**English translation of the judgment of the Court**

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| R. c. Ouellet | | | | 2025 QCCA 347 |
| COURT OF APPEAL | | | | |
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| CANADA | | | | |
| PROVINCE OF QUEBEC | | | | |
| MONTREAL SEAT | | | | |
| No.: | 500-10-700053-232 | | | |
| (540-01-098396-206) | | | | |
|  | | | | |
| DATE: | April 8, 2025 | | | |
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| CORAM: | | THE HONOURABLE | BENOÎT MOORE, J.A.  GUY COURNOYER, J.A.  FRÉDÉRIC BACHAND, J.A. | |
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| HIS MAJESTY THE KING | | | | |
| APPELLANT – Prosecutor | | | | |
| v. | | | | |
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| GAÉTAN OUELLET | | | | |
| RESPONDENT – Accused | | | | |
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| CORRIGENDUM  (of the judgment rendered on March 24, 2025) | | | | |
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**WARNING: Order in first instance restricting publication: The trial court made an order under s. 486.4 *Cr.C.*  directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.**

1. A clerical error inadvertently occurred in paragraph [43] of the Court's judgment rendered on March 24, 2025.
2. Accordingly, the Court **CORRECTS** paragraph[43] on the judgment rendered on March 24, 2025, by replacing “appellant” with “respondent”, so as to read as follows:

[43] In my opinion, the trial judge's reasons were limited to stating his conclusion in a laconic and declaratory manner (i.e., ‘conclusory reasons’),[[1]](#footnote-1) without any analysis of the respondent's or the complainant's testimony on the legal issues in dispute: the complainant's capacity to consent, her communication of consent, and the defence of an honest belief in communicated consent. The judge stated his conclusion without providing any reasons.[[2]](#footnote-2) However, the duty to give reasons requires that ‘trial judges […] state more than the result.’[[3]](#footnote-3) What aspect of the respondent's testimony was believed or found plausible, truthful or sincere with respect to the complainant's capacity to consent, her communication of consent, and the defence of an honest belief in communicated consent? I am unable to determine this.

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|  | | | BENOÎT MOORE, J.A. |
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|  | | | FRÉDÉRIC BACHAND, J.A. |
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| Mtre Simon Blais | | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | | |
| For the Appellant | | | |
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| Mtre Vincent Rondeau-Paquet | | | |
| Mtre Elisabeth Beauchamp | | | |
| BOLDUC PAQUET | | | |
| For the Respondent | | | |
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| Date of hearing: | September 10, 2024 | | |
| Taken under advisement: | | September 13, 2024 | |

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| No.: | 500-10-700053-232 | | | |
| (540-01-098396-206) | | | | |
|  | | | | |
| DATE: | March 25, 2025 | | | |
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| CORAM: | | THE HONOURABLE | BENOÎT MOORE, J.A.  GUY COURNOYER, J.A.  FRÉDÉRIC BACHAND, J.A. | |
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| APPELLANT – Prosecutor | | | | |
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| GAÉTAN OUELLET | | | | |
| RESPONDENT – Accused | | | | |
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| JUDGMENT  (Corrected on April 8, 2025) | | | | |
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**WARNING: Order in first instance restricting publication: The trial court made an order under s. 486.4 *Cr.C.*  directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.**

1. The appellant is appealing a judgment by the Court of Québec, District of Laval (the Honourable Gilles Garneau), acquitting the respondent of sexual assault, assault and assault with a weapon.
2. For the reasons of Cournoyer, J.A., with which Moore, J.A. concurs, **THE COURT:**
3. **ALLOWS** the appeal;
4. **ORDERS** a new trial on the count of sexual assault;
5. For his part, being of the opinion that the trial judge’s reasons were not so inadequate as to vitiate the judgment, and that the other grounds raised by the appellant are unfounded, Bachand, J.A. would have dismissed the appeal.

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|  | | | BENOÎT MOORE, J.A. |
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|  | | | FRÉDÉRIC BACHAND, J.A. |
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| Mtre Simon Blais | | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | | |
| For the Appellant | | | |
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| Mtre Vincent Rondeau-Paquet | | | |
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| Date of hearing: | September 10, 2024 | | |
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| REASONS OF COURNOYER, J.A. |
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1. The prosecution is appealing only against the verdict of acquittal handed down by the trial judge with respect to one count of sexual assault relating to three separate events.[[4]](#footnote-4) The respondent was also acquitted of two counts of assault.
2. The prosecution advances four grounds of appeal.
3. The trial judge allegedly erred in law: 1) in his application of the concepts of capacity and consent in relation to the commission of the offence of sexual assault; 2) in making a finding of fact in the absence of any supportive evidence; 3) in failing to give reasons for his decision such as to satisfy the functional test; 4) in assessing the complainant's credibility on the basis of prejudices and stereotypes.
4. In my opinion, the judgment was insufficiently reasoned, and I propose that the Court allow the appeal and order a new trial. For the same reason, it is extremely difficult and speculative to assess the merits of the first two grounds raised by the prosecution. That said, I nevertheless consider that, with regard to the second event, the judge made a finding of fact in the absence of evidence, which is an additional ground for ordering a new trial.
5. Even if the prosecution's right of appeal against an acquittal is limited to questions of law alone, the trial judge must nevertheless “provide intelligible reasons for an acquittal.”[[5]](#footnote-5) Since a new trial is to be held, I do not intend to provide a complete and precise summary of the complainant's and the respondent's versions of events. I believe it is imperative that I stick to the essential points in order to explain why I am of the opinion that “the reasons are so deficient as to preclude effective appellate review.”[[6]](#footnote-6)

