

# R. v. J.A., [2011] 2 S.C.R. 440

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: November 8, 2010;

Judgment: May 27, 2011.

File No.: 33684.

[2011] 2 S.C.R. 440 | [2011] 2 R.C.S. 440 | [2011] S.C.J. No. 28 | [2011] A.C.S. no 28 | 2011 SCC 28

Her Majesty The Queen, Appellant; v. J.A., Respondent, and Attorney General of Canada and Women's Legal Education and Action Fund, Interveners.

(145 paras.)

## Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

## Case Summary

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### Catchwords:

**Criminal law — Sexual assault — Consent — Accused and complainant consensually engaging in erotic asphyxiation — Accused anally penetrating complainant during period of unconsciousness — Whether Criminal Code defines consent as requiring conscious, operating mind throughout sexual activity — Whether consent to sexual activity may be given prior to period of unconsciousness — Criminal Code, R.S.C. 1985, c. C-46, ss. 265, 273.1, 273.2.**

### Summary:

One evening, in the course of sexual relations, J.A. placed his hands around the throat of his long-term partner K.D. and choked her until she was unconscious. At trial, K.D. estimated that she was unconscious for "less than three minutes". She testified that she consented to J.A. choking her, and understood that she might lose consciousness. She stated that she and J.A. had experimented with erotic asphyxiation, and that she had lost consciousness before. When K.D. regained consciousness, her hands were tied behind her back, and J.A. was inserting a dildo into her anus. K.D. gave conflicting testimony about whether this was the first time J.A. had inserted a dildo into her anus. J.A. removed the dildo ten seconds after she regained consciousness. The two then had vaginal [page441] intercourse. When they finished, J.A. cut K.D.'s hands loose.

K.D. made a complaint to the police two months later and stated that while she consented to the choking, she

had not consented to the sexual activity that had occurred. She later recanted her allegation, claiming that she made the complaint because J.A. threatened to seek sole custody of their young son. The trial judge convicted J.A. of sexual assault. A majority of the Court of Appeal allowed the appeal, set aside the conviction and dismissed the charges against J.A.

*Held* (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed and the respondent's conviction for sexual assault restored.

*Per* McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: The issue to resolve in this appeal is whether a person can perform sexual acts on an unconscious person if the person consented to those acts in advance of being rendered unconscious. Parliament has defined consent in a way that requires the complainant to be conscious throughout the sexual activity in question. Parliament's definition of consent does not extend to advance consent to sexual acts committed while the complainant is unconscious. The legislation requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.

This definition of consent is in harmony with the provisions of the *Criminal Code* and their underlying policies and is also consistent with the tenor of the jurisprudence of this Court. The jurisprudence has consistently interpreted consent as requiring a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act. The jurisprudence also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not sufficient for the accused to have believed the complainant was consenting: he must also take reasonable steps to ascertain consent, and must believe that the complainant communicated her consent to engage in the sexual activity in question. This is impossible if the complainant is unconscious.

The argument that advance consent equals actual consent because the complainant cannot change her mind after being rendered unconscious runs contrary to this Court's conclusion in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, [page442] that the only relevant period for ascertaining whether the complainant consented under the *Criminal Code* is while the touching is occurring. When the complainant loses consciousness, she loses the ability to either oppose or consent to the sexual activity that occurs. Finding that such a person is consenting would effectively negate the right of the complainant to change her mind at any point in the sexual encounter.

In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it would be inappropriate for this Court to carve out exceptions to the concept of consent when doing so would undermine Parliament's choice. This concept of consent produces just results in the vast majority of cases and has proved to be of great value in combating stereotypes that have historically existed. In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.

*Per* Binnie, LeBel and Fish JJ. (dissenting): It is a fundamental principle of the law governing sexual assault in Canada that no means "no" and only yes means "yes". In this case, K.D. said yes, not no. She engaged with J.A. in sexual activity to which she had freely consented in advance, while conscious. To convict J.A. of sexual assault in these circumstances is unwarranted as a matter of statutory interpretation, prior decisions of the Court, or considerations of policy. And it is wrong on the facts of this case.

The provisions of the *Criminal Code* regarding consent to sexual contact and the case law were intended to protect women against abuse by others. They aim to safeguard and enhance the sexual autonomy of women, and not to make choices for them.

It is a well-established principle that the complainant's genuine consent precludes a finding of sexual assault. There is nothing in the *Criminal Code* that indicates that Parliament has considered or adopted a statutory exception to this principle which would vitiate consent to unconscious sexual activity. Indeed, the wording of s. 273.1(2)(e) of the *Criminal Code* suggests that the complainant's consent can be given in advance, as it was in this case, and remains operative unless and until it is subsequently revoked. Upon regaining consciousness, K.D. did not revoke her prior consent to the sexual conduct in issue -- which was then still ongoing. And it has not been suggested that she had earlier [page443] revoked her consent by words or conduct, or even in her own mind.

A person cannot, while unconscious, consent or revoke consent. However, it hardly follows that consenting adults cannot, as a matter of law, willingly and consciously agree to engage in a sexual practice involving transitory unconsciousness -- on the ground that, during the brief period of that consensually induced mental state, they will be unable to consent to doing what they have already consented to do. There is no factual or legal basis for holding that the complainant's prior consent, otherwise operative throughout, was temporarily rendered inoperative during the few minutes of her voluntary unconsciousness. It was not suspended by the fact that she had rendered herself incapable of revoking the consent she had chosen, freely and consciously, not to revoke either immediately before or immediately after the brief interval of her unconsciousness. The complainant's prior consent to the activity in question constituted a valid consent only to the contemplated activity. In the absence of any evidence that J.A.'s conduct exceeded the scope of the complainant's consent, or caused her bodily harm that would vitiate her consent at common law, there is no basis in the provisions of the *Criminal Code* for concluding that the complainant's consent in fact was not a valid consent in law.

## Cases Cited

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By McLachlin C.J.

**Applied:** *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; **referred to:** *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Humphrey* (2001), 143 O.A.C. 151; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; *R. v. Park*, [1995] 2 S.C.R. 836; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Osvath* (1996), 46 C.R. (4) 124; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76.

By Fish J. (dissenting)

*R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Jobidon*, [1991] 2 S.C.R. 714; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Carson* (2004), 185 C.C.C. (3d) 541; *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339; *R. v. Ashlee*, 2006 ABCA 244, 61 Alta. L.R. (4) 226.

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## Statutes and Regulations Cited

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*An Act to amend the Criminal Code (sexual assault)*, Bill C-49, 3 Sess., 34 Parl., 1991 (assented to June 23, 1992), S.C. 1992, c. 38.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 45, 265, 271(1), 273.1, 273.2, 693(1)(a).

*Sexual Offences Act 2003* (U.K.), 2003, c. 42, s. 75.

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Tanovich, David M. "Criminalizing Sex At The Margins" (2010), 74 C.R. (6) 86.

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#### **History and Disposition:**

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Juriansz and LaForme JJ.A.), 2010 ONCA 226, 100 O.R. (3d) 676, 253 C.C.C. (3d) 153, 74 C.R. (6) 51, 260 O.A.C. 248, [2010] O.J. No. 1202 (QL), 2010 CarswellOnt 1739, setting aside the accused's conviction for sexual assault. Appeal allowed, Binnie, LeBel and Fish JJ. dissenting.

