



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Snelgrove*, 2018 NLCA 59

Date: October 17, 2018

Docket Number: 201701H0018

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

CARL DOUGLAS SNELGROVE

RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201601G2389

Appeal Heard: March 2, 2018

Judgment Rendered: October 17, 2018

Reasons for Judgment by Welsh J.A.

Concurring Reasons by Hoegg J.A.

Dissenting Reasons by White J.A.

Counsel for the Appellant: Iain R. W. Hollett

Counsel for the Respondent: Randolph J. Piercey Q.C. and Jonathan Noonan

Welsh J.A.:

[1] A jury found Carl Douglas Snelgrove not guilty of one count of sexual assault contrary to section 271(1) of the *Criminal Code*. The Crown appeals the acquittal on the basis that the trial judge erred by refusing to instruct the jury regarding section 273.1(2)(c) of the *Code*, which nullifies consent where the accused, by abusing a position of trust, power or authority, induces the complainant to engage in sexual activity. Further the Crown submits that the judge erred in law in her instructions to the jury on the meaning of consent.

BACKGROUND

[2] The twenty-three year old complainant testified that on December 21, 2014 she went alone to find a taxi after an evening of drinking. She said that, at about 2:30 a.m. she felt that she was too drunk to remain at the bar. It was then that she saw Mr. Snelgrove, a Royal Newfoundland Constabulary officer, who was on duty, in uniform, parked in his marked patrol car.

[3] Mr. Snelgrove testified that he had just brought an intoxicated person to the lock-up and was working on the related paper work. He testified that the complainant came to the car and asked him for a ride home. On cross-examination, the complainant testified that she could not recall whether she had asked for or Mr. Snelgrove had offered a ride. Mr. Snelgrove testified that they had normal conversation on the drive, and that the complainant told him that he was “really attractive” and “looked really good in his uniform”.

[4] When they arrived at the residence a few minutes later, Mr. Snelgrove testified that the complainant went to the door at the back of her house, then she returned to his vehicle where he was doing his paper work. The complainant testified that, when she could not find the keys to her apartment, she asked for help. They discussed calling a friend where she might go, or who might have a key to her apartment. A phone call was made but this option was not pursued. Mr. Snelgrove suggested that they look for an alternate way into the apartment. They found an unlocked window which Mr. Snelgrove raised to enable the complainant to crawl through. Mr. Snelgrove testified that he had then gone to the door to ensure that she was safe, and that the complainant had invited him in. The complainant was unable to recall much of what happened after she let Mr. Snelgrove into the apartment. She testified that she was “too drunk to kind of stand up” so she went to lie or sit on a nearby loveseat. The next thing she recalled was that Mr. Snelgrove was having sex with her. When asked about her reaction, the complainant testified that she could not recall “because all I

remember after that was that I woke up in my bed". She did not recall Mr. Snelgrove leaving.

[5] There is no dispute that sexual activity took place, the issue being whether the complainant had consented and, if so, whether that consent was vitiated by the operation of section 273.1(2)(c) of the *Criminal Code*. On cross-examination, the complainant responded to questions from defence counsel:

Q. Okay. You can't say at that point you didn't consent to him kissing you can you?

A. I don't know.

Q. Okay. And in fact, when you and he had all the sexual activity for the night you may have consented to that right?

A. I can't remember.

Q. Okay. But you may –

A. It's possible, I guess.

Q. Because you gave a statement to the police again. It is the second statement I think, it's at page 421. The police officer says to you, is it possible that you consented, you said it's possible like I'm not sure.

A. Yes.

Q. Okay, why do you think it's possible that you consented to having sexual relations with that man?

A. Because I was drunk so I don't know how I would have acted. I don't – I can't say for sure what I did or didn't do.

Mr. Snelgrove testified that the complainant initiated the sexual activity and that it was consensual.

[6] Royal Newfoundland Constabulary policy requires an officer to advise the communications dispatcher when he has a female person in the vehicle, and to provide his name, badge number, police vehicle identifier, mileage and location. Upon arrival at the destination, the location and mileage must be reported to the dispatcher. Mr. Snelgrove testified that he knew, but did not follow, the policy and further, that he did not advise the dispatcher that he would be outside his assigned area of responsibility.

ISSUES

[7] At issue is whether the trial judge erred (1) in declining to instruct the jury on the operation of section 273.1(2)(c) of the *Criminal Code*, or (2) in her instruction to the jury regarding consent. Given that I would allow the appeal on the basis of the first issue and order a new trial, I would decline to address the second question. An appropriate instruction on the issue of consent will depend on the evidence adduced at the new trial.

ANALYSIS

Appeal by the Crown – Question of Law

[8] The Attorney General may appeal against a verdict of acquittal “on any ground of appeal that involves a question of law alone” (section 676(1)(a) of the *Criminal Code*). In this case, issues raised on the appeal regarding the trial judge’s interpretation and application of section 273.1(2)(c) of the *Criminal Code* are questions of law. Similarly, whether there is an evidentiary foundation warranting putting the issues of vitiation of consent or loss of consent to the jury is a question of law (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paragraphs 70 to 82).

Nullification of Consent – Section 273.1 of the *Criminal Code*

[9] Based on Mr. Snelgrove’s position as an on-duty police officer, the Crown requested that the trial judge include in her charge to the jury an instruction on section 273.1(2)(c) of the *Criminal Code* regarding the vitiation or nullification of consent based on abuse of the police officer’s position of trust or authority. In a *voir dire* held for the purpose, the trial judge refused the Crown’s request.

[10] Section 273.1 addresses the meaning of consent for purposes of analyzing the offence of sexual assault under section 271 of the *Criminal Code*:

(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

...

(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;

...

[11] Section 265(3), referenced in section 273.1, provides:

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

...

(d) the exercise of authority.

[12] The trial judge concluded that the necessary evidentiary foundation did not exist to ground an instruction on section 273.1(2)(c). In her oral decision on the *voir dire*, the judge explained:

The Crown submits that there is evidence that the accused induced the apparent consent such as evidence that the accused gave the complainant a ride home, evidence that the complainant did say she felt she was safer with a police officer than with a cab driver. Evidence that the accused was talking to the complainant in the car and complimented her. Evidence that the accused did not advise the Comm (*sic*) Centre that there was a female in his car. Evidence that the accused assisted the complainant getting into her house by opening her window. Evidence that he went into her home and did not explain in his testimony why he did so or rather suggested that he did not have an explanation why he did go into her home.

