R. *v*. Ewanchuk, [1999] 1 S.C.R. 330

Her Majesty The Queen *Appellant*

v.

Steve Brian Ewanchuk *Respondent*

and

The Attorney General of Canada,
Women's Legal Education and Action Fund ("LEAF"),
Disabled Women's Network Canada ("DAWN Canada")
and Sexual Assault Centre of Edmonton *Interveners*

Indexed as: R. *v*. Ewanchuk

File No.: 26493.

1998: October 14; 1999: February 25.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for alberta

Criminal law -- Sexual assault -- Consent -- Nature of consent -- Accused persistently engaging complainant in a series of progressively more intimate sexual advances -- Complainant clearly saying no to each advance -- Complainant fearful and accused aware of her fear -- Whether a sexual assault occurred -- Whether defence of

"implied consent" exists in Canadian law -- Whether trial judge erred in applying that defence -- Criminal Code, R.S.C., 1985, c. C-46, ss. 265(1), (2), (3), 273.1, 273.2, 686(4).

The complainant, a 17-year-old woman, was interviewed by the accused for a job in his van. She left the van door open as she was hesitant about discussing the job offer in his vehicle. The interview was conducted in a polite, business-like fashion. After the interview, the accused invited the complainant to see some of his work which was in the trailer behind the van. The complainant purposely left the trailer door open but the accused closed it in a way which made the complainant think that he had locked it. There was no evidence whether the door was actually locked. The complainant stated that she became frightened at this point. The accused initiated a number of incidents involving touching, each progressively more intimate than the previous, notwithstanding the fact that the complainant plainly said "no" on each occasion. He stopped his advances on each occasion when she said "no" but persisted shortly after with an even more serious advance. Any compliance by the complainant was done out of fear and the conversation that occurred between them clearly indicated that the accused knew that the complainant was afraid and certainly not a willing participant. The trial judge acquitted the accused of sexual assault relying on the defence of implied consent and the Court of Appeal upheld that acquittal. At issue here are whether the trial judge erred in his understanding of consent in sexual assault and whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

Held: The appeal should be allowed.

Per Lamer C.J. and Cory, Iacobucci, Major, Bastarache and Binnie JJ.: If the trial judge misdirected himself as to the legal meaning or definition of consent, then his conclusion is one of law, and is reviewable. It properly falls to this Court to

determine whether the trial judge erred in his understanding of consent in sexual assault, and to determine whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

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

The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his behaviour. The absence of consent, however, is purely subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trier of fact in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, the trial judge believes the complainant that she did not consent, the Crown has discharged its obligation to prove the absence of consent. The accused's perception of the complainant's state of mind is not relevant and only becomes so when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

The trier of fact may only come to one of two conclusions: the complainant either consented or did not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. No defence of implied consent to sexual assault exists in Canadian law. Here, the trial judge accepted the complainant's testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as "implied consent". This conclusion was an error.

To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. Section 265(3) of the *Criminal Code* enumerates a series of conditions -- including submission by reason of force, fear, threats, fraud or the exercise of authority -- under which the law will deem an absence of consent in assault cases, notwithstanding the complainant's ostensible consent or participation. In a situation where the trier of fact finds that the complainant did not want to be touched sexually and made her decision to permit or participate in the sexual assault activity as a result of an honestly held fear, the law deems an absence of consent and the third component of the *actus reus* of sexual assault is established. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and

the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea*.

The *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched.

The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The defence of mistake is simply a denial of *mens rea.* It does not impose any burden of proof upon the accused. The accused need not testify in order to raise the issue. Support for the defence may stem from any of the evidence before the Court, including the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

Consent is an integral component of the *mens rea*, but considered from the perspective of the accused. 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. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

There is a difference in the concept of "consent" as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea.* For the purposes of the *actus reus* "consent" means that the complainant in her mind wanted the sexual touching to take place. In the

context of *mens rea* -- specifically for the purposes of the honest but mistaken belief in consent -- "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. The two parts of the analysis must be kept separate.

Not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the *mens rea* of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the *Criminal Code*.

The accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence. Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

Here, the accused knew that the complainant was not consenting before each encounter. The trial judge ought to have considered whether anything occurred between the communication of non-consent and the subsequent sexual touching which the accused could honestly have believed constituted consent. The trial record conclusively

establishes that the accused's persistent and increasingly serious advances constituted a sexual assault for which he had no defence. But for his errors of law, the trial judge would necessarily have found the accused guilty. Since a new trial would not be in the interests of justice, this Court can properly exercise its discretion under s. 686(4) of the *Code* and enter a conviction.

Whether the accused took reasonable steps to ascertain that the complainant was consenting is a question of fact to be determined by the trier of fact only after the air of reality test has been met. Given the way the trial and appeal were argued, s. 273.2(*b*) did not have to be considered.

Per L'Heureux-Dubé and Gonthier JJ.: Agreement was expressed generally with the reasons of Major J. on most issues.

Canada is a party to the *Convention on the Elimination of All Forms of Discrimination against Women*, which requires respect for and observance of the human rights of women. Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. These human rights are protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the assault provisions of s. 265 and under the more specific sexual assault provisions of ss. 271, 272 and 273 of the *Criminal Code*.

This case is not about consent, since none was given. It is about myths and stereotypes. The trial judge believed the complainant and accepted her testimony that she was afraid and he acknowledged her unwillingness to engage in any sexual activity. However, he gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her. The application of

s. 265(3) requires an entirely subjective test. As irrational as a complainant's motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent.

The question of implied consent should not have arisen. The trial judge's conclusion that the complainant implicitly consented and that the Crown failed to prove lack of consent was a fundamental error given that he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies women's sexual autonomy and implies that women are in a state of constant consent to sexual activity.

The majority of the Court of Appeal also relied on inappropriate myths and stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions.

The findings necessary to support a verdict of guilty on the charge of sexual assault were made. In particular, there was no evidence that would give an air of reality to a defence of honest but mistaken belief in consent for any of the sexual activity which took place in this case. Section 273.2(*b*) precludes an accused from raising that defence if he did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting. The position that the nature of the defence of honest but mistaken belief does not need to be based on reasonable grounds as long as it is honestly held has been modified by the enactment of s. 273.2(*b*), which introduced the "reasonable steps" requirement.