**The trial judgment**

1. The trial judgment was delivered orally after being reserved a few weeks.
2. The judge began by summarizing the evidence led by the prosecution:

[translation]

Ms. I... L..., who is the complainant, was the accused's partner when the alleged events took place. She had met the accused at the end 2006, and they moved in together five (5) or six (6) months later. Two children were born from this relationship. The relationship ended in October 2020. She describes her relationship as normal until she gave birth to her first child. She took care of all the household chores and the child. She was tired, which caused tension in their intimate relationships.

The couple had not been getting along since 2013, following the birth of their child. She no longer had any sex drive, and the accused became increasingly insistent about having sex.

In the spring of 2014, she had her son in her arms and the couple was arguing. They were in the kitchen. She was between the island and the sink. The accused was angry with her. He had a glass bottle in his hands and threw it at her. She turned around and the bottle landed on the counter. He went down to the basement and smashed the door. She feared for herself and the child. The accused blamed her for being the cause of his frustrations.

The second event took place in September 2017. The couple was spending the evening with friends and their two children. The friends left but left the children behind. It had been a night of heavy drinking. They went to bed. She refused to have sex because her friends' children were there. He caressed her, she refused and asked him to stop. He held her wrists above her head with one hand and caressed her with the other. His gaze frightened her, she asked him to stop. He pulled on her camisole, which ripped, and that was when the accused got a hold of himself and stopped.

The next day, they avoided talking to each other, but he would tell her that it was just a game to turn her on. She did not want to have sex with him until he started therapy. He began therapy in February 2018. The third event took place in January 2018.

The third event took place in January 2018. The couple had spent the evening with several friends. There was a lot of drinking. The accused asked her for acts of affection and that they take a bath together. To buy herself some peace, she agreed. After the bath, she went to bed in her son's room.

The next day, the accused told her that they had had sex together. She did not remember anything because she was drunk. Therapy began in February 2018 and lasted one and a half years.

In the spring of 2019, they entered into a sexual contract. She had to agree to have sex with him even if she didn't want to, and he couldn't sulk or scold her, because the arguments lasted for hours.

The complainant recorded certain conversations she had with the accused.

In the first audio recording, she repeated to him that he had sex with her while she was drunk, mentioned that he scared her, and that she was afraid to say ‘no’ to him. The accused talked about his frustrations and said to her, "You threatened to leave with the children.” He wanted mediation. She wanted full custody of the children; she did not want shared custody.

She accused him splashing the children with cold water when they misbehaved. The accused told her that it was the psychologist who advised him to do so.

The conversation lasted several hours. She also mentioned that the accused had filmed her without her knowledge on two (2) occasions. She confronted him with the camera. He ran after her to take it away. He grabbed her, snatched the camera from her and drove off in his truck. When he returned, he told her that he had destroyed it.

The second audio recording: The defendant accused her of not taking care of him ever since the children were born. He insisted on sleeping with her. She refused. She slept on the couch.

The third audio recording is another argument. He told her that she no longer had any sex drive and that he would force her to have sex. She told him to go read up on consent. Both sides traded accusations.

The fourth audio recording is yet another argument and the same old accusations from both sides. He accused her of not complying with the sexual contract.

Fifth recording, yet another argument, and the complainant told him that she no longer loved him and did not feel safe. He talked about his frustration.

The last recording in August 2020, they talked about separation, they argued about sex. She ended up saying to him: ‘Do what you want, take what you have to take.’ He went upstairs to get a condom, she undressed, she wanted the argument to end: ‘Go on, screw me and leave me alone.’ They were on the couch in the living room. He penetrated her, she said that it hurt and told him to get it over as quickly as possible. It lasted about twenty minutes. During intercourse, he insulted her. Both of them insulted each other during this conversation.

During cross-examination, the Court learned that she had filed a complaint on October 30, 2020. She had left the family home on October 20, 2020, the date the accused returned from hunting. She had left him a separation letter, which was filed. The accused filed a motion in Superior Court for joint custody.

Regarding the bottle incident, she said that perhaps he wasn't aiming at her.

1. The judge then summarized the respondent's testimony:

[translation]

The accused testified in his own defence. On December 2, 2019, for his birthday, the complainant gave him a gift, namely an introductory course in handgun use.

He spoke of his couples therapy, which lasted one and a half years. It was the complainant who ended the therapy because he was stubborn.

Upon returning from hunting on October 20, 2020, he discovered the letter of separation. He sought legal counsel and had an appointment on October 23. He received a response from the complainant on October 28.

He was arrested following the complainant's complaint on November 3, 2020, while the court date for the civil motion concerning child custody was set for hearing on November 5. Divorce and custody proceedings [inaudible].