## **Counsel**

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*Christine Bartlett-Hughes*, for the appellant.

*Howard L. Krongold* and *Matthew C. Webber*, for the respondent.

*James C. Martin*, for the intervener the Attorney General of Canada.

*Susan Chapman* and *Elizabeth Sheehy*, for the intervener the Women's Legal Education and Action Fund.

The judgment of McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

## McLACHLIN C.J.

1 It is a fundamental principle of Canadian law that a person is entitled to refuse sexual contact. From this, it follows that sexual acts performed without consent and without an honest belief in consent constitute the crime of sexual assault. The issue raised by this appeal is whether a person can perform sexual acts on an unconscious person if the person consented to those acts in advance of being rendered unconscious.

2 The Crown argues that consent in advance of being rendered unconscious does not change the fact that the person, while unconscious, does not have an operating mind and is therefore incapable of consenting to sexual acts performed on her while unconscious. It argues that this is what the *Criminal Code*, R.S.C. 1985, c. C-46, requires, and that to hold otherwise would be to condone non-consensual sex and sexual exploitation. The respondent, J.A., on the other hand, argues that he may engage in sexual activity with an unconscious person, provided he does not exceed the bounds of what the unconscious person expected. To hold otherwise, the respondent says, is to criminalize benign and essentially consensual sexual activity.

3 Our task on this appeal is to determine whether the *Criminal Code* defines consent as requiring a conscious, operating mind throughout the sexual activity. I conclude that the *Code* makes it clear that an individual must be conscious throughout the sexual activity in order to provide the requisite consent. Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point. I would therefore allow the appeal and restore the conviction of the respondent.

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### I. Facts

4 On May 22, 2007, the respondent J.A. and his long-time partner K.D. spent an evening together at home. While watching a movie on the couch, they started to kiss and engage in foreplay. After some time, they went upstairs to their bedroom and became more intimate. They both undressed, and started kissing on the bed.

5 While K.D. was lying on her back, J.A. placed his hands around her throat and choked her until she was unconscious. At trial, K.D. estimated that she was unconscious for "less than three minutes". She testified that she consented to J.A. choking her, and understood that she might lose consciousness. She stated that she and J.A. had experimented with erotic asphyxiation, and that she had lost consciousness before.

6 When K.D. regained consciousness, she was on her knees at the edge of the bed with her hands tied behind her back, and J.A. was inserting a dildo into her anus. K.D. gave conflicting testimony about whether this was the first time J.A. had inserted a dildo into her anus. During her examination in chief, she stated that this was a first, and initially maintained this answer

during cross-examination by defence counsel:

[Mr. Goldstein]: In terms of having what you referred to as a dildo inserted -- you had said in your butt, is that something that had happened before?

[K.D.]: No, we hadn't done that. We discussed the possibility of it. At the moment I just went with it in the spirit of experimentation.

7 However, when confronted with the transcript of her testimony at J.A.'s bail hearing, K.D. changed her answer:

[K.D.]: ... we had tried it one time prior.

[Mr. Goldstein]: Okay... .

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[K.D.]: Somewhat of a drunken evening a while ago. I do apologize.

8 K.D. testified that J.A. removed the dildo ten seconds after she regained consciousness. The two then had vaginal intercourse. When they had finished, J.A. cut K.D.'s hands loose.

9 K.D. made a complaint to the police on July 11. In a videotaped statement, she told the police that she had not consented to the sexual activity that had occurred. She later recanted her allegation, and claimed that she made a false complaint to the police because J.A. had threatened to seek sole custody of their two-year-old son. J.A. was charged with aggravated assault, sexual assault, attempting to render the complainant unconscious in order to sexually assault her, and with breaching his probation order.

## II. Judicial History

### A. *Ontario Court of Justice, 2008 ONCJ 195 (CanLII)*

10 K.D. was the only witness at trial in the Ontario Court of Justice.

11 Nicholas J. found J.A. not guilty of aggravated assault and assault causing bodily harm. She concluded that K.D. had consented to being choked into unconsciousness. The trial judge also held that K.D. did not suffer bodily harm since the unconsciousness that she experienced was only transient. Nicholas J. found that the complainant consented to being choked.

12 However, Nicholas J. found J.A. guilty of sexual assault. She described K.D.'s conflicting testimony as "typical ... of a recanting complainant in a domestic matter" (para. 8). She concluded that K.D. had not consented to the insertion of the dildo, and that this was the first time that the couple had engaged in this sexual activity (para. 41).

13 In the alternative, the trial judge held that K.D. could not "legally consent to sexual [page448] activity that takes place when she is unconscious" (para. 45).

14 J.A. was also found guilty of breaching his probation order.

B. *Ontario Court of Appeal, 2010 ONCA 226, 100 O.R. (3d) 676*

**15** J.A. successfully appealed his convictions to the Ontario Court of Appeal. The court unanimously held that there was insufficient evidence at trial to conclude beyond a reasonable doubt that K.D. did not consent to the insertion of the dildo in advance of unconsciousness (Simmons J.A., at para. 55; LaForme J.A., at para. 114). The court split on whether such consent would be legally valid.

**16** On behalf of the majority, Simmons J.A. held that individuals could consent in advance to sexual activity that occurs while they are unconscious. She emphasized that the Crown must prove the absence of consent in order to establish the *actus reus* of sexual assault. She reasoned that if an individual consents in advance to sexual activity taking place while she is unconscious, and never changes her mind, "[t]he only state of mind ever experienced by the person is that of consent" (para. 77).

**17** The majority also rejected the Crown's argument that consent in this case was vitiated by the intentional infliction of bodily harm. Simmons J.A. agreed with the Crown that the trial judge had committed an error of law in her analysis of bodily harm, but held that bodily harm could not be relied upon to vitiate consent in the case of sexual assault *simpliciter*.

**18** LaForme J.A. dissented, holding that the definition of consent for the purposes of sexual assault required the individual to have an active mind throughout the sexual activity. He based [page449] his conclusion on this Court's decision in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, stating that this decision "conclusively establishes that a prior consent is not effective as a matter of law because unconsciousness deprives the person consenting of the ability to express consent or know whether they are consenting at the time the sexual activity occurs" (para. 117).

**19** LaForme J.A. also held that the *Criminal Code* defined consent as an ongoing state of mind, and that consent ceases "as soon as the complainant falls unconscious and is incapable of consenting" (para. 123). He noted that the *Criminal Code* allowed individuals to revoke their consent at any time during the sexual activity.

**20** LaForme J.A. did not discuss whether bodily harm could vitiate consent in the case of sexual assault *simpliciter*. However, he did state that he only disagreed with Simmons J.A.'s discussion of unconscious consent (para. 113).

### III. Analysis

#### A. *Issue on Appeal*

**21** The only question before this Court is whether consent for the purposes of sexual assault requires the complainant to be conscious throughout the sexual activity. This is because the Crown appeals to this Court as of right on the basis of "any question of law on which a judge of the court of appeal dissents": *Criminal Code*, s. 693(1)(a). Accordingly, whether the complainant consented in fact or suffered bodily harm are not at issue; nor is the Court of Appeal's holding that, for reasons of procedural fairness, the Crown in this case cannot rely on bodily harm to vitiate consent since it did not formally allege that bodily harm occurred. Since the issue of bodily harm is not before this Court, I take no position on whether or in which circumstances individuals may consent to bodily harm during sexual activity. In my view, it would [page450] be

inappropriate to decide the matter without the benefit of submissions from interested groups.

