts and Renate M. Mohr, eds. (Toronto: University of Toronto Press, 1994). Ms. MacIntyre noted the seven women’s organizations that were actively involved in the consultation process. She writes that on November 20, 1991 (p. 301):

The minister then dropped a bombshell. Justice was also ‘considering’ four additional amendments: a mixed subjective/objective standard for the mistake defence; a codified definition of consent to include circumstances that do not constitute consent; a preamble; and a presumption that sexual history evidence is irrelevant. The coalition then threw away its script.

Having grimly approached the meeting ready to disassociate from Campbell’s reforms, the assembled women’s group switched gears to embrace the new proposals enthusiastically and to expand on their necessity. We indicated that if such substantive amendments were made we could support early legislation and were ready to lend Justice our expertise in assisting in that project.

[113] It is interesting to note that the proposal submitted by the coalition of women’s groups to the Minister would require that consent must be sought and obtained and shall mean words or gestures that unequivocally express or manifest voluntary agreement to the sexual activity or sexual activities between the accused and the complainant. The proposal also set out circumstances where there would be no voluntary agreement. It also proposed that s. 265(3)(c) be amended by adding after the word fraud “or false representation or any significant lie which influenced the decision to agree to the sexual activity or activities which form the subject matter of the charge.”

[114] Many of these proposals did not become part of Bill C-49. The Minister did not engage in a lengthy explanation to the House about the addition of the definition of consent. Her only comment on this provision was on the second

reading (House of Common Debates, Vol. VIII (8 April 1992) at 9507 (Hon. Kim Campbell):

Consent is defined as the voluntary agreement of the complainant to engage in sexual activity. This definition is the ordinary, common sense meaning of consent. As a matter of law, conduct that falls short of a voluntary agreement is not consent.

[115] This background to the legislation confirms what I consider to be the plain and ordinary meaning of the words set out in s. 273.1(1). I agree with the analysis of Fraser C.J.A. in *R. v. Ewanchuk*, 1998 ABCA 52, where she wrote:

[59] Parliament also included for the first time ever (in s. 273.1) a statutory definition of consent in sexual assault cases. "Consent" now means the voluntary agreement of the complainant to engage in the sexual activity in question. By defining "consent" to mean the voluntary agreement to engage in sexual activity, Parliament signalled that the focus should henceforth be on whether the complainant positively affirmed her willingness to participate in the subject sexual activity as opposed to whether she expressly rejected it. Parliament understood very well that a definition of "consent" was required to overcome the historical tendency by some judges to treat a complainant's silence or non-resistance as "implied consent".

[116] In the Supreme Court, Major J. wrote the majority judgment ([1999] 1 S.C.R. 330). There can be little doubt that *Ewanchuk* is the seminal decision with respect to the *actus reus* and *mens rea* of the crime of sexual assault. There were concurring judgments by L'Heureux-Dubé J. and McLachlin J.. McLachlin J. agreed with the reasons by Major J., L'Heureux-Dubé J. did so generally. On the issue of consent, Major J. held that the assessment is purely subjective – it is determined by the internal state of mind by the complainant towards the touching at the time it occurred (paras. 26-27). With respect to s. 273.1(1) of the *Code*, he concluded it was consistent with the common law (para. 47).

[117] However, my colleague, Roscoe, J.A., (at para. 34) agrees 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, the words “ voluntary agreement . . . to engage in the sexual activity in question” must mean something more than consent to the application of force. I take this to mean that if something more is not found to be involved in this phrase, it would be contrary to the tool of

statutory interpretation against tautology, although they do not use this term. With respect, I am unable to agree with this analysis or conclusion. Voluntary agreement to engage in the sexual activity in question does indeed import different criteria absent from s. 265.