According to the sexual contract, which stipulated that they would have sex once a week, not on specific days of the week or on Sundays, provided that there were no quarrels and that it in no case was it take place during the week or on Sundays.

The event where their friends left and they left the children, he described the scene as follows: He lay down on top of her, kissed her. She wasn't interested. He insisted. She pushed him away. He turned away and fell asleep. He wasn't holding her wrists. It lasted a few seconds.

The event in the bath: They spent the evening with friends in a club and ended up in a strip club. They took a bath and had a bottle (inaudible). They kissed, she masturbated him. She got out of the bath and told him she would wait for him in bed.

She lay down in her son's room. He caressed her, she spread her legs, and they had sexual intercourse. The next day, after having sex with her, he told the complainant that he enjoyed it. She said to him, ‘I didn't know, I didn't want to.’

Regarding the sexual encounter in the living room in 2020: They argued, and she said to him, ‘You want to fuck me, fine, fuck me.’ He went to get a condom, and they had sex. The accused admitted that he had been vulgar that evening.

Regarding the camera: He mentioned that she came out of the bathroom, threw the camera at him and said, ‘What's this?’ He took the camera, and she ran after him to try to take it away from him. He got into the truck and drove off to destroy the camera.

Regarding the bottle: He was leaning against the island and she was standing at the sink counter. He was three (3) feet away from her. She insulted him and he threw the bottle into the sink, never aiming at her.

During cross-examination, he consistently maintained the same version of events that he had given during direct examination. Another witness was heard, but he was not relevant and contributed nothing to the debate.

1. With respect to applicable law, the judge referred to *W.(D.),*[[7]](#footnote-7) because there were conflicting versions. Regarding the principles applicable to consent, the judge cited *G.F.*[[8]](#footnote-8) as to the complainant’s capacity to consent, *J.A.*[[9]](#footnote-9) with respect to the requirement that there be consent throughout the sexual activity as well as *Ewanchuk*.[[10]](#footnote-10)
2. Finally, the judge explained his findings:

[translation]

So, as the Court has found, these are completely different versions.

With regard to the bottle incident, the Court has reasonable doubt because, during cross-examination, the complainant even admitted that he may not have been aiming at her. Consequently, he is acquitted of the fourth charge, namely, assault with a weapon.

With regard to the other events, the Court listened to the accused very carefully. It believes his entire testimony. He provided details that are both plausible and truthful, and his testimony appears sincere.

Another factor that tips the balance is the fact that she did not want shared custody; she wanted full and complete custody. And when we look at the sequence of events, three (3) days or so before the accused's motion was heard in Superior Court, he was arrested. Also, in her letter, she always mentioned that she wanted custody of the children, and she insisted on this point, repeating it several times during their arguments. This leaves the Court very sceptical.

Also, most of the events took place after they had engaged in heavy drinking that evening.

Furthermore, the Court considers that, taking into account the entire encounter that took place, the Court cannot reach any other conclusion than that there was informed consent.

And with regard to the event in the bath, believing the accused, the Court considers that consent was given and that it was abided by.

With regard to the other acts of assault, namely the fact that he grabbed her wrists or that he snatched the camera from her, his testimony is also credible and I believe him.

Another factor that the Court considers is that she mentioned several times that she was afraid of him. However, it should not be forgotten that on his birthday, she gave him an introductory course in handgun use.

This couple was in a very unhealthy relationship, and I hope they can find common ground for the sake of the children.

Therefore, in light of all the above, the Court finds that there is reasonable doubt in favour of the accused and acquits him of all charges.

**The giving of reasoned judgments: applicable principles**

1. I believe it is essential to recall the principles applicable to the giving of reasoned judgments.
2. The duty to provide reasons for judgments is an essential component in the implementation of the open court principle. This principle embodies the importance of ensuring that justice be done openly, an essential hallmark of a democratic society.[[11]](#footnote-11)
3. In *Sheppard*,[[12]](#footnote-12) Binnie J. explained why the giving of reasons is the pith and marrow of the judicial function:

[15] Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be *seen* to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.

1. In sum, “[t]he delivery of reasoned decisions is inherent in the judge’s role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.”[[13]](#footnote-13) This means that while a trial judgment may be succinct, it must adequately “flag the difficulties with the […] evidence” led.[[14]](#footnote-14)
2. It is true that [translation] “an oral judgment rendered from the bench is never as perfect as a written one.”[[15]](#footnote-15) As the Court noted in *LSJPA — 152*:[[16]](#footnote-16) [translation] “appellate courts are certainly aware that oral judgments, delivered in circumstances that are well known, are sometimes succinct and limited to the essentials. Appellate judges must therefore read between the lines, not ignore the implicit, strive to recognise the underlying meaning of first instance judgments, but, that said, speculation is not part of their duties.”
3. However, the requirements to give reasons increase when the judgment, although delivered orally, as in this case, is rendered after having been reserved for a certain time. In *Lessard*,[[17]](#footnote-17) Vauclair J.A. stated the following in this regard:

[22] [translation] However, these principles are weakened here for two reasons. The first is that the judgment delivered orally was rendered after the matter had been taken under advisement for approximately one month. Without claiming that the coherence of a decision can be measured solely by the time in which the case was under advisement, it seems to me that the requirement for high-quality reasons should increase proportionally. The importance of giving reasons in the context of criminal law is now undeniable: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869. It is not always possible to grasp the meaning of confused reasons, and sometimes it is even impossible. An appellate court cannot resort to speculation to understand them: *R. c. Casavant*, 2016 QCCA 1340. Conversely, the reading of the reasons may be shocking because the words used clearly indicate errors. In principle, it is not within the mandate of an appellate court to rewrite or alter the words used.

