

Reviewing Ewanchuk and JA: by Ta Va

The Supreme Court of Canada described the complex relationship between consent, sections 265 and 273 of the *Criminal Code*, and the parties to a sexual assault offence in *R v Ewanchuk* and *R v A(J)*. As demands for consensual participation continue to grow, it is timely to review how Canadian courts consider consent in the context of sexual assault offences.

The offence of sexual assault is defined in section 265 of the *Criminal Code*. The act consists of touching, the sexual nature of the contact, and the absence of consent.¹ Consent is an essential component of sexual assault offences and, as such, has been defined in section 273.1(1) of the *Criminal Code*. Consent, in this context, is the voluntary agreement of the complainant to engage in sexual activity that must be actively present at the time of execution.² Importantly, this section defines several circumstances that invalidate consent as a question of law.³ Because of this, both the *Criminal Code* and common law have strictly limited the legal validity of consent to sexual activities where “yes” is clearly communicated.⁴ Consent to sexual activity obtained contrary to these criteria are invalidated in law, aggravating the case against the accused.

When the court considers a sexual assault, the Crown must first demonstrate that the accused voluntarily touched the complainant in a sexual manner in the ‘absence of consent’, which is from the subjective view of consent from the complainant.⁵ The accused’s perspective

¹ *Criminal Code*, RSC 1985, c C-46, s 265.

² *Criminal Code*, RSC 1985, c C-46, s 273.1.

³ *R v Daigle* [1998] 1 SCR 1220, [1998] SCJ No 54. For discussion on consent relative to consciousness, see *R v Randall* 2012 NBCA 25, [2012] NBJ No 297; *R v A(J)* 2011 SCC 28, [2011] 2 SCR 440; *Hogg* 2000 p.255.

⁴ *Criminal Code*, RSC 1985, c C-46, ss 265(3)-265(4); *R v Park* 1995 2 SCR 836 at paras 16-17 [*Park*].

⁵ *Park*, *supra* note 5 at 850.

is only considered in the second stage of intent considerations, which forms the foundation of the defense of honest/mistaken belief.⁶

When considering the intention of the accused to commit a sexual assault offence, the crown must demonstrate that an accused proceeded with the sexual act with knowledge of the complainant's lack of consent, or with reckless or wilful blindness to obtaining consent.⁷ This stage affords an accused with the opportunity to raise the defence of an honest but mistaken belief in consent to sexual assault offences. The defence operates by negating the intent component of the offence.⁸ Due to the evidentiary nature of sexual assault offences, Canadian courts apply a modified objective test when determining the intent of an accused to commit the act.⁹

To successfully raise the defence of honest/mistaken belief in consent, the accused must demonstrate an 'air of reality' to their belief. The accused must show the court that they took reasonable steps to ascertain consent, in consideration of the circumstances known to the accused at the time of the offence.¹⁰ Once establishing the grounds of the defence in fact, the court considers whether the accused's belief was reasonable under criteria prescribed in s.273.1(2) and 273.2.¹¹ This defense is only successful if the accused demonstrates that, based on the complainant's words and conduct, they received positive *communication* of consent from the complainant. Any other belief is not a valid defense, resulting in conviction.¹²

⁶ *Ibid* at para 41-44; *R c Daviault* 1994 118 DLR (4th) 469, 42; *R v Creighton* [1993] 3 SCR 3.

⁷ *Ibid* at para 41; *Park*, *supra* note 5 at para 39.

⁸ *Ewanchuk*, *supra* note 7 a para 43.

⁹ *Criminal Code*, RSC 1985, c C-46, s 265(4); *Park*, *supra* note 5 at paras 16-17.

¹⁰ *R v Malcolm* 2000 MBCA 77 at para 24.

¹¹ *Ewanchuk*, *supra* note 7 at paras 50-52; *Criminal Code*, RSC 1985, c C-46, s 273.2.

¹² *Ibid* at paras 45-49; *R v Davis* [1999] 3 SCR 759.

The Supreme Court of Canada (SCC) deliberated on the juridical implications of consent in *R v Ewanchuk*. The SCC confirmed that legally valid consent consisted only of a clearly communicated 'yes' from the complainant prior to engaging or continuing sexual activity after any indication to stop. The court reapplied sections 265(3), 273.1(2), 265(4), and 273.2 of the *Criminal Code* to conclude that Ewanchuk obtained consent from the complainant that was invalidated in law in several ways, indicating that his defence of honest/mistaken belief could not be sustained. Ewanchuk was convicted of s.265 sexual assault.¹³

Later, the SCC revisited these concepts in *R v. A.(J.)* (JA). The judgment focused on the legal validity of consent to a sexual act that becomes engaged when the consenting partner is not conscious. The court considered whether obtaining valid consent prior to losing consciousness can remain active after the complainant has lost capacity to consent in general. The SCC reviewed its early deliberations of s.273.1 in *Ewanchuck*, stating that consent for sexual activities requires that the complainant provide actual, active consent through every phase of the sexual activity. The circumstances of this case allowed the court to codify that an unconscious person cannot give consent in advance.¹⁴ The SCC adopted a definition of consent by interpreting Parliament's use of words like "consenting" while drafting the provisions of s. 273.1 of the CCC to show that consent for sexual acts must be active in the mind and not given in advance. The legislative intent was to ensure that consent was an active and conscious state—something that could not be done if one party is unconscious.¹⁵

¹³ *Ewanchuk*, *supra* note 7 at paras 50-52.

¹⁴ *R. v. A. (J.)*, 2011 SCC 28 at para 66 [J.A.].

¹⁵ *Ibid* at para 36.

In the second part of their judgment, the SCC considered whether the accused could apply the defence of an honest but mistaken belief in consent under s.273.2. The majority argued that the accused could not raise a defence of honest but mistaken belief (s. 265(4) of the CCC) because, if a person is unconscious, it is impossible for the accused to obtain consent for the sexual activity happening during unconsciousness. Further, this defence implies that the accused took all reasonable steps to obtain consent, which as the SCC ruled, is impossible if the complaint is unconscious.¹⁶

In response to the decision in JA, Parliament amended the CCC to include s. 273.1(1.1), s. 273.1(2)(a.1) and s.273(iii). The first amendment was the addition of s. 273.1(1.1) which ensures that each sexual act that happens must be consented to by the complainant; not just in the future, but at the time it takes place.¹⁷ The second amendment was the addition of s. 273.1(2)(a.1) which states that consent is not obtained if the complainant is unconscious.¹⁸ The third amendment was the addition of s. 273.2(a)(iii), which further invalidates a defence of honest/mistaken belief in consent that was obtained contrary to sections 265(3), 273.1(2) or(3).¹⁹

Yet, the ruling in JA leaves us with a question of how much do we let the state into our bedrooms? Each law promoting safety can also be seen as compromising the sexual integrity of others. As stated by dissent in JA, "Keeping the state out of the bedrooms of the nation" is a legislative policy, and not just a political slogan."²⁰

¹⁶ *Ibid* at paras 45-48.

¹⁷ *Criminal Code*, RSC 1985, c C-46, s 273.1(1.1)

¹⁸ *Ibid*, s 273.1(2)(a.1).

¹⁹ *Ibid*, s 273.2(a)(iii).

²⁰ *J.A.*, *supra* note 16 at para 116.