### B. *Framework of Sexual Assault*

**22** Before turning to the issue in this case, it is useful to consider the framework of the law of sexual assault.

**23** A conviction for sexual assault under s. 271(1) of the *Criminal Code* requires proof beyond a reasonable doubt of the *actus reus* and the *mens rea* of the offence. A person commits the *actus reus* if he touches another person in a sexual way without her consent. Consent for this purpose is actual subjective consent in the mind of the complainant at the time of the sexual activity in question: *Ewanchuk*. As discussed below, the *Criminal Code*, s. 273.1(2), limits this definition by stipulating circumstances where consent is not obtained.

**24** A person has the required mental state, or *mens rea* of the offence, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or wilfully blind to the absence of consent. The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant communicated consent to engage in the sexual activity. However, as discussed below, ss. 273.1(2) and 273.2 limit the cases in which the accused may rely on this defence. For instance, the accused cannot argue that he misinterpreted the complainant saying "no" as meaning "yes" (*Ewanchuk*, at para. 51).

**25** The issue in this case is whether the complainant consented, which is relevant to the *actus reus*; the Crown must prove the absence of consent to fulfill the requirements of the wrongful act. However, the provisions of the *Criminal Code* with respect to the *mens rea* defence of honest but mistaken belief also shed light on the issue of whether consent requires the complainant to have been conscious throughout the duration of the sexual activity.

**26** The relevant provisions of the *Criminal Code* are ss. 265, 273.1 and 273.2.

**27** The *Criminal Code* defines sexual assault as an assault that is committed in circumstances of a sexual nature. Section 265 provides that:

**265.** (1) A person commits an assault when

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

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

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

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

**28** Parliament has enacted provisions that specifically define consent for the purpose of sexual assault. In particular, s. 273.1 establishes 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.

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(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.

**29** The definition of consent for the purposes of sexual assault is found in s. 273.1(1). In order to clarify this broad definition, Parliament provides a non-exhaustive list of circumstances in which no consent is obtained in s. 273.1(2). Section 273.1(3) authorizes the courts to identify additional cases in which no consent is obtained, in a manner consistent with the policies underlying the provisions of the *Criminal Code*.

**30** The defence of honest but mistaken belief in consent was recognized and limited by Parliament in s. 273.2 of the *Criminal Code*:

**273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

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(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

C. *The Concept of Consent Under the Criminal Code*

**31** The foregoing provisions of the *Criminal Code* indicate that Parliament viewed consent as the conscious agreement of the complainant to engage in every sexual act in a particular encounter.

**32** The proper approach to statutory interpretation was summarized in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601: "The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole." The Court emphasized that while "[t]he relative effects of ordinary meaning, context and purpose on the interpretive process may vary, ... in all cases the court must seek to read the provisions of an Act as a harmonious whole" (para. 10).

**33** It follows that we must seek to interpret the provisions that deal with consent in a harmonious way. Applying this approach, we see that Parliament defined consent in a way that requires the complainant to be conscious throughout the sexual activity in question. The issue is not whether the Court should identify a new exception that vitiates consent to sexual activity while unconscious (see reasons of Fish J., at para. 95), but whether an unconscious person can qualify as consenting under Parliament's definition.

**34** Consent for the purposes of sexual assault is defined in s. 273.1(1) as "the voluntary agreement of the complainant to engage in the sexual activity in question". This suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument [page454] that broad advance consent is what Parliament had in mind. As discussed below, this Court has also interpreted this provision as requiring the complainant to consent to the activity "at the time it occur[s]" (*Ewanchuk*, at para. 26).

**35** Section 273.1(2) provides a non-exhaustive list of circumstances in which no consent is obtained. These examples shed further light on Parliament's understanding of consent.

**36** Section 273.1(2)(b) provides that no consent is obtained if "the complainant is incapable of consenting to the activity". Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent. This might be because of mental impairment. It also might arise from unconsciousness: see *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Humphrey* (2001), 143 O.A.C. 151, at para. 56, *per* Charron J.A. (as she then was). It follows that Parliament intended consent to mean the conscious consent of an operating mind.

**37** The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*: *Ewanchuk*, at paras. 48-49. Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to express her lack of consent or her revocation of consent for the *actus reus* to be established.

**38** With this caution in mind, I come to the three provisions that relate to the *mens rea* that are relevant to the issue in this case: s. 273.1(2)(d), s. 273.1(2)(e) and s. 273.2(b).

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**39** Section 273.1(2)(d) provides that there can be no consent if the "complainant expresses, by words or conduct, a lack of agreement to engage in the activity". Since this provision refers to the expression of consent, it is clear that it can only apply to the accused's *mens rea*. The point here is the linking of lack of consent to any "activity". This suggests a present, ongoing conception of consent, rather than advance consent to a suite of activities.

**40** Section 273.1(2)(e) establishes that it is an error of law for the accused to believe that the complainant is still consenting after she "expresses ... a lack of agreement to continue to engage in the activity". Since this provision refers to the expression of consent, it is clear that it can only apply to the accused's *mens rea*. Nonetheless, it indicates that Parliament wanted people to be capable of revoking their consent at any time during the sexual activity. This in turn supports the view that Parliament viewed consent as the product of a conscious mind, since a person who has been rendered unconscious cannot revoke her consent. As a result, the protection afforded by s. 273.1(2)(e) would not be available to her.

**41** According to my colleague, Fish J., s. 273.1(2)(e) "suggests that the complainant's consent *can* be given in advance, and remains operative unless and until it is subsequently revoked" (para. 104 (emphasis in original)). With respect, I cannot accept this interpretation. The provision in question establishes that the accused must halt all sexual contact once the complainant expresses that she no longer consents. This does not mean that a failure to tell the accused to stop means that the complainant must have been consenting. As this Court has repeatedly held, the complainant is not required to express her lack of consent for the *actus reus* to be established. Rather, the question is whether the complainant subjectively consented in her mind: *Ewanchuk; R. v. M. (M.L.)*, [1994] 2 S.C.R. 3.

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**42** Section 273.2 sheds further light on Parliament's conception of consent. Section 273.2(b) states that a person wishing to avail himself of the *mens rea* defence must not only believe that the complainant communicated her consent (or in French, "*l'accusé croyait que le plaignant avait consenti*" (s. 273.2)), but must also have taken reasonable steps to ascertain whether she "was consenting" to engage in the sexual activity in question at the time it occurred. How can one take reasonable steps to ascertain whether a person is consenting to sexual activity while it is occurring if that person is unconscious? Once again, the provision is grounded in the assumption that the complainant must consciously consent to each and every sexual act. Further, by requiring the accused to take reasonable steps to ensure that the complainant "was consenting", Parliament has indicated that the consent of the complainant must be an ongoing state of mind.

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

contention that an individual may consent in advance to sexual activity taking place while she is unconscious.

#### D. *The Concept of Consent in the Jurisprudence*

**44** The jurisprudence has consistently interpreted consent as requiring a conscious, operating [page457] mind, capable of granting, revoking or withholding consent to each and every sexual act. While the issue of whether advance consent can suffice to justify future sexual acts has not come before this Court prior to this case, the tenor of the jurisprudence undermines this concept of consent.

