

# CED: An Overview of the Law

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## Criminal Law – Offences

### Notes for LXXXII.1(a)(i)-(iv): Sexual Assault

#### LXXXII.1(a)(i): Elements of Offence

FN1. Criminal Code, R.S.C. 1985, c. C-46, s. 271 [rep. & sub. 2012, c. 1, s. 25]; R. v. Ewanchuk (1999), 1999 CarswellAlta 99 (S.C.C.) (sexual assault comprising "assault" committed in circumstances of sexual nature, such that sexual integrity of victim violated); R. v. Palinker (2008), 2008 CarswellOnt 2050 (Ont. S.C.J.) (complainant coerced into sexual contact by accused; not sexual assault, as accused did not apply force to complainant, therefore no "assault").

#### LXXXII.1(a)(ii).A: Actus Reus – General

FN1. R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.).

FN2. R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.).

FN3. R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.).

#### LXXXII.1(a)(ii).B: Actus Reus – “Sexual”

FN1. R. v. Chase (1987), 37 C.C.C. (3d) 97 (S.C.C.) (grabbing breasts sufficient); R. v. S. (P.L.) (1991), 64 C.C.C. (3d) 193 (S.C.C.) (touching of genital area in circumstances of sexual nature sufficient); R. v. V. (K.B.) (1992), 71 C.C.C. (3d) 65 (Ont. C.A.); affirmed (1993), 82 C.C.C. (3d) 382 (S.C.C.); R. c. Bernier (1997), 119 C.C.C. (3d) 467 (Que. C.A.); affirmed (1998), [1998] 1 S.C.R. 975 (S.C.C.) (accused intending touching of breasts and testicles as jokes; sexual assault not requiring sexual motivation; offence not requiring physical violence or hostility in ordinary sense); R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.); R. v. Osborne (2007), 2007 CarswellOnt 4008 (Ont. C.J.) (sexual banter, kiss on cheek, repeated hugs; given context, acts could constitute workplace social interaction of non-sexual nature).

FN2. R. v. V. (K.B.) (1992), 71 C.C.C. (3d) 65 (Ont. C.A.); affirmed (1993), 82 C.C.C. (3d) 382 (S.C.C.) (grabbing genitals of 3-year-old child to discipline for doing same thing to another child; conviction upheld; sexual integrity violated); R. v. J. (C.) (1990), 58 C.C.C. (3d) 167 (Nfld. C.A.).

FN3. R. v. Taylor (1985), 44 C.R. (3d) 263 (Alta. C.A.) (act intended to degrade or demean another person for sexual gratification "sexual assault"); R. v. Ricketts (1985), 61 A.R. 175 (Alta.

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C.A.) (sufficient force to amount to assault accompanied by lascivious suggestion amounting to sexual assault); *R. v. Alderton* (1985), 17 C.C.C. (3d) 204 (Ont. C.A.).

FN4. *R. v. Cook* (1985), 20 C.C.C. (3d) 18 (B.C. C.A.) (part of body touched not determinative; affront to sexual integrity or sexual dignity may be sufficient); *R. v. White* (1990), 88 Sask. R. 54 (Sask. Q.B.); affirmed (1991), 91 Sask. R. 225 (Sask. C.A.) (rubbing shoulders and touching legs insufficient to constitute sexual assault); *R. v. Chen* (1990), 63 Man. R. (2d) 79 (Man. Q.B.) (teacher putting finger in hole in pants in area of victim's vagina in course of advising victim how to mend pants; conviction; actions going beyond those appropriate); *R. v. Cadden* (1989), 48 C.C.C. (3d) 122 (B.C. C.A.) (nodding at student as sign to perform fellatio or masturbation not invitation but threat to invade bodily integrity of victim; action constituting assault); *R. c. M. (S.)* (1989), 73 C.R. (3d) 60 (C.Q.) (kissing 4-year-old daughter's private parts while playing; acquittal; no intentional application of force); *R. v. Antonenko* (1988), 1988 CarswellSask 396 (Sask. Q.B.); affirmed (1989), 1989 CarswellSask 592 (Sask. C.A.); *R. v. Ricketts* (1985), 61 A.R. 175 (Alta. C.A.).