Finally, on the facts as found at trial, s. 273.1(2)(*d*) also applies to this case and could not be ignored by the trial judge.

Per McLachlin J.: The reasons of Major J. and the finding of L'Heureux-Dubé J. that stereotypical assumptions lay at the heart of this case were agreed with. These stereotypical assumptions no longer find a place in Canadian law.

Cases Cited

By Major J.

Referred to: *Belyea v. The King*, [1932] S.C.R. 279; *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Jensen* (1996), 106 C.C.C. (3d) 430, aff'd [1997] 1 S.C.R. 304; *R. v. Park*, [1995] 2 S.C.R. 836; *Saint-Laurent v. Hétu*, [1994] R.J.Q. 69; *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. Creighton*, [1993] 3 S.C.R. 3; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Bulmer*, [1987] 1 S.C.R. 782; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Cassidy*, [1989] 2 S.C.R. 345.

By L'Heureux-Dubé J.

Distinguished: *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; **referred to:** *R. v. Osolin*, [1993] 4 S.C.R. 595; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Daigle*, [1998] 1 S.C.R. 1220.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 15.

Convention on the Elimination of All Forms of Discrimination against Women, Can. T.S.1982 No. 31.

Criminal Code, R.S.C., 1985, c. C-46, ss. 265(1), (2), (3), 271, 272, 273, 273.1 [ad. 1992, c. 38, s. 1], 273.2 [ad. *idem*], 686(4).

Authors Cited

Andrias, Richard T. "Rape Myths: A persistent problem in defining and prosecuting rape" (1992), 7 *Crimimal Justice* 2.

Archard, David. *Sexual Consent*. Boulder, Colo.: Westview Press, 1998.

Blackstone, William, Sir. *Commentaries on the Laws of England*, 4th ed., Book III. Oxford: Clarendon Press, 1770.

Boyle, Christine L. M. *Sexual Assault*. Toronto: Carswell, 1984.

Brett, Nathan. "Sexual Offenses and Consent" (1998), 11 *Can. J. Law & Jur.* 69.

Burt, Martha R. "Rape Myths and Acquaintance Rape". In Andrea Parrot and Laurie Bechhofer, eds., *Acquaintance Rape: The Hidden Crime*. New York: Wiley, 1991, 26.

Canada. Department of Justice. Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System. *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action*. Ottawa: The Group, 1992.

Canada. Statistics Canada. "The Violence Against Women Survey", *The Daily*, catalogue No. 11-001E, November 18, 1993.

Cook, Rebecca J. "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" (1990), 30 *Va. J. Int'l L.* 643.

Estrich, Susan. "Rape" (1986), 95 *Yale L.J.* 1087.

MacKinnon, Catharine A. *Toward a Feminist Theory of the State*. Cambridge, Mass.: Harvard University Press, 1989.

McInnes, J., and Christine Boyle. "Judging Sexual Assault Law Against a Standard of Equality" (1995), 29 *U.B.C. L. Rev.* 341.

Naffine, Ngaire. "Possession: Erotic Love in the Law of Rape" (1994), 57 *Mod. L. Rev.* 10.

Renner, K. Edward, Christine Alksnis and Laura Park. "The Standard of Social Justice as a Research Process" (1997), 38 *Can. Psychology* 91.

Sheehy, Elizabeth A. "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989), 21 *Ottawa L. Rev.* 741.

Stuart, Don. Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330.

Stuart, Don. *Canadian Criminal Law*, 3rd ed. Scarborough, Ont.: Carswell, 1995.

United Nations. General Assembly. Committee on the Elimination of Discrimination against Women, Eleventh Session, 1992, General Recommendation No. 19, G.A. Res. 34/180, U.N. Doc. A/47/48 (1979).

United Nations. General Assembly. *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, U.N. Doc. A/48/49 (1993).

Williams, Glanville. *Textbook of Criminal Law*, 2nd ed. London: Stevens, 1983.

Wilson, Bertha. "Will Women Judges Really Make a Difference?" (1990), 28 *Osgoode Hall L.J.* 507.

APPEAL from a judgment of the Alberta Court of Appeal (1998), 57 Alta. L.R. (3d) 235, 13 C.R. (5th) 324, [1998] A.J. No. 150 (QL), dismissing an appeal from acquittal by Moore J. Appeal allowed.

Bart Rosborough, for the appellant.

Peter J. Royal, Q.C., for the respondent.

Beverly Wilton and *Lisa Futerman*, for the intervener the Attorney General of Canada.

Diane Oleskiw and *Ritu Khullar*, for the interveners the Women's Legal Education and Action Fund and the Disabled Women's Network Canada.

Paul L. Moreau, for the intervener the Sexual Assault Centre of Edmonton.

The judgment of Lamer C.J. and Cory, Iacobucci, Major, Bastarache and Binnie JJ. was delivered by

//*Major J.*//

1 MAJOR J. -- In the present appeal the accused was acquitted of sexual assault. The trial judge relied on the defence of implied consent. This was a mistake of law as no such defence is available in assault cases in Canada. This mistake of law is reviewable by appellate courts, and for the reasons that follow the appeal is allowed.

I. Facts

2 The complainant was a 17-year-old woman living in the city of Edmonton. She met the accused respondent Ewanchuk on the afternoon of June 2, 1994, while walking through the parking lot of the Heritage Shopping Mall with her roommate. The accused, driving a red van towing a trailer, approached the two young women. He struck up a conversation with them. He related that he was in the custom wood-working business and explained that he displayed his work at retail booths in several shopping malls. He said that he was looking for staff to attend his displays, and asked whether the young women were looking for work. The complainant's friend answered that they were, at which point the accused asked to interview her friend privately. She declined, but spoke with the accused beside his van for some period of time about the sort of work he required, and eventually exchanged telephone numbers with the accused.

3 The following morning the accused telephoned the apartment where the complainant and her friend resided with their boyfriends. The complainant answered the phone. She told the accused that her friend was still asleep. When he learned this, the accused asked the complainant if she was interested in a job. She indicated that she was, and they met a short time later, again in the Heritage Mall parking lot. At the accused's suggestion, the interview took place in his van. In the words of the complainant, a "very business-like, polite" conversation took place. Some time later, the complainant asked if she could smoke a cigarette, and the accused suggested that they move outside since he was allergic to cigarette smoke. Once outside the van, he asked the complainant if she would like to see some of his work, which was kept inside the trailer attached to his van, and she indicated that she would.