**45** As held by Major J. in *Ewanchuk*, "[t]he 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 (emphasis added)). The trier of fact must determine what was going on in the mind of the complainant in response to the touching. The majority repeatedly underlined that the focus is on the complainant's "state of mind": paras. 26, 27, 29, 30, 33, 34 and 48; see also *R. v. Park*, [1995] 2 S.C.R. 836, at para. 16, referring to the consent of the complainant as a "mental state" (*per* L'Heureux-Dubé J.). Moreover, as noted above, the complainant is not required to express her lack of consent: *M. (M.L.)*. Rather, the absence of consent is established if the complainant was not experiencing the state of mind of consent while the sexual activity was occurring.

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

**47** The jurisprudence of this Court also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not open to the defendant to argue that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant. There is no defence [page458] of implied consent to sexual assault: *Ewanchuk*, at para. 31.

**48** The cases on the *mens rea* defence of honest but mistaken belief in consent take the same view. At common law, this was a standard defence of mistake of fact: the accused was not guilty if he honestly believed a state of facts, which, if true, would have rendered his conduct lawful: *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at pp. 134 and 139. In *Ewanchuk*, this Court held that it is not sufficient for the accused to have believed that the complainant was subjectively consenting in her mind: "In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question" (para. 46 (emphasis in original)). See also *Park*, at para. 39 (*per* L'Heureux-Dubé J.). It thus is not sufficient for the accused to have believed the complainant was consenting: he must also take reasonable steps to ascertain consent, and must believe that the complainant communicated her consent to engage in the sexual activity in question. This is impossible if the complainant is unconscious.

**49** The respondent argues that my dissenting reasons in *Esau* suggest that an individual may

consent while unconscious for purposes of the *actus reus* of the offence. The issue in that case was whether the defence of honest but mistaken belief was available where the complainant asserted that she was unconscious due to drunkenness at the time of the sexual activity. The majority of the Court, *per* Major J., held that the evidence sufficed to raise a basis for the defence. My dissenting reasons argued that the defence did not arise because an unconscious complainant "lacks the capacity to communicate a voluntary decision to consent... . To put it another way, the necessary (but not sufficient) condition of consent - the capacity to communicate agreement - is absent" (para. 73). I further stated:

[page459]

The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent. [*ibid.*]

**50** Simmons J.A. read this passage as supporting the view that an individual may consent while unconscious (para. 82). However, the point of the passage is simply to cast doubt on whether the defence of honest but mistaken belief can arise with respect to an unconscious complainant, assuming (without deciding) that the *actus reus* could be made out. The passage thus does not support the view that advance consent prior to unconsciousness can establish consent for purposes of the *actus reus* of the offence.

#### E. *The Arguments to the Contrary*

**51** The issue in this case relates only to the *actus reus* of sexual assault. The question is whether advance consent can establish consent to sexual activity committed on a person who has been rendered unconscious. The foregoing discussion of the provisions of the *Criminal Code* and the jurisprudence suggests that the answer to this question is no. However, before concluding on the matter, we must examine the arguments put against this conclusion.

**52** The first argument is that advance consent equals actual consent because the complainant cannot change her mind after being rendered unconscious. Simmons J.A. accepted this argument: "Where a person consents in advance to sexual activity expected to occur while unconscious and does not change their mind, I fail to see how the Crown can prove lack of consent. The only state of mind ever experienced by the person is that of consent" (para. 77).

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**53** This argument runs contrary, however, to this Court's conclusion in *Ewanchuk* that the only relevant period for ascertaining whether the complainant consented under the *Criminal Code* is *while the touching is occurring* (para. 26). When the complainant loses consciousness, she loses the ability to either oppose or consent to the sexual activity that occurs. Finding that such a person is consenting would effectively negate the right of the complainant to change her mind at any point in the sexual encounter.

**54** The second argument is that the law should carve out an exception to the general

requirement of conscious, ongoing consent to sexual contact, because this is required to deal with the special concerns unconsciousness raises.

**55** J.A. submits that this is what the law has done in the medical field, where the common law recognizes that doctors may perform surgery on unconscious patients. This argument fails to appreciate, however, that consent functions differently in different contexts: G. P. Fletcher, *Basic Concepts of Legal Thought* (1996), at p. 112. A number of considerations make consent to sexual activity different from consent in other contexts such as medical interventions, and property transactions. Parliament has indicated that the notion of consent for sexual assault is distinct from consent in other contexts (*Criminal Code*, ss. 273.1 and 273.2). It has also enacted special protections for medical practitioners, exempting them "from criminal responsibility for performing a surgical operation on any person for the benefit of that person" (s. 45). Consequently, the fact that individuals may consent in advance to surgery does not determine if they may consent in advance to sexual activity. The body of pragmatic, context-specific rules of consent to govern medical operations developed by Parliament and at common law does not permit this Court to overrule the requirements in the *Criminal Code* for consent to sexual acts. Moreover, the two situations are different. The pragmatic considerations that inform the definition of consent in the context of surgical operations differ from those that arise in the case of sexual activity. Surgical interventions are usually carefully planned, and [page461] appropriate consent is assured by consent forms and waivers - all to the end of limiting the risk of abuse. Such safeguards are rare, if perhaps non-existent, in the sexual arena.

**56** Along the same lines, the respondent and Simmons J.A. cite the example of two friends who agree before going to a party to assist each other in getting home if either should pass out from drinking too much. In such a case, the argument goes, the individual who assists her friend should be commended, rather than charged with assault and kidnapping because the friend was not capable of consenting while unconscious.

**57** Again, the analogy is not exact. In the case of non-sexual assaults, consent may, where appropriate, be implied at common law: *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 52, *per* McLachlin J. (as she then was); *R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 743, *per* Gonthier J. This Court, applying the common law, has recognized cases in which the social setting and the relationship between the parties implies consent to non-sexual touching, such as shaking hands at a business meeting or colliding with a hockey player on the ice. Conversely, in interpreting the provisions of the *Criminal Code* that relate to sexual assault, this Court has expressly rejected the notion of implied consent: *Ewanchuk*, at para. 31.

**58** The respondent also argues that requiring conscious consent to sexual activity may result in absurd outcomes. He cites the example of a person who kisses his sleeping partner. In that situation, [page462] he argues, the accused would be guilty of sexual assault unless he is permitted to argue that his sleeping partner consented to the kiss in advance.

**59** The first difficulty with altering the definition of consent to deal with the respondent's hypothesis is that it would only provide a defence where the complainant specifically turns her mind to consenting to the particular sexual acts that later occur before falling asleep. The respondent's position is that there is no sexual assault in this case because the complainant consented to both being rendered unconscious and to engaging in the sexual activity that occurred while she was unconscious. If a hypothetical complainant did not expect her partner to kiss her - or whatever other acts are at issue - while she was asleep, the respondent's approach would not provide a defence.

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

**61** A third difficulty is evidentiary. If the complainant is unconscious during the sexual activity, she has no real way of knowing what happened, and whether her partner exceeded the bounds of her consent. Only one person really knows what happened during the period of unconsciousness, leaving the unconscious party open for exploitation. The complainant may never discover that she [page463] was in fact the victim of a sexual assault. Fish J. correctly points out that in some cases, there may be forensic evidence that establishes conclusively that the accused exceeded the bounds of the consent given. However, if the complainant never suspects that a sexual assault has occurred, no forensic evidence will be gathered. Moreover, many acts of sexual assault leave no forensic evidence.