LXXXII.1(a)(ii).C: Actus Reus – “Consent”

FN1. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(1) [en. 1992, c. 38, s. 1]; *R. v. Stender* (2004), 24 C.R. (6th) 91 (Ont. C.A.); affirmed (2005), [2005] 1 S.C.R. 914 (S.C.C.) (sex obtained by threat to disseminate intimate photos of victim was not as a result of a voluntary agreement); *R. v. M. (M.L.)* (1994), 89 C.C.C. (3d) 96 (S.C.C.) (lack of resistance not equated with consent; 16-year-old complainant stepdaughter neither resisting nor objecting by word or gesture; conviction upheld); *R. v. Ewanchuk* (1999), 22 C.R. (5th) 1 (S.C.C.) (consent not legally effective unless freely given); *R. v. Darrach* (1998), 13 C.R. (5th) 283 (Ont. C.A.); affirmed on other grounds (2000), 36 C.R. (5th) 223 (S.C.C.) (definition of "consent" not unconstitutionally vague); *R. v. Ashlee* (2006), 212 C.C.C. (3d) 477 (Alta. C.A.); leave to appeal refused (2006), 2006 CarswellAlta 1696 (S.C.C.) (consent has to be given to particular sexual activity at time of activity; prior consent to sexual activity with unconscious complainant is inoperative).

FN2. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(2)(a) [en. 1992, c. 38, s. 1]; *R. v. Plummer* (1975), 24 C.C.C. (2d) 497 (Ont. C.A.) (burden on Crown to prove lack of consent beyond reasonable doubt); see also *R. v. Morrill* (1954), 18 C.R. 240 (Ont. C.A.); *R. v. Donovan* (1934), [1934] 2 K.B. 498 (Eng. C.A.); *R. v. Giovannetti* (1991), 1991 CarswellOnt 2059 (Ont. C.A.) (trial judge entitled to have reasonable doubt about consent on earlier occasion and no reasonable doubt about consent on latter occasion).

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FN3. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(2)(b) [en. 1992, c. 38, s. 1]; R. v. D. (N.J.) (1990), 112 N.B.R. (2d) 271 (N.B. C.A.) (trial judge entitled to find that victim not having capacity to consent; complainant appearing to have mental age of less than 14 years); R. c. Côté (1992), 49 Q.A.C. 76 (Que. C.A.) (effect of mental disability on ability to consent); R. c. Bernier (1997), 119 C.C.C. (3d) 467 (Que. C.A.); affirmed (1998), [1998] 1 S.C.R. 975 (S.C.C.) (complainants mentally handicapped to varying degrees); R. c. Daigle (1997), 1997 CarswellQue 758 (Que. C.A.); affirmed (1998), 1998 CarswellQue 577 (S.C.C.) (15-year-old complainant incapable of giving valid consent after drinking in one shot glass of gin spiked with PCP; accused also not taking reasonable steps to ascertain whether complainant consenting and unable to rely on defence of honest but mistaken belief); R. v. T. (D.) (2011), 2011 CarswellOnt 2708 (Ont. C.J.) (disparity in relative situations of parties meant complainant was unable to choose freely).

FN4. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(2)(c) [en. 1992, c. 38, s. 1]; R. v. Litchfield (1993), 86 C.C.C. (3d) 97 (S.C.C.) (physician charged with sexually assaulting women in course of physical examinations; court must consider all circumstances surrounding conduct, including patients' vulnerability in circumstances); R. v. May (1912), [1912] 3 K.B. 572 (Eng. K.B.); R. v. Ryan (1993), 80 C.C.C. (3d) 514 (B.C. C.A.) (no consent where patient silently permitting psychiatrist to engage in sexual conduct, given nature of specific relationship); R. c. Bernier (1997), 119 C.C.C. (3d) 467 (Que. C.A.); affirmed (1998), [1998] 1 S.C.R. 975 (S.C.C.).