4 The complainant entered the trailer, purposely leaving the door open behind her. The accused followed her in, and closed the door in a way which made the complainant think that he had locked it. There is no evidence whether the door was actually locked, but the complainant stated that she became frightened at this point. Once inside the trailer, the complainant and the accused sat down side-by-side on the floor of the trailer. They spoke and looked through a portfolio of his work. This lasted 10 to 15 minutes, after which the conversation turned to more personal matters.

5 During the time in the trailer the accused was quite tactile with the complainant, touching her hand, arms and shoulder as he spoke. At some point the accused said that he was feeling tense and asked the complainant to give him a massage. The complainant complied, massaging the accused's shoulders for a few minutes. After she stopped, he asked her to move in front of him so that he could massage her, which she did. The accused then massaged the complainant's shoulders and arms while they continued talking. During this mutual massaging the accused repeatedly told the

complainant to relax, and that she should not be afraid. As the massage progressed, the accused attempted to initiate more intimate contact. The complainant stated that, "he started to try to massage around my stomach, and he brought his hands up around -- or underneath my breasts, and he started to get quite close up there, so I used my elbows to push in between, and I said, No".

6 The accused stopped immediately, but shortly thereafter resumed non-sexual massaging, to which the complainant also said, "No". The accused again stopped, and said, "See, I'm a nice guy. It's okay".

7 The accused then asked the complainant to turn and face him. She did so, and he began massaging her feet. His touching progressed from her feet up to her inner thigh and pelvic area. The complainant did not want the accused to touch her in this way, but said nothing as she said she was afraid that any resistance would prompt the accused to become violent. Although the accused never used or threatened any force, the complainant testified that she did not want to "egg [him] on". As the contact progressed, the accused laid himself heavily on top of the complainant and began grinding his pelvic area against hers. The complainant testified that the accused asserted, "that he could get me so horny so that I would want it so bad, and he wouldn't give it to me because he had self-control".

8 The complainant did not move or reciprocate the contact. The accused asked her to put her hands across his back, but she did not; instead she lay "bone straight". After less than a minute of this the complainant asked the accused to stop. "I said, Just please stop. And so he stopped". The accused again told the complainant not to be afraid, and asked her if she trusted that he wouldn't hurt her. In her words, the complainant said, "Yes, I trust that you won't hurt me". On the stand she stated that she

was afraid throughout, and only responded to the accused in this way because she was fearful that a negative answer would provoke him to use force.

9 After this brief exchange, the accused went to hug the complainant and, as he did so, he laid on top of her again, continuing the pelvic grinding. He also began moving his hands on the complainant's inner thigh, inside her shorts, for a short time. While still on top of her the accused began to fumble with his shorts and took out his penis. At this point the complainant again asked the accused to desist, saying, "No, stop".

10 Again, the accused stopped immediately, got off the complainant, smiled at her and said something to the effect of, "It's okay. See, I'm a nice guy, I stopped". At this point the accused again hugged the complainant lightly before opening up his wallet and removing a $100 bill, which he gave to the complainant. She testified that the accused said that the $100 was for the massage and that he told her not to tell anyone about it. He made some reference to another female employee with whom he also had a very close and friendly relationship, and said that he hoped to get together with the complainant again.

11 Shortly after the exchange of the money the complainant said that she had to go. The accused opened the door and the complainant stepped out. Some further conversation ensued outside the trailer before the complainant finally left and walked home. On her return home the complainant was emotionally distraught and contacted the police.

12 At some point during the encounter the accused provided the complainant with a brochure describing his woodwork and gave her his name and address, which she

wrote on the brochure. The investigating officer used this information to locate the accused at his home, where he was arrested. He was subsequently charged with sexual assault and tried before a judge sitting alone.

13 The accused did not testify, leaving only the complainant's evidence as to what took place between them. The trial judge found her to be a credible witness and her version of events was not contradicted or disputed. In cross-examination the complainant testified that, although she was extremely afraid throughout the encounter, she had done everything possible to project a confident demeanour, in the belief that this would improve her chances of avoiding a violent assault. The following passage is illustrative of her evidence:

> Q You didn't want to show any discomfort, right?
>
> A No.
>
> Q Okay. In fact, you wanted to project the picture that you were quite happy to be with him and everything was fine, right?
>
> A Not that I was happy, but that I was comfortable.
>
> Q Comfortable, all right. And relaxed?
>
> A Yes.
>
> Q And you did your best to do that, right?
>
> A Yes.

14 Later in cross-examination, counsel for the accused again asked the complainant about the image she sought to convey to the complainant by her behaviour:

> Q And you wanted to make sure that he didn't sense any fear on your part, right?
>
> A Yes.

II. Judicial History

A. *Court of Queen's Bench*

15 The trial judge made a number of findings of fact in his oral judgment. He found that the complainant was a credible witness. He found as facts: that in her mind she had not consented to any of the sexual touching which took place; that she had been fearful throughout the encounter; that she didn't want the accused to know she was afraid; and that she had actively projected a relaxed and unafraid visage. He concluded that the failure of the complainant to communicate her fear, including her active efforts to the contrary, rendered her subjective feelings irrelevant.

16 The trial judge then considered the question of whether the accused had raised the defence of honest but mistaken belief in consent, and concluded that he had not. The trial judge characterized the defence position as being a failure by the Crown to discharge its onus of proving "beyond a reasonable doubt that there was an absence of consent". That is, he took the defence to be asserting that the Crown had failed to prove one of the components of the *actus reus* of the offence. This led the trial judge to characterize the defence as one of "implied consent". In so doing he concluded that the complainant's conduct was such that it could be objectively construed as constituting consent to sexual touching of the type performed by the accused.

17 The trial judge treated consent as a question of the complainant's behaviour in the encounter. As a result of that conclusion he found that the defence of honest but mistaken belief in consent had no application since the accused made no claims as to his mental state. On the totality of the evidence, provided solely by the Crown's witnesses,

the trial judge concluded that the Crown had not proven the absence of consent beyond a reasonable doubt and acquitted the accused.