**62** A fourth difficulty is jurisprudential. Recognizing exceptions to the requirement of conscious consent would not only run counter to the definition of consent in the *Criminal Code*, but would impose on the courts the task of determining how consent to unconscious sexual activity can be proven. The respondent suggests that the court could ask if the complainant consented before losing consciousness to the sexual acts that subsequently occurred - pre-unconsciousness authorization. This would require the court to determine what the unconscious party wanted just prior to going unconscious, and then assess if this is what indeed occurred. This inquiry would be objective, contrary to the subjective inquiry required by the *Criminal Code*. The only other option - post-unconsciousness determination of consent where the complainant decides when she regains consciousness if she would have consented to all the acts that occurred - is also problematic. A *post facto* determination runs contrary to the rule that the complainant's post-act sentiments are irrelevant; if a complainant consents to sexual activity while it is taking place, but later decides that she should not have, the accused should be acquitted on the *actus reus* of the offence.

**63** The Crown suggested that this Court could allow for mild sexual touching that occurs while a person is unconscious by relying on the *de minimis* doctrine, based on the Latin phrase *de minimis non curat lex*, or the "law does not care for small or trifling matters": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 200, *per* Arbour J., dissenting. Without suggesting that the *de minimis* principle has no place in the law [page464] of sexual assault, it should be noted that even mild non-consensual touching of a sexual nature can have profound implications for the complainant.

**64** Running through the arguments in favour of carving out particular circumstances as exceptions to the conscious consent paradigm of the *Criminal Code* is the suggestion that the strict approach Parliament has adopted toward consent in the context of sexual assault has no place in relationships of mutual trust, like marriage. However, accepting this view would run counter to Parliament's clear rejection of defences to sexual assault based on the nature of the

relationship. The *Criminal Code* does not establish a different inquiry into consent depending on the relationship between the accused and the complainant. Their relationship may be evidence for both the *actus reus* and the *mens rea*, but it does not change the nature of the inquiry into whether the complainant consented, as conceived by the *Criminal Code*.

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

#### IV. Summary

**66** The definition of consent for sexual assault requires the complainant to provide actual active [page465] consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*.

#### V. Disposition

**67** I would allow the appeal, and restore the respondent's conviction for sexual assault.

The reasons of Binnie, LeBel and Fish JJ. were delivered  
by

**FISH J. (dissenting)**

I

**68** It is a fundamental principle of the law governing sexual assault in Canada that no means "no" and only yes means "yes".

**69** K.D., the complainant in this case, said yes, not no. She consented to her erotic asphyxiation by the respondent, J.A., her partner at the time. Their shared purpose was to render K.D. unconscious and to engage in sexual conduct while she remained in that state. It is undisputed that K.D.'s consent was freely and voluntarily given - in advance and while the

conduct was still in progress. Immediately afterward, K.D. had intercourse with J.A., again consensually.

**70** K.D. first complained to the police nearly two months later when J.A. threatened to seek sole custody of their two-year-old child. She later recanted.

**71** We are nonetheless urged by the Crown to find that the complainant's *yes in fact* means *no in [page466] law*. With respect for those who are of a different view, I would decline to do so.

**72** The provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, regarding consent to sexual contact and the case law (including *R. v. Ewanchuk*, [1999] 1 S.C.R. 330) relied on by the Crown were intended to protect women against abuse by others. Their mission is not to "protect" women *against themselves* by limiting their freedom to determine autonomously when and with whom they will engage in the sexual relations of their choice. Put differently, they aim to safeguard and enhance the sexual autonomy of women, and not to make choices for them.

**73** The Crown's position, if adopted by the Court, would achieve exactly the opposite result. It would deprive women of their freedom to engage by choice in sexual adventures that involve no proven harm to them or to others. That is what happened here.

**74** Adopting the Crown's position would also require us to find that cohabiting partners across Canada, including spouses, commit a sexual assault when either one of them, *even with express prior consent*, kisses or caresses the other while the latter is asleep. The absurdity of this consequence makes plain that it is the product of an unintended and unacceptable extension of the *Criminal Code* provisions upon which the Crown would cause this appeal to rest.

**75** Lest I be misunderstood to suggest otherwise, I agree that consent will be vitiated where the contemplated sexual activity involves a degree of bodily harm or risk of fatal injury that cannot be condoned under the common law, or on grounds of public policy. Asphyxiation to the point of unconsciousness may well rise to that level, but the contours of this limitation on consent have not been addressed by the parties. Nor has the matter been previously considered by the Court. For procedural [page467] reasons as well, the issue of bodily harm must be left for another day.

**76** I agree as well that prior consent affords no defence where it is later revoked or where the ensuing conduct does not comply with the consent given.

**77** Applying these principles here, I would dismiss the appeal.

**78** Finally, I think it helpful to set out succinctly the issue on this appeal.

**79** According to the Chief Justice, the question is "whether an unconscious person can qualify as consenting [to sexual activity]" (para. 33). With respect, that is not the question at all: *No one* has suggested in this case that an unconscious person can validly consent to sexual activity.

**80** Rather, the question is whether a *conscious* person can freely and voluntarily consent in advance to agreed sexual activity that will occur while he or she is briefly and consensually rendered unconscious. My colleague would answer that question in the negative; I would answer that question in the affirmative, absent a clear prohibition in the *Criminal Code*, absent

proven bodily harm that would vitiate consent at common law, and absent any evidence that the conscious partner subjected the unconscious partner to sexual activity beyond their agreement.

**81** In this case, J.A. engaged with K.D. in sexual activity to which K.D. freely consented while conscious. The Chief Justice would nonetheless convict J.A. of sexual assault, a serious crime. I oppose this result. In my respectful view, it is unwarranted as a matter of statutory interpretation, prior decisions of the Court, or considerations of policy. And it is wrong on the facts of this case.

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**82** That is what divides us. The rest is commentary.

## II

**83** McLachlin C.J. has set out the relevant facts fully and fairly, and I have nothing to add in that regard.

**84** This is an appeal as of right by the Crown. In the absence of leave on any other grounds - none was sought by the Crown - our jurisdiction is therefore limited to the question of law alone upon which there was a dissent in the Court of Appeal. That question is set out this way in the Crown's notice of appeal:

As a matter of law can a person consent in advance to sexual activity expected to occur when the person is either unconscious or asleep?

**85** In this light, three defining aspects of this appeal merit special emphasis.

**86** First, as the Chief Justice has noted (at para. 15), the Court of Appeal found, unanimously, that "the evidence that was led at trial was simply not capable of supporting a finding that the complainant did not consent on a standard of proof beyond a reasonable doubt" (2010 ONCA 226, 100 O.R. (3d) 676, *per* Simmons J.A., Juriansz J.A. concurring, at para. 55; *per* LaForme J.A., at para. 114). Accordingly, this finding is not open to dispute before us (*R. v. Keegstra*, [1995] 2 S.C.R. 381, at paras. 23-24).

**87** Second, the Court of Appeal found, again unanimously, that there was no basis for a finding of fact that the sexual conduct that occurred did not comply with the consent given by K.D. Speaking for herself and Juriansz J.A., Simmons J.A. held (at para. 89):

... the trial judge's conclusions regarding the sexual assault charge were premised, at least in part, on the trial judge's finding that the complainant did not, at any time, consent to anal penetration of any kind. As I have explained, in my opinion, the record in this case is not [page469] capable of supporting that finding of fact. [Emphasis added.]