[118] For example in *R. v. Guerrero*, [1988] O.J. No. 627 (C.A.) the complainant testified that she participated in sexual acts with the appellant because he had nude photographs of her. He threatened that if she did not comply he would send the photographs to her school. Krever J.A., for the court, overturned the conviction. The threats, although reprehensible, were not threats of the application of force and hence not covered by the conduct enumerated in s. 244(3)(b) [now 265(3)(b)].

[119] In *R. v. Davis*, [1999] 3 S.C.R. 759 the Supreme Court of Canada declined to address the issue of whether threats amounting to extortion could vitiate consent despite not coming within what is now s. 265(3). The acts in question predated s. 273.1.

[120] However, in *R. v. Stender* (2004), 188 C.C.C. (3d) 514 the Ontario Court of Appeal convicted the respondent on a Crown appeal. The complainant testified that she did not consent and only engaged in the sexual activity because of the respondent's threats to disseminate nude photographs of her to friends and acquaintances. The respondent admitted he had blackmailed the complainant into having sex with him.

[121] The case was argued at trial solely on the basis whether the threats by the respondent vitiated consent by the complainant. On appeal, the Crown argued that the complainant never consented from the outset. Cronk J.A., for the unanimous court, agreed. She concluded that on the admitted facts and factual findings of the trial judge, consent within the meaning of s. 273.1 was not given by the complainant. This conclusion was endorsed by the Supreme Court of Canada ([2005] 1 S.C.R. 914).

[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.

VITIATION OF CONSENT BY FRAUD

[129] To determine if the trial judge erred in finding no evidence upon which a reasonable jury, properly instructed, and acting reasonably, could find consent to have been vitiated, requires consideration of the legal principles that would permit a trier of fact to find consent to have been vitiated. This mandates a careful examination of the principles articulated by the Supreme Court of Canada in *R. v. Cuerrier*, [1998] 2 S.C.R. 371. Before doing so, it is important to appreciate the historical treatment of when consent could be vitiated by fraud and what was, and was not, changed by the decision of the court in *R. v. Cuerrier*.

[130] In the nineteenth century there were a number of cases that dealt with vitiation of consent by fraud. In *R. v. Bennett* (1866), 4 F&F1105, 176 E.R. 925 the accused stood trial on a charge of indecent assault. The evidence was that he had spent two nights in the same bed as his thirteen year old niece. She testified that as far as she knew he had not done anything to her, due to him having given her liquor. A week later she was examined and found to be suffering from a venereal disease. Willis J. charged the jury that the complainant may have consented to have connexion with the accused, but if she was ignorant of his diseased condition, she did not consent to the aggravated circumstance of connexion with a diseased man. Any consent she may have given would be vitiated. A conviction was entered.

[131] To similar effect was *R. v. Sinclair* (1867), 13 Cox C.C. 28. A man knowing he was suffering from gonorrhœa persuaded a young girl to have intercourse with him, without informing her of his condition. Shee J. instructed the jury that if they

were satisfied that she would not have consented had she known of his condition, then her consent would be vitiated by fraud and the accused would be guilty of assault in inflicting actual bodily harm. The jury convicted.

[132] These cases were effectively overruled by the majority decision of the Queen's Bench Division in *R. v. Clarence* (1888), 22 Q.B.D. 23. The accused was convicted of two statutory offences, infliction of grievous bodily harm, and assault occasioning actual bodily harm, contrary to s. 20 and s. 47 of the *Offences Against the Persons Act* 1861, 24 & 25 Vict. c. 100. Clarence knew he was infected with gonorrhœa. He had sexual intercourse with his wife and transmitted the disease to her. She testified that had she known of his condition, she would not have consented to intercourse. The recorder directed the jury that, if they were satisfied these facts were proven, they could find the accused guilty of either count, notwithstanding the complainant was his spouse. The jury found Clarence guilty. The recorder stated a case to determine whether the accused could be properly found guilty on either of both of the charges. Thirteen judges heard the appeal. The convictions were quashed by a majority of nine to four.

