



SUPREME COURT OF CANADA

CITATION: R. v. Hutchinson, 2014 SCC 19

DATE: 20140307

DOCKET: 35176

BETWEEN:

Craig Jaret Hutchinson

Appellant

and

Her Majesty The Queen

Respondent

- and -

Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario

Interveners

CORAM: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:

(paras. 1 to 75)

McLachlin C.J. and Cromwell J. (Rothstein and Wagner JJ. concurring)

REASONS CONCURRING IN

Abella and Moldaver JJ. (Karakatsanis J. concurring)

RESULT:

(paras. 76 to 104)

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R. v. HUTCHINSON

Craig Jaret Hutchinson

Appellant

v.

Her Majesty The Queen

Respondent

and

**Canadian HIV/AIDS Legal Network and
HIV & AIDS Legal Clinic Ontario**

Interveners

Indexed as: R. v. Hutchinson

2014 SCC 19

File No.: 35176.

2013: November 8; 2014: March 7.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis
and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Criminal law — Offences — Sexual assault — Consent — Complainant consenting to sexual activity with male partner unaware that he had sabotaged condom — Whether evidence establishing that there was no voluntary agreement of the complainant to engage in the sexual activity in question or whether complainant’s apparent consent was vitiated by fraud — Criminal Code, R.S.C. 1985, c. C-46, ss. 265(3)(c), 273.1(1).

The complainant agreed to sexual activity with her partner, H, insisting that he use a condom in order to prevent conception. Unknown to her, H had poked holes in the condom and the complainant became pregnant. H was charged with aggravated sexual assault. The trial judge found that the complainant had not consented to unprotected sex and convicted H of sexual assault. On appeal, the majority upheld the conviction on the basis that condom protection was an “essential feature” of the sexual activity, and therefore the complainant did not consent to the “sexual activity in question”. The dissenting judge held that there was consent to the “sexual activity in question”, but that a new trial was required to determine whether consent was vitiated by fraud.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Rothstein, Cromwell and Wagner JJ.: The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no “voluntary agreement of the complainant to engage in the sexual activity in question”

under s. 273.1(1) and it requires proof that the complainant did not voluntarily agree to the touching, its sexual nature, or the identity of the partner. If the complainant consented, or her conduct raises a reasonable doubt about the lack of voluntary agreement to the sexual activity in question, the second step is to consider under ss. 265(3) and 273.1(2) whether there are any circumstances that may vitiate the complainant's ostensible consent or participation. In this case, the main issue is whether condom sabotage resulted in there being no "voluntary agreement by the complainant to engage in the sexual activity in question" under s. 273.1(1) or whether the condom sabotage constituted fraud under s. 265(3)(c), with the result that no consent was obtained. Resolving this issue requires the Court to determine the meaning of the "sexual activity in question" in s. 273.1(1)

There are essentially two approaches to determining the meaning of what constitutes voluntary agreement to the sexual activity in question and the role of mistake or deception in determining whether such agreement existed. The first approach defines the "sexual activity in question" as extending beyond the basic sexual activity the complainant thought she was consenting to at the time to conditions and qualities of the act or risks and consequences flowing from it, provided these conditions are "essential features" of the sexual activity or go to "how" the physical touching was carried out. The second approach defines "the sexual activity in question" more narrowly as the basic physical act agreed to at the time, its sexual nature, and the identity of the partner. If the complainant subjectively agreed to the partner's touching and its sexual nature, voluntary agreement is

established under s. 273.1(1). That voluntary agreement, however, may not be legally effective.

The primary tools of statutory construction including the plain words of the provisions, the scheme of the provisions and the legislative history support a narrow interpretation of the basic definition of consent in s. 273.1(1). The jurisprudence and the provisions also support this interpretation. This Court has interpreted the fraud provision in s. 265(3)(c) of the *Criminal Code* in the context of HIV non-disclosure cases: *Cuerrier*, *Mabior*. The adoption of the “essential features”/“how the act was carried out” approach would be inconsistent with the approach adopted in *Cuerrier* and *Mabior* and would put the outcome in those cases in question. Under the “essential features”/“how the act was carried out” approach, mistakes — they need not be deceptions — about conditions and qualities of the physical act will result in a finding of no consent under s. 273.1(1) even in the absence of risk of harm. For example, there would be no consent found under s. 273.1(1) in cases involving deception about HIV status, even where the accused had a low viral load and condom protection was used. Finally, adopting the “essential features” or “how the physical act was carried out” approach would re-introduce a vague and unclear test for consent, and could also criminalize conduct that lacks the necessary reprehensible character, casting the net of the criminal law too broadly.

Properly interpreted, voluntary agreement to the sexual activity in question in s. 273.1(1) means that the complainant must subjectively agree to the

specific physical act itself, its sexual nature and the specific identity of the partner. The “sexual activity in question” does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases. Here, the “sexual activity in question” was sexual intercourse and the complainant voluntarily agreed to it. On the question of whether her agreement to the “sexual activity in question” was vitiated by fraud, the dishonesty is evident and admitted. The only remaining issue is whether there was a sufficient deprivation to establish fraud. Where a complainant has chosen not to become pregnant, deceptions that expose her to an increased risk of becoming pregnant may constitute a sufficiently serious deprivation to vitiate consent under s. 265(3)(c). This application of “fraud” under s. 265(3)(c) is consistent with *Charter* values of equality and autonomy, while recognizing that not every deception that induces consent should be criminalized. In this case, there was no consent by reason of fraud, pursuant to s. 265(3)(c).

Per Abella, Moldaver and Karakatsanis JJ.: At its core, this case concerns the right recognized in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, to determine how sexual activity will take place. Society’s commitment to protecting a person’s autonomy and dignity requires that individuals have the right to determine *who* touches their body, and *how* the touching will occur. This protection underlies the definition of consent set out in s. 273.1(1) as “the voluntary agreement of the complainant to engage in the sexual activity in question”. Consent to the “sexual activity in question” necessarily means the complainant’s voluntary agreement both

to engage in touching of a sexual nature and to the manner in which that touching is carried out. The starting point for the analysis of consent under the *actus reus* of sexual assault is s. 273.1(1). When a complainant does not voluntarily agree to the sexual activity which occurred, consent does not exist within the meaning of s. 273.1(1), and the inquiry for the purposes of the *actus reus* of sexual assault is complete. If there is *no* consent *ab initio*, it is pointless to inquire whether there was fraud under s. 265(3)(c) which would have vitiated the complainant's consent. In other words, without voluntary agreement as to the "how" — the manner in which the sexual activity in question occurred — there is no consent within the meaning of s. 273.1(1).

Unlike under s. 265(3)(c), which requires both a dishonest act *and* a deprivation, consent under s. 273.1(1) has never required an analysis of the risks or consequences caused by unwanted sexual touching. It is the unwanted nature of non-consensual sexual activity that violates the complainant's sexual integrity and gives rise to culpability under the criminal law, not just the risk of further harm that the sexual touching may create. Requiring an analysis of the risks or consequences of non-consensual touching by applying s. 265(3)(c) whenever deception is later discovered, adds a barrier to the simple ability to demonstrate whether the activity which occurred was agreed to *when it occurred*. It thereby undermines the values of personal autonomy and physical integrity sought to be protected by making sexual assault an offence.

It does not follow that because a condom is a form of birth control, it is not also part of the sexual activity. Removing the use of a condom from the meaning of sexual activity in s. 273.1(1) because the condom may have been intended for contraceptive purposes, means that an individual has no right to require the use of a condom during intercourse where pregnancy is not at issue. All individuals must have an equal right to determine how they are touched, regardless of gender, sexual orientation, reproductive capacity, or the type of sexual activity they choose to engage in. By any definition, when someone uses a condom, it is part of the sexual activity. It is therefore part of what is — or is not — consented to. When individuals agree to sexual activity with a condom, they mean an intact condom. They are not merely agreeing to a sexual activity, they are agreeing to how it should take place. That is what s. 273.1(1) was intended to protect.