Evidence that by using a position of trust and personal feelings of confidence to induce the complainant into a position or putting himself in a position where he would not be, but for the fact that he is a police officer. However, as defence counsel submits, there is no evidence whatsoever that the complainant was induced as her evidence is, she doesn't know how it all happened. She doesn't know what happened in the apartment and how the sexual encounter occurred. She did not speak to the subjective impact, if any, of a trust relationship, see paragraph 37 of *R. v. T.D.*, 2012 ONSC 2166.

...

There is no evidence before me to suggest that the complainant was reduced to a state of dependency upon the accused such that he was able to misuse his dominant position to extract her consent to a sexual assault. Rather, the complainant asserts she was too drunk to remember. If she did consent, then she did not give evidence of whether that consent was induced. It would be unjust to suggest to the jury that they can infer inducement in these circumstances, based upon the evidence at trial, particularly when the complainant cannot recall what happened.

[13] The Crown submits that, in reaching this conclusion, the trial judge erred in her interpretation of section 273.1(2)(c), and in requiring testimony from the complainant regarding whether her consent was induced.

General Principles

[14] In *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, McLachlin C.J.C. and Cromwell J., for the majority, provided an overview of principles applicable to consent to sexual activity:

[17] The sexual assault offences invoke the criminal law to protect sexual autonomy. The *Criminal Code* and jurisprudence establish a high level of protection of the right to choose whether to engage in sexual activity and with whom. The absence of consent to sexual activity, as part of the *actus reus* of the offence, is judged subjectively from the complainant's point of view: *Ewanchuk*, at paras. 25-26. Consent cannot be implied, must coincide with the sexual activity, and may be withdrawn at any time. Additionally, no consent is obtained if the apparent agreement to the sexual activity is obtained by coercion, fraud or abuse of authority. ... Individually and collectively, these features of sexual assault law protect Canadians' sexual autonomy.

[18] But the law has long recognized that there are limits on how completely it may fulfil that objective through the blunt instrument of the criminal law. As the most serious interference by the state with peoples' lives and liberties, the criminal law should be used with *appropriate restraint*, to avoid over-criminalization. It draws a line between conduct deserving the harsh sanction of the criminal law, and conduct that is undesirable or unethical but "lacks the reprehensible character of criminal acts": ... The criminal law must provide fair notice of what is prohibited and clear standards for enforcement: ...

Application of Section 273.1 in the Case of a Police Officer

[15] Section 273.1(2)(c) of the *Code* provides that consent is vitiated or nullified where a person in a position of trust or authority induces consent to sexual activity by abusing that position. The analysis begins with a determination that the accused was in a position of trust or authority in respect of the complainant. However, the fact that a person is in a position of trust or authority is, by itself, not sufficient to vitiate consent where sexual activity occurs.

[16] In this case, I am satisfied that the relationship of an on-duty police officer to a member of the public is traditionally one of trust or authority. In the absence of evidence to the contrary, that relationship is presumed and does not require evidence. I do not read the trial judge's decision as being inconsistent

with that proposition. Rather, her focus was on whether there was an evidentiary foundation from which the jury could infer or conclude that the complainant's consent was induced by Mr. Snelgrove's abuse of his position.

[17] The trial judge concluded that the necessary evidentiary foundation to engage section 273.1(2)(c) for consideration by the jury was absent because the complainant admitted that she could not remember much of what occurred that night due to her state of intoxication. Assuming that she had consented, which she conceded she may have done, the question of vitiation of that consent would fall to be considered given Mr. Snelgrove's status as an on-duty police officer in uniform. The question is, did the trial judge err in refusing to include an instruction on section 273.1(2)(c) on the basis of the lack of an evidentiary foundation?

[18] As noted previously, it was not sufficient, by itself, that Mr. Snelgrove was an on-duty police officer. The complainant was not prevented from consenting to sexual activity with him on that basis alone. In order to vitiate her consent, the *Criminal Code* requires evidence from which it could be inferred or concluded that she was induced to consent to the sexual activity by Mr. Snelgrove's abuse of his position of trust or authority.

[19] The following case law relied upon by counsel is of limited assistance because the complainant's circumstances in those cases were such that inducement to consent as a result of the abuse of the offender's position of trust or authority could be inferred. (*R. v. Alsadi*, 2012 BCCA 183, 285 C.C.C. (3d) 316, complainant was a patient in a psychiatric hospital; *R. v. Lutoslawski*, 2010 ONCA 207, 326 D.L.R. (4th) 637, appeal dismissed (2010 SCC 49, [2010] 3 S.C.R. 60), a fifteen year old complainant; *R. v. Makayak*, 2004 NUCJ 5, a prisoner in a police detachment; *R. v. Thompson*, 2017 SKCA 33, a developmentally delayed complainant.) Nonetheless, these cases demonstrate that the analysis does not require direct evidence from the complainant regarding whether her consent was induced. Rather, the inference may be drawn from circumstantial evidence.

[20] In this case, the trial judge was particularly concerned that the complainant failed to testify that her consent was induced by Mr. Snelgrove's abuse of his position of trust or authority because she could not remember what had occurred. Counsel for the Crown submits that, if such evidence is necessary, then section 273.1(2)(c) would be rendered redundant by the operation of section 265(3)(d). I do not accept that proposition.

[21] The distinction between sections 273.1(2)(c) and 265(3)(d) is referenced in *R. v. Alsadi*, 2012 BCCA 183, in which Chiasson J.A., for the Court, accepted that section 273.1(2)(c) “introduces a more subtle form of pressure that can be inferred from the circumstances of the exercise of the power or authority” than was previously applied by the courts under section 265(3)(d) (paragraph 19). Chiasson J.A. concluded that section 265(3)(d) was not relevant on the facts of that case, and that section 273.1(2)(c) was engaged because:

[24] ... The issue is whether the respondent incited or induced the complainant to participate in the sexual activity by abusing a position of trust, power or authority. It is not whether she misapprehended her right to refuse his advances, or feared reprisals, or did not understand that she could say “no”.

[22] A similar distinction is drawn in *R. v. Lutoslawski* in which Doherty J.A., for the Court, explained:

[12] ... The term “exercise of authority” in s. 265(3)(d) suggests a coercive use of authority to overcome resistance to a consent. Inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion. An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity.

See also *Hutchinson*, at paragraph 4, where reference is made to vitiation of apparent consent pursuant to both sections 265(3) and 273.1(2); *R. v. Geddes*, 2015 ONCA 292, 322 C.C.C. (3d) 414, in which the Court commented that the “exercise of influence to the point of coercion constitutes “the exercise of authority” for the purposes of s. 265(3)(d)” (paragraph 35); *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237, at paragraph 27, in which the “overlap” between the provisions is acknowledged.