And LaForme J.A. (at paras. 112-13) made clear that he agreed with the "thorough and persuasive analysis" of Simmons J.A. except only for her conclusion that "there is no basis for holding that 'as a matter of general principle, a person cannot legally consent in advance to sexual activity expected to occur while the person is either unconscious or asleep'".

**88** Third, the trial judge found that the asphyxiation causing unconsciousness in this case did not constitute bodily harm. This finding was set aside by the Court of Appeal, once more

unanimously, on the ground that the trial judge had applied the wrong legal test in concluding as she did. Largely for reasons of procedural fairness, the court declined to revisit the Crown's submission that the complainant's asphyxiation constituted bodily harm, vitiating her consent under the common law. The record as we have it affords us no sufficient basis for revisiting this issue. As I mentioned earlier, whether asphyxiation causing unconsciousness will vitiate consent therefore remains an open question to be answered when the need next arises.

**89** In short, then, we are urged on this appeal to find that J.A. committed a sexual assault on K.D., his partner at the time, by engaging with her in sexual activity to which she had agreed in advance, and agreed again while that activity was still in progress, without causing her bodily harm and without exceeding the scope of her consent. In the Crown's submission, J.A.'s guilt of this serious crime can be grounded in the brief intervening period of unconsciousness that occurred during his sexual encounter with K.D., before and after which K.D. neither subjectively experienced nor affirmatively communicated a revocation of her prior consent.

**90** Essentially, the Crown contends that J.A. committed a sexual assault on K.D. because prior [page470] consent to sexual touching that is anticipated to occur during a period of unconsciousness is precluded by the *Criminal Code* and by this Court's decision in *Ewanchuk*. Alternatively, the Crown argues that K.D.'s consent should be declared invalid at common law on the basis of public policy.

**91** For the reasons that follow, I find neither argument persuasive.

### III

**92** I begin with a consideration of the provisions of the *Criminal Code* upon which the Crown relies.

**93** The starting point in determining whether the complainant's consent will be recognized at law is that "the genuine consent of a complainant has traditionally been a defence to almost all forms of criminal responsibility" (*R. v. Jobidon*, [1991] 2 S.C.R. 714, at p. 729). Despite the fact that "a number of exceptions [have been] imposed by Parliament and also, increasingly, by the courts", this principle still "underpin[s] Canadian law" (D. Stuart, *Canadian Criminal Law: A Treatise* (5th ed. 2007), at p. 587).

**94** Consent is frequently referred to as a "defence", as in *Jobidon*, and can be thought of in that way insofar as it negates liability. On a charge of sexual assault, however, we must remember throughout that the *absence* of consent is an essential element of the *actus reus* and must therefore be proved, beyond a reasonable doubt, by the Crown.

**95** McLachlin C.J. finds that Parliament has created a statutory exception to the well-established general principle that the complainant's genuine consent precludes a finding of sexual assault. In my colleague's view, the purpose and effect of this perceived exception is to vitiate consent to "unconscious sexual activity" - that is, sexual contact [page471] that is expected to occur while the consenting adult is asleep or unconscious. With respect, nothing in the *Criminal Code* indicates that Parliament has considered, let alone adopted, an exception of this sort.

**96** Section 273.1(1) of the *Code* defines consent for the purposes of the sexual assault provisions as "the voluntary agreement of the complainant to engage in the sexual activity in

question". Nothing in this definition refers to the timing of consent or otherwise excludes advance consent to unconscious sexual contact. And it is important to remember that, on this appeal, neither the voluntariness nor the specificity of the complainant's consent is in issue before us.

**97** On the contrary, as the Court of Appeal found, there is no basis in the evidence to support a finding that the complainant did not freely and consciously consent to "the sexual activity in question": erotic asphyxiation involving anal penetration during the contemplated period of transitory unconsciousness, followed by vaginal intercourse.

**98** Section 273.1(1) also provides that the definition of consent is subject to two limiting provisions.

**99** The first is s. 265(3), which applies to *all* forms of assault and specifies that no consent is obtained where the complainant submits or does not resist by reason of force, threats of force, fraud or the exercise of authority. Manifestly, none of these statutory exceptions apply here.

**100** The second limiting provision, s. 273.1(2), applies only to sexual assaults and sets out five situations in which "[n]o consent is obtained". Only two are relied on by the Crown: s. 273.1(2)(b) and s. 273.1(2)(e).

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**101** Section 273.1(2)(b) provides that "[n]o consent is obtained ... where ... the complainant is incapable of consenting to the activity". I agree that unconsciousness qualifies as "incapa[city]" within the meaning of this provision. But it is apparent from the ordinary meaning of the words used by Parliament and from their context that s. 273.1(2)(b) has no application here. It simply confirms that consent cannot be *obtained* from a person who is at the time incapable of consenting. It does not contemplate consent given in advance at a time when the complainant, as in this case, was *capable*- not *incapable* - of giving her free and knowing consent.

**102** Section 273.1(2)(e), the second exception invoked by the Crown, provides that no consent is obtained where "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". The Crown submits, and the Chief Justice accepts, that this provision is inconsistent with the possibility of advance consent to unconscious sexual touching because Parliament intended people engaged in sexual activity to have the right to revoke consent at any time during the activity and "a person who has been rendered unconscious cannot revoke her consent" (reasons of the Chief Justice, at para. 40).

**103** I agree that prior consent to sexual activity can later be revoked. And I agree that a person cannot while unconscious consent or revoke consent. It hardly follows, in my respectful view, that consenting adults cannot, as a matter of law, willingly and consciously agree to engage in a sexual practice involving transitory unconsciousness - on the ground that, during the brief period of that consensually induced mental state, they will be unable to consent to doing what they have already consented to do.

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**104** If anything, the wording of s. 273.1(2)(e) suggests that the complainant's consent *can* be

given in advance, and remains operative unless and until it is subsequently revoked: It provides that "the complainant, having consented to engage in sexual activity", may later revoke his or her consent. I agree with the respondent that revocation is a question of fact. In this regard, I again mention that the complainant, upon regaining consciousness, did not revoke her prior consent to the sexual conduct in issue - which was then still ongoing. And it has not been suggested that she had earlier revoked her consent by words or conduct, or even in her own mind.

**105** With respect, there is no factual or legal basis for holding that K.D.'s prior consent, otherwise operative throughout, was temporarily rendered inoperative during the few minutes of her voluntary unconsciousness. In my view, it was not suspended by the fact that she had rendered herself incapable of revoking the consent she had chosen, freely and consciously, *not to revoke* either immediately before or immediately after the brief interval of her unconsciousness. Nothing in s. 273.1(2)(e) creates a legal requirement, or a binding legal fiction, that warrants convicting the complainant's partner of sexual assault in these circumstances.

**106** Finally, the Chief Justice relies on s. 273.2(b), which precludes a defence of honest but mistaken belief in consent where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". The Chief Justice finds that, "by requiring the accused to take reasonable steps to ensure that the complainant 'was consenting', Parliament has indicated that the consent of the complainant must be an ongoing state of mind" (para. 42).