A person consents to *how* she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reason she wishes. The fact that some of the consequences of her motives are more serious than others, such as pregnancy, does not in the slightest undermine her right to decide how the sexual activity she chooses to engage in is carried out. It is neither her partner's business nor the state's. The complainant's voluntary agreement to the manner in which the sexual touching is carried out, requires the complainant's consent to where on her body she was touched and with what. It does not, however, require consent to the consequences of that touching, or the characteristics of the sexual partner, such as age, wealth, marital status, or health. These consequences or characteristics, while

undoubtedly potentially significant, are not part of the actual physical activity that is agreed to.

In this case, the question is not whether consent was vitiated by fraud. It is whether there was consent to the sexual activity in the first place. The complainant agreed to engage in sexual activity in a certain manner, that is, sexual intercourse with an intact condom. H deliberately sabotaged the condom without her knowledge or agreement. The fact that she only learned of the deliberate sabotaging after the sexual activity took place, is of no relevance. What is relevant is what sexual activity she agreed to engage in with H and whether he stuck to the bargain. In this case, he did not. Since the complainant did not agree to how she was touched at the time it occurred, consent within the meaning of s. 273.1(1) did not exist.

Cases Cited

By McLachlin C.J. and Cromwell J.

Discussed: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, rev'g 1998 ABCA 52, 57 Alta. L.R. (3d) 235; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; **referred to:** *R. v. Clarence* (1888), 22 Q.B.D. 23; *R. v. Flattery* (1877), 2 Q.B.D. 410; *R. v. Dee* (1884), 14 L.R. Ir. 468; *R. v. G.C.*, 2010 ONCA 451, 266 O.A.C. 299, leave to appeal refused, [2010] 3 S.C.R. v; *R. v. O.A.*, 2013 ONCA 581, 310 O.A.C. 305.

By Abella and Moldaver JJ.

Discussed: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; **referred to:** *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440; *R. v. Chase* (1984), 55 N.B.R. (2d) 97, rev'd [1987] 2 S.C.R. 293.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Oland, Hamilton, Fichaud and Farrar JJ.A.), 2013 NSCA 1, 325 N.S.R. (2d) 95, 1031 A.P.R. 95, 296 C.C.C. (3d) 22, 1 C.R. (7th) 1, 274 C.R.R. (2d) 254, [2013] N.S.J. No. 1 (QL), 2013 CarswellNS 22, affirming the conviction for sexual assault entered by Coughlan J., 2011 NSSC 361, 311 N.S.R. (2d) 1, 985 A.P.R. 1, [2011] N.S.J. No. 723 (QL), 2011 CarswellNS 935. Appeal dismissed.

Luke A. Craggs, for the appellant.

James A. Gumpert, Q.C., and *Timothy S. O'Leary*, for the respondent.

Jonathan A. Shime, *Wayne Cunningham* and *Ryan Peck*, for the interveners.

The judgment of McLachlin C.J. and Rothstein, Cromwell and Wagner JJ. was delivered by

THE CHIEF JUSTICE AND CROMWELL J. —

Introduction

[1] Control over the sexual activity one engages in lies at the core of human dignity and autonomy (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 28). This principle underlies the offences of assault and sexual assault. Sexual activity without consent is a crime under the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] In this case, the complainant consented to sexual activity with a condom to prevent conception. Unknown to her at the time, her partner, Mr. Hutchinson, poked holes in the condom and the complainant became pregnant. Mr. Hutchinson was charged with aggravated sexual assault. The complainant said that she did not consent to unprotected sex. The trial judge agreed and convicted Mr. Hutchinson of sexual assault (2011 NSSC 361, 311 N.S.R. (2d) 1). The majority of the Nova Scotia Court of Appeal, *per* MacDonald C.J.N.S., upheld the conviction on the basis that condom protection was an essential feature of the sexual activity, and therefore the complainant did not consent to the “sexual activity in question”. Farrar J.A., dissenting, held that there was consent to the sexual activity, but that a new trial was required to determine whether consent was vitiated by fraud (2013 NSCA 1, 325 N.S.R. (2d) 95).

[3] The immediate problem is how cases such as this fall to be resolved under the provisions of the *Criminal Code*. This is an issue of statutory interpretation. Underlying this is a broader question — where should the line between criminality and non-criminality be drawn when consent is the result of deception?

[4] The *Criminal Code* sets out a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence establishes that there was no “voluntary agreement of the complainant to engage in the sexual activity in question” under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant’s ostensible consent or participation. *Ewanchuk*, at para. 36. Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)).

[5] We conclude that the first step requires proof that the complainant did not voluntarily agree to the touching, its sexual nature, or the identity of the partner. Mistakes on the complainant’s part (however caused) in relation to other matters, such as whether the partner is using effective birth control or has a sexually transmitted disease, are not relevant at this stage. However, mistakes resulting from

deceptions in relation to other matters may negate consent at the second stage of the analysis, under the fraud provision in s. 265(3)(c) of the *Criminal Code*.

[6] Applying this template to the facts in this case leads us to conclude that, at the first step, the complainant voluntarily agreed to the sexual activity in question at the time that it occurred. The question is whether that consent was vitiated because she had been deceived as to the condition of the condom. This question is addressed at the second step. The accused's condom sabotage constituted fraud within s. 265(3)(c), with the result that no consent was obtained. We would therefore affirm the conviction and dismiss the appeal.

The Provisions of the *Criminal Code*

[7] Section 265(1) of the *Criminal Code* establishes the general offence of assault:

265. (1) A person commits an assault when

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

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

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

[8] Section 265(2) states that this section applies to all forms of assault, including sexual assault.

[9] The offence of sexual assault is created by s. 271:

271. Everyone who commits a sexual assault is guilty of

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

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

[10] Section 273.1(1) defines “consent” as follows:

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.

[11] These provisions define the basic offence of sexual assault. They are supplemented by two additional sets of provisions which give a non-exhaustive list of circumstances in which no consent is obtained. Section 265(3), which applies to all assaults, lists four such situations involving the accused’s abuse of authority and use of force, fear and fraud:

265....

(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.

[12] Section 273.1(2) lists five non-exhaustive situations where no consent is obtained for purposes of the sexual assault offences:

273.1 . . .

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

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

[13] Section 273.1(1) makes the definition of “consent” for the purposes of sexual assault “subject to” subsection (2) and to s. 265(3). Thus, s. 273.1(1) does not

replace the circumstances of no consent in ss. 273.1(2) and 265(3). Fraud, for example, continues to negate consent to sexual assault, pursuant to s. 265(3)(c).

Issue

[14] The main issue here is whether the Crown proved that the complainant did not consent to the sexual touching by the appellant. Did the condom sabotage, as the majority of the Court of Appeal held, result in there being no “voluntary agreement of the complainant to engage in the sexual activity in question” under s. 273.1(1) of the *Criminal Code*? Or should the condom sabotage be analyzed, as the dissenting judge in the Court of Appeal concluded, under the fraud provision in s. 265(3)(c) of the *Criminal Code*?

[15] Resolving this issue requires this Court to determine the meaning of the “sexual activity in question” in s. 273.1(1).

[16] The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1. The task is to determine the intent of Parliament, insofar as this can be done, by looking at the words used and the scheme and object of the provision. Every part of a provision or set of provisions should be given meaning if possible: Sullivan, at p. 210.

Analysis

Sexual Autonomy and the Criminal Law: Overview

[17] The sexual assault offences invoke the criminal law to protect sexual autonomy. The *Criminal Code* and jurisprudence establish a high level of protection of the right to choose whether to engage in sexual activity and with whom. The absence of consent to sexual activity, as part of the *actus reus* of the offence, is judged subjectively from the complainant's point of view: *Ewanchuk*, at paras. 25-26. Consent cannot be implied, must coincide with the sexual activity, and may be withdrawn at any time. Additionally, no consent is obtained if the apparent agreement to the sexual activity is obtained by coercion, fraud or abuse of authority. (We note that this is a case of apparent agreement — the complainant subjectively agreed at the time sexual intercourse occurred. This is not a case where there was no such agreement. The question is whether, in spite of that agreement, no consent was obtained in law because that agreement was obtained as a result of Mr. Hutchinson's deceit about the condition of the condom.) Individually and collectively, these features of sexual assault law protect Canadians' sexual autonomy.