[23] While I do not agree that section 273.1(2)(c) renders section 265(3)(d) redundant, I accept that section 273.1(2)(c) engages a more nuanced or subtle form of pressure or inducement which may be inferred from the circumstances. The trial judge did not adopt this nuanced interpretation. Rather, she analyzed the issue from the perspective of the complainant being “reduced to a state of dependency” on the accused enabling him “to misuse his dominant position to extract her consent” to sexual activity (underlining added, paragraph 12, above). That language is more consistent with an analysis under section 265(3)(d) of the *Code* pursuant to which consent is nullified because the complainant submitted or did not resist by reason of the exercise of authority by the accused.

[24] Section 273.1(2)(c) does not require a finding of dependency by the complainant or a dominant position by the accused. Rather, section 273.1(2)(c) is engaged when an accused abuses, that is, misuses or makes improper use of his position of trust or authority, thereby inducing, that is, persuading or enticing the complainant to consent to sexual activity. (See definitions of “induce” in *Webster’s Unabridged Dictionary*, second edition (New York: Random House) 2001, to mean “to lead or move by persuasion or influence, as to some action or state of mind”; and in the *Oxford Dictionary* (Oxford University Press, Oxford) 2003, to mean “prevail on; persuade”. *Black’s Law Dictionary*, eighth edition, defines “inducement” to mean “The act or process of enticing or persuading another person to take a certain course of action”. “Abuse” in *Webster’s Unabridged Dictionary* is defined to mean “wrong or improper use; misuse”; and in the *Oxford Dictionary* to mean “improper use”.)

[25] In the absence of the complainant’s direct evidence of inducement, the surrounding circumstances may provide an evidentiary basis for consideration by the trier of fact in determining whether consent was vitiated by the operation of section 273.1(2)(c). For example, in this case, a circumstance the jury may consider to be relevant is the vulnerability of the complainant who was intoxicated, in contrast to Mr. Snelgrove who was a police officer on duty, in a position of trust or authority in relation to the complainant, and not similarly impaired. This may be one factor the jury could consider relevant in assessing whether Mr. Snelgrove abused his position of trust or authority to induce the complainant to engage in the sexual activity.

[26] Where, as here, the accused is tried by a jury, it is important to keep separate the responsibilities of the judge, who determines and explains to the jury the rules of law that apply, and the duties of the jury to decide the facts and apply the law as explained by the judge. It is an error for the judge to step into the realm reserved for the jury.

[27] That said, the judge must assess whether there is an evidentiary foundation for including an instruction on a particular principle of law in the charge to the jury. The whole of the evidence, in this case, including Mr. Snelgrove’s testimony and the surrounding circumstances, must be analyzed to determine whether there is an evidentiary foundation from which it could be inferred that, in fact, the complainant’s consent was induced by Mr. Snelgrove’s abuse of his position of trust or authority.

[28] As applied here, I am satisfied that different interpretations may be drawn from the evidence which may affect factual determinations that may be made by

the trier of fact, that is, the jury. For example, if the jury accepted the evidence of Mr. Snelgrove that the sexual activity was initiated by the complainant and was not induced by the abuse of his position as a police officer, and that the circumstances support that conclusion, the result would follow that, on the facts, section 273.1(2)(c) would not apply to vitiate the complainant's consent. On the other hand, the jurors may assess the evidence differently if they were reluctant to accept Mr. Snelgrove's testimony in light of evidence such as the officer's failure to comply with police policy when driving the complainant home; his decision to stay outside her residence, and outside his assigned area of responsibility, to finish his paper work; his decision to go into the complainant's residence; and the intoxicated state of the complainant (see paragraph 12, above).

[29] I am satisfied that factual determinations, which were properly the responsibility of the jury, were required in order to determine whether section 273.1(2)(c) may operate to vitiate the complainant's consent. The trial judge erred by interfering with the function of the jury, and assessing the evidence rather than limiting her consideration to whether there was an evidentiary foundation requiring an instruction to the jury on vitiating consent. The evidence was such that an instruction on section 273.1(2)(c) was warranted.

[30] Finally, because this is an appeal by the Crown against Mr. Snelgrove's acquittal, the particular onus on the Crown, set out in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, applies:

[14] ... It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

[31] In this case, the Crown has satisfied that onus. Assuming the jury concluded that the complainant had consented to the sexual activity, there was circumstantial evidence on which the jury may have determined that section 273.1(2)(c) would operate to vitiate that consent. The trial judge's failure to instruct the jury on that provision might reasonably have had a material bearing on the acquittal. On this basis, I would order a new trial.

SUMMARY AND DISPOSITION

[32] The trial judge erred in law in her interpretation and application of section 273.1(2)(c) of the *Criminal Code* and in declining to instruct the jury regarding

violation of the complainant's consent on the basis that there was no evidentiary foundation warranting that instruction. In light of this conclusion, I would decline to address the second question regarding the meaning of consent. An appropriate instruction on that issue will depend on the evidence adduced at the new trial.

[33] In the result, I would allow the appeal and order a new trial.

B. G. Welsh J.A.

Hoegg J.A. (Concurring Reasons):

[34] I agree with my colleague Welsh J.A. that the Crown's appeal be allowed. I also agree with her reasoning but wish to add the following paragraphs respecting matters I believe are material to the appeal.

[35] The issue is whether the trial judge erred in declining to instruct the jury respecting the alternate theory of liability set out in section 273.1(2)(c). The judge stated that there was no evidence to support doing so.

[36] When considering whether an alternate theory of liability ought to be put to a jury, a judge must exercise his or her gatekeeper role, and decide if there is evidence on which a properly instructed jury acting reasonably could convict. This is a question of law.

[37] This Court addressed the issue in *R. v. Druken*, 2002 NFCA 23, 211 Nfld. & P.E.I.R. 219. In *Druken* the issue was whether the offence of manslaughter ought to have been put to the jury as an alternative to the offence of murder. This Court ruled that when there is evidence which could support putting an alternate theory of liability to the jury, a trial judge has a "fundamental obligation" to do so (paragraphs 43-48).

[38] When a judge is faced with this issue, the question becomes how he or she is to exercise that gatekeeper role. The answer is to conduct an "air of reality" analysis (*Druken* at paragraph 47), which is the same analysis a judge must conduct in deciding whether to put a defence to a jury.