1. The leniency inherent in the functional test reflects acknowledgment of the demanding task facing judges with regard to the giving of reasons.[[18]](#footnote-18) That said, this test does not mean that the lowest common denominator should be accepted, as this would not meet the legitimate expectations of the accused, the prosecution, the complainants and society.
2. As Binnie J. noted in *Sheppard*,the case law prior to that Supreme Court decision was not intended as “an appellate invitation to trial judges to insulate their decisions from judicial review *by saying as little as possible about the reasons for their judgment*.”[[19]](#footnote-19)
3. To echo LeBel J.’s comments in *R. v. Araujo*, no one wants judges to emulate Marcel Proust and write judgments that rival in length his novel *À la recherche du temps perdu*.[[20]](#footnote-20)
4. The length of a judgment is not a guarantee of its quality, but conciseness is not always a virtue.
5. There is a minimum threshold. In some cases, the trial judge must summarize the evidence[[21]](#footnote-21) and assess whether or not there are inconsistencies with regard to the material facts concerning the live issues of the case. This requirement applies from the outset when “factors supporting or detracting from credibility [are not] clear from the record.”[[22]](#footnote-22)
6. Thus, it will sometimes be necessary for the reasons to be more complete, as McLachlin C.J. explained in *R.E.M.*:

[44] The degree of detail required may vary with the circumstances. Less detailed reasons may be required in cases where the basis of the trial judge’s decision is apparent from the record, even without being articulated. More detail may be required where the trial judge is called upon “to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue”: *Sheppard*, at para. 55, point 6.[[23]](#footnote-23)

1. The giving of reasoned judgments ensures “not only the reality, but the *appearance* of a fair adjudicative process.”[[24]](#footnote-24) An assessment of the fairness of the trial process must be made from the point of view of fairness in the eyes of the accused, the prosecution, the complainants and the public.[[25]](#footnote-25) Failure to comply with the duty to give reasons has consequences for all parties, as it may require a new trial that could have been avoided if sufficient reasons had been given.
2. As noted in *G.F.*[[26]](#footnote-26), the key lies in the ability to understand why the judge reached the conclusion that he or she did:

[71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the “what” and the “why” from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge’s findings: paras. 50 and 52.

[Underlining added]

1. The reasons must therefore enable an appellate court to determine whether an error was made in light of the record, the live issues and the parties' submissions:

[74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard*, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55. Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application — the presumption that “the trial judge understands the basic principles of criminal law at issue in the trial”: *R.E.M*., at para. 45. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, “[t]rial judges are presumed to know the law with which they work day in and day out”: see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.

[75] Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law. In those cases, cursory reasons may obscure potential legal errors and not permit an appellate court to follow the trial judge’s chain of reasoning: *Sheppard*, at para. 40, citing *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27. While trial judges do not need to provide detailed maps for well-trod paths, more is required when they are called upon to chart new territory. However, if the legal basis of the decision can nonetheless be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient.[[27]](#footnote-27)

[Underlining added]

1. That said, “the inadequacy of reasons [does not] provide[…] a free-standing right of appeal and [does not] in itself confer[…] entitlement to appellate intervention.”[[28]](#footnote-28) Of course, “not every failure or deficiency in the reasons provides a ground of appeal,”[[29]](#footnote-29) because “enough was said in the trial judge’s reasons to show that he came to grips with the issues.”[[30]](#footnote-30)
2. Since this case concerns an appeal by the prosecution against an acquittal, it is important to emphasize the fundamental importance of the presumption of innocence because of its impact on the duty to give reasons. An excellent summary can be found in *Kruk*:[[31]](#footnote-31)

[61] The presumption of innocence also restricts how credibility is assessed in cases of conflicting testimony between defence and Crown witnesses. The analysis of testimony must never be treated as a contest of credibility, and triers of fact need not accept the defence’s evidence or version of events in order to acquit (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 23; *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 757). The burden *never* shifts to the accused to establish their own innocence, and the onus always lies with the Crown to prove every essential element (*R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, at para. 13).

[62] Reasonable doubt applies to credibility assessments such that if the evidence the Crown adduced does not rise to the level required of a criminal conviction, an accused cannot be found guilty simply because they are disbelieved (see *W. (D.)*). Some elements of the totality of the evidence may give rise to a reasonable doubt, even where much — or all — of the accused’s evidence is disbelieved. Any aspect of the accepted evidence, or the absence of evidence, may ground a reasonable doubt. Moreover, where the trier of fact does not know whether to believe the accused’s testimony, or does not know who to believe, the accused is entitled to an acquittal (*J.H.S.*, at paras. 9-13; *R. v. H. (C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.); *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, at p. 533; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 19). Finally, where the Crown relies on circumstantial evidence to establish guilt, the trier of fact may only convict if guilt is the only reasonable inference from the evidence (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 30).