[18] But the law has long recognized that there are limits on how completely it may fulfil that objective through the blunt instrument of the criminal law. As the most serious interference by the state with peoples' lives and liberties, the criminal law should be used with *appropriate restraint*, to avoid over-criminalization. It draws a line between conduct deserving the harsh sanction of the criminal law, and conduct

that is undesirable or unethical but “lacks the reprehensible character of criminal acts”: *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 133; A. Wertheimer, *Consent to Sexual Relations* (2003). The companion of restraint is *certainty*. The criminal law must provide fair notice of what is prohibited and clear standards for enforcement: *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 14 and 19.

[19] The need for restraint and certainty, which sometimes work at cross-purposes to absolute protection of sexual autonomy, has influenced the law’s approach to consent, particularly where consent has been obtained by deception.

Interpreting the Provisions: Two Approaches

[20] There are essentially two approaches to the question of what constitutes “voluntary agreement . . . to . . . the sexual activity in question” and the role of mistake or deception in determining whether such agreement existed.

[21] The first approach, which has many variants, defines the “sexual activity in question” as extending beyond the basic sexual activity the complainant thought she was consenting to at the time to conditions and qualities of the act or risks and consequences flowing from it, provided these conditions are “essential features” of the sexual activity (reasons of the majority of the Court of Appeal, at paras. 71 and 81) or go to “how” the physical touching was carried out (reasons of Abella and Moldaver JJ.). Under this approach, whether a complainant’s mistake prevents voluntary agreement to the sexual activity under s. 273.1(1) depends on the nature of

the mistake. The difficulty with this approach, as we shall see, is that it provides no clear line between mistakes that result in no consent under s. 273.1(1), and mistakes that do not. The result of this lack of clarity may be inappropriate criminalization and uncertainty in the law.

[22] The second approach defines the “sexual activity in question” more narrowly as the basic physical act agreed to at the time, its sexual nature, and the identity of the partner. If the complainant subjectively agreed to the partner’s touching and its sexual nature, voluntary agreement is established under s. 273.1(1) of the *Criminal Code*. That voluntary agreement, however, may not be legally effective. The *Code* also sets out a number of situations in which, notwithstanding apparent agreement, no consent is obtained. In particular, deceptions may negate consent if they meet the requirements for fraud under s. 265(3)(c).

[23] The choice between these approaches is a matter of statutory construction. Which approach is correct depends on (1) the wording, scheme and object of the provisions of the *Criminal Code*; (2) the jurisprudence on the provisions and their common law predecessors; and (3) the underlying objectives of the criminal law. We will consider each of these in turn.

- (1) The Wording, Scheme and Object of the Legislation and the Scheme of the Provisions

[24] The plain words of the provisions, read in their ordinary and natural sense, support a narrow interpretation of the basic definition of “consent” in s. 273.1(1). The ordinary meaning of the “sexual activity in question” is the physical act agreed to; there is nothing in the wording to suggest that it includes the conditions or qualifications of the sexual act.

[25] The scheme of the provisions — a basic definition of “consent” in s. 273.1(1), coupled with circumstances vitiating such agreement in s. 265(3) and s. 273.1(2) — also supports a narrow interpretation of “voluntary agreement . . . to . . . the sexual activity in question”.

[26] The “essential features” approach of the Court of Appeal and the “how the physical act is carried out” approach of Abella and Moldaver JJ. do not conform to this two-part scheme. The fraud provision in s. 265(3)(c) deals with situations where consent to the sexual activity has been given because of a deception by the accused. But under these approaches, all deceptions about “essential features” of the sexual activity or about “how” the sexual activity was carried out would result in a finding of no consent to the “sexual activity in question” under s. 273.1(1). Many deceptions would be dealt with at the first step under s. 273.1(1), rather than where the scheme of the *Criminal Code* suggests they should be dealt with, under s. 265(3)(c). Section 273.1(1) would do most of the work that the fraud provision was intended to do, rendering the fraud provision in s. 265(3)(c) redundant in many cases,

contrary to the principle that every word and provision in a statute has a meaning and a function.

[27] Finally, the object of s. 273.1, as revealed by its legislative history, does not support a broad reading of the “sexual activity in question”. The definition of “consent” in s. 273.1 was part of a parcel of amendments added to the *Criminal Code* in 1992, intended to address Parliament’s concerns about sexual violence against women and children and to promote and ensure the full protection of s. 7 and s. 15 *Charter* rights (see the preamble to Bill C-49, containing the 1992 *Criminal Code* amendments, S.C. 1992, c. 38). The centerpiece of the revisions was a new provision narrowing the defence of honest belief of consent. An accused who chooses to rely on the defence of honest belief of consent is required to take reasonable steps to ascertain that the complainant was consenting. Parliament’s intention was to “overcome the apparent unwillingness by some to let go of the debunked notion that unless a complainant physically resisted or expressed verbal opposition to sexual activity, an accused was entitled to assume that consent existed” (*R. v. Ewanchuk*, 1998 ABCA 52, 57 Alta. L.R. (3d) 235, at para. 58). Section 273.1 therefore signalled that the focus should be on whether the complainant positively affirmed her consent to the “sexual activity in question”. There was no suggestion that Parliament intended to expand the notion of “sexual activity” by including not only the sexual act for which consent is required, but also potentially infinite collateral conditions, such as the state of the condom.

[28] In summary, the primary tools of statutory construction all point to a rejection of the broad interpretation of the “sexual activity in question” under the “essential features”/“how the act was carried out” approach.

(2) The Jurisprudence

[29] This Court has interpreted the fraud provision in s. 265(3)(c) of the *Criminal Code* in the context of HIV non-disclosure cases: *Cuerrier*; *Mabior*. In our view, adoption of the “essential features”/“how the act was carried out” approach would put the outcomes in those cases in question and replace the clarity and restraint achieved by those decisions with confusion and over-criminalization.

[30] Initially, the common law of fraud in sexual relations focussed on the nature of the deceit and asked whether it went to certain “essential” characteristics of the act. If the deception went to the sexual nature of the act or the identity of the partner, it was said to vitiate consent: *R. v. Clarence* (1888), 22 Q.B.D. 23 (Cr. Cas. Res.). This test was incorporated into Canada’s first *Criminal Code* in 1892 (S.C. 1892, c. 29). Parliament restricted deceptions vitiating consent to “false and fraudulent representations as to the nature and quality of the act” (ss. 259(b) and 266). The formulation, however, did little to bring certainty or rationality to the law of consent to sexual activity. The problem was where and how to draw the line between those aspects of the sexual activity that went to the “nature and quality of the act” and those that did not: A. Hooper, “Fraud in Assault and Rape” (1968), 3 *U.B.C. L. Rev.* 117, at p. 121. Simply put, the “nature and quality of the act” did not show courts

where to draw the line — or even help them to do so — between deceptions that did and did not vitiate consent.

[31] In view of this unsatisfactory state of affairs, the *Criminal Code* in relation to sexual offences was overhauled in 1983. In 1983, the language of the “nature and quality of the act” was dropped and the language of the present s. 265(3)(c) was adopted so that “no consent is obtained where the complainant submits or does not resist by reason of . . . fraud” — without any specification of the nature of the deception (S.C. 1980-81-82-83, c. 125, s. 19).

[32] While for a time Canadian courts continued to apply a restrictive interpretation of fraud, influenced by the earlier jurisprudence concerning the “false and fraudulent representations as to the nature and quality of the act”, the law of fraud in relation to sexual assault, as we shall see, had a new beginning in Canadian law with the Court’s judgment in *Cuerrier*.

[33] Three aspects of *Cuerrier* are particularly important. First, the majority held that the concept of fraud in the new s. 265(3)(c) was not restricted to deceptions as to the nature and quality of the act: para. 108. The former jurisprudence was rejected as being too restrictive, but at the same time, the majority recognized that some limitations on the concept of fraud are clearly necessary: para. 135.