B. *Alberta Court of Appeal* (1998), 57 Alta. L.R. (3d) 235

18 Each of the three justices of the Court of Appeal issued separate reasons. McClung and Foisy JJ.A. both dismissed the appeal on the basis that it was a fact-driven acquittal from which the Crown could not properly appeal. In addition, McClung J.A. concluded that the Crown had failed to prove that the accused possessed the requisite criminal intent. He found that the Crown had failed to prove beyond a reasonable doubt that the accused had intended to commit an assault upon the complainant.

19 Fraser C.J. dissented. She found that the trial judge erred in a number of ways. Specifically, she found that:

-- The trial judge erred in his interpretation of the term "consent" as that term is applied to the offence of sexual assault.

-- There is no defence of "implied consent", independent of the provisions of ss. 273.1 and 273.2 of the *Criminal Code*.

-- It was an error to employ an objective test to determine whether a complainant's "consent" was induced by fear.

-- The trial judge erred in the legal effect he ascribed:

to the complainant's silence when subjected to sexual contact by the respondent;

to the complainant's non-disclosure of her fear when subjected to sexual contact by the respondent;

to the complainant's expressed lack of agreement to sexual contact;

to the fact that there was no basis for a defence of "implied consent" or "consent by conduct";

to the fact that there was no consent to sexual activity.

-- The defence of mistake of fact had no application to the issue of 'consent' in this case.

-- The trial judge erred when he failed to consider whether the respondent had been wilfully blind or reckless as to whether the complainant consented.

20 Fraser C.J. held that the only defence available to the accused was that of honest but mistaken belief in consent, and concluded that this defence could not be sustained on the facts as found. Accordingly, she would have allowed the appeal and substituted a verdict of guilty.

III. Analysis

A. *Appealable Questions of Law*

21 The majority of the Court of Appeal dismissed the appeal on the ground that the Crown raised no question of law but sought to overturn the trial judge's finding of fact that reasonable doubt existed as to the presence or absence of consent. If the trial judge misdirected himself as to the legal meaning or definition of consent, then his conclusion is one of law, and is reviewable. See *Belyea v. The King*, [1932] S.C.R. 279, *per* Anglin C.J., at p. 296:

> The right of appeal by the Attorney-General, conferred by [the *Criminal Code*] is, no doubt, confined to "questions of law". . . . But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury . . . to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law, -- especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge. [Emphasis added.]

22 It properly falls to this Court to determine whether the trial judge erred in his understanding of consent in sexual assault, and to determine whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

B. *The Components of Sexual Assault*

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

(1) *Actus Reus*

24 The crime of sexual assault is only indirectly defined in the *Criminal Code*, R.S.C., 1985, c. C-46. The offence is comprised of an assault within any one of the definitions in s. 265(1) of the *Code*, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated: see *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909. 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.

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

26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38,

aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, *per* L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.

27 Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators have observed that the notion of consent connotes active behaviour: see, for example, N. Brett, "Sexual Offenses and Consent" (1998), 11 *Can. J. Law & Jur.* 69, at p. 73. While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective.

28 The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. 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": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.

29 While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and

actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

30 The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

(a) *"Implied Consent"*

31 Counsel for the respondent submitted that the trier of fact may believe the complainant when she says she did not consent, but still acquit the accused on the basis that her conduct raised a reasonable doubt. Both he and the trial judge refer to this as "implied consent". It follows from the foregoing, however, that the trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.

(b) *Application to the Present Case*

32 In this case, the trial judge accepted the evidence of the complainant that she did not consent. That being so, he then misdirected himself when he considered the actions of the complainant, and not her subjective mental state, in determining the question of consent. As a result, he disregarded his previous finding that all the accused's sexual touching was unwanted. Instead he treated what he perceived as her ambiguous conduct as a failure by the Crown to prove the absence of consent.

33 As previously mentioned, the trial judge accepted the complainant's testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as "implied consent". This conclusion was an error. See D. Stuart, Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330, where the author points out that consent is a matter of the state of mind of the complainant while belief in consent is, subject to s. 273.2 of the *Code*, a matter of the state of mind of the accused and may raise the defence of honest but mistaken belief in consent.

34 The finding that the complainant did not want or consent to the sexual touching cannot co-exist with a finding that reasonable doubt exists on the question of consent. The trial judge's acceptance of the complainant's testimony regarding her own state of mind was the end of the matter on this point.

35 This error was compounded somewhat by the trial judge's holding that the complainant's subjective and self-contained fear would not have changed his mind as to whether she consented. Although he needn't have considered this question, having already found that she did not in fact consent, any residual doubt raised by her

ambiguous conduct was accounted for by what he accepted as an honest and pervasive fear held by the complainant.

(c) *Effect of the Complainant's Fear*

36 To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. The *Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant's ostensible consent or participation. As enumerated in s. 265(3), these include submission by reason of force, fear, threats, fraud or the exercise of authority, and codify the longstanding common law rule that consent given under fear or duress is ineffective: see G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at pp. 551-61. This section reads as follows:

> **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.

37 The words of Fish J.A. in *Saint-Laurent v. Hétu*, [1994] R.J.Q. 69 (C.A.), at p. 82, aptly describe the concern which the trier of fact must bear in mind when

evaluating the actions of a complainant who claims to have been under fear, fraud or duress:

> "Consent" is . . . stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.

38 In these instances the law is interested in a complainant's reasons for choosing to participate in, or ostensibly consent to, the touching in question. In practice, this translates into an examination of the choice the complainant believed she faced. The courts' concern is whether she freely made up her mind about the conduct in question. The relevant section of the *Code* is s. 265(3)(*b*), which states that there is no consent as a matter of law where the complainant believed that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force.

39 The question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed. If a complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent, and the third component of the *actus reus* of sexual assault is established. The trier of fact has to find that the complainant did not want to be touched sexually and made her decision to permit or participate in sexual activity as a result of an honestly held fear. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective.

40 Section 265(3) identifies an additional set of circumstances in which the accused's conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea.*

(2) <u>*Mens Rea*</u>

41 Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement. See *R. v. Daviault*, [1994] 3 S.C.R. 63.

42 However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, [1993] 3 S.C.R. 3. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. See *Park*, *supra*, at para. 39.

43 The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The nature of this defence was described in

Pappajohn v. The Queen, [1980] 2 S.C.R. 120, at p. 148, by Dickson J. (as he then was) (dissenting in the result):

> Mistake is a defence...where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.