1. Furthermore, it is important to recall the caution issued by Binnie J. in *Walker*,[[32]](#footnote-32)namely that deficiencies in the reasons for acquittal should not give rise to a ground of unreasonable acquittal:

[2] In my view, with respect, while the trial judge’s duty to give reasons applies generally to acquittals as much as to convictions, the *content* of the reasons necessary to give full effect to the right of appeal is governed by the different issues to which the reasons are directed on an acquittal (perhaps no more than the basis of a reasonable doubt) and a conviction (factual findings showing the pathway to conviction, explaining why significant elements of the evidence are accepted, rejected or fail to raise a reasonable doubt). Caution must be taken to avoid seizing on perceived deficiencies in a trial judge’s reasons for acquittal to create a ground of “unreasonable acquittal” which is not open to the court under the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”). […]

1. With respect to the limited right of the prosecution to appeal an acquittal, Binnie J. elaborated as follows:

[21] In this case, the Crown argues that the perceived deficiencies in the trial judge’s reasons undermined the exercise of its statutory right of appeal. However, the Crown’s argument must be assessed in light of the Crown’s limited right of appeal from an acquittal (“a question of law alone” (s. 676(1)(a) *Cr. C.*)) in contrast to the broader right of appeal given by Parliament to an accused from a conviction. In particular, the Crown has no right to appeal what it regards as an “unreasonable acquittal”: *R. v. Kent*, [1994] 3 S.C.R. 133; *R. v. Morin*, [1988] 2 S.C.R. 345, and *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 33.

[22] A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence. The intervener Attorney General of Ontario argues that “[t]he fact that the accused is presumed innocent doesn’t derogate in any way from the judge’s duty to correctly apply all applicable legal principles” (Factum, at para. 7). This is true, so far as it goes, but whereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the *absence* of proof. The trial judge may just conclude that one or more of the elements of the offence was “not proven” to the criminal standard. This difference does not excuse a trial judge from failure to provide intelligible reasons for an acquittal, but it necessarily informs an assessment of whether the reasons are so deficient as to preclude effective appellate review.

[Underlining added]

1. To conclude on the approach to be followed when the prosecution raises the inadequacy of reasons in the trial judgment, I believe it will be helpful to refer to the summary of these principles provided by Fairburn A.C.J.O. of the Court of Appeal for Ontario in *Aiken*:[[33]](#footnote-33)

[43] While the duty to give reasons applies generally to both reasons for convictions and reasons for acquittals, particular caution must be exercised in relation to this ground of appeal when it is raised in the context of an appeal from acquittals: *Walker*, at para. 2. As noted in *Walker*, at para. 2, "the content of the reasons necessary to give full effect to the right of appeal is governed by the different issues to which the reasons are directed on an acquittal . . . and a conviction" (emphasis in original).

[44] The difference between these situations lies in the fact that while a conviction requires satisfaction of proof beyond a reasonable doubt of every element of the offence, an acquittal can simply rest on the absence of proof: *Walker*, at para. 22. While this difference does not excuse a "failure to provide intelligible reasons for an acquittal", it does inform an "assessment of whether the reasons are so deficient as to preclude effective appellate review": *Walker*, at para. 22. The different approach to the adequacy of reasons for an acquittal guards against Crown appeals that are nothing more than claims of an "unreasonable acquittal" under the guise of claims of inadequacy of reasons: *Walker*, at paras. 2, 21.

[45] In my view, it cannot be said that the appellant in this case is really complaining about an unreasonable acquittal or the simple rejection of a Crown theory that was advanced at trial. To the contrary, for the reasons that follow, I find that the appellant is really raising a concern over the fact that the reasons disclose no "intelligible basis for the verdict[s]" of acquittal: *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, 2008 SCC 51, at para. 53; *Sheppard*, at para. 28; *R. v. S. (D.E.)*, [2018] O.J. No. 6632, 2018 ONCA 1046, at para. 13.

1. Of course, it is important to avoid “expanding Crown appeals beyond the scope of s. 676.”[[34]](#footnote-34) To repeat, “[t]he trial judge is not held to some abstract standard of perfection”[[35]](#footnote-35) and an appellate court “is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself.”[[36]](#footnote-36)