[34] Second, the majority introduced an analysis of fraud that required two elements to be present before consent was vitiated by fraud: deceit and injury or,

expressed differently, dishonesty and deprivation or risk of deprivation: *Cuerrier*, at paras. 110-16. With only two narrow exceptions that we will discuss shortly, consent will be vitiated by fraud *only* when consent is obtained by lies or deliberate failure to disclose *coupled with* a significant risk of serious bodily harm as a result of the sexual touching: paras. 125-39. As Cory J. wrote for the majority, at para. 135:

The existence of fraud should not vitiate consent unless there is a significant risk of serious harm. Fraud which leads to consent to a sexual act but which does not have that significant risk might ground a civil action. However, it should not provide the foundation for a conviction for sexual assault. The fraud required to vitiate consent for that offence must carry with it the risk of serious harm. [Emphasis added.]

[35] Third, the majority accepted that the traditional notion of fraud in relation to the nature and quality of the act and the identity of the partner would continue to vitiate consent: *Cuerrier*, at para. 118. We understand this to mean that deceptions in relation to the sexual nature of the act and the identity of the partner (narrowly defined) vitiate consent without proof that the sexual activity gave rise to the risk of serious bodily harm.

[36] The basic architecture of this approach was very recently approved by the Court in *Mabior*. The Court said:

. . . the *Cuerrier* approach is in principle valid. It carves out an appropriate area for the criminal law — one restricted to “significant risk of serious bodily harm”. It reflects the *Charter* values of autonomy, liberty and equality, and the evolution of the common law, appropriately excluding the *Clarence* line of authority. The test’s approach to consent accepts the wisdom of the common law that not every deception that

leads to sexual intercourse should be criminalized, while still according consent meaningful scope. [Emphasis added; para. 58.]

[37] The Court in *Mabior* explained how the *Cuerrier* test applies to deceptions about HIV status. The Court concluded that HIV non-disclosure will not vitiate consent under s. 265(3)(c) if (1) the accused's viral load at the time of sexual relations was low; and (2) condom protection was used. Notably, voluntary agreement to the sexual activity, under s. 273.1(1) was not in issue; the case proceeded on the basis that there had been subjective consent to the sexual touching at the time it had occurred and the only issue was whether fraud vitiated consent under s. 265(3)(c).

[38] An approach that asks whether the deception went to an "essential feature" of the act or "how the sexual act was carried out" is inconsistent with the Court's approach in *Cuerrier* and *Mabior*. Consider two hypotheticals. In the first, the accused lies about the fact that the condom has holes in it so that the complainant who insists that he uses a condom will consent to the sexual activity. In the second, the accused lies about his HIV status so that the complainant will consent to have sex without a condom. From a legal perspective, what is the difference between, on one hand, deceiving the complainant about the condition of the condom and creating a risk of pregnancy, and on the other hand, deceiving the complainant about HIV status so that she will agree to unprotected sex? Since *Cuerrier*, it is clear that the latter situation must be analyzed under the fraud provision in s. 265(3)(c) of the *Criminal*

Code. Why then not the former? Consistency and certainty in the law require that both situations be treated the same.

[39] Both the Court of Appeal majority's approach and the approach proposed by Abella and Moldaver JJ. are also fundamentally at odds with the holdings in *Cuerrier* and *Mabior* that apparent consent is vitiated by fraud only where there is both deception and deprivation. Under the Court of Appeal's approach and that of our colleagues, mistakes — they need not be deceptions — about conditions and qualities of the physical act will result in a finding of no consent under s. 273.1(1) *even in the absence of harm or risk of harm*. This is contrary to the fundamental point made in *Cuerrier* and affirmed in *Mabior*: “The fraud required to vitiate consent for that offence must carry with it the risk of serious harm”: *Cuerrier*, at para. 135.

[40] These inconsistencies are not merely semantic — they may affect outcomes under the “essential features”/“how the act was carried out” approach. HIV status may well be an “essential feature” of the sexual activity under the Court of Appeal majority's approach. It could also be characterized as part of the “how” under Abella and Moldaver JJ.'s approach. If the use of an intact condom goes to the manner in which the sexual activity occurred, why not the exchange of diseased fluids? Thus, under these approaches, deceptions about HIV status could result in a finding of no consent under s. 273.1(1), even where the accused had a low viral load at the relevant time and condom protection was used. That conclusion, however, would be in direct conflict with *Cuerrier* and *Mabior*.

[41] In short, adopting the “essential features”/“how the act was carried out” approaches would make the law inconsistent, highly formalistic and unduly uncertain. The law would be inconsistent because there is no reason in principle to analyze a case of a lie that obtains consent to unprotected sex and a lie as to the condition of a condom differently. It is highly formalistic because an error with respect to any essential feature or “physical” element, presumably including whether a condom is of a certain make or design, would vitiate consent while lies on matters relating to the physical safety of the complainant would not, absent an actual risk or harm. It is uncertain because, as we shall see, it is difficult to tell what matters from part of the “essential features” or the “how” and which do not.

(3) Underlying Objectives of the Criminal Law: Restraint and Certainty

[42] Our jurisprudence has consistently confirmed that in interpreting criminal law provisions, the twin watchwords of restraint and clarity must inform the inquiry. In *Cuerrier* and *Mabior*, this Court narrowly limited the sorts of deceptions that vitiate consent in order to create certainty in the law and limit criminal liability to serious, reprehensible conduct. The Court held that deceptions with respect to anything other than the sexual nature of the act or the identity of the partner will only vitiate consent if there is dishonesty which gives rise to a risk of physical harm, beyond the injury inherent in being lied to in order to induce consent. This jurisprudence provides a clear line between criminal and non-criminal conduct and avoids over-criminalization. Adopting the “essential features” or “how the physical

act was carried out” approach would undercut the important objectives achieved by the Court’s jurisprudence. These approaches re-introduce a vague and unclear test for consent and broaden the scope for criminalization, including for HIV non-disclosure, thus effectively reversing this Court’s efforts to restrain and clarify the scope of criminalization in those circumstances in *Cuerrier* and *Mabior*.

[43] The Court of Appeal majority’s “essential features” approach is inherently uncertain and prone to over-criminalization. Historically, such approaches have proven unworkable because they are incapable of producing a sufficiently clear or restrained standard for the purposes of defining the scope of criminal liability.

[44] The majority of the Court of Appeal held that the “essential features” of the sexual activity are determined by the complainant’s subjective conditions for consent to that activity. There need be no deception or dishonesty on the part of the partner. It follows that the “essential features” of the sexual activity vary from person to person. It would therefore be impossible to predict what a particular person considers “essential”. It is also unclear how “essential” the feature must be to the complainant. The majority of the Court of Appeal also held that not all conditions for consent will be considered “essential features” of the sexual activity; they drew the line between characteristics that merely affect motive to engage in the sexual activity and characteristics that are “components” of the sexual activity. But this line is blurry. We are told that the use of an effective condom is a “component” of the sexual activity, not part of the motive to engage in the sexual activity. Yet the elimination of

the risk of pregnancy may well be a motivation for agreeing to the sexual act. Indeed, on the complainant's evidence in this case, she would not have consented to sex without a condom.

[45] Justices Abella and Moldaver introduce a variation on this approach but one which, as we see it, is equally uncertain. Under their approach, the “sexual activity in question” extends to “how” the sexual touching occurs, but not to the consequences of the sexual activity. But it is not clear what the “how” of the act includes, or whether agreement is undermined by only deception or also by a complainant's unilateral mistake. Presumably, it extends to any physical aspect of the sexual activity to which the complainant has not agreed in advance — a vast swath of conduct indeed. And again, the line is blurry; many aspects of the sexual activity can be characterized as *both* part of the “how” and part of the consequences. This case provides an example. Abella and Moldaver JJ. hold that a sabotaged condom is part of “how” the sexual touching occurred, but sabotaging a condom also amounts to a deception about the potential consequences of the physical act — namely, pregnancy.