**107** With respect, I read s. 273.2 differently. It provides that a belief in consent is not a defence where "the accused believed that the complainant consented to the activity [in question]" and failed to take reasonable steps "to ascertain that the complainant was consenting". Any doubt [page474] whether "was consenting" and "consented" refer to prior consent is dispelled by the corresponding French text of the provision: "*Ne constitue pas un moyen de défense ... le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation ... [et] n'a pas pris les mesures raisonnables ... pour s'assurer du consentement.*"

**108** Lest I be misunderstood in this regard, I hasten to add that K.D.'s prior consent to the "activity in question" constituted a valid consent only to the contemplated activity. In the absence of any evidence that J.A.'s conduct exceeded the scope of K.D.'s consent, I am unable to find in the mentioned provisions of the *Criminal Code* any basis for concluding that K.D.'s consent in fact was not a valid consent in law.

#### IV

**109** For the reasons given, I am satisfied that nothing in the *Criminal Code* supports the Crown's principal submission: that K.D.'s consent to the activity in question was vitiated by the fact that she could not consent, during her consensually induced unconsciousness, to the sexual activity to which she had already consented. In the absence of any language in the *Code* that supports this proposition, the Crown relies on what in its view is the policy underlying the mentioned provisions. This submission is not at all persuasive.

**110** First, the provisions in question were enacted to address policy concerns that are entirely different from those before us here. The preamble to Bill C-49 (*An Act to amend the Criminal Code (sexual assault)*), 3rd Sess., 34th Parl., 1991 (assented to June 23, 1992), S.C. 1992, c.

38) and the Parliamentary debates preceding its enactment demonstrate that the consent provisions were intended to protect women from sexual violence and to protect and enhance their freedom to choose when, and with whom, they will engage in sexual relations of their choice.

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**111** The dominant theme throughout the debates was that women have "the right to make decisions about their bod[ies], including whether or not to engage in sexual activity" and that "[n]o in every conceivable circumstance means no" (*House of Commons Debates*, vol. VIII, 3rd Sess., 34th Parl., April 8, 1992, at p. 9507, and vol. IX, June 15, 1992, at p. 12045). Legislative changes were required to ensure that a woman who previously said "yes" to sexual activity could subsequently say "no" and be taken seriously, first by her sexual partner and, failing that, by the police and the courts.

**112** These policy concerns are simply not engaged on the facts before us: *This is not a case about a woman who said no- at any time*. Rather, the complainant described herself as a willing and enthusiastic participant throughout all stages of the sexual activity in question. She consented to the sexual activity leading up to her unconsciousness and to the unconsciousness itself. The Court of Appeal found, as we have seen, that nothing in the record supports a finding that she did not consent to the sexual activity that occurred while she was unconscious.

**113** Moreover, we have no idea how long the anal penetration had gone on when she awoke - she may in fact have awoken as soon as it began - but we do know that she did not ask the accused to stop when she was awake and knew exactly what was going on.

**114** I am unable to conclude that Parliament, in protecting the right to say no, restricted the right of adults, female or male, consciously and willingly to say yes to sexual conduct in private that neither involves bodily harm nor exceeds the bounds of the consent freely given. The right to make decisions about one's own body clearly comprises both rights.

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**115** Although this right to choose is not absolute, I agree that private, consensual sexual behaviour "should only give rise to criminal sanctions where there is a compelling principle of fundamental justice that constitutes a reasonable limit on the right to personal and sexual autonomy" (D. M. Tanovich, "Criminalizing Sex At The Margins" (2010), 74 C.R. (6th) 86, at p. 90). I agree as well that "it would be a significant limit on the sexual autonomy of each individual to say that, as a matter of law, no-one can consent in advance to being sexually touched while asleep or unconscious" (H. C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at p. 3-25).

**116** Respect for the privacy and sexual autonomy of consenting adults has long been embraced by Parliament as a fundamental social value and an overarching statutory objective: "Keeping the state out of the bedrooms of the nation" is a legislative policy, and not just a political slogan.

**117** The approach advocated by the Chief Justice would also result in the criminalization of a broad range of conduct that Parliament cannot have intended to capture in its definition of the offence of sexual assault. Notably, it would criminalize kissing or caressing a sleeping partner,

however gently and affectionately. The absence of contemporaneous consent, and therefore the *actus reus*, would be conclusively established by accepted evidence that the complainant was asleep at the time. Prior consent, or even an explicit request - "kiss me before you leave for work" - would not spare the accused from conviction.

**118** The *mens rea* would be conclusively established as well. An honest but mistaken belief in consent, however reasonable in the circumstances, would neither preclude prosecution nor bar conviction. If my colleague's view is correct, the [page477] accused's error would constitute a mistake of law, which cannot avail as a defence.

**119** The Crown acknowledges that, on its view of the law, anyone who engages in amorous expressions of affection while his or her partner is asleep would be guilty of sexual assault. In response to the implausibility of the suggestion that Parliament intended to criminalize such conduct, the Crown has identified only two safeguards, more aptly characterized as palliatives that should give us little comfort: prosecutorial discretion and the doctrine of *de minimis non curat lex* (the law is not concerned with trifling matters).

**120** As for prosecutorial discretion, I think it is sufficient to recall that this Court, in dealing with the delicate issue of nullifying consent at law, has in the past demonstrated a "healthy reluctance to endorse the exercise of prosecutorial discretion as a legitimate means of narrowing the applicability of a criminal section" (*R. v. Guerrier*, [1998] 2 S.C.R. 371, at para. 136, *per* Cory J.). And Justice McLachlin (as she then was), in agreement on this point, made clear that "[p]rosecutorial deference cannot compensate for overextension of the criminal law; it merely replaces overbreadth and uncertainty at the judicial level with overbreadth and uncertainty at both the prosecutorial level and the judicial level" (para. 53).

**121** And, as for reliance on the *de minimis* doctrine, I do not view sexual assault of any kind as a trifling matter. It is a serious crime with serious consequences both for the complainant and for an accused. I agree with the Chief Justice (at para. 63) that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant". For public policy reasons, the Ontario Court of Appeal has held that it would be inappropriate to apply this principle in the context [page478] of domestic assaults (*R. v. Carson* (2004), 185 C.C.C. (3d) 541, at para. 25).

**122** Finally, even if one accepts that s. 273.1(3) "authorizes the courts to identify additional cases in which no consent is obtained" (reasons of the Chief Justice, at para. 29), identifying a *new* exception in this case would go well beyond what *Jobidon* permits.

V

**123** The Crown, LaForme J.A. in the court below, and the Chief Justice all rely on *Ewanchuk* in support of their view that the law already precludes advance consent to unconscious sexual contact.

**124** First, it is argued that *Ewanchuk* establishes that the only relevant time for determining consent is the time at which the sexual contact takes place. This argument is based on Major J.'s comment that the absence of consent is "determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred" (*Ewanchuk*, at para. 26). Second, it is argued that one cannot infer that an unconscious individual is consenting because there is no defence of implied consent in the law of sexual assault.

**125** With respect, I would reject both arguments.

**126** The comments made in *Ewanchuk* must be read in context. Most significantly, the complainant in that case did not consent before, during or after the sexual touching. In addition, neither incapacity nor the timing of consent were in issue. The requirement of contemporaneity simply signifies that a woman who consents to sexual activity remains free to withdraw her consent at any time and, in the context of this case, that a woman cannot *provide* her consent while she is unconscious. *Ewanchuk* does not at all establish that a woman cannot consciously and voluntarily [page479] consent to sexual activity that will occur while she is unconscious.