**Application to the facts of this case**

1. I will now analyse whether the judgment provides adequate reasons to determine whether the basis for the judgment of acquittal on the charge of sexual assault is intelligible and allows the prosecution to exercise its right of appeal.
2. I note an initial issue.
3. The judge noted that he believed [translation] “[the respondent’s] entire testimony. [The respondent] [had] provided details that [were] both plausible and truthful, and his testimony appear[ed] sincere.” Furthermore, the judge stated that the complainant's interest in challenging the shared custody sought by the respondent made him sceptical.
4. At first glance, these two elements might seem sufficient to determine the outcome of the appeal. With regard to the first, the judge believed the respondent's testimony, which far exceeded reasonable doubt and justified an acquittal. As for the second, the judge took into account the complainant's interest, a factor going to credibility on which reasonable doubt can be based.[[37]](#footnote-37)
5. However, I consider that, given the live issues at trial and the fact that the judge was called upon “to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue,”[[38]](#footnote-38) more detailed and intelligible reasons were necessary.
6. I have reproduced the judge's findings in their entirety.
7. In my opinion, the trial judge's reasons were limited to stating his conclusion in a laconic and declaratory manner (i.e., ‘conclusory reasons’),[[39]](#footnote-39) without any analysis of the appellant's or the complainant's testimony on the legal issues in dispute: the complainant's capacity to consent, her communication of consent, and the defence of an honest belief in communicated consent. The judge stated his conclusion without providing any reasons.[[40]](#footnote-40) However, the duty to give reasons requires that ‘trial judges […] state more than the result.’[[41]](#footnote-41) What aspect of the respondent's testimony was believed or found plausible, truthful or sincere with respect to the complainant's capacity to consent, her communication of consent, and the defence of an honest belief in communicated consent? I am unable to determine this.
8. However, as legal scholarship has pointed out,[[42]](#footnote-42) these are questions that raise issues of application. In my opinion, intelligible — and not meagre — reasoning was therefore required in this case.
9. Second, the judge rightly observed that [translation] “most of the events [had taken] place after they had engaged in heavy drinking that evening.” But what conclusion does he draw from this finding? No one knows. Intoxication was relevant in assessing the credibility and reliability of the complainant's and respondent's testimony, but also with respect to the issue of the complainant's capacity to consent.
10. The record contains evidence regarding the complainant's state of intoxication, which raised questions about her capacity to consent to sexual activity and to communicate her consent to the respondent. The judgment provided no explicit nor even implicit answer on this point.

\* \* \*

**The various events**

1. Although section 581 of the *Criminal Code* provides that each count in an indictment shall in general apply to a single transaction, it is common for the evidence led to relate to several distinct events within the same count.[[43]](#footnote-43) This is the case here, since the prosecution led evidence regarding three separate events.
2. As the Supreme Court explained in *M.R.H.*, the practice of “drafting a single count of an indictment to capture multiple distinct incidents creates the risk that the accused may be convicted without the jurors’ unanimous agreement on any one underlying incident.”[[44]](#footnote-44) This risk did not arise in the case at bar.
3. To establish the respondent's guilt on the charge of sexual assault, the prosecution only had to prove beyond a reasonable doubt that one of the assaults had occurred.[[45]](#footnote-45) That said, inadequate reasons for acquittal in relation to one of the three events will justify a retrial order in relation to that event alone.
4. I will therefore discuss each event that was proven at trial in order to assess the adequacy of the reasons in relation to each of them.

**The 2017 sexual assault**

1. Apart from stating that he believed the accused and that he rejected the complainant's testimony, the judge did not explain the basis for his finding that consent existed with respect to that event. Even if the judge could reject the complainant's testimony, according to the respondent's own version, the complainant had not consented to participate in a sexual activity.
2. Furthermore, in a conversation recorded on March 16, 2018, the complainant confronted the respondent about this incident, telling him the following: [translation] “You wanted to force me to have sex with you when I didn’t feel like it, and I told you so.” The respondent then replied, [translation] “Well yeah. And what did it take? Two? Three minutes? Tops. And then I stopped.”[[46]](#footnote-46)
3. The judge was required to sort through this conflicting evidence and explain in an intelligible way the basis for his conclusion as to existence of the complainant’s consent.

**The 2018 sexual assault**

1. This allegation concerns the incident in the bath. I quote again from the judge's summary:

[translation]

The event in the bath: They spent the evening with friends in a club and ended up in a strip club. They took a bath and had a bottle (inaudible). They kissed, she masturbated him. She got out of the bath and told him she would wait for him in bed.

She lay down in her son's room. He caressed her, she spread her legs, and they had sexual intercourse. The next day, after having sex with her, he told the complainant that he enjoyed it. She said to him, ‘I didn't know, I didn't want to.’

1. He set out his final conclusion as follows:

[translation]

And with regard to the event in the bath, believing the accused, the Court considers that consent was given and that it was abided by.

1. Here is part of the description of this event given by the respondent:

[translation]

|  |  |
| --- | --- |
| Q | Did you make sure to check that she was okay, that she was conscious? |
| A | I was so drunk that no, I didn't... Make sure she was conscious, yes, she was conscious, there. But make sure of what? Check her pulse, no, I didn't check her pulse if that's your question. |
| Q | OK. Then, make sure that she consented? |
| A | Make sure that she consented? Well, as far as I was concerned, I lay down next to her and she didn't say anything. Then, when I started masturbating her, she spread her legs. |

1. In light of the respondent's answers, I am of the view that the judge's reasons do not allow us to determine how the judge could have concluded that consent was communicated by the complainant for the sexual activity in their son's bed. In fact, they do not even allow us to determine whether the judge actually concluded that consent existed or whether he concluded that the respondent could have believed that consent existed.
2. Indeed, the respondent did not claim in his testimony that the complainant had communicated her consent to him. At best, according to the version presented by the respondent, he raised a defence of honest but mistaken belief in communicated consent.
3. The excerpt from the respondent's testimony and a reading of the following passage from *Barton* reveal how the insufficiency of reasons forecloses understanding of the judge's conclusion that [translation] “consent was given and that it was abided by”:

[107] That said, it is possible to identify certain things that clearly are not reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant’s silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk*, at para. 51, citing *M. (M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see Sheehy, at p. 518). Accordingly, an accused’s attempt to “test the waters” by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see Sheehy, at p. 537).