[46] These approaches would also result in the criminalization of acts that should not attract the heavy hand of the criminal law. We have already noted the difficulty of seeing why the presence of a sexually transmitted infection would not be a “component” of the sexual activity or part of “how” the sexual touching occurs. Under the Court of Appeal majority's “essential features” test, a man who pierces a condom may be found guilty of sexual assault; why would a woman who lies about

birth control measures not be equally guilty? Under Abella and Moldaver JJ.'s test, the *quality or effectiveness* of a condom changes the sexual activity that takes place; why would it not follow that an individual might be prosecuted for using an expired condom or a particular brand of condom? Anomalies abound. The “how the physical act was carried out” test appears not to capture a woman who lies about taking birth control pills, but it might well capture a woman who lies about using a diaphragm.

[47] Conversely, the “how the act was carried out” approach would not capture conduct that is as equally reprehensible as Mr. Hutchinson’s actions, like substituting a partner’s birth control pills with sugar pills. We do not see any principled basis for criminalizing the act of sabotaging condoms, but not the act of sabotaging birth control pills.

[48] This difficulty is apparent on the facts of this case. The trial judge found that the complainant did not voluntarily agree to sexual intercourse without contraception and that Mr. Hutchinson knew this: paras. 44 and 47. What was critical to her consent was contraception and what she sought to mitigate was the risk of pregnancy. Yet on the approach adopted by our colleagues, her lack of voluntary agreement would result from the use of sabotaged condoms, but not from a lie by Mr. Hutchinson to the effect that he was sterile. These different results on the issue of voluntary agreement respectfully lack rational justification in a case such as this one in which the whole concern of the complainant was pregnancy — a risked consequence of the sexual activity. Her consent did not turn on the “how” of the

sexual act, but on whether the risk of pregnancy was mitigated to a degree which she thought sufficient.

[49] Ultimately, these approaches lead to empty semantic arguments incapable of furnishing a principled and clear line between criminal and non-criminal conduct. This conclusion is reinforced by the experience of other jurisdictions.

[50] We earlier referred to the difficulties of line drawing inherent in the “nature and quality of the act” test in *Clarence* and the Canadian *Criminal Code* until its revision in 1983. Courts experienced great difficulty in formulating principled reasons for why a certain deception did or did not relate to the nature and quality of the act and there was no principled basis upon which to confine the test to serious deceptions meriting the ultimate force of the criminal law: see, e.g., *Hooper*; *Cuerrier*.

[51] A further example is the distinction made in U.S. criminal and tort law between deceptions going to the fact (“fraud in the factum”) which vitiate consent for the purposes of rape and battery and other deceptions that act as inducements (“fraud in the inducement”) which do not. As expressed by one leading text, the rule is that “if the deception relates not to the thing done but merely to some collateral matter” the consent is valid: R. M. Perkins and R. N. Boyce, *Criminal Law* (3rd ed. 1982), at p. 1079. No matter how beguiling it appears at first, the distinction has proved unworkable. It is not helpful in differentiating between legally effective and ineffective consent and where it attempts to draw the line has no basis in principle:

see, e.g., P. J. Falk, “Rape by Fraud and Rape by Coercion” (1998), 64 *Brook. L. Rev.* 39, at p. 159-61; D. A. Fischer, “Fraudulently Induced Consent to Intentional Torts” (1977), 46 *U. Cin. L. Rev.* 71, at pp. 79, 87 and 98. As Peter Westen put it, “The interchangeability of [fraud in the factum and fraud in the inducement] enables courts and commentators to conceptualize *any* fraud that they regard as sufficient to invalidate acquiescence as a fraud in the factum”: *The Logic of Consent* (2004), at p. 198 (emphasis in original); see also, E. W. Puttkammer, “Consent in Rape” (1924-1925), 19 *Ill. L. Rev.* 410, at p. 423; Wertheimer, at p. 206; J. Feinberg, “Victims’ Excuses: The Case of Fraudulently Procured Consent” (1986), 96 *Ethics* 330.

[52] What these lines of authority have in common is that they, like the “essential features” or “how the physical act is carried out” approach, attempt to draw a line between deceptions that do and do not vitiate consent by adjectivally categorizing the subject matter of the deception. Deceptions described as going to the “nature and quality of the act” or the “fact” (as opposed to the “inducement”) vitiate consent, while other types of deceptions do not. But the attempted distinction has proven to be too unclear, too easily manipulated, and too unconnected with underlying policy rationales to provide a useful marker of liability.

[53] The lesson is clear. Broad adjectival approaches to the “sexual activity in question” produce not only uncertainty, but also may criminalize conduct that lacks the necessary reprehensible character, casting the net of the criminal law too broadly. There is no reason to expect that attempting to categorize deceptions as to whether

they go to the “essential features” of the act or to “how the physical act is carried out” will fare any better than did other adjectival approaches in the past.

The Correct Approach

[54] We conclude that Farrar J.A. was correct to interpret the “sexual activity in question” in s. 273.1(1) to refer simply to the physical sex act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys). The complainant must agree to the *specific* physical sex act. For example, as our colleagues correctly note, agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching.

[55] The “sexual activity in question” does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases. Thus, at the first stage of the consent analysis, the Crown must prove a lack of subjective voluntary agreement to the specific physical sex act. Deceptions about conditions or qualities of the physical act may vitiate consent under s. 265(3)(c) of the *Criminal Code*, if the elements for fraud are met.

[56] This approach fits within the ordinary meaning of s. 273.1(1) and the scheme of the *Code*, and it does not pose problems of uncertainty, over-criminalization, or inconsistency with *Cuerrier* and *Mabior*.

[57] In our view, “voluntary agreement . . . to . . . the sexual activity in question” also encompasses both the sexual nature of the activity (i.e., that the act was sexual in nature as opposed to being for a different purpose, such as a medical examination) and the identity of the partner (defined in the narrow sense of the specific identity of a partner who is personally known to the complainant). While identity and the sexual nature of the act were troublesome issues for the early cases, and while *Cuerrier*, in *obiter*, suggests that they might be considered at the second stage of the consent analysis under s. 265(3)(c), the better view is that “voluntary agreement . . . to . . . the sexual activity in question” will not exist under s. 273.1(1) if the complainant did not subjectively agree to the sexual nature of the act or the specific identity of the partner. As a result, a complainant’s mistaken belief about the identity of the partner or the sexual nature of the act — whether or not that mistake is the result of a deception — will result in no consent under s. 273.1(1) of the *Criminal Code*.

[58] The sexual nature of the act is expressly included by the reference in s. 273.1(1) to the “sexual activity in question”. If one voluntarily agrees to a non-sexual activity (for example, a medical examination), one is not voluntarily agreeing to a sexual activity. Similarly, in our view, the identity of the partner, in the narrow sense, should be included in the “sexual activity in question” under s. 273.1(1); if a complainant agrees to sexual activity with A, who is a specific individual known personally to her, she is not agreeing to sexual activity with B.

[59] A number of early cases support this interpretation. For example, in *R. v. Flattery* (1877), 2 Q.B.D. 410 (Cr. Cas. Res.), the court upheld a conviction of rape where a man obtained sex from a girl on the pretext of medical treatment. The court noted that the case was not a case where a man induced consent to sex through fraud; rather, the victim consented to a surgical operation — not to a sexual act. Thus, there was no consent to any sexual activity.

[60] Similarly, *R. v. Dee* (1884), 14 L.R. Ir. 468 (Cr. Cas. Res.), the court upheld a conviction of rape where a man pretended to be the victim's husband. May C.J. stated that “[t]he act she permitted cannot properly be regarded as the real act which took place; therefore, the connexion was done, in my opinion, without her consent, and the crime of rape was constituted” (p. 479).

[61] In *Dee*, Palles C.B. stated:

. . . an act done under the *bona fide* belief that it is another act *different in its essence* is not in law the act of the party. That is the present case — a case which it is hardly necessary to point out is not that of consent in fact sought to be avoided for fraud, but one in which that which took place never amounted to consent. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of the husband only
[Emphasis in original; p. 488.]