44 The defence of mistake is simply a denial of *mens rea.* It does not impose any burden of proof upon the accused (see *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 936) and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including, the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

(a) *Meaning of "Consent" in the Context of an Honest but Mistaken Belief in Consent*

45 As with the *actus reus* of the offence, consent is an integral component of the *mens rea*, only this time it is considered from the perspective of the accused. Speaking of the *mens rea* of sexual assault in *Park, supra*, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:

> . . . the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes".

46 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. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

47 For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law:

> **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.

48 There is a difference in the concept of "consent" as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea.* For the purposes of the *actus reus*, "consent" means that the complainant in her mind wanted the sexual touching to take place.

49 In the context of *mens rea* – specifically for the purposes of the honest but mistaken belief in consent – "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.

(b) *Limits on Honest but Mistaken Belief in Consent*

50 Not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the *mens rea* of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the *Code*, which provide that:

> **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.
>
> **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
>
> (*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.

51 For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3. Similarly, an accused cannot rely upon his purported belief that the

complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes". As Fraser C.J. stated at p. 272 of her dissenting reasons below:

> One "No" will do to put the other person on notice that there is then a problem with "consent". *Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he again touches her in a sexual manner.* [Emphasis in original.]

I take the reasons of Fraser C.J. to mean that an unequivocal "yes" may be given by either the spoken word or by conduct.

52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 79, the Court stated:

> An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(*a*)(ii).

(c) *Application to the Facts*

53 In this appeal the accused does not submit that the complainant's clearly articulated "No's" were ambiguous or carried some other meaning. In fact, the accused places great reliance on his having stopped immediately each time the complainant said "no" in order to show that he had no intention to force himself upon her. He therefore knew that the complainant was not consenting on four separate occasions during their encounter.

54 The question which the trial judge ought to have considered was whether anything occurred between the communication of non-consent and the subsequent sexual touching which the accused could honestly have believed constituted consent.

55 The trial judge explicitly chose not to consider whether the accused had the defence of honest but mistaken belief in consent, and concluded that the defence was probably not available unless the accused testified. This conclusion ignores the right of the accused to have this defence considered solely on the Crown's case. The trial judge paid only passing interest to this defence undoubtedly because he had concluded that the defence of implied consent exonerated the accused. The accused is entitled to have all available defences founded on a proper basis considered by the court, whether he raises them or not: see *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 789.

56 In *Esau, supra*, at para. 15, the Court stated that, "before a court should consider honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence". See also *R. v. Osolin*, [1993] 4 S.C.R. 595. All that is required is for the accused to adduce some evidence, or refer to evidence already adduced, upon which a properly instructed trier of fact could form a reasonable doubt as to his *mens rea*: see *Osolin, supra,* at pp. 653-54, and p. 687.

57 The analysis in this appeal makes no attempt to weigh the evidence. At this point we are concerned only with the facial plausibility of the defence of honest but mistaken belief and should avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence.

58 As the accused did not testify, the only evidence before the Court was that of the complainant. She stated that she immediately said "NO" every time the accused touched her sexually, and that she did nothing to encourage him. Her evidence was accepted by the trial judge as credible and sincere. Indeed, the accused relies on the fact that he momentarily stopped his advances each time the complainant said "NO" as evidence of his good intentions. This demonstrates that he understood the complainant's "NO's" to mean precisely that. Therefore, there is nothing on the record to support the accused's claim that he continued to believe her to be consenting, or that he re-established consent before resuming physical contact. The accused did not raise nor does the evidence disclose an air of reality to the defence of honest but mistaken belief in consent to this sexual touching.

59 The trial record conclusively establishes that the accused's persistent and increasingly serious advances constituted a sexual assault for which he had no defence. But for his errors of law, the trial judge would necessarily have found the accused guilty. In this case, a new trial would not be in the interests of justice. Therefore, it is proper for this Court to exercise its discretion under s. 686(4) of the *Code* and enter a conviction: see *R. v. Cassidy*, [1989] 2 S.C.R. 345, at pp. 354-55.

60 In her reasons, Justice L'Heureux-Dubé makes reference to s. 273.2(*b*) of the *Code*. Whether the accused took reasonable steps is a question of fact to be determined

by the trier of fact only after the air of reality test has been met. In view of the way the trial and appeal were argued, s. 273.2(*b*) did not have to be considered.

IV. Summary

61 In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching in question to occur. Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the trier of fact is satisfied beyond a reasonable doubt that the complainant did not in fact consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind.

62 If there is reasonable doubt as to consent, or if it is established that the complainant actively participated in the sexual activity, the trier of fact must still consider whether the complainant consented because of fear, fraud or the exercise of authority as enumerated in s. 265(3). The complainant's state of mind in respect of these factors need not be reasonable. If her decision to consent was motivated by any of these factors so as to vitiate her freedom of choice the law deems an absence of consent and the *actus reus* of sexual assault is again established.

63 Turning to the question of *mens rea*, it is artificial to require as a further step that the accused separately assert an honest but mistaken belief in consent once he acknowledges that the encounter between him and the complainant unfolded more or less as she describes it, but disputes that any crime took place: see *Park*, *supra*, at p. 851, *per* L'Heureux-Dubé J. In those cases, the accused can only make one claim: that on the

basis of the complainant's words and conduct he believed her to be consenting. This claim both contests the complainant's assertions that in her mind she did not consent, and posits that, even if he were mistaken in his assessment of her wishes, he was nonetheless operating under a morally innocent state of mind. It is for the trier of fact to determine whether the evidence raises a reasonable doubt over either her state of mind or his.

64 In cases such as this, the accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.

65 Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

66 Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise but are of profound importance to the community's sense of safety and justice. The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to

participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.

V. Disposition

67 The appeal is allowed, a conviction is entered and the matter is remanded to the trial judge for sentencing.

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

//*L'Heureux-Dubé J.*//

68 L'HEUREUX-DUBÉ J. -- Violence against women takes many forms: sexual assault is one of them. In Canada, one-half of all women are said to have experienced at least one incident of physical or sexual violence since the age of 16 (Statistics Canada, "The Violence Against Women Survey", *The Daily*, November 18, 1993). The statistics demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women (*Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (April 1992), at p. 13, also cited in *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 669).

69 Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J. wrote in *Osolin*, *supra*, at p. 669, sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women". These human rights are protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and their violation constitutes an

offence under the assault provisions of s. 265 and under the more specific sexual assault provisions of ss. 271, 272 and 273 of the *Criminal Code*, R.S.C., 1985, c. C-46.