[133] Much has been written about this case, particularly the significance of the complainant being the wife of the accused and the common law principle that a wife impliedly consented to intercourse on marriage, and subject to few exceptions, such consent could not be revoked.² There is no need to analyze in detail all of the judgments. But some reference is important to understand what the law was prior to *R. v. Cuerrier*.

[134] The two significant majority judgments were written by Willis J. and Stephen J.. Lord Coleridge C.J., and Pollock B. agreed with both of these judgments, the rest of the majority expressly agreed with Stephen J.. Neither Willis J. nor Stephen J. rested their reasons on the supposed inability of a wife to refuse consent to sexual intercourse with her husband.

[135] Willis J. was of the view that if the described conduct was a crime, it was up to the legislature to make it so, rather than judges to extend the law. He

² A fiction finally put to rest in England by the House of Lords in *R. v. R.*, [1992] 1 A.C. 599.

specifically disavowed himself from the view that such conduct was somehow excused because the persons are married. He wrote (p. 33):

If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. As between unmarried people this qualification will not apply. I cannot understand why, as a general rule, if intercourse be an assault, it should not be a rape. To separate the act into two portions, as was suggested in one of the Irish cases, and to say that there was consent to much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind.

[136] Willis J. went on to conclude that the conduct described did not come within the *Act* on the basis that it was not an assault (p. 35), and because both sections required an actual infliction or occasioning of bodily harm from a direct and intentional violence at the time of the incident and not to the administration or transmission of poison (pp. 36-37).

[137] Stephen J. also examined the language of the statutory provisions. With respect to s. 20, it punished “every one who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person either with or without any weapon or instrument.” With respect to the submission that the accused did not act unlawfully because he had a right to have intercourse with his wife, he found the unlawful requirement would be met because what the accused did was forbidden by law relating to marriage (p. 41). Stephen J. rested his decision on his interpretation that there be an “infliction of bodily harm either with or without any weapon or instrument.” He held (p. 41):

The words appear to me to mean the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon, as by a blow with the fist, or by pushing a person down. Indeed, though the word “assault” is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result.

...

Infection by the application of an animal poison appears to me to be of a different character from an assault. The administration of poison is dealt with by s. 24,

which would be superfluous if poisoning were an “infliction of grievous bodily harm either with or without a weapon or instrument.” The one act differs from the other in the immediate and necessary connection between a cut or a blow and the wound or harm inflicted, and the uncertain and delayed operation of the act by which infection is communicated.

[138] With respect to the count alleging an offence contrary to s. 47 of the *Act*, he wrote (p. 42):

Is the case, then, within s. 47, as “an assault occasioning actual bodily harm”? The question here is whether there is an assault. It is said there is none, because the woman consented, and to this it is replied that fraud vitiates consent, and that the prisoner’s silence was a fraud. Apart altogether from this question, I think that the act of infection is not an assault at all, for the reasons already given. Infection is a kind of poisoning. It is the application of an animal poison, and poisoning, as already shewn, is not an assault.

[139] With respect to what might vitiate consent he concluded (p. 43):

The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear. In *Reg. v. Flattery* (1), in which consent was obtained by representing the act as a surgical operation, the prisoner was held to be guilty of rape. In the case where consent was obtained by the personation of a husband, there was before the passing of the Criminal Law Amendment Act of 1885 a conflict of authority. The last decision in England, *Reg. v. Barrow* (2), decided that the act was not rape, and *Reg. v. Dee* (3), decided in Ireland in 1884, decided that it was. The Criminal Law Amendment Act of 1885 “declared and enacted” that thenceforth it should be deemed to be rape, thus favouring the view taken in *Reg. v. Dee*. (1) I do not propose to examine in detail the controversies connected with these cases. The judgments in the case of *Reg. v. Dee* (1) examine all of them minutely, and I think they justify the observation that the only sorts of fraud which so far destroy the effect of a woman’s consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.