[62] In *Clarence*, Stephen J. acknowledged that there is abundant authority for the idea that frauds about identity or the sexual nature of the act vitiate consent. However, he commented:

I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery. [p. 44]

[63] More recently, the Ontario Court of Appeal in *R. v. G.C.*, 2010 ONCA 451, 266 O.A.C. 299, leave to appeal refused, [2010] 3 S.C.R. v, adopted this approach and held that the complainant's belief that the partner was her boyfriend when it was in fact his identical twin resulted in *no consent* to the "sexual activity in question" under s. 273.1 of the *Criminal Code*. (See also *R. v. O.A.*, 2013 ONCA 581, 310 O.A.C. 305.).

Application

[64] The first question is whether the complainant voluntarily agreed to the "sexual activity in question". On the approach we propose, the "sexual activity in question" was the sexual intercourse that took place in this case. Effective condom use is a method of contraception and protection against sexually transmitted disease; it is not a sex act.

[65] There is no dispute that the complainant subjectively consented to sexual intercourse with Mr. Hutchinson at the time that it occurred. We conclude that the Crown did not prove that there was no voluntary agreement to the "sexual activity in question" under s. 273.1(1) of the *Criminal Code*.

[66] The next question is whether any of the circumstances in which voluntary agreement is not effective apply. These circumstances are listed in s. 265(3) and s. 273.1(2). The only provision argued is s. 265(3)(c). So the key issue is whether the complainant's agreement to the sexual activity in question was vitiated by fraud under s. 265(3)(c) of the *Criminal Code*.

[67] As we have seen, "fraud" for the purposes of consent has two elements: (1) dishonesty, which can include the non-disclosure of important facts; and (2) deprivation or risk of deprivation in the form of serious bodily harm which results from the dishonesty: *Cuerrier*. Did the Crown prove that no consent was obtained by virtue of fraud?

[68] The dishonesty in this case is evident and admitted. Mr. Hutchinson obtained the complainant's consent to sexual intercourse only by failing to disclose the critical fact that he had sabotaged the condoms and thereby compromised their contraceptive value. The only remaining issue is whether there was a sufficient deprivation to establish fraud.

[69] Mr. Hutchinson argues that the universal threshold for deprivation under s. 265(3)(c) post-*Cuerrier* is a "significant risk of serious bodily harm", and that the Crown did not establish that here. The Crown argues that a new trial is required to determine whether the risk of pregnancy caused by the sabotaged condoms constituted a "significant risk of serious bodily harm". These arguments over-read *Cuerrier*. The Court in *Cuerrier* was addressing the specific risk of sexually

transmitted diseases. It did not foreclose the possibility that other types of harm may amount to equally serious deprivations and therefore suffice to establish the requirements of fraud under s. 265(3)(c).

[70] The concept of “harm” does not encompass only bodily harm in the traditional sense of that term; it includes at least the sorts of profound changes in a woman’s body — changes that may be welcomed or changes that a woman may choose not to accept — resulting from pregnancy. Depriving a woman of the choice whether to become pregnant or increasing the risk of pregnancy is equally serious as a “significant risk of serious bodily harm” within the meaning of *Cuerrier*, and therefore suffices to establish fraud vitiating consent under s. 265(3)(c).

[71] We conclude that where a complainant has chosen not to become pregnant, deceptions that deprive her of the benefit of that choice by making her pregnant, or exposing her to an increased risk of becoming pregnant by removing effective birth control, may constitute a sufficiently serious deprivation for the purposes of fraud vitiating consent under s. 265(3)(c).

[72] This application of “fraud” under s. 265(3)(c) is consistent with *Charter* values of equality and autonomy, while recognizing that not every deception that induces consent should be criminalized. To establish fraud, the dishonest act must result in a deprivation that is equally serious as the deprivation recognized in *Cuerrier* and in this case. For example, financial deprivations or mere sadness or stress from being lied to will not be sufficient.

[73] In this case, while the Crown did not establish beyond a reasonable doubt that the complainant's pregnancy was the result of the damaged condoms, Mr. Hutchinson exposed her to an increased risk of becoming pregnant by using a faulty condom. As the trial judge found, a condom with a pinprick in it is no longer effective birth control (para. 27). This constituted a sufficient deprivation for fraud, within the meaning established in *Cuerrier*.

[74] We conclude that there was no consent in this case by reason of fraud, pursuant to s. 265(3)(c) of the *Criminal Code*. Mr. Hutchinson is therefore guilty of sexual assault.

Disposition

[75] We would dismiss the appeal.

The reasons of Abella, Moldaver and Karakatsanis JJ. were delivered by

ABELLA AND MOLDAVER JJ. —

[76] This case involves a woman who agreed to sexual intercourse with a condom. When a woman agrees to have sexual intercourse with a condom, she is

consenting to a particular sexual activity. It is a different sexual activity than sexual intercourse *without* a condom. Her reasons for requiring a condom as part of the activity may be to prevent pregnancy, or they may be a matter of personal preference. But whatever her reasons, they are beyond the scope of the criminal law. What *is* within its scope is what she actually agreed to, not why. The deliberate and undisclosed thwarting of her agreement as to how the intercourse is to take place turns the sexual activity into a non-consensual act, regardless of its consequences. This engages s. 273.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, whose purpose is to ascertain whether there was consent to the activity in the first place. This is, first and foremost, a function of everyone's right to decide whether and how to engage in sexual activity.

[77] The factual events which gave rise to these proceedings are not in dispute. The complainant agreed to have sexual intercourse with Craig Hutchinson with a condom so that she would not get pregnant. Condom use, therefore, clearly meant an intact condom. Mr. Hutchinson secretly poked holes in the condom and used it during sexual intercourse. The complainant only learned of this when he later told her what he had done. At trial, Mr. Hutchinson was convicted of sexual assault under s. 271 of the *Criminal Code*.

[78] The issue before this Court is which *Criminal Code* provision applies in examining whether there was consent. The trial judge and a majority of the Nova Scotia Court of Appeal found that s. 273.1(1) applied and concluded that under that

provision, there was no consent to the sexual activity in question. The dissenting judge was of the view that the complainant had consented to sexual intercourse generally and that the condom was not part of the sexual activity. He would have ordered a new trial to determine whether the consent had been vitiated by fraud under s. 265(3)(c).

[79] We would dismiss the appeal. The starting point for the analysis is s. 273.1(1). The question is not whether consent was vitiated by fraud, it is whether there was consent to the sexual activity in the first place. In our view, there was no such consent, making s. 273.1(1) the applicable provision. The complainant in this case agreed to engage in sexual activity in a certain manner, that is, sexual intercourse with a condom. It goes without saying that when someone agrees to sexual intercourse with a condom, she is agreeing to sexual intercourse with an *intact* condom. The deliberate sabotaging of that condom without her knowledge or agreement makes what happened different from what the complainant agreed to. Since the complainant never agreed to engage in sexual intercourse with a sabotaged condom, there is therefore no consent under s. 273.1(1) and the inquiry for the purposes of the *actus reus* of sexual assault is complete.

Analysis

[80] The relevant provisions, s. 273.1(1) and s. 265(3)(c), state:

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.

265. . . .

. . .

(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.

[81] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, this Court set out the governing framework for analyzing whether the elements of sexual assault are met in a given case. The *mens rea* for sexual assault requires the accused to have knowledge of, or be willfully blind to, the complainant’s lack of consent. The central focus of the analysis of the *actus reus* of sexual assault, on the other hand, is to determine what the complainant agreed to, and what in fact took place. The *actus reus* requires proof of three elements: “(i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent” (para. 25). While the first two elements are determined objectively, the third — the absence of consent — “is subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred” (para. 26). It is the third component of the *actus reus* that we are concerned with in this appeal.

[82] In *Ewanchuk*, the foundational principles underlying the law of sexual assault were distilled by Major J. as follows:

Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over *who* touches one's body, and *how*, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner". . . . It follows that any intentional but unwanted touching is criminal. [Emphasis added; para. 28.]

[83] In other words, society's commitment to protecting a person's autonomy and dignity requires that individuals have the right to determine *who* touches their body, and *how* the touching will occur. The right to determine *how* sexual touching is to occur clearly encompasses a person's right to determine where one's body is touched and by what means. At its core, this case concerns the right recognized in *Ewanchuk* to determine how sexual touching will take place.