70 So pervasive is violence against women throughout the world that the international community adopted in December 18, 1979 (Res. 34/180), in addition to all other human rights instruments, the *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, entered into force on September 3, 1981, to which Canada is a party, which has been described as "the definitive international legal instrument requiring respect for and observance of the human rights of women". (R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" (1990), 30 *Va. J. Int'l L.* 643, at p. 643). Articles 1 and 2 of the Convention read:

> ARTICLE I
>
> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
>
> ARTICLE II
>
> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women. [Emphasis added.]

71 The Committee on the Elimination of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/47/48 (1979), established under Article 17 of the Convention, adopted General Recommendation No. 19 (Eleventh session, 1992) on the interpretation of discrimination as it relates to violence against women:

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends:

. . .

(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention . . . [Emphasis added.]

72 On February 23, 1994, the U.N. General Assembly adopted the *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, U.N. Doc. A/48/49 (1993). Although not a treaty binding states, it sets out a common international standard that U.N. members states are invited to follow. Article 4 of the Declaration provides:

> *Article 4*
>
> States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:
>
> . . .
>
> (*i*) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;
>
> (*j*) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women. . . . [Emphasis added.]

73 Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra*, [1990] 3 S.C.R. 697). In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity.

74 It is within that larger framework that, in 1983, Canada revamped the sexual assault provisions of the *Code* (S.C. 1980-81-82-83, c. 125), formerly ss. 143, 149 and 244 (R.S.C. 1970, c. C-34) which are now contained in the general assault provisions of s. 265. Together with the 1992 amendments of the *Code* (*An Act to amend the Criminal*

Code (sexual assault), S.C. 1992, c. 38), mainly ss. 273.1 and 273.2, they govern the issue of consent in the context of sexual assault. In the preamble to the 1992 Act, Parliament expressed its concern about the "prevalence of sexual assault against women and children" and stated its intention to "promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*".

75 Fraser C.J., in her dissenting reasons in this case, has set out the legislative history of those provisions. In *R. v. Cuerrier,* [1998] 2 S.C.R. 371, Cory J. and I both noted the significant reform of sexual assault provisions undertaken by Parliament. (See C. Boyle, *Sexual Assault* (1984), at pp. 27-29.) I observed in *R. v. Park,* [1995] 2 S.C.R. 836, at para. 42, that:

> . . . the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in. If this is the case, then our approach to consent must evolve accordingly, for it may be out of phase with that conceptualization of the law.

See also *R. v. Seaboyer,* [1991] 2 S.C.R. 577.

76 In the present case, the respondent was charged with sexual assault under s. 271 of the *Code*. The applicable notions of "assault" and "consent" are defined in ss. 265, 273.1 and 273.2 of the *Code.* The relevant provisions read:

> **265.** (1) A person commits an assault when
>
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

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

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

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

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

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

(*c*) fraud; or

(*d*) the exercise of authority.

. . .

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

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

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

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

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

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

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

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

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

(*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.

77 Briefly stated, the accused is charged with sexually assaulting a 17-year-old girl. The accused was acquitted at trial and the acquittal was upheld on appeal, by a majority of the Alberta Court of Appeal, Fraser C.J. dissenting ((1998), 57 Alta. L.R. (3d) 235). The appellant alleges that the acquittal and the subsequent decision of the Court of Appeal are based on an error of law in the interpretation of the notion of consent contained in ss. 265(3), 273.1 and 273.2 of the *Code* and invites this Court to enter a conviction.

78 I have had the benefit of the reasons of Justice Major in this appeal and I agree generally with his reasons on most issues and with the result that he reaches. However, I wish to add some comments and discuss some of the reasoning of the trial judge and of the majority of the Court of Appeal.

79 Although my colleague has recounted the facts, there are some significant nuances that need to be stated. When the complainant and the accused met in the parking lot of a shopping mall to discuss the job offer, the complainant suggested that the interview be held in the mall. The accused expressed his preference for more privacy and proposed instead that the interview take place in his van to which a trailer was attached. The complainant agreed to sit in the van, but she left the door of the van open since she was still hesitant about discussing the job offer in his vehicle.

80 The accused then proposed that they proceed to his trailer. Shortly after entering the trailer, the complainant agreed to massage lightly the accused. However, she testified that she did not want to give him a massage but was afraid at this point, considering that she saw and heard the accused lock the door of the trailer and that the accused was almost twice her size. The accused then asked the complainant to come in front of him so that he could return the favour. He started massaging the complainant and brought his hands close to her breasts. The complainant pushed him away with her elbows and said "no". He then told the complainant to turn around in order to massage her feet. Again out of fear, she complied. When he began massaging her feet, the touching progressed to her inner thigh and pelvic area up to a point where he laid heavily on top of the complainant and started grinding his pelvic area against hers while telling her, as she testified, that: "he could get me so horny so that I would want it so bad, and he wouldn't give it to me because he had self-control and because he wouldn't want to give it to me". The accused stopped after the complainant asked him to "Just please stop" and at one point he said: "I had you worried, didn't I? You were scared, weren't you?". She answered: "Yes, I was very scared". This is particularly revealing of the accused's knowledge that she was afraid and certainly not a willing participant. The accused resumed his pelvic grinding, only this time he tried to touch her vaginal area, exposed his penis and placed it on the complainant's clothed pelvic area under her shorts. He stopped after the complainant said "No, stop".

81 After this ordeal, the accused opened the door at her request and the complainant finally exited the trailer. When the complainant arrived home, she was crying and told her roommate, Ms. Tait, what had occurred. Shortly after, the accused called the complainant's apartment to ask her if she was fine. She answered that she was and called the police. This evidence is uncontradicted and the trial judge found the complainant to be an articulate and intelligent young woman and a credible witness.

82 This case is not about consent, since none was given. It is about myths and stereotypes, which have been identified by many authors and succinctly described by D. Archard, *Sexual Consent* (1998), at p. 131:

> Myths of rape include the view that women fantasise about being rape victims; that women mean 'yes' even when they say 'no'; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually 'innocent'); that women often deserve to be raped on account of their conduct, dress, and demeanour; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual advances of active men, the view that sexual love consists in the 'possession' by a man of a woman, and that heterosexual sexual activity is paradigmatically penetrative coitus.

