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# Ostensible Consent: Reality and Legal Reality

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**Case Commented On:** *R v Hajar*, 2016 ABCA 222 (CanLII)

*R v Hajar*, 2016 ABCA 222 (CanLII) is an appeal of a sentencing for sexual offences against a minor. Hajar was convicted of sexual interference and luring a child (respectively s 151 and s 172 of the *Criminal Code*) and was given a global sentence of 18 months imprisonment followed by three years probation. Both the Crown and Hajar appealed, arguing the sentence was unfit. This post focuses on the majority's rejection of the relevance of the ostensible consent of the minor to the sexual activity that was the subject of the charge, and their consequent rejection of the position that the offence was a legal technicality.

## Facts and Issues

Hajar's conviction for sexual interference involved his having a 14 year old perform fellatio on him; he was 20 at the time of the offence. At sentencing, the *de facto* consent of the complainant was said not to be a defence, and not to be considered a mitigating factor in sentencing (*R v Hajar*, 2014 ABQB 550 (CanLII) at paras 28, 31). The global sentence of 18 months imprisonment followed by three years probation was appealed, and the Court of Appeal sat as a five-justice panel. The majority decision was written by Chief Justice Fraser, Justice Paperny, and Justice Watson. Justice Bielby wrote a decision concurring in the result, and Justice Slatter wrote a dissent.

A central issue on appeal was whether a starting point for sentencing for major sexual interference should be established, and what it should be. The majority decided that a starting point was needed, and set it at three years imprisonment (at paras 71-81). Ultimately, the majority determined that a fit sentence for Hajar would have been three and a half years imprisonment. However, in light of the lengthy process delay, the majority elected not to impose that sentence and left the original sentence in place (at para 169).

## The Court's Decision

The majority recognized that there has been an unjustified disparity in sentences for sexual interference where the child was considered to have willingly participated (at para 72) and they described the treatment of *de facto* consent to be the major cause of this problem:

> [82] We turn now to the one issue that largely explains the significant differences amongst judges in sentencing for the crime of sexual interference. Parliament left absolutely no doubt that consent is not a defence to the crime of sexual interference under s 151 of the Code. But what frequently causes judges to stumble and thereby subverts sentencing is the concept of de facto consent. De facto consent connotes two separate ideas: (1) that there was actual consent, but (2) it was ineffective only because of the law. Therefore, despite the law, de facto consent should mitigate sentence on the basis that the

> sexual activity that occurred is not deserving of serious sanction. This thinking has found favour in more than one courtroom in this country. The result – an invisible finger has often pressed down hard on the sentencing scale to diminish the gravity of the offence of sexual interference or the offender's mens rea degree of responsibility or both.
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> [83] Using *de facto* consent as a mitigating factor in sentencing for sexual interference is based on a fundamental flaw. That is the erroneous notion that an adult's sexual activity with a child who gives his or her *de facto* consent is legally a crime but does not rise to the level of overall seriousness deserving of an unambiguous denunciation. This thinking is wrong – on many levels and for many reasons. (at paras 82-83, footnotes omitted)

The majority proceeded to list four problems with using the 'willing participation' of the child as a mitigating factor: (1) Parliament has clearly recognized that children in the specified age groups are incapable of consenting to the sexual activity (at paras 84-93); (2) it undermines the protection Parliament sought to ensure for children under 16 (at paras 94-96); (3) the *de facto* consent of the child is often intentionally cultivated by the offender to manipulate the child and conceal the crime (at para 97); (4) it shifts the blame to the child victim (at paras 98-100). The majority flatly rejected that the 'absence of exploitation' can be a mitigating factor in sentencing (at para 105), and dismissed that approach (which is central to the approach of the concurring justice and the dissent) as being merely "a proxy for de facto consent" (at para 111). The majority decision is forceful, clear, and unequivocal – *de facto* consent is never a mitigating factor in sentencing for sexual interference.

In her concurring judgment, Justice Bielby took the position that where the accused rebuts the presumption of exploitation, the sentencing judge should not apply the three-year starting point (at para 204). The presence of ostensible consent would not be relevant to the finding of whether or not exploitation was present. Justice Bielby found that there are circumstances where sexual interference occurs absent exploitation (at para 177); the majority held that sexual interference is inherently exploitative, but that similar considerations could lower the appropriate sentence (at para 131).