[84] This protection underlies the definition of consent set out in s. 273.1(1) as being "the voluntary agreement of the complainant to engage in the sexual activity in question". When it defined consent in s. 273.1(1) in this way in 1992, Parliament's intent was to address the "fundamental" issue of giving full and clear meaning to the concept of "consent" (Kim Campbell, Minister of Justice and Attorney General of Canada, *House of Commons Debates*, vol. IX, 3rd Sess., 34th Parl., June 15, 1992, at pp. 12027-28; see also pp. 12041 and 12043). As another parliamentarian explained:

Consent is the crux of sexual assault trials. If it has been established that consent has been given, the woman's claim of attack is rejected. It is imperative that the law be absolutely clear on this matter, as must the partners involved in the sexual activity.

The bill states that consent is the voluntary agreement of the complainant to engage in the sexual activity in question. There is no need for lawyers to be present. All you need are two people who understand each other's needs. . . .

(Shirley Maheu, M.P. from Saint-Laurent—Cartierville, *ibid.*, at p. 12045)

[85] Since the protection for personal integrity underlies the requirement for consent in s. 273.1(1), consent to the “sexual activity in question” necessarily means the complainant’s voluntary agreement both to engage in touching of a sexual nature and to the manner in which that touching is carried out. In other words, without voluntary agreement as to the “how” — the manner in which the sexual activity in question occurred — there is no consent within the meaning of s. 273.1(1).

[86] The dissenting judge in the Court of Appeal, like McLachlin C.J. and Cromwell J., concluded that the specific sexual activity in question here was ‘sexual intercourse’. Since the complainant consented to sexual intercourse, there was consent within the meaning of s. 273.1(1). In the dissenting judge’s view, the term “sexual activity” in s. 273.1(1) has a narrow meaning, referring only to “actual incidents of physical touching, whether oral sex, or intercourse, or another ‘category’ of activity, and not to the *conditions* of that touching”: para. 127 (emphasis in original). With respect, adverting to generic, categorical labels of sexual activity obscures the purpose of the consent inquiry regarding the *actus reus* of sexual assault.

The complainant must consent to the sexual touching which actually took place: *Ewanchuk*, at para. 26. And this Court confirmed in *R. v. J.A.*, [2011] 2 S.C.R. 440, that the relevant time for determining that consent is when the activity occurred. To interpret “sexual activity in question” in s. 273.1(1) without regard to the specific touching that occurs extinguishes the right of a person to decide whether to give or withhold consent to the sexual activity which is to take place.

[87] The dissenting judge’s technical definition of “sexual activity in question” also suggests that once a person consents to a “category” of sexual activity, the inquiry goes to s. 265(3) to determine whether that general consent was vitiated. This, with respect, reads out the protection in *Ewanchuk* for the “how” of the sexual touching. A person who has consented to being touched over her clothing above the waist, is not consenting to being touched under her clothing below the waist. Both instances are “touching”, but only one was agreed to. In the same way, agreeing to “penetration” does not thereby mean consenting to any or all forms of penetration. The notion that general consent is given under s. 273.1(1) so long as the other person’s actions fall somewhere within the generic category of what the complainant agreed to, such as touching or penetration, is untenable. It represents the triumph of terminology over personal integrity and completely undermines *Ewanchuk*’s basic principle that “any intentional but unwanted touching is criminal” by virtue of the fact that it was unwanted (*Ewanchuk*, at para. 28 (emphasis added)).

[88] A person consents to *how* she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reason she wishes.

The fact that some of the consequences of her motives are more serious than others, such as pregnancy, does not in the slightest undermine her right to decide the manner of the sexual activity she wants to engage in. It is neither her partner's business nor the state's. The complainant's voluntary agreement to the manner in which the sexual touching was carried out, requires the complainant's consent to where on her body she was touched and with what. It does not, however, require consent to the consequences of that touching, or the characteristics of the sexual partner, such as age, wealth, marital status, or health. These consequences or characteristics, while potentially significant, are not part of the actual physical activity that is agreed to. If we included them in the meaning of the sexual activity in question under s. 273.1(1), we would be criminalizing activity that thwarts the *motives* of a complainant, instead of focussing on the unwanted physical activity that actually took place. To state the proposition demonstrates its unacceptable reach. While it is true that the third element of the *actus reus* — the complainant's absence of consent to the touching — is a subjective inquiry, it must nonetheless relate to the specific way in which he or she is touched, not to why. The avoidance or pursuit of pregnancy may well motivate why the specific sexual activity is being agreed to, but the motivation for the sexual activity is not the sexual activity itself.

[89] That is why we would *not* adopt the “essential features” test proposed by the majority of the Nova Scotia Court of Appeal, under which “if there is no consent

to an essential feature of the sexual act itself, there can be no consent to ‘the sexual activity in question’” (para. 46). By focussing on what is an “essential” feature of the sexual activity to the complainant, there is a risk of capturing “features” which are not a part of the *how* of the sexual activity. In other words, the language of “essential features” opens the door to a broader inquiry than whether the complainant consented *specifically to the sexual touching which occurred*. To the extent that our colleagues have conflated our approach with the “essential features” test, it does not, with respect, reflect our reasons.

[90] But neither do we agree that the fraud provision in s. 265(3)(c) must be the framework for analyzing consent in sexual assault cases whenever deception is involved. When a complainant does not voluntarily agree to the sexual activity which occurred, consent does not exist within the meaning of s. 273.1(1), and the inquiry for the purposes of the *actus reus* of sexual assault is complete.

[91] Unlike under s. 265(3)(c), which requires both a dishonest act *and* a deprivation, consent under s. 273.1(1) has never required an analysis of the risks or consequences caused by unwanted sexual touching. **This Court has consistently affirmed that it is the *unwanted* nature of non-consensual sexual touching that violates the complainant’s sexual integrity and gives rise to culpability under the criminal law, not just the risk of further harm that the sexual touching may create.** Requiring an analysis of the risks or consequences of all non-consensual sexual touching if deception is later discovered, adds a barrier to the simple ability to demonstrate

whether the activity which occurred was agreed to *when it occurred*. It thereby undermines the values of personal autonomy and physical integrity sought to be protected by making sexual assault an offence.

[92] Regardless of whether deception occurred in a given case, the analysis under s. 273.1(1) must link consent to the specific sexual activity which occurred, including *how* the sexual touching was physically carried out. In other words, did the complainant consent to *where* she was touched and *by what*? We therefore think the following two-part test for analyzing consent under the *actus reus* of sexual assault flows inevitably from *Ewanchuk*:

Under s. 273.1(1), has the complainant consented to the identity of her sexual partner, the sexual nature of the touching, and the manner in which the sexual touching was carried out?

If so, are there any circumstances that vitiate the complainant's consent under s. 265(3)?

[93] This approach does not, as our colleagues suggest, “do most of the work that the fraud provision was intended to do”. What it *does* do, is give meaning to the word “consent”. Indeed, as our colleagues themselves point out, there are many situations in which a person's deception does not change the manner in which the sexual activity is actually carried out. Section 265(3)(c) may well apply to those deceptions that do not fall under s. 273.1(1), either because the deception does not go

to the manner in which a person is touched, does not involve the identity of one's partner, or does not pertain to the sexual nature of the touching. If there was no consent *ab initio* to the sexual activity, however, it is pointless to inquire under s. 265(3)(c) whether consent was vitiated by fraud. The two inquiries are conceptually distinct and must remain so. One goes to the *manner* in which the sexual touching is carried out, the other to the *consequences* of the sexual touching. The fact that the violation of someone's consent results in a deprivation does not change the fact that there was no consent to begin with.