[140] Applying the principles to the facts, he held (p. 44-45):

The woman’s consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent. The injury done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault. It is not

stated at what interval after December 20 the disease shewed itself, but there must have been some interval during which it was uncertain whether infection had been communicated or not. During this interval was the man guilty or not? If he was, it seems extraordinary to say that he had committed an assault from which an event which was not in his power could set him free. If he was not, it seems to me equally strange to say that he could be deprived of his innocence by such an event.

[141] There can be no doubt that, as a result of *R. v. Clarence*, the law was that the only types of deception which could vitiate consent were those related to the nature of the act that was consented to, and the identity of the person committing the act.

[142] What then is meant by fraud or deception as to the nature of the act ? It has long been considered that fraud as to the nature of the act being for medical treatment would vitiate consent (*R. v. Case* (1850), 4 Cox C.C. 220; *R. v. Flatterly* (1877), 2 Q.B.D. 410; *R. v. Williams*, [1923] 1 K.B.D. 340; *R. v. Harms*, [1944] 2 D.L.R. 61 (Sask. C.A.); *R. v. Maurantonio*, [1968] 1 O.R. 145 (C.A.)). I need not consider this issue since the Crown, before the trial judge and in this court, did not suggest that the deception the evidence suggests practised by the respondent in any way changed the nature of the act.

[143] In *Cuerrier*, the accused was charged with two counts of aggravated assault. He knew he had HIV. He was cautioned as to the need to use condoms every time he engaged in sexual intercourse and inform all prospective partners of his status. He refused to do so. He formed a relationship with one complainant and, in response to her queries about sexually transmitted diseases, assured her that his test from eight or nine months earlier was negative. Unprotected sex was frequent. The accused later formed a relationship with the second complainant and also engaged in unprotected sexual intercourse. The second complainant said she told him she was afraid of diseases. He did not tell her of his positive HIV status. The respondent later apologized for his deception. Both complainants testified that, had they known of his status, they would not have engaged in unprotected sexual intercourse. Neither complainant in fact tested positive for the virus.

[144] At trial, the accused was acquitted on a motion for a directed verdict on the basis that the only type of fraud that could vitiate consent was that which went to the nature and quality of the act or the identity of the offender. The British Columbia Court of Appeal upheld the acquittals. In the Supreme Court of Canada,

the panel of seven was unanimous in directing a new trial, but for very different reasons.

[145] L’Heureux-Dubé J., was of the view that fraud under s. 265(3)(c) of the *Code* should mean any type of fraud that induced another person to consent to the physical act regardless if the act was risky or dangerous.

[146] McLachlin J., as she then was, writing for herself and Gonthier J., did not agree that Parliament intended to change the law when it re-enacted s. 244(3)(c) [now s. 265(3)(c)]. She advocated for a smaller incremental change to the common law by reverting to the position prior to *Clarence*, that deception as to a sexually transmitted disease, carrying a high risk of infection, constituted fraud vitiating consent.³

[147] The majority judgment was written by Cory J. He, like L’Heureux-Dubé J., concluded that “fraud” under s. 265(3)(c) was no longer bound by the concepts that consent would only be vitiated if it went to the nature and quality of the act or the identity of the offender. However, he was careful to point out that fraud pertaining to the nature and quality of the act or the identity of the partner will still be sufficient to vitiate consent (para. 118).

[148] After referring to *Clarence* and the earlier cases, he accepted that non disclosure of a venereal infection can vitiate consent. He wrote:

[122] The *Clarence* decision rejected the broad approach to fraud set out in *Bennett* and *Sinclair*. There the court held that non-disclosure of a venereal infection was not related to the nature of the act of sexual intercourse and therefore the fraud did not vitiate the consent. For the reasons set out earlier neither the reasoning or conclusion reached in *Clarence* are acceptable.