**127** Nor is the rejection of the defence of implied consent in *Ewanchuk* dispositive of the issue before us. We are not asked by the respondent to *infer* the complainant's consent. Her actual subjective consent *was established through her own testimony*. *Ewanchuk* decided that if the complainant testifies that she did *not* subjectively consent - and she is believed - then the *actus reus* will be made out regardless of her outward conduct. That is not our case.

**128** As we shall presently see, this Court has stressed that consent should only be vitiated by judges in limited circumstances and on a case-by-case basis. The broad nullification of consent now proposed by my colleague can hardly be said to have been decided in *Ewanchuk*, a case in which the possibility of advance consent to unconscious sexual touching was not even remotely in issue.

## VI

**129** In *Jobidon*, this Court stressed that "[t]he law's willingness to vitiate consent on policy grounds is significantly limited" (p. 766 (emphasis added)). As Gonthier J. took care to explain, the Court's decision in that case was narrowly restricted to situations in which adults intentionally apply force to each other during the course of a fist fight or brawl and serious hurt or non-trivial bodily harm is both intended and caused.

**130** Since *Jobidon* was decided, the vitiation of consent on grounds of public policy has been limited to situations in which actual bodily harm was both intended *and* caused. In *R. v. Paice*, 2005 SCC 22, [page480] [2005] 1 S.C.R. 339, the majority of the Court insisted that both constraints remain operative. To remove either requirement, the Court held, would risk the criminalization - "by judicial fiat" - of "numerous activities that were never intended by Parliament to come within the ambit of the assault provisions" (para. 12).

**131** The policy concerns identified by the Crown do not warrant the extension of the "significantly limited" principle invoked in *Jobidon* to a situation in which bodily harm was neither intended nor caused. As I have explained, the record before us does not permit us to revisit the issue of bodily harm addressed in the courts below. Our mandate is circumscribed by the question of law before us, which is whether unconsciousness *alone* is sufficient to nullify consent.

**132** Essentially, the Crown urges us to answer that question in the affirmative on three grounds: (1) the risk that the unconscious person's consent will be intentionally exceeded, (2) the risk of innocent misunderstandings between the parties as to the scope of the consent, and (3) the risk of unjust acquittals where the Crown is unable to prove that the accused did not obtain prior consent from an unconscious person.

**133** I am not persuaded that advance consent to unconscious sexual activity, if held valid in the circumstances of this case, will increase the risk that an unconscious person's consent will be intentionally exceeded. Intentionally exceeding the scope of the unconscious partner's consent would amount to sexual contact *without consent* - or sexual assault - and, for that reason, properly attract criminal liability.

**134** Unconscious sex may well involve a risk of innocent misunderstandings between the parties as to the scope of consent. However, this raises issues that are related not to the *actus reus* of the [page481] offence (the only issue before us) but to the defence of honest but mistaken belief in consent. If it is established that the scope of the complainant's consent has been exceeded, then the *actus reus* will be established and the inquiry will move to whether the accused had the requisite *mens rea*.

**135** Pursuant to s. 273.2(b) of the *Code*, an accused cannot invoke an honest but mistaken belief in consent in the absence of evidence that he took "reasonable steps" in the circumstances known to him at the time "to ascertain that the complainant was consenting".

**136** In cases of unconscious sex, the defence of honest but mistaken belief in consent will be extremely difficult to establish. Since consent cannot be "obtained" from an unconscious complainant, the required reasonable steps would have to be taken prior to the period of unconsciousness. Relevant factors to the reasonableness assessment might include the proximity in time between the steps taken and the period of unconsciousness and the specificity of the agreement made between the parties.

**137** Advance consent and a clear understanding may well reduce rather than enhance the risk of unwanted sexual conduct. The conscious partner, explicitly apprised, will be at risk of prosecution and conviction if the scope of the unconscious partner's consent is unintentionally exceeded. If the accused's belief in consent was honest, *but not reasonable*, he or she will be guilty of sexual assault.

**138** By making the actual subjective consent of a complainant determinative, the law respects her sexual autonomy. At the same time, by restricting the availability of the defence of honest but mistaken belief in the case of complainants who do *not* consent, the law can ensure that there are criminal consequences for sexually exploiting vulnerable [page482] parties. As counsel for the respondent put it to us in oral argument, "if the law is going to treat these situations harshly, it should treat them harshly when people get it wrong, not when people get it right" (transcript, at pp. 57-58 (emphasis added)).

**139** Finally, the Crown submits that recognizing the legal validity of advance consent to unconscious sexual touching will create a defence that will be difficult to disprove beyond a reasonable doubt. While refusing to invalidate prior consent may pose some evidentiary difficulties for the Crown, I do not find this argument to be dispositive.

**140** First, in order to secure a conviction for sexual assault, the Crown must prove the sexual conduct alleged - an essential element of the offence. If it can prove the sexual act (by way of forensic evidence or an admission or confession, for example), then it will necessarily be able to prove, through the evidence of the complainant, the required absence of consent to that conduct.

**141** Second, the answer to an apprehended *evidentiary* problem does not lie in an unwarranted extension of the *substantive* law. If Parliament thinks it necessary to address the evidentiary concern, it may do so by more appropriate means. For example, it can satisfy that perceived need by enacting an evidential presumption of non-consent in favour of the Crown where it has proved that the accused engaged in sexual contact with an unconscious person.

**142** This is the approach taken in the United Kingdom. Section 75 of the *Sexual Offences Act 2003* (U.K.), 2003, c. 42, creates a rebuttable presumption of non-consent where "the complainant was asleep or otherwise unconscious" (s. 75(2)(d)). The same presumption is made applicable to other specified situations.

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**143** One commentator has argued that "[t]he imposition of an evidential presumption in these circumstances is not unreasonable", because "consent is unlikely to be present and it seems fair rebuttably to presume that it was not". Conversely, he argues that "a conclusive presumption about the absence of consent" where the complainant is asleep or unconscious "would have been Draconian" (see R. Card, *Sexual Offences: The New Law* (2004), at pp. 43 and 44; see also the United Kingdom House of Commons, Home Affairs Committee, *Sexual Offences Bill: Fifth Report of Session 2002-03*, HC 639 (2003), at para. 31).

**144** In any event, it is not unduly onerous to require the Crown to disprove advance consent beyond a reasonable doubt. In most cases, this will be established through the complainant's testimony. The Crown points to *R. v. Ashlee*, 2006 ABCA 244, 61 Alta. L.R. (4th) 226, as an example of a case in which an unjust acquittal would have been entered because the complainant was not available to testify. In my view, the tactical burden on the Crown to call the complainant in a sexual assault case in order to prove the absence of subjective consent (a fact uniquely known to the complainant) should not be easily displaced. Moreover, *Ashlee* does not support the Crown's submission at all since there was no need in that case to rely on the vitiation of consent doctrine that is said here to be necessary: the absence of consent was evident from the circumstances and a conviction ensued despite the complainant's absence.

## VII

**145** For all of these reasons, I would affirm the judgment of the Court of Appeal and dismiss the present appeal to this Court.

*Appeal allowed, Binnie, LeBel and Fish JJ. dissenting.*

### **Solicitors:**

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