[94] In our view, both *R. v. Cuerrier*, [1998] 2 S.C.R. 371, and *R. v. Mabior*, [2012] 2 S.C.R. 584, are examples of cases that were properly decided under s. 265(3)(c). In those cases, this Court set out the applicable approach to sexual assault cases under s. 265(3)(c) involving non-disclosure or deception as to the existence of a disease. The complainants had consented to the manner in which the sexual activity had been carried out, the identity of their sexual partner, and the sexual nature of that touching. The complainants had consented to sex with and, in some cases, without condoms, and the sexual intercourse took place in accordance with that agreement. The significant issue before the Court was whether the complainants' consent had been vitiated by fraud because the accused had not disclosed that he was HIV-positive (*Cuerrier*, at para. 77; *Mabior*, at para. 106).¹ As the risk of HIV transmission is a consequence of sexual activity, and the complainants had consented

¹ Additionally, the accused in *Cuerrier* was charged with *aggravated* assault under s. 268 of the *Criminal Code*; accordingly, the definition of consent set out in s. 273.1(1) for *sexual* assault offences was not at issue.

to the manner in which the sexual activity occurred, these cases were properly decided within the realm of s. 265(3)(c). There are, moreover, important policy considerations that justify deciding HIV non-disclosure cases under s. 265(3)(c). Requiring a “significant risk of serious bodily harm” in HIV non-disclosure cases ensures that the criminal law does not further stigmatize and criminalize an already vulnerable group.

[95] This approach was never intended to replace the governing framework for analyzing consent in sexual assault cases set out in *Ewanchuk*. By further redefining the deprivation component of the fraud test affirmed in *Mabior* only two years ago, our colleagues leave open the possibility that other “equally serious deprivations” could establish deprivation in future cases. This makes the deprivation component a moving target, and generates uncertainty in an already complex area.

[96] While the starting point for the analysis is s. 273.1(1), unlike our colleagues, we see no legal danger or uncertainty in recognizing that in a given case, lack of consent could theoretically have been established under either provision. What is fraught, however, is redefining the concept of consent in a way that significantly limits the protective scope of s. 273.1(1) and erodes a person’s right, confirmed in *Ewanchuk*, to decide what sexual activity will take place.

[97] The heart of our disagreement with McLachlin C.J. and Cromwell J. turns on whether the use of a condom is included in the manner in which the sexual activity is carried out. According to our colleagues, the use of a condom during sexual

intercourse does not change the “*specific* physical sex act” which occurs, but rather is merely a “collateral conditio[n]” to the sexual activity. In their view, so long as there is consent to “sexual intercourse”, this general consent is not vitiated by a deception about condom use unless it exposes the individual to a deprivation within the meaning of s. 265(3)(c), which they conclude in this case means depriving a woman of the choice to become pregnant by “making her pregnant, or exposing her to an increased risk of becoming pregnant”.

[98] With respect, it does not follow that because a condom is a form of birth control, it is not also part of the sexual activity. Removing the use of a condom from the ambit of what is consented to in the sexual activity because in some cases it may be used for contraceptive purposes, means that an individual is precluded from requiring a condom during intercourse where pregnancy is *not* at issue. That is, individuals who engage in sexual activity that has no risk of pregnancy, either because of age, fertility, or gender, for example, would have no legal right to insist upon the use of a condom. If one of those individuals has insisted upon the use of a condom, and their partner has *deliberately* and *knowingly* ignored those wishes — whether by not using a condom at all, removing it partway through the sexual activity, or sabotaging it — that individual will nonetheless be presumed to have consented under the approach suggested by our colleagues. In other words, because the person could not become pregnant, the criminal law will not uphold his or her right to sexual autonomy and physical integrity. With respect, even aside from the problematic analogy between pregnancy and bodily harm, this result does not reflect

the fact that everyone has a right to insist on a condom as part of the sexual activity — for whatever reason. All individuals must have an equal right to determine how they are touched, regardless of gender, sexual orientation, reproductive capacity, or the type of sexual activity they choose to engage in. We fail to see how condoms can be seen as anything but an aspect of how sexual touching occurs. When individuals agree to sexual activity with a condom, they are not merely agreeing to a sexual activity, they are agreeing to how it should take place. That is what s. 273.1(1) was intended to protect.

[99] It is worth remembering that three decades ago, this Court overturned a decision of the New Brunswick Court of Appeal, *R. v. Chase* (1984), 55 N.B.R. (2d) 97, that touching a women’s breast was an assault, but not a sexual one. The Court of Appeal concluded that a breast was only a “secondary” sexual characteristic and that “sexual” should be given “its natural meaning as limited to the sexual organs or genitalia”. A man who had grabbed a woman’s breasts had therefore committed an assault, but not a *sexual* assault, since

the contact was not with the sexual organs of the victim but to the mammary gland, a secondary sexual characteristic. . . . [T]o include as sexual an assault to the parts of a person’s body considered as having secondary sexual characteristics may lead to absurd results if one considers a man’s beard. Nor am I prepared to include those parts of the human body considered erogenous zones lest a person be liable to conviction for stealing a goodnight kiss. . . . It seems to me that the word “sexual” as used in the section ought to be given its natural meaning as limited to the sexual organs or genitalia. [paras. 13-14]

In this Court, McIntyre J., had “no difficulty” overturning the Court of Appeal’s decision, concluding instead that a sexual assault had been committed by the accused ([1987] 2 S.C.R. 293, at p. 303).

[100] To say that condom use is not part of the sexual activity in question under s. 273.1(1) but rather a collateral condition, is reminiscent of the artificially narrow approach to the word “sexual” taken by the Court of Appeal in *Chase* and rejected by this Court. We must similarly take care not to adopt an interpretation of “sexual activity in question” that unreasonably or arbitrarily excludes certain forms of touching from the meaning of s. 273.1(1). By any definition, when someone uses a condom, it is part of the sexual activity. It is therefore part of what is — or is not — consented to. And if what is consented to is sexual activity with a condom, the condom is expected to be intact. If it is not intact *because of its deliberate sabotaging*, the activity that has been agreed to has been unilaterally changed by the saboteur.

[101] What took place here was sexual intercourse with a sabotaged condom, a sexual activity to which the complainant did *not* consent. The fact that she only learned of the deliberate sabotaging *after* the sexual activity took place, is of no relevance. What is relevant is what sexual activity she agreed to engage in with Mr. Hutchinson and whether he stuck to the bargain. He did not. Since the complainant did not agree at any time to how she was touched, consent within the meaning of s. 273.1(1) did not exist.

[102] Nor can we see why requiring the consistent approach to consent in sexual assault set out in *Ewanchuk* — and never abandoned by this Court — can now be said to lead to “over-criminalization”. Sexual assault is a crime. What s. 273.1(1) does is explain, clearly and simply, that the *actus reus* of sexual assault is made out when someone does not agree to the manner of the sexual touching, that is, when an individual engages in sexual touching in a way that is contrary to the complainant’s wishes, thereby violating his or her bodily integrity. This on its own, however, is half the story. The *mens rea* for the offence of sexual assault captures those who *knowingly* touch the complainant in a way that he or she has not agreed to, thereby disregarding the complainant’s right to determine how he or she is sexually touched. While the criminal law must remain sensitive to concerns about over-criminalization, those concerns should not be used to generally undermine the hard-fought legislative protection for someone’s right to determine how he or she is sexually touched. It is also worth remembering the Chief Justice’s comments in *R. v. J.A.* — with the Court’s unanimous agreement on this point — where she observed that “even mild non-consensual touching of a sexual nature can have profound implications for the complainant” (paras. 63 and 121).

[103] The complainant in this case agreed to engage in sexual activity in a certain manner, that is, sexual intercourse with an intact condom. Mr. Hutchinson deliberately sabotaged the condom without her knowledge or agreement. **It trivializes the seriousness of the violation of the complainant’s integrity that occurred to analogize a sabotaged condom, as our colleagues have done, to its brand or expiration**

date. Because of the deliberate deceit of her partner, the sexual activity was not carried out in the manner that the complainant had agreed to. Put simply, the complainant did not consent to how she was touched, and thus she did not voluntarily agree to the sexual activity in question under s. 273.1 of the *Code*.

[104] We would therefore dismiss the appeal.

Appeal dismissed.

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Solicitors for the interveners: Cooper, Sandler, Shime & Bergman, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.