[123] The deadly consequences that non-disclosure of the risk of HIV infection can have on an unknowing victim, make it imperative that as a policy the broader view of fraud vitiating consent advocated in the pre-*Clarence* cases and in the U.S. decisions should be adopted. Neither can it be forgotten that the *Criminal Code* has been evolving to reflect society's attitude towards the true nature of the consent. The marital rape exemption was repealed in Canada in 1983. The

³ *Clarence* has been held to no longer be applicable in England. See *R. v. Dica* [2004] EWCA Crim 1103, [2004] 3 All E.R. 593.

defence of mistaken belief in consent was narrowed in the 1992 amendments. Section 273.2(b) eliminated consent as a defence to sexual assault in situations where the accused did not take reasonable steps to ascertain that the complainant was consenting.

[124] In my view, it should now be taken that for the accused to conceal or fail to disclose that he is HIV-positive can constitute fraud which may vitiate consent to sexual intercourse.

[149] It can be legitimately said that with this conclusion nothing further needed to be said. The evidence was that the accused knew he was HIV positive, he deliberately lied or concealed that fact from the complainants, and they would not have consented had they known the true state of affairs. There was therefore evidence for a trier of fact to consider if the consent by the complainants was vitiated by fraud.

[150] Nonetheless, Cory J. went on to discuss the requirements for the offence of fraud, and how they should apply to dishonesty to disclose the existence of a sexually transmitted disease. The two basic requirements for fraud are dishonesty and deprivation. Dishonesty is assessed objectively. That is, would a reasonable person find the actions of the accused to be dishonest (para. 114).

[151] In addition, the dishonesty must result in deprivation, which may consist of actual harm or simply a risk of harm. To safeguard against over breadth in applying these criteria, he imposed on the Crown the requirement to establish that the dishonest act had the effect of exposing the person consenting to a “significant risk of serious bodily harm.” (para. 128).

Application of these principles

[152] It was the Crown’s theory before the trial judge and in his court that a trier of fact could find that the complainant’s consent was vitiated because the evidence could support a finding that she was exposed to the risk of pregnancy by his deceptive acts; the complainant would not have consented if she had known the true facts; and pregnancy carries with it a significant risk of serious bodily harm.

[153] The whole premise of the Crown's case is, with respect to those that hold a different view, misplaced. *Cuerrier* is a case about complainants being deceived into consenting to sexual intercourse with a man who was infected with a disease which is frequently, but not always, transmitted by sexual activity. The majority decision not only dealt with the dishonest transmission of HIV, but also set guidelines to deal with dishonesty about all sexually transmitted diseases. This is made clear by Cory J. when he explained:

[137] It follows that in circumstances such as those presented in this case there must be a significant risk of serious harm if the fraud resulting from non-disclosure is to vitiate the consent to the act of intercourse. For the purposes of this case, it is not necessary to consider every set of circumstances which might come within the proposed guidelines. **The standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm.** However, the test is not so broad as to trivialize a serious offence. [my emphasis]

[154] Life is simply not a sexually transmitted disease. The evidence adduced at trial here was that pregnancy is always a risk of sexual intercourse, even if a condom is used or during menses. The evidence also suggests that the respondent increased the risk of pregnancy by his acts, but this did not change the risk involved in sexual intercourse. It is fundamentally different than deceptive acts about the transmission or risk of transmission of HIV or other diseases.

[155] In other words, the complainant was already exposed to the risk of pregnancy with all of the life-altering implications that would entail, including the potential complications demonstrated by the Crown's evidence, which the Crown says a trier of fact could find to be a significant risk of serious bodily harm.

[156] I have no difficulty in accepting the fundamental changes, both psychological and physical, that occur when a woman becomes pregnant. It cannot be gainsaid that a pregnant woman faces risks to her health that a non pregnant woman does not. Pregnancy can only be a life-altering event for a woman, but, in my opinion, it is not a risk or event that vitiates consent.

[157] I can find no reference in Canada, or the rest of the world for that matter, that has ever suggested a lie about the use of contraceptives or having been vasectomized is a matter for the criminal law.