FN5. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(2)(d) [en. 1992, c. 38, s. 1]; R. v. M. (M.L.) (1994), 89 C.C.C. (3d) 96 (S.C.C.); R. v. Letendre (1991), 5 C.R. (4th) 159 (B.C. S.C.) (complainant scared and asking why accused making advances; complainant required to communicate unwillingness to participate in sexual act clearly and unequivocally); R. c. Bernier (1997), 119 C.C.C. (3d) 467 (Que. C.A.); affirmed (1998), [1998] 1 S.C.R. 975 (S.C.C.) (evidence of immediate objections admissible under res gestae rule; complainants not testifying).

FN6. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(2)(e) [en. 1992, c. 38, s. 1].

FN7. Criminal Code, R.S.C. 1985, c. C-46, s. 265(3)(a).

FN8. Criminal Code, R.S.C. 1985, c. C-46, s. 265(3)(b); R. v. MacNeil (1976), 16 N.S.R. (2d) 366 (N.S. C.A.) (evidence required that accused doing some overt act from which safe to infer that complainant, as result thereof, having reasonable fear of bodily harm, and that fear leading complainant to acquiesce to act of intercourse; Crown must also establish that accused knowing or ought to have known that complainant's "consent" given as result of such fear); R. v. Makow (1973), 13 C.C.C. (2d) 167 (B.C. C.A.) (complainant alleging consent to intercourse out of fear).

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FN9. Criminal Code, R.S.C. 1985, c. C-46, s. 265(3)(c); *R. v. Lee* (1991), 3 O.R. (3d) 726 (Ont. Gen. Div.) (HIV); *R. v. P. (F.)* (1987), 35 C.C.C. (3d) 528 (B.C. C.A.) ("fraud" restricted to nature and quality of act or identity of offender; no fraud where accused agreeing to pay \$100 to prostitute for sexual acts and then not paying); *Bolduc v. R.* (1967), [1967] 3 C.C.C. 294 (S.C.C.) (physician lying to woman; acquittal); see also *R. v. Makray* (1982), 70 C.C.C. (2d) 479 (Ont. C.A.); *R. v. Maurantonio* (1967), 2 C.R.N.S. 375 (Ont. C.A.); leave to appeal refused (1967), 2 C.R.N.S. 375n (S.C.C.) (physician lying to patient regarding intimate examination; conviction); *R. v. Harms* (1943), 81 C.C.C. 4 (Sask. C.A.) (doctor lying to patient; conviction).

FN10. Criminal Code, R.S.C. 1985, c. C-46, s. 265(3)(d); *R. v. J. (R.H.)* (1993), 86 C.C.C. (3d) 354 (B.C. C.A.); leave to appeal refused (1994), 87 C.C.C. (3d) vi (note) (S.C.C.) (fact that accused in position of authority not sufficient; Crown must also prove that being reason complainant submitting); *R. v. Caskenette* (1993), 80 C.C.C. (3d) 439 (B.C. C.A.) (complainants working for accused and much smaller than accused; not established that accused in position of trust or authority or that young person in relationship of dependency); *R. v. White* (1990), 88 Sask. R. 54 (Sask. Q.B.); affirmed (1991), 91 Sask. R. 225 (Sask. C.A.) (conviction where accused worker at corrections centre and victims inmates; accused exercising authority at time); *R. v. S. (C.E.)* (1989), 89 N.S.R. (2d) 114 (N.S. C.A.) (accused in position of authority over daughter; submission not constituting consent); *St-Laurent c. Québec (Juge de la Cour du Québec)* (1993), 90 C.C.C. (3d) 291 (Que. C.A.); leave to appeal refused (1994), 175 N.R. 240 (note) (S.C.C.) (psychiatrist accused of sexually assaulting patients); *R. v. M. (M.L.)* (1994), 89 C.C.C. (3d) 96 (S.C.C.); *R. v. Matheson* (1999), 23 C.R. (5th) 269 (Ont. C.A.) ("authority" not confined to persons with right to enforce obedience but rather including persons with power to influence conduct and actions of others; provision addressing reality of consent, not nominal relationship between parties; psychologist properly convicted for sexual assaults on patients).

FN11. *R. v. A. (J.)* (2011), 2011 CarswellOnt 3515 (S.C.C.).