[Underlining added]

1. In these circumstances, it was especially crucial for the trial judge to explain his reasoning clearly, which he failed to do, leaving us with the impossible task of speculating as to the very basis of his decision.

**The 2020 sexual assault**

1. Finally, with regard to the last event, the prosecution argued in its closing submissions that the initial consent had been vitiated by an abuse of power on the part of the respondent when assessing the relationship between the latter and the complainant as a whole. The judgment provided no answer to this argument.
2. The prosecution also argued that during this event, which was recorded, the complainant told the respondent several times that she did not like the sexual activity they were engaging in and that she did not want to have sex.
3. The prosecution added that the following excerpt shows that the complainant withdrew her consent to continue the sexual encounter when the respondent reminded her of the terms of the sexual contract by which she had consented in advance to one sexual encounter per week:

[translation]

RESPONDENT: When you tell me once a week, bitch, it's once a week. Okay? Fucking bitch.

I.L.: Get away from me, damn it.

RESPONDENT: Are you anxious to get this over with or not?

I.L.: Get away from me. Get away from me. Your breath stinks, get away from me.

RESPONDENT: Your breath stinks too, bitch.

I.L.: I’m not panting in your face.

RESPONDENT: Of course not, you’re not doing any work.

I.L.: No. I don’t want to fuck.

RESPONDENT: No, it's true, you never want to fuck, but you love having my cock deep inside your (inaudible).

I.L.: No.

RESPONDENT: Oh yeah, oh yeah.

I.L.: No. Right now, do you know what this is called, Gaétan?

RESPONDENT: Ah, come on. It's true that you studied at university to know that huh. You're the one who stripped naked in front of me, not the other way around.

1. It is not essential to draw a definitive conclusion on whether this passage establishes that the complainant withdrew her consent to continue the sexual activity, as the prosecution argues. Suffice it to say that the judge did not resolve the conflicting evidence on a key issue, namely consent.
2. I would add that the exchange itself highlights the need to also assess the relevance of the *sexual contract* between the respondent and the complainant to the validity of the initial consent. Indeed, this *sexual contract* appears to be based on general consent given in advance, which could undoubtedly be interpreted as contrary to the requirement that consent must be given on each specific occasion.[[47]](#footnote-47)
3. When, as in this case, the laconic nature of the judgment presents an insurmountable obstacle, to even attempt reading between the lines, not ignoring what is implied or striving to recognize the underlying meaning of the judgment proves to be impossible.[[48]](#footnote-48) In such a situation, an appellate court can only find that the insufficiency of reasons negates the right of appeal from being exercised.[[49]](#footnote-49)

**The first two grounds**

1. Since I have concluded that the respondent’s acquittal was insufficiently reasoned, I do not necessarily have to address the first two grounds raised by the prosecution, namely, the application of the concepts of capacity and consent in relation to the commission of the offence of sexual assault and the making of a finding of fact in the absence of any supportive evidence.
2. Nevertheless, I believe it is prudent to do so.[[50]](#footnote-50)

**Error of law in the application of the concepts of capacity and consent**

1. For the reasons I have already set out, I am of the view that the inadequacy of the reasons interferes with the prosecution's right of appeal. This is illustrated in this ground of appeal, where the prosecution attempts, as best it can, to show that the judge erred in law in his application of the concepts of capacity and consent. The proposed exercise is based on a highly speculative interpretation of the basis for the judgment, which I find unconvincing.

**Finding of fact made in the absence of evidence**

1. I am of the view that the judge made a finding of fact in the absence of evidence with regard to the second event. Here is the relevant passage from the judgment on which the error alleged by the prosecution is based:

[translation]

The event in the bath: They spent the evening with friends in a club and ended up in a strip club. They took a bath and had a bottle (inaudible). They kissed, she masturbated him. She got out of the bath and told him she would wait for him in bed.

She lay down in her son's room. He caressed her, she spread her legs, and they had sexual intercourse. The next day, after having sex with her, he told the complainant that he enjoyed it. She said to him, ‘I didn't know, I didn't want to.’

[Underlining added]

1. It is not contested on appeal that the respondent testified that he told the complainant that he would wait for her in bed, not the other way around. There is therefore no evidence to suggest that the complainant invited the respondent to join her in bed.
2. That said, my colleague is of the view that the trial judge did not err in law, because the prosecution is giving too broad a scope to *J.M.H.*[[51]](#footnote-51) which must be understood in light of Lamer J.'s observations in *Schuldt*.[[52]](#footnote-52) With respect, I must disagree with this interpretation.
3. In *J.M.H.*, Cromwell J. identified four situations where alleged shortcomings in a trial judge’s assessment of the evidence constitute an error of law and thereby allow appellate review of an acquittal. The recent case of *Hodgson*,[[53]](#footnote-53) provides the following useful summary:

[35] In *J.M.H.*, the Court identified four non-exhaustive such situations:

1. Making a finding of fact for which there is no evidence — however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule.