Justice Slatter, in a dissenting judgment, found that willing participation was one of many things to be considered by a sentencing judge and that it could speak to the degree of exploitation present (at para 239). He considered that some sexual interference may be non-exploitative, and believed that no starting point should be set for sentencing:

> Parliament has declared all the conduct covered by s. 151 to be criminal, but that does not mean it is all exploitative, or exploitative to the same degree. A three year starting point for non-exploitative conduct is not proportionate, and indeed may in some cases be grossly disproportionate. For non-exploitative conduct the one-year minimum sentence is likely to be the appropriate place to start the sentencing analysis. (at para 270)

**Legal, *De Facto* and Ostensible**

In addition to rejecting the application of *de facto* consent in sentencing and rejecting it in principle, the majority also rejected it as a meaningful legal term:

> The concepts we employ and the words we use to describe them matter. We prefer to use the term "ostensible consent" to describe those situations where a child "appears" to consent to sexual activity, but does not consent either in fact or in law. For obvious

> reasons, ostensible consent does not constitute a mitigating factor in sentencing either. (at para 103)

*De facto* means 'in fact' or 'in reality', and the use of it to describe the minor's apparent willingness is extremely misleading. The term *'de facto* consent' gives an unwarranted importance to the willing participation of the child – it is not consent in fact, it is a false imitation of consent. To appreciate the importance of the majority's rejection of the term, consider a portion of the decision from Hajar's initial sentencing:

> Consequently, given that s 150.1 deems there to be the absence of consent where the complainant is more than five years younger than the accused, the act of fellatio in this case must also be considered a "non-consensual" act. Simply put, the 14-year-old victim in this case did not consent to the act regardless of what she may have said or done. She was legally incapable of consenting. (2014 ABQB 550 at para 30)

That is a correct statement of law, but it holds a strange implicature. The sentencing justice used the words 'legally incapable' in the last sentence of the quote, and this would cause the average English speaker to think that the Justice was delineating 'legally incapable' from something else – the most likely candidate being "factually incapable". The term creates the false impression discussed earlier – it reduces the crime to a legal technicality. The problem with sexual interference where the child is found to be a willing participant is not the lack of legal consent; it is the lack of consent in reality. If it is accepted that the victim in a sexual interference case was able to consent in reality, then the portion of the offence that makes it morally blameworthy – sexual contact without consent – disappears. Even where it is not used to acquit or to lighten the sentence of an offender, the acknowledgement of *de facto* consent undermines the purpose of the criminalization of the behaviour – it removes the moral blameworthiness of the act.

The law concerning sexual interference specifically, and concerning sexual offences generally, cannot become an area where the public is encouraged to consider legal findings as being mere technicalities, where sentences are handed down for technical violations that cause no actual harm and where the offences are not truly deserving of serious denunciation. The changes to the law of consent in the past decades have not established legal barriers disconnected from reality around Canadians – they have changed the law's understanding of consent to better accord with the reality of consent and sexual interactions. The law of consent is an area of law formerly based on, or at least susceptible to the application of, myths and stereotypes, which has gradually been brought into accordance with reality. Appreciating that the changes to the law regarding consent have their basis in fact is central to the cultural change this area of law is seeking to engender.

The *Hajar* decision rejects the idea that the absence of legal consent is the central aspect of the offence of sexual interference – it was the absence of consent in reality. Hopefully *Hajar* will become a marker for when Alberta courts ejected *de facto* consent from the law, as *R v Ewanchuk*, [1999] 1 SCR 330 (CanLII) has become the marker for when implied consent was denounced (though see the recent *R v JR*, 2016 ABQB 414 (CanLII) for a reminder that the myth that underlies implied consent persists). I conclude with the words of the majority from *Hajar* at paragraph 170:

One final point about the evidence and circumstances of this case. There is a durability to rape myths and the predatory behaviour which spawns them that undermine fundamental norms and values in our society. Firmly rooted in ingrained inequality, these pernicious attitudes fuel the continuation of child sexual abuse. The problem is compounded when the attitudes are fertilized from outside the zone of protection our courts can create. That said, it falls to each generation of judges to ensure that equality principles flourish and strengthen and that rape myths not be allowed to poison the fair and impartial application of the criminal law. But the courts cannot do it alone. It also takes the commitment of society and political leaders to do so as well. Our children deserve no less.