[39] This was the approach adopted by the Ontario Court of Appeal in *R. v. F. (D.S.)* (1999), 43 O.R. (3d) 609, 169 D.L.R. (4th) 639 (O.N.C.A.) respecting whether the alternate theory of liability set out in section 265(3)(b) of the *Code* (lack of consent to sexual activity when the complainant submits or does not resist by reason of threats or fear of force) ought to have been put to the jury. Several years later, the same court took the same approach in *R. v. Lergie*, 2010 ONCA 548, 101 O.R. (3d) 561. In *Lergie* the issue related to whether an accused could be liable as an aider or abettor to an offence (if not found to be the principal offender). The Court stated “[a]s matter of general principle, the submission of an alternative basis of liability is controlled by the air of reality standard” (paragraph 141).

[40] Between the Ontario Court of Appeal’s decisions in *R. v. F. (D.S.)* and *Lergie*, the Supreme Court of Canada decided *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3. The issue in *Cinous* was whether the defence of self-defence ought to have been put to the jury. The Court set out the two-pronged question to be asked when such an issue is being considered at paragraph 82:

... The question remains whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused.
...

The Court directed a judge how to carry out this task at paragraph 87:

The trial judge must review the evidence and determine whether, if believed, it could permit a properly instructed jury acting reasonably to acquit. It follows that the trial judge cannot consider issues of credibility. Further, the trial judge must not weigh evidence, make findings of fact, or draw determinate factual inferences.

(Emphasis in original.)

[41] The reasoning of the Ontario Court of Appeal in *Lergie* relied on the reasoning of the Supreme Court in *Cinous*.

[42] In the current case, the complainant testified that she had been drinking with friends from the evening of December 20, 2014 into the early morning of December 21, 2014, first at a friend’s residence and later at a downtown bar. At about 2:30 a.m. she left the bar, feeling that she was “too drunk to still be out”, and walked along Water Street in search of a cab. She happened upon Constable Snelgrove, uniformed and in his police car, and they agreed he would

drive her home. She testified that she got into the car with him because she “figured it would be safer to go with a police officer than a cab driver”. She said she had wanted to go home and sleep and that she had no intention to have sex with the officer.

[43] Constable Snelgrove helped the complainant enter her apartment through a window because she did not have her keys. He then went to her door and she let him in. She testified that she let him in because he said he wanted to see if she was okay. He testified that the complainant came outside and invited him in but he was unable to offer an explanation as to why he went to her door and entered her apartment.

[44] She testified that when they were in her living room talking, she felt too drunk to stand up, so she sat or laid down on the loveseat. Her next recollection is that she was naked and having sex with Constable Snelgrove, sitting on the loveseat, with him standing above her and her legs on his shoulders. She testified that she “came to” when he said out loud that he had “missed two callouts”. She had no recollection of Constable Snelgrove leaving her apartment. Her next recollection was awakening later that morning and realizing what had occurred. The complainant testified that she had neither wanted nor expected to have sex with Constable Snelgrove, and that she could not recall agreeing to have sex with the officer. On cross-examination, she “guessed” that it was possible she had agreed to have sex with the officer “because I was so drunk so I don’t know how I would have acted. I don’t—I can’t say for sure what I did or didn’t do”.

[45] Constable Snelgrove said he smelled alcohol off the complainant, but he maintained she was not drunk. The complainant maintained that she was quite drunk and that she had passed out in her apartment. Other witnesses confirmed that she had been drinking from approximately 6:00 p.m. until she left the bar at approximately 2:30 a.m., although witnesses could not say exactly how much she had to drink. The friend whom she called when she realized she did not have her house key testified that he could tell that she “was intoxicated for sure because she had a lot of slurred speech ... she was definitely not herself”. This was minutes before the sexual activity occurred. Constable Snelgrove also testified that when he let the complainant out of his car to go to her apartment, he got back in his car and spent “three, four, or five minutes” completing the report he had started before the complainant got into his car.

[46] I agree with Welsh J.A. that there was sufficient evidence to put section 273.1(2)(c) to the jury. In that regard, evidence respecting that Constable

Snelgrove was uniformed, on-duty and operating a police car, and in violation of RNC policies respecting female passengers and driving outside of his assigned work area, combined with his admission that he had to help the complainant undo his police belt because of its two-release system and the other evidence noted by my colleague in paragraph 28 above, was relevant to section 273.1(2)(c) and sufficient to put the section to the jury.

[47] My colleague also references the complainant's intoxicated state. I agree this evidence was relevant to section 273.1(2)(c), but wish to say more. In *R. v. Hogg* (2000), 148 C.C.C. (3d) 86, 136 O.A.C. 91 (O.N.C.A.) the Ontario Court of Appeal stated that "[t]he protection of the vulnerable and the weak and the preservation of the right to freely choose to consent to sexual activity is clearly the aim of section 273.1(2)(c)". I agree with this statement. In this regard, the cases on which the Crown relies involve vulnerable complainants or complainants in vulnerable positions:

In *R. v. Alsadi*, 2012 BCCA 183, 285 C.C.C. (3d) 316, the accused was a security guard at a psychiatric hospital, and the complainant was a patient who suffered from schizophrenia;

In *R. v. Lutoslawski*, 2010 ONCA 207, 326 D.L.R. (4th) 637, the accused was an organizer with a youth group that took children camping and the complainant was a 15-year-old girl who had gone on camping trips with the accused;

In *R. v. Makayak*, 2004 NUCJ 5, 62 W.L.B. (2d) 428, the complainant was in custody on remand and the accused was a civilian prison guard at the detachment; and

In *R. v. Thompson*, 2017 SKCA 33, 139 W.L.B. (2d) 215, the complainant was a 36-year-old woman with a developmental disability indicating an intellectual age of approximately an 11 to 13-year-old, and the accused was a friend of the complainant's parents who had previously played a supportive role in the complainant's life. The sexual contact took place under the pretext of the accused providing massage therapy to the complainant.

[48] In this case, it was open to the jury to consider the complainant—as a drunk civilian woman getting a ride home in the middle of the night from a sober police officer in his police car and then letting him into her apartment believing he was checking on her safety—to have been vulnerable. The whole

of the evidence was “reasonably capable of supporting the inferences required” for the jury to find that the officer induced the complainant to engage in the sexual activity by abusing his position.

[49] I would also say that because a complainant cannot definitively deny that he or she agreed to sexual activity because they cannot recall what happened does not necessarily mean that there is a reasonable doubt on the question of consent. Acknowledgment of the possibility of agreement does not equate to consent in law, and this is particularly true in situations where the evidence supports the engagement of section 273.1(2)(c). While the ultimate burden of proving the absence of consent lies on the Crown, a finder of fact is entitled to consider all the surrounding circumstances to determine whether or not there was consent.