(For example see *Seaboyer*, *supra*, at p. 651, *per* L'Heureux-Dubé J.; M. Burt, "Rape Myths and Acquaintance Rape", in A. Parrot and L. Bechhofer, eds., *Acquaintance Rape: The Hidden Crime* (1991); N. Naffine, "Possession: Erotic Love in the Law of Rape" (1994), 57 *Mod. L. Rev.* 10; R. T. Andrias, "Rape Myths: A persistent problem in defining and prosecuting rape" (1992), 7 *Criminal Justice* 2; *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action*, *supra*; C. A. MacKinnon, *Toward a Feminist Theory of the State* (1989); E. A. Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989), 21 *Ottawa L. Rev.* 741.)

83 The trial judge believed the complainant and accepted her testimony that she was afraid and he acknowledged her unwillingness to engage in any sexual activity. In addition, there is no doubt that the respondent was aware that the complainant was afraid since he told her repeatedly not to be afraid. The complainant clearly articulated her absence of consent: she said no. Not only did the accused not stop, but after a brief

pause, as Fraser C.J. puts it, he went on to an "increased level of sexual activity" to which twice the complainant said no. What could be clearer?

84 The trial judge gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her. Section 265(3)(*b*) states that no consent is obtained where the complainant submits by reason of threats or fear of the application of force. Therefore, s. 265(3)(*b*) applies and operates to further establish the lack of consent: see *Cuerrier*, *supra*.

85 I agree with Major J. that the application of s. 265(3) requires an entirely subjective test. In my opinion, as irrational as a complainant's motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent. Accordingly, I agree with Fraser C.J. that any objective factor should be considered under the defence of honest but mistaken belief.

86 However, in my view, Major J. unduly restricts the application of s. 265(3) to instances where the complainant chooses "to participate in, or ostensibly consent to, the touching in question" (at para. 38; see also para. 36). Section 265(3) applies to cases where the "complainant submits or <u>does not resist</u>" (emphasis added) by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority. Therefore, that section should also apply to cases where the complainant is silent or passive in response to such situations.

87 In the circumstances of this case, it is difficult to understand how the question of implied consent even arose. Although he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid, the trial judge nonetheless did not take "no" to mean that the complainant did not consent.

Rather, he concluded that she implicitly consented and that the Crown had failed to prove lack of consent. This was a fundamental error. As noted by Professor Stuart in Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330, at p. 330:

> Both the trial judgment and that of Justice McClung do not make the basic distinction that consent is a matter of the state of mind of the complainant and belief in consent is, subject to s. 273.2 of the *Criminal Code*, a matter of the state of mind of the accused.

This error does not derive from the findings of fact but from mythical assumptions that when a woman says "no" she is really saying "yes", "try again", or "persuade me". To paraphrase Fraser C.J. at p. 263, it denies women's sexual autonomy and implies that women are "walking around this country in a state of constant consent to sexual activity".

88 In the Court of Appeal, McClung J.A. compounded the error made by the trial judge. At the outset of his opinion, he stated at p. 245 that "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines". He noted, at pp. 245-46, that "she was the mother of a six-month-old baby and that, along with her boyfriend, she shared an apartment with another couple".

89 Even though McClung J.A. asserted that he had no intention of denigrating the complainant, one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication

is that if the complainant articulates her lack of consent by saying "no", she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of "good" moral character. "Inviting" sexual assault, according to those myths, lessens the guilt of the accused as Archard, *supra*, notes at p. 139:

> . . . the more that a person contributes by her behaviour or negligence to bringing about the circumstances in which she is a victim of a crime, the less responsible is the criminal for the crime he commits. A crime is no less unwelcome or serious in its effects, or need it be any the less deliberate or malicious in its commission, for occurring in circumstances which the victim helped to realise. Yet judges who spoke of women 'inviting' or 'provoking' a rape would go on to cite such contributory behaviour as a reason for regarding the rape as less grave or the rapist as less culpable. It adds judicial insult to criminal injury to be told that one is the part author of a crime one did not seek and which in consequence is supposed to be a lesser one.

90 McClung J.A. writes, at p. 247:

> There is no room to suggest that Ewanchuk knew, yet disregarded, her underlying state of mind as he furthered his romantic intentions. He was not aware of her true state of mind. Indeed, his ignorance about that was what she wanted. The facts, set forth by the trial judge, provide support for the overriding trial finding, couched in terms of consent by implication, that the accused had no proven preparedness to assault the complainant to get what he wanted. [Emphasis added.]

On the contrary, both the fact that Ewanchuk was aware of the complainant's state of mind, as he did indeed stop each time she expressly stated "no", and the trial judge's findings reinforce the obvious conclusion that the accused knew there was no consent. These were two strangers, a young 17-year-old woman attracted by a job offer who found herself trapped in a trailer and a man approximately twice her age and size. This is hardly a scenario one would characterize as reflective of "romantic intentions". It was nothing more than an effort by Ewanchuk to engage the complainant sexually, not romantically.

91 The expressions used by McClung J.A. to describe the accused's sexual assault, such as "clumsy passes" (p. 246) or "would hardly raise Ewanchuk's stature in the pantheon of chivalric behaviour" (p. 248), are plainly inappropriate in that context as they minimize the importance of the accused's conduct and the reality of sexual aggression against women.

92 McClung J.A. also concluded that "the sum of the evidence indicates that Ewanchuk's advances to the complainant were far less criminal than hormonal" (p. 250) having found earlier that "every advance he made to her stopped when she spoke against it" and that "[t]here was no evidence of an assault or even its threat" (p. 249). According to this analysis, a man would be free from criminal responsibility for having non-consensual sexual activity whenever he cannot control his hormonal urges. Furthermore, the fact that the accused ignored the complainant's verbal objections to any sexual activity and persisted in escalated sexual contact, grinding his pelvis against hers repeatedly, is more evidence than needed to determine that there was an assault.

93 Finally, McClung J.A. made this point: "In a less litigious age going too far in the boyfriend's car was better dealt with on site -- a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee" (p. 250). According to this stereotype, women should use physical force, not resort to courts to "deal with" sexual assaults and it is not the perpetrator's responsibility to ascertain consent, as required by s. 273.2(*b*), but the women's not only to express an unequivocal "no", but also to fight her way out of such a situation. In that sense, Susan Estrich has noted that "rape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish nonconsent" ("Rape" (1986), 95 *Yale L.J.* 1087, at p. 1090).