[158] The closest reported cases that could be found were two civil cases. In *Stephen K. v. Roni L.*, 105 Cal. App. 3d 640 (1980), the respondent brought a paternity suit against the appellant. He admitted paternity but filed a cross claim for fraud, negligent misrepresentation and other tort claims on the basis that the respondent had falsely represented that she was taking birth control pills. The court affirmed that the conduct did not give rise to civil liability. However, in *Barbara A. v. John G.*, 145 Cal. App. 3d 369 (1983), the respondent sued the appellant for unpaid legal fees. She counter claimed for damages in tort arising out of what she claimed was the appellant's misrepresentation that he had had a vasectomy. No contraception was used. The respondent claimed she suffered a tubal pregnancy and had to undergo surgery and suffered personal injury. The court distinguished *Stephen K.*, *supra* on the basis that different policy considerations were involved. The court ruled her action was not barred.

[159] My colleague, Roscoe, J.A., does not conclude that there was some evidence that would permit a trier of fact to find a significant risk of serious bodily harm. Instead she finds that there was some evidence for a trier of fact to find actual serious bodily harm, which in turn could permit a finding of fraud vitiating consent (para. 46). With respect, I am unable to agree with her analysis. However, I need not discuss the basis for my disagreement in light of my conclusion that the test articulated by Cory J. in *Cuerrier* does not apply.

[160] In my opinion, the trial judge committed no error in granting the motion for a directed verdict, although I would arrive at that result for somewhat different reasons.

SUMMARY

[161] The described conduct by the respondent would amount to a gross violation of trust. While morally reprehensible, it does not amount to the offence of sexual assault. Not all morally repugnant behaviour amounts to an offence. It may well give rise to civil liability. In order to be liable for conviction for aggravated sexual assault, or any lesser and included offence, in addition to a myriad of other requirements, there must be some evidence upon which a reasonable jury properly instructed could find that the complainant did not consent, or if she did, her

consent was vitiated by the dictates of s. 265(3) or s. 273.1(2) of the *Criminal Code*.

[162] The definition of “consent” in s. 273.1(1) of the *Code* cannot be interpreted to import an additional requirement of “informed consent” into the basic condition that consent simply means the voluntary agreement by the complainant to engage in the sexual activity in question. The Crown did not argue that the deception by the respondent went to the nature or quality of the act. The Crown’s reliance on the criteria suggested by Cory J. in *Cuerrier* for vitiating consent – deception or dishonest failure to disclose the existence of a sexually transmitted disease and a significant risk of serious bodily harm is misplaced. One cannot simply substitute exposure to bodily fluids containing a sexually transmitted disease such as HIV with bodily fluids containing spermatozoa. One leads to a devastating illness with fatal consequences, the other to pregnancy, a natural and predictable risk of sexual intercourse.

[163] Pregnancy is a life-altering event for a woman, but, in my opinion, neither the risk of conception nor the event vitiates consent. It has never before been suggested that a lie about the use of contraceptives or having been vasectomized is a matter for the criminal law. Perhaps it should be, but that is for Parliament not the courts. Accordingly, I would dismiss the appeal.

Beveridge, J.A.

Concurring Reasons for Judgment: (Bateman, J.A.)

[164] I have had the advantage of reviewing the masterful and persuasive reasons of my two colleagues.

[165] There was no material dispute on the events leading to the charge against Mr. Hutchinson:

- Mr. Hutchinson knew that the complainant did not want to become pregnant;
- The complainant insisted on barrier contraception at all times when she believed she was at risk of becoming pregnant;
- Mr. Hutchinson decided to and did make the complainant pregnant;
- He accomplished this by surreptitiously sabotaging the condoms which rendered them useless.