[50] That said, it is important to note that, in the context of this particular case, it would still be open to the jury to return a not guilty verdict after considering the evidence in relation to section 273.1(2)(c). Moreover, even if the jury did not accept Constable Snelgrove’s evidence, the jury could still find that there was a reasonable doubt in the context of both section 273.1(1) and 273.1(2)(c).

[51] In interpreting and applying section 273.1(2)(c), the meaning of consent is important. In *R. v. Esau*, [1997] 2 S.C.R. 777, 148 D.L.R. (4th) 662 at para. 64, McLachlin J. stated:

... Consent in the context of the crime of sexual assault is a legal concept. At law, it connotes voluntary agreement. It embraces the notions of legal and physical capacity to consent, supplemented by voluntary agreement or concurrence in the act in question. *Webster’s Third New International Dictionary* (1986), at p. 482, defines consent as “capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action”.

Justice McLachlin wrote in dissent in *Esau*, although her description of consent was not in controversy with the majority judgment. This definition has been subsequently applied by the Nova Scotia Court of Appeal in *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C. (3d) 237 at paras. 44-47 and by Laform J.A. in dissent in *R. v. A.J.*, 2010 ONCA 226, 100 O.R. (3d) 676 at para. 125, whose dissenting conclusion prevailed in the Supreme Court of Canada in 2011 SCC 28, [2011] 2 S.C.R. 440. A similar but expanded description was proposed by the Alberta Court of Appeal in *R. v. Barton*, 2017 ABCA 216, 354 C.C.C. (3d) 245 at para. 217.

[52] As well, I am concerned about the use of the phrase “vitiating of consent” to describe the possible effect of section 273.1(2)(c). I would not describe section 273.2(1)(c) as providing for the vitiating of consent. Section 273.1(2)(c) provides that there is no consent to sexual activity if it has been induced by an accused’s abuse of a position of trust, power or authority. In other words, it is not a question of vitiating or nullifying consent, because there was no consent at law in the first place.

[53] Lastly, I agree with Welsh J.A. that the *Graveline* test is met. To do so, the Crown is required to show that “in the concrete reality of the case at hand” the failure to instruct on section 273.1(2)(c) could have had a material bearing on the verdict. The Crown is not required to show that the verdict would necessarily have been different (*Graveline* at paragraph 14).

[54] The record in this case shows that the jury came back to the trial judge during their deliberations with the question “what happens if we do not all agree?” To my mind, this question indicates that the jury was struggling to reach a unanimous verdict.

[55] I view this situation as support for the contention that an instruction on section 273.1(2)(c) could have had a material bearing on the verdict.

L. R. Hoegg J.A.

White J.A. (Dissenting Reasons):

[56] Carl Snelgrove, a police officer with the Royal Newfoundland Constabulary (RNC), was charged with sexual assault contrary to section 271 of the *Criminal Code*. The charge arose from an interaction that occurred while he was on duty. Mr. Snelgrove was acquitted following a trial by judge and jury. The Crown appeals the acquittal on the basis that the trial judge erred in her instructions to the jury.

BACKGROUND

[57] In the early morning hours of December 21, 2014, the complainant, who had been drinking with friends in downtown St. John's, left a bar and was looking for a taxi when she encountered Mr. Snelgrove, in uniform and in a patrol vehicle. They agreed he would drive her home, although the testimony differs as to who asked who.

[58] Mr. Snelgrove drove the complainant to her home. He did not advise the dispatcher that he had a female in the vehicle despite being aware of the RNC policy requiring him to do so. When they arrived at the complainant's residence, the complainant left the car to go into her apartment. Mr. Snelgrove testified that he remained in the car in the complainant's driveway to finish paperwork he had been doing immediately prior to driving the complainant home. While Mr. Snelgrove was still in the driveway, the complainant realized she had lost the keys to her apartment and could not get in. Mr. Snelgrove helped her enter through an unlocked window. The complainant then went to the front door and let Mr. Snelgrove into her apartment. He testified that as he started to leave she began kissing him and taking off her clothes. Mr. Snelgrove also testified that the complainant tried to remove his duty belt but was unable to so he removed it. Mr. Snelgrove testified that the complainant performed oral sex on him and they then moved to the couch and started to have vaginal sex. Mr. Snelgrove testified he had asked the complainant what she liked and she said "everything", and he had asked if she would have anal sex and she said "yes". At trial, the complainant testified that her memory was very fuzzy. She testified that she could recall talking to Mr. Snelgrove in the living room and that they kissed. The complainant testified that she went to the love seat because she was drunk and the next thing she remembered was that she "came to" to find herself in the middle of anal sex.

[59] The trial judge charged the jury on consent and incapacity by reason of intoxication and unconsciousness but not on inducing consent by abusing a position of trust, power, or authority as per section 273.1(2)(c).

ISSUES

[60] The Crown appeals Mr. Snelgrove's acquittal on the basis that the trial judge erred by not instructing the jury in relation to section 273.1(2)(c) of the *Code*.

STANDARD OF REVIEW

[61] Jury acquittals are not overturned lightly as stated by the Supreme Court of Canada in *R. v. Sutton*, 2000 SCC 50, [2002] 2 S.C.R. 595 at para. 2. The Crown appeals the jury acquittal pursuant to section 676(1)(a) of the *Code* which allows the Crown to appeal an acquittal on questions of law. The main issue in this case is whether the trial judge erred in her directions to the jury which is a question of law and therefore subject to a standard of correctness (see *R. v. Elder*, 2015 ABCA 126, 599 A.R. 385 at para. 12).

ANALYSIS

[62] Mr. Snelgrove was charged with sexual assault contrary to section 271 of the *Code*. The alleged sexual assault occurred when Mr. Snelgrove was in uniform and on duty as an RNC officer.

[63] At trial, the issue before the jury was not whether sexual activity occurred, but whether the complainant consented to the sexual activity or if there was a reasonable doubt regarding consent, and, if so, whether that consent was vitiated by incapacity because of intoxication or unconsciousness.

[64] On appeal the focus is on whether the trial judge should have instructed the jury to consider whether consent was induced by an abuse of the position of trust, power or authority and thereby vitiated.

[65] There are a number of provisions in the *Code* that deal with vitiation of consent in relation to various types of offences involving assault. The relevant provision in this case is section 273.1(2)(c) of the *Code* which provides:

273.1(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

...

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

[66] The Crown argues that the trial judge erred by refusing to instruct the jury in relation to section 273.1(2)(c) of the *Code*. Following a *voir dire* on the issue of whether the jury should be instructed in relation to section 273.1(2)(c), the trial judge concluded:

The issue before me on this *voir dire* is whether there is an evidentiary basis to put the alternate theory of liability to the jury being that if the complainant consented the consent is vitiated by section 273.1(2)(c) of the *Code*. [Section] 273.1(2)(c) says no consent is obtained for the purposes of section 271 of the *Code* where the accused

induces the complainant to engage in activity by abusing a position of trust, power or authority.