94 Cory J. referred to the inappropriate use of rape myths by courts in *Osolin*, *supra*, at p. 670:

> A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented.

In *Seaboyer*, *supra*, I alluded to this issue as follows, at pp. 707-9:

> Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a non-discriminatory application of the law in this area. In view of the history of government attempts, the harm done when discretion is posited in trial judges and the demonstrated inability of the judiciary to change its discriminatory ways, Parliament was justified in so choosing. My attempt to illustrate the tenacity of these discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament.
>
> . . .
>
> History demonstrates that it was discretion in trial judges that saturated the law in this area with stereotype. My earlier discussion shows that we are not, all of a sudden, a society rid of such beliefs, and hence, discretionary decision making in this realm is absolutely antithetical to the achievement of government's pressing and substantial objective.

95 This case has not dispelled any of the fears I expressed in *Seaboyer*, *supra*, about the use of myths and stereotypes in dealing with sexual assault complaints (see also Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990), 28 *Osgoode Hall L.J.* 507). Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The *Code* was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only

perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.

96 In "The Standard of Social Justice as a Research Process" (1997), 38 *Can. Psychology* 91, K. E. Renner, C. Alksnis and L. Park make a strong indictment of the current criminal justice process, at p. 100:

> The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principle [*sic*] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and gender-blind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children. [Emphasis added.]

97 This being said, turning to the facts of the present case, I agree with Major J. that the findings necessary to support a verdict of guilty on the charge of sexual assault have been made. In particular, there is, on the record, no evidence that would give an air of reality to an honest belief in consent for any of the sexual activity which took place in this case. One cannot imply that once the complainant does not object to the massage in the context of a job interview, there is "sufficient evidence" to support that the accused could honestly believe he had permission to initiate sexual contact. This would mean that complying to receive a massage is consent to sexual touching. It would reflect the myth that women are presumptively sexually accessible until they resist. McLachlin J. has recognized in *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 82, that reliance on rape myths cannot ground a defence of mistaken belief in consent:

> Care must be taken to avoid the false assumptions or "myths" that may mislead us in determining whether the conduct of the complainant affords a sufficient basis for putting the defence of honest mistake on consent to the jury. One of these is the stereotypical notion that women who resist or say no may in fact be consenting.

Furthermore, I agree with Fraser C.J. at p. 278 that there is no air of reality to a defence of mistaken belief in consent "in the face of the complainant's clearly stated verbal objections".

98 Moreover, s. 273.2(*b*) precludes the accused from raising the defence of belief in consent if he did not take "reasonable steps" in the circumstances known to him at the time to ascertain that the complainant was consenting. This provision and the defence of honest but mistaken belief were before the trial judge and it should have been given full effect. The trial judge erred in law by not applying s. 273.2(*b*) which was the law of the land at the time of the trial, irrespective of whether the case proceeded on that basis. As stated by McLachlin J. in *Esau, supra*, at para. 50, with whom I concurred:

> Major J. [for the majority] does not consider s. 273.2. This may be because it was not argued on the appeal or in the proceedings below. With respect, I do not believe that the force of s. 273.2 may be avoided on that ground. Parliament has spoken. It has set out minimum conditions for the defence of mistaken belief in consent. If those conditions are not met, the defence does not lie.

99 I agree entirely with Fraser C.J. that, unless and until an accused first takes reasonable steps to assure that there is consent, the defence of honest but mistaken belief does not arise (see *R. v. Daigle*, [1998] 1 S.C.R. 1220; *Esau, supra, per* McLachlin J. dissenting; and J. McInnes and C. Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995), 29 *U.B.C. L. Rev.* 341). In this case, the accused proceeded from massaging to sexual contact without making any inquiry as to whether the complainant consented. Obviously, interpreting the fact that the complainant did not refuse the massage to mean that the accused could further his sexual intentions is not a reasonable step. The accused cannot rely on the complainant's silence or ambiguous conduct to initiate sexual contact. Moreover, where a complainant expresses non-consent, the accused has a corresponding escalating obligation to take additional steps to ascertain

consent. Here, despite the complainant's repeated verbal objections, the accused did not take any step to ascertain consent, let alone reasonable ones. Instead, he increased the level of his sexual activity. Therefore, pursuant to s. 273.2(*b*) Ewanchuk was barred from relying on a belief in consent.

100 Major J., at para. 43, relies on this Court's decision in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, to describe the nature of the defence of honest but mistaken belief. In *Pappajohn*, the majority held that this defence does not need to be based on reasonable grounds as long as it is honestly held. That approach has been modified by the enactment of s. 273.2(*b*) which introduced the "reasonable steps" requirement. Therefore, that decision no longer states the law on the question of honest but mistaken belief in consent.

101 I wish to point out that, on the facts as found at trial, s. 273.1(2) also applies to this case. Coupled with the reasonable steps requirement of s. 273.2(*b*), s. 273.1(2) restricts the circumstances in which an accused could claim that he had a mistaken belief in the complainant's agreement to engage in the impugned sexual activity. Particularly relevant to this case, s. 273.1(2)(*d*) states that no consent is obtained where "the complainant expresses, by words or conduct, a lack of agreement...". Here, the complainant clearly expressed her lack of consent by saying "no" three times. The application of that provision acknowledges that when a woman says "no" she is communicating her non-agreement, regardless of what the accused thought it meant, and that her expression has an enforceable legal effect. It precludes the accused from claiming that he thought there was an agreement. That provision was in force at the time of trial and could not be ignored by the trial judge.

Disposition

102 Like my colleague Major J., I would allow the appeal, enter a conviction and send the matter back to the trial judge for sentencing.

The following are the reasons delivered by

//*McLachlin J.*//

103 MCLACHLIN J. -- I agree with the reasons of Justice Major. I also agree with Justice L'Heureux-Dubé that stereotypical assumptions lie at the heart of what went wrong in this case. The specious defence of implied consent (consent implied by law), as applied in this case, rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent (see L'Heureux-Dubé J.). On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law.

104 I join my colleagues in rejecting them.

Appeal allowed.

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Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

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Solicitors for the intervener the Sexual Assault Centre of Edmonton: Witten, Binder, Edmonton.