2. The legal effect of findings of fact or of undisputed facts.

3. An assessment of the evidence based on a wrong legal principle.

4. A failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence.

1. The present appeal concerns the first of these situations, namely making a finding of fact for which there is no evidence. In *J.M.H.*, Cromwell J. articulated the scope of that error of law:

[25] It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604. It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence. An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met. Moreover, as pointed out in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, a reasonable doubt is logically derived from the evidence or absence of evidence. Juries are properly so instructed and told that they may accept some, all or none of a witness’s evidence: *Lifchus*, at paras. 30 and 36; Canadian Judicial Council, Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence (online).

[26] The principle that it is an error of law to make a finding of fact for which there is no supporting evidence does not, in general, apply to a decision to acquit based on a reasonable doubt. As Binnie J. put it in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 22:

A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence. The intervener Attorney General of Ontario argues that “[t]he fact that the accused is presumed innocent doesn’t derogate in any way from the judge’s duty to correctly apply all applicable legal principles” (Factum, at para. 7). This is true, so far as it goes, but whereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. [Emphasis deleted.]

[27] The point was expressed very clearly in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33: “. . . as a matter of law, the concept of ‘unreasonable acquittal’ is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt.”

1. From these passages I glean the following principles:

1) it is an error of law to make a finding of fact for which there is no supporting evidence;

2) an acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met;

3) a reasonable doubt is logically derived from the evidence or absence of evidence;

4) the principle that it is an error of law to make a finding of fact for which there is no supporting evidence does not, in general, apply to a decision to acquit based on a reasonable doubt;

5) as a matter of law, the concept of ‘unreasonable acquittal’ is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt.

1. In the present case, the judge's finding of fact that the complainant had invited the respondent to join her in bed was not supported by any evidence. This inescapable determination puts an end to any further analysis and cannot in any way be qualified by arguing that it is a misinterpretation or misapprehension of the evidence.
2. I cannot agree that *J.M.H.* and *Schuldt* stand for the proposition that a finding of fact that is not supported by the evidence constitutes an error of law only when the burden of proof rested on the accused. In *Schuldt*, the Manitoba Court of Appeal had overturned the acquittal handed down at trial because it was of the view that “[t]here must be a factual foundation upon which to have reasonable doubt, and it simply does not exist in the present case.”[[54]](#footnote-54) As is known, and I shall have more to say about this later, reasonable doubt can rest on the absence of proof.
3. That said, how are we to interpret the passage I have underlined in Lamer J.'s opinion?

Therefore, it is with the greatest of deference for the contrary view that I cannot find in *Belyea*, as Martland J. did, support for the basis upon which he decided the *Lemire* and the *Wild* appeals. I do agree with him, however, that a finding of fact that is made in the absence of any supportive evidence is an error of law. I must say, however, that that will happen as regards an acquittal only if there has been a transfer to the accused by law of the burden of proof of a given fact.[[55]](#footnote-55)

[Underlining added]

1. In my opinion, *B.(G.)* and *J.M.H.* provide guidance on the interpretation that should be adopted. In *B.(G.)*, Wilson J. wrote:

Lamer J. concluded that *Wild* had been correctly decided because the trial judge had speculated on the possibility that one of the other occupants might have been the driver of the car thus coming to a conjectural conclusion which he considered might be inconsistent with guilt. Lamer J. confirmed that this would indeed constitute an error of law. He further held, however, that while he agreed with Martland J. that a finding of fact made in the absence of any supportive evidence is an error of law, this will only happen in the case of an acquittal on the basis of a reasonable doubt if there has been a transfer to the accused by law of the burden of proof of a given fact. Lamer J. added that the majority decision in *Wild* should not be taken as detracting from this statement of the law.

In *Schuldt* the accused was charged with having attempted to break and enter a gun shop with the intent to commit an indictable offence. The accused had been acquitted at trial as the trial judge found that there was no proof that the accused had the requisite intention. The acquittal was set aside by the majority of the Manitoba Court of Appeal on the basis that the trial judge's finding of fact was not reasonable but fanciful and quite out of touch with the reality of the case. The Court of Appeal therefore found that there was no factual basis upon which to have a reasonable doubt and that this constituted an error of law. Relying on *Sunbeam* and *Lampard* Lamer J. concluded that the Court of Appeal had exceeded its jurisdiction. He explained why at p. 610:

In other words, absent a shifting of the burden of proof upon the accused there is always some evidence upon which to make a finding of fact favourable to the accused, and such a finding, if in error, is an error of fact. But when the burden of proof has been shifted (as is the case for proof of intent when a person is found in a place which he or she has broken into), it can be said, absent any evidence to the contrary, that there is no evidence upon which a reasonable doubt could exist as regards the intent of the accused, and an appeal against the ensuing acquittal raises a question of law alone.

In light of these authorities it was, in my view, clearly not open to the Court