...

...[A]s stated in *R. v. L. (F.S.)*, 2009 ONCA 813, at paragraph 5, section 273.1(2)(c) of the *Code* requires proof by the Crown of an inducement to sexual activity by the abuse of a position of trust, power or authority. The mere existence of a relationship of trust, power or authority, is insufficient to vitiate consent to sexual activity. In this case, the Crown submits that the facts leading up to the sexual encounter are sufficient or, rather, the evidence leading up to the sexual encounter is sufficient to form the basis required to put the concept of inducement under section 273.1(2)(c) to the jury.

Specifically, the Crown refers to the definition of inducement as defined in [*R v. Lutoslawski*, 2010 ONCA 207, 326 D.L.R. (4th) 637, aff'd 2010 SCC 48, [2010] 3 S.C.R. 60] at paragraph 12, where the Ontario Court of Appeal stated that inducing consent by abusing the relationship set out in section 273.1(2)(c) does not imply the same kind of coercion, referring to the coercion under [section] 265(3)(d). An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity.

The Crown also refers to [*R v. Makayak*, 2004 NUCJ 5, 62 W.C.B. (2d) 428] and where the Court, in that case, indicated or discussed the meaning of the word induces in section 273.1(2)(c) and states that the use of the word induces introduces a more subtle form of pressure that can be inferred from the circumstances of the exercise of the power of authority.

The Crown submits that there is evidence that the accused induced the apparent consent such as evidence that the accused gave the complainant a ride home, evidence that the complainant did say she felt she was safer with a police officer than with a cab driver. Evidence that the accused was talking to the complainant in the car and complimented her. Evidence that the accused did not advise the Comm Centre that there was a female in his car. Evidence that the accused assisted the complainant getting into her house by opening her window. Evidence that he went into her home and did not explain in his testimony why he did so or rather suggested that he did not have an explanation why he did go into her home.

Evidence that by using a position of trust and personal feelings of confidence to induce the complainant into a position or putting himself in a position where he would not be, but for the fact that he is a police officer. However, as defence counsel submits, there is no evidence whatsoever that the complainant was induced as her evidence is, she doesn't know how it all happened. She doesn't know what happened in the apartment and how the sexual encounter occurred. She did not speak to the subjective impact, if any, of a trust relationship, see paragraph 37 of *R. v. T.D.*, 2012 ONSC 2166.

I further refer to the Ontario Court of Appeal decision of *R. v. Hogg* which [was] referenced in other cases but I'm just pointing to the reference in [*R. v. B. (N.J.)*, 2004 NSCA 23, 221 N.S.R. (2d) 247], where there's a comment in that particular case,

“*R. v. Hogg* at paragraph 28, where the Court states a complete and comprehensive response might have included an explanation of consent, inducement and vitiated consent such as recounted by Finlayson, J.A. in *R. Hogg* at paragraph 93”,

And this is the quote from *R. v. Hogg*,

“If the Crown is relying upon section 273.1(2)(c) to vitiate the complainant's consent to the sexual assault under section 271 of the *Code*, the onus was upon the Crown to establish the factual underpinning to the section, namely that the appellant was in a position of trust, power or authority with respect to the complainant which reduced her to a state of dependency upon him such that he was able to misuse his dominant position to extract her consent to a sexual assault.”

There is no evidence before me to suggest that the complainant was reduced to a state of dependency upon the accused such that he was able to misuse his dominant position to extract her consent to a sexual assault. Rather, the complainant asserts that she was too drunk to remember. If she did consent, then she did not give evidence of whether that consent was induced. It would be unjust to suggest to the jury that they can infer inducement in these circumstances, based upon the evidence at trial, particularly when the complainant cannot recall what happened.

In my view there's no evidentiary basis which would suggest that the jury should consider this alternate form of liability. After considering all the cases submitted to me, and considering the submissions of counsel, it's my determination, therefore, that there is no evidentiary basis to put section 273.1(2)(c) to the jury and I will not be doing so in my final instructions.

[67] The Crown argued that the trial judge made three errors in reaching her decision not to put section 273.1(2)(c) to the jury, specifically that the trial judge erred

1. by misinterpreting the case law as it related to the need to establish a relationship of dependency;
2. by misinterpreting the word “induces”; and
3. in finding that the complainant had to, in essence, testify that her consent was induced because the respondent was a police officer in order for this section to be put to the jury.

[68] Mr. Snelgrove argues that the trial judge did not err in her refusal to put section 273.1(2)(c) to the jury as there was no evidence of inducement and thus no evidentiary basis to support putting the section to the jury.

[69] Mr. Snelgrove, an on-duty police officer in uniform and driving a patrol vehicle, was in a position of trust, power and authority toward the complainant. The main issue is whether there is evidence that Mr. Snelgrove abused his position of trust, power or authority to induce the complainant to engage in the sexual activity, thereby requiring the trial judge to instruct the jury as to section 273.1(2)(c) of the *Code*.

[70] The Crown's first argument is based upon on the comment of the trial judge, in her reasons for refusing to put section 273.1(2)(c) to the jury, that "There is no evidence before me to suggest that the complainant was reduced to a state of dependency upon the accused such that he was able to misuse his dominant position to extract her consent to a sexual assault." The Crown argues that the trial judge misinterpreted the case law, specifically *R. v. Hogg* (2000), 148 C.C.C. (3d) 86, 136 O.A.C. 91 (Ont. C.A.), as requiring evidence that the complainant is in a state of dependency in relation to the accused before putting section 273.1(2)(c) to the jury. The Crown submits that the trial judge erred in refusing to put section 273.1(2)(c) to the jury on the basis that there was no evidence of a state of dependency.