[166] The Supreme Court of Canada decision in **R. v. Williams, supra**, referred to at para. 51 of the reasons of Roscoe J.A., concerned an appeal from a conviction for aggravated assault arising out of circumstances where Williams, being HIV positive, had unprotected sexual intercourse with his sexual partner who believed him to be HIV free. The appeal was allowed because there was no proof that Williams knew of his status at the time the partner became infected. He did not learn that he had HIV until midway through the relationship, at which point he did not disclose it to his partner. However, in the course of his reasons, Binnie J., writing for the Court, rejected Williams argument that, once he became aware of his HIV-positive status, his failure to disclose it did not vitiate his partner's consent. Binnie J. opined that this argument was based upon an erroneous interpretation of **R. v. Cuerrier, supra**. He said:

37 The meaning of consent in the assault context was recently considered by the Court in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 26-27, *per* Major J.:

The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred

Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators have observed that the notion of consent connotes active behaviour While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective.

38 There is no doubt that the complainant did not subjectively consent to unprotected sex with an HIV-positive partner. She so testified and there is no reason to doubt her. Following November 15, 1991, the respondent knew, but the complainant did not, that he was HIV-positive. Each act of unprotected sex exposed her to the lethal virus. There is nothing whatsoever in the evidence to suggest that the complainant, believing rightly or wrongly that she was HIV-free, consented to run such a risk.

39 In *Cuerrier, supra*, an HIV-positive accused had, as had the respondent in this case, engaged in unprotected sex with two complainants without disclosing his infection. However, unlike here, the complainants in *Cuerrier* did not become infected with HIV. Cory J. held, at para. 127:

Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent.

[Emphasis added]

[167] It is unclear from the above passage whether the Court is saying that there was no consent, *ab initio*, or that the ostensible consent to the intercourse was vitiated by the non-disclosure. In **R. v. Cuerrier, supra** Cory J., for the majority, concluded that failure to disclose HIV-positive status “. . . can constitute fraud which may vitiate consent to sexual intercourse.” (at para 124)

[168] If we view the case against Mr. Hutchinson as one requiring fraud vitiating consent then the additional element of “significant risk of bodily harm” is required. This is an appeal from a directed verdict. I agree with Roscoe J.A. that the judge erred in determining there was no evidence from which a trier of fact could conclude that the sabotaging of the condoms presented a significant risk of bodily harm. Instead he impermissibly ventured into the territory of the trier of fact and weighed the evidence. That he did so is clear in the following excerpt from his reasons:

[42] Counsel provided me with a copy of Judge Derrick's decision committing Mr. Hutchinson to trial, for its persuasive value. With great articulation and care, the learned judge reaches a conclusion opposite to mine when applying an identical test. We disagree on the subject of risk. Judge Derrick records, at para. 37 of her decision, a finding about the level of risk when she says:

The fact that the incidence of serious problems in pregnancy, childbirth and abortion, are low does not alter the fact that a pregnant woman faces the possibility of risks to her health and even her life that a non-pregnant woman does not.

I accept that, but, in my opinion, the Crown is required to demonstrate a level of risk that is higher than that passage describes. In my respectful view, a low risk, a remote risk, the risk indicated by the words "very rare" and "safe", does not meet the requirement of *Cuerrier*.

(Emphasis added)

[169] The sufficiency of the evidence on the risk of harm was for the trier of fact to decide and not to be weighed on the motion.

[170] As observed by Roscoe J.A., the judge made no analysis on the endangerment of life issue, which inquiry he presumably concluded was unnecessary in view of his finding of insufficient “risk of harm”.

[171] I would respectfully disagree with my colleague Beveridge J.A. that the sabotaging of the condoms rendering them useless did not change the risk involved in sexual intercourse (at para. 154, above). Further, with respect, it is artificial to focus as he did, on the risk of “pregnancy”, separating it from the health risks that arise on pregnancy or the additional health dangers attendant on abortion. It is my

respectful view that Beveridge J.A. fell into the same error as did the motions judge. He weighed the evidence.

[172] I would agree with my colleague Roscoe J.A. that the judge erred in granting the motion for a directed verdict and that a new trial be ordered.

Bateman, J.A.