FN12. *R. v. Cuerrier* (1998), 127 C.C.C. (3d) 1 (S.C.C.).

FN13. *R. v. Cuerrier* (1998), 127 C.C.C. (3d) 1 (S.C.C.).

FN14. *R. v. Mabior* (2012), 2012 CarswellMan 509 (S.C.C.) (accused having low HIV viral load; accused convicted for having intercourse with three complainants without condom; accused not convicted for having sexual relations with fourth complainant with condom protection).

FN15. *R. c. C. (D.)* (2012), 2012 CarswellQue 9359 (S.C.C.).

FN16. *R. v. Cuerrier* (1998), 127 C.C.C. (3d) 1 (S.C.C.).

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FN17. R. v. M. (M.L.) (1994), 89 C.C.C. (3d) 96 (S.C.C.).

FN18. R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.).

FN19. Criminal Code, R.S.C. 1985, c. C-46, s. 150.1 [en. R.S.C. 1985, c. 19 (3rd Supp.), s. 1; am. 2005, c. 32, s. 2; 2008, c. 6, ss. 13, 54(a)].

FN20. Criminal Code, R.S.C. 1985, c. C-46, s. 150.1(6) [en. 2008, c. 6, s. 13(2)]; R. v. W. (C.R.) (1992), 110 N.S.R. (2d) 311 (N.S. C.A.) (where accused taking all reasonable steps to ascertain age of complainant, Crown must prove no consent); R. c. Bowes (1992), [1992] R.L. 470 (Que. C.A.) (accused charged with sexual exploitation of 14 year old; victim having consented; no conviction for sexual assault; consent of 14 year old valid).

LXXXII.1(a)(iii): Mens Rea

FN1. Criminal Code, R.S.C. 1985, c. C-46, s. 271 [rep. & sub. 2012, c. 1, s. 25]; R. v. P. (1976), 32 C.C.C. (2d) 400 (Ont. H.C.) (accused convicted of rape where reckless as to whether consent given); R. v. Paré (1990), 1990 CarswellBC 910 (B.C. C.A.) (recklessness regarding consent not negating defence of mistake; wilful blindness negating such defence); see also §§2-4, 11-20 (regarding offences for which no mental element specified).

FN2. R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.).

FN3. R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.); R. v. Millar (2008), 2008 CarswellOnt 3471 (Ont. S.C.J.) (complainant lacking capacity to meaningfully consent, due to intoxication; accused took reasonable steps to ascertain compliance, including turning on light to enable complainant to identify him and approaching sexual activity in slow, progressive manner).

FN4. R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.); see also §§2804, 2813.

FN5. R. v. S. (P.L.) (1991), 64 C.C.C. (3d) 193 (S.C.C.); R. v. Chase (1987), 37 C.C.C. (3d) 97 (S.C.C.); R. v. J. (C.) (1990), 58 C.C.C. (3d) 167 (Nfld. C.A.) (purpose of accused especially important where he and complainant having engaged in wrestling and tickling since complainant's childhood; sexual gratification not essential element); R. v. Moreau (1986), 26 C.C.C. (3d) 359 (Ont. C.A.); R. v. Swietlinski (1980), 55 C.C.C. (2d) 481 (S.C.C.); R. v. Leary (1977), 33 C.C.C. (2d) 473 (S.C.C.); R. c. Bernier (1997), 119 C.C.C. (3d) 467 (Que. C.A.); affirmed (1998), [1998] 1 S.C.R. 975 (S.C.C.) (sufficient that accused knowingly touching in sexual manner, knowing that victim not consenting or not capable of giving valid consent; requiring proof of sexual motivation would transform sexual assault into offence of specific intent); R. v. Ewanchuk (1999), 22 C.R. (5th) 1 (S.C.C.); R. v. Spence (2008), 2008 CarswellOnt 1387 (Ont. C.J.) (sleep negating intent).

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LXXXII.1(a)(iv): Defence Provisions

FN1. Criminal Code, R.S.C. 1985, c. C-46, s. 273.2 [en. 1992, c. 38, s. 1]; see also Criminal Law — Defences (regarding honest but mistaken belief in consent).