[71] The situation in *Hogg* involved a drug user and her supplier. The Court had to determine whether the supplier was in a position of trust, power or authority in relation to the drug user. The Court found that the relationship was not inherently one where the supplier was in a position of trust, power or authority:

17 The protection of the vulnerable and the weak and the preservation of the right to freely choose to consent to sexual activity is clearly the aim of s.273.1(2)(c): *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 (S.C.C.), at 496-98; *R. c. Audet* (1996), 106 C.C.C. (3d) 481 (S.C.C.), at 490 ff; *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449 (S.C.C.), at 460-64. I have no doubt that it could have application to the relationship between a drug dealer and an addicted client. However, the relationship is not one of an imbalance of power *per se*. This is not a case of a position of authority or trust, such as in the prototypic doctor/patient, teacher/student relationship, where vulnerability is inherent to the relationship itself. The trial judge should have instructed the jury that they must be satisfied that because the appellant was a supplier of illicit drugs to the complainant, that this relationship created a relationship of dependency that could be exploited by the appellant to vitiate the complainant's consent to engage in sexual activity: *R. c. Audet, supra*; *R. v. Matheson* (1999), 44 O.R. (3d) 557 (Ont. C.A.). It should have been made clear to the jury that this

involved both an objective and a subjective standard: the objective relating to establishing that the relationship was that of supplier and drug user and the subjective relating to her dependency upon him as her supplier such that she could not give independent consent to his sexual advances. In both cases, the burden of proof was on the Crown.

[72] In determining whether the accused was in a position of trust, power or authority in relation to the complainant, the Court in *Hogg* found that a relationship in which one person is in a state of dependency on another can be exploited to vitiate consent to sexual activity. The Court in *Hogg* did not find that there is a requirement for a state of dependency in every case; it is but one type of position of trust, power or authority.

[73] In her *voir dire* reasons the trial judge simply states that in this particular case there is no evidence that the complainant was in a state of dependency; highlighting that lack of evidence in relation to that factor is not the same as saying that it is a prerequisite to putting section 273.1(2)(c) to the jury.

[74] Nowhere in her *voir dire* reasons does the trial judge state or imply that a state of dependency is a prerequisite to putting section 273.1(2)(c) to a jury. The trial judge was making the point that there is no evidence of inducement. There is evidence of a position of trust, power or authority. There is evidence that the sexual activity occurred. But there is no evidence that Mr. Snelgrove abused his position to induce consent to that sexual activity.

[75] The Crown's second argument is that "although the trial judge does not state it explicitly in her decision", she was looking for an "explicit inducement" and failed to consider whether the totality of the evidence, including Mr. Snelgrove's evidence, was capable of demonstrating an inducement. The Crown argues that the trial judge erred by looking solely to the complainant's evidence for evidence of an inducement.

[76] It is not in issue that an inducement can be found when the person in the position of trust, power or authority uses "personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity"; that inducement can be inferred from the circumstances of a case; or that the evidence does not need to come from the complainant. But there needs to be some evidence that the position was abused to induce the complainant to engage in the activity. As stated in *R. v. L. (F. S.)*, 2009 ONCA 813, 251 O.A.C. 128:

5 ... s. 273.1(2)(c) of the *Code* requires proof by the Crown of an inducement to sexual activity by the abuse of a position of trust, power or authority. The mere existence of a relationship of trust, power or authority is insufficient to vitiate consent to sexual activity.

[77] The Crown relies upon the definition of “induce” as stated in *R. v. Makayak*, 2004 NUCJ 5, 62 W.C.B. (2d) 428, at para. 69:

“Induce” is defined in the *Oxford English Dictionary* as:

1. To lead (a person), by persuasion or some influence or motive that acts upon the will to some action, condition, belief, etc.; to lead on, move, influence, prevail upon (any one) to do something.

[78] The Crown argues that the following evidence forms a sufficient evidentiary basis for putting section 273.1(2)(c) to the jury:

- The complainant testified that the respondent asked her if she needed a ride home. (In her cross-examination she testified she could not recall if the respondent had asked her if she needed a ride home).
- The complainant testified that she went with the respondent because of the “state she was in” and she “figured it would be safer to go with a police officer than a cab driver”.
- On the drive to her residence the respondent testified that the complainant told him that he was really attractive and that he looked really good in his uniform.
- The respondent suggested that they look for another way in when the complainant discovered she lost her keys. They eventually found an unlocked window which the complainant then crawled in through.
- The complainant testified that the respondent wanted to make sure she was ok so she let him in.
- The complainant testified, on cross-examination, that it was possible she consented because she was drunk so she didn’t know how she would have acted or what she may or may not have done.
- The respondent testified he had to undo his duty belt because the complainant could not get it undone.

- The respondent testified that he asked the complainant what she “liked” and she responded “everything”. He asked the complainant what she meant and she said “I’ll do anything”. The respondent then asked her if she would have anal sex and the complainant said yes.
- The respondent acknowledged he knew the RNC policy in relation to transporting females but did not follow it. He testified he did not need to generate a report on the complainant.
- The respondent acknowledged he did not mention to dispatch or his supervisor that he was driving the complainant home to an area outside his assigned area of responsibility.
- The respondent acknowledged that when the complainant initially left the police vehicle she did not invite him inside; it was only after he helped her find another way into her apartment that she invited him in.

[79] The above actions do not meet the definition of induce in this context nor do I see how inferences can be drawn from the above evidence. For example, Mr. Snelgrove not reporting to dispatch that he had a female in the patrol vehicle is arguably an abuse of his position, but how did it induce the complainant to engage in sexual activity, regardless that she was not even aware of his violation of the policy? Similarly, that the complainant let Mr. Snelgrove in after he helped her find a way into her apartment does not suggest an inducement. The only evidence is that he helped her in and went to the front door. How is this abusing his position to induce the complainant to engage in sexual activity?

[80] The Crown is missing a link; they have not established how the evidence they rely upon is evidence that Mr. Snelgrove induced the complainant to engage in sexual activity by abuse of his position or how such inducement may be inferred. The trial judge noted the same problem with the Crown’s argument at the closing of Crown counsel’s submissions on the *voir dire*, when she stated:

So I’m just having some difficulty...seeing where the evidentiary foundation is with respect to that particular connection. I can see what you’re saying in terms of, you know, there may be evidence there with respect to position of trust. Obviously, there’s evidence that sexual relations occurred, but making that connection to show that she was induced because of [an] abuse of the position, ... I’m trying to figure out where that evidence is. [I]t’s not abundantly clear to me. ...

(Emphasis added.)

[81] My colleague states that different interpretations may be drawn from the evidence which may affect factual determinations by the jury. I would caution that the judge has a role as gatekeeper in a jury trial to ensure that only defences or theories of liability with a sufficient evidentiary basis go to the jury. The remarks of the Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, in the context of instructing juries on circumstantial evidence should be heeded in this context as well:

26 There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. Baron Alderson referred to this risk in *Hodge's Case*. He noted the jury may "look for — and often slightly ... distort the facts" to make them fit the inference that they are invited to draw: p. 1137. Or, as his remarks are recorded in another report, the danger is that the mind may "take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole": W. Wills, *Wills' Principles of Circumstantial Evidence* (7th ed. 1937), at p. 45; cited by Laskin J. in *John*, dissenting but not on this point, at p. 813.

27 While this 19th century language is not suitable for a contemporary jury instruction, the basic concern that Baron Alderson described — the danger of jumping to unwarranted conclusions in circumstantial cases — remains real. When the concern about circumstantial evidence is understood in this way, an instruction concerning the use of circumstantial evidence and the reasonable doubt instruction have different, although related, purposes: see B. L. Berger, "The Rule in *Hodge's Case*: Rumours of its Death are Greatly Exaggerated" (2005), 84 *Can. Bar Rev.* 47, at pp. 60-61.

[82] The majority also state that it is not the role of the judge in a jury trial to assess the evidence but that consideration should be limited to whether there is a sufficient evidentiary foundation requiring jury instruction. I am at a loss to see how the above evidence provides *any* evidentiary foundation that Mr. Snelgrove induced the complainant to engage in sexual activity through the abuse of his position of trust, power or authority. A review of the trial judge's reasons shows that she considered the Crown's evidence *as well as* the lack of evidence from the complainant in reaching her conclusion that there was not a sufficient evidentiary foundation requiring jury instruction. The trial judge did not anywhere in her reasons require or allude to a requirement of an explicit inducement.

[83] The Crown's final argument, that the trial judge erred in finding that the complainant had to, in essence, testify that her consent was induced because the respondent was a police officer in order for this section to be put to the jury, has no merit.

[84] The trial judge explicitly recognized that inducement could be inferred. The problem here, as has exhaustively been stated, is that there was no evidence of inducement. The trial judge did not imply that the complainant had to testify that her consent was induced. The trial judge actually made the following statement in her reasons for refusing to put section 273.1(2)(c) to the jury:

It would be unjust to suggest to the jury that they can infer inducement in these circumstances, based upon the evidence at trial, particularly when the complainant cannot recall what happened.

(Emphasis added.)

[85] The trial judge did cite the complainant's lack of testimony in relation to inducement as a factor in her decision not to put section 273.1(2)(c) to the jury but did not state it was a requirement. The judge cited the lack of evidence from the complainant as to inducement to consent as an example of the total lack of evidence as to inducement. The trial judge, as stated above, referred to the Crown's evidence in her reasons for concluding that there was not a sufficient evidentiary foundation requiring jury instruction.

[86] The statement in *L. (F.S.)* bears repeating:

5s. 273.1(2)(c) of the *Code* requires proof by the Crown of an inducement to sexual activity by the abuse of a position of trust, power or authority. The mere existence of a relationship of trust, power or authority is insufficient to vitiate consent to sexual activity.

[87] The Ontario Court of Appeal addressed the purpose of section 273.1(2)(c) in *Hogg*, stating “[t]he protection of the vulnerable and the weak and the preservation of the right to freely choose to consent to sexual activity is clearly the aim of s.273.1(2)(c)”.

[88] This is balanced by the requirement for evidence of inducement through abuse of a position of trust, power or authority, in cases where persons in such positions are charged with sexual offences. Further, without the inducement requirement, Parliament would be proscribing, in effect virtually prohibiting, all sexual relationships of all those in positions of trust, power or authority. The reasoning of my colleagues whereby they purport to draw an inference from circumstantial evidence that is not suggestive of inducement conflates the notion of position of trust, power or authority with the notion of inducement and effectively interprets section 273.1(2)(c) in a manner that is inconsistent with its language. The purpose of section 273.1(2)(c) was to allow people to freely

consent while protecting from abuses of power aimed to induce consent. The Supreme Court of Canada described the importance of both aspects of section 273.1(2) in *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346:

17 The sexual assault offences invoke the criminal law to protect sexual autonomy. The *Criminal Code* and jurisprudence establish a high level of protection of the right to choose whether to engage in sexual activity and with whom. The absence of consent to sexual activity, as part of the *actus reus* of the offence, is judged subjectively from the complainant's point of view: *Ewanchuk*, at paras. 25-26. Consent cannot be implied, must coincide with the sexual activity, and may be withdrawn at any time. Additionally, no consent is obtained if the apparent agreement to the sexual activity is obtained by coercion, fraud or abuse of authority. Individually and collectively, these features of sexual assault law protect Canadians' sexual autonomy.

18 But the law has long recognized that there are limits on how completely it may fulfil that objective through the blunt instrument of the criminal law. As the most serious interference by the state with peoples' lives and liberties, the criminal law should be used with appropriate restraint, to avoid over-criminalization. It draws a line between conduct deserving the harsh sanction of the criminal law, and conduct that is undesirable or unethical but "lacks the reprehensible character of criminal acts": *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 133; A. Wertheimer, *Consent to Sexual Relations* (2003). The companion of restraint is *certainty*. The criminal law must provide fair notice of what is prohibited and clear standards for enforcement: *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 14 and 19.

(Underlining added.)

[89] While Mr. Snelgrove clearly exercised poor judgment in engaging in sexual activity with the complainant, there was no evidence that he abused his position to induce the complainant to engage in that sexual activity to warrant the trial judge instructing the jury in relation to section 273.1(2)(c) of the *Code*.

ADEQUACY OF INSTRUCTIONS

[90] It was also argued on appeal that the trial judge's instructions were inadequate with respect to how an intervening loss of consciousness would cause consensual sexual activity to no longer be consensual. Crown counsel acknowledged that there was no objection to the instructions at trial on this basis.

[91] Considering the instructions as a whole, I conclude that the trial judge's instructions on this issue were sufficient. As noted by Crown counsel, parties are entitled to a properly instructed jury, not a perfectly instructed jury (*R. v.*

Jacquard, [1997] 1 S.C.R. 314, 143 D.L.R. (4th) 433 at paras. 2, 32, 62.)
Accordingly, I would reject this ground of appeal.

SUMMARY

[92] In order to convict Mr. Snelgrove on the basis of inducement the jury would have to conclude, in the absence of evidence of inducement, that the mere fact that Mr. Snelgrove was a police officer in uniform and on duty, was in and of itself enough to make an otherwise consensual sexual interaction a sexual assault.

[93] It would have been an error for the trial judge to put s. 273.1(2)(c) to the jury as in doing so she would have had to implicitly endorse a view that in the absence of evidence of inducement the existence of a position of trust, power or authority (which is admitted) is in itself an inducement. That is a bridge too far and, it is not the law.

[94] The trial judge was clear in her view that it “would be unjust to suggest to the jury that they can infer inducement in these circumstances”. She properly understood and fulfilled her role as gatekeeper.

[95] The trial judge did not err in declining to put section 273.1(2)(c) to the jury. I would dismiss the appeal.

C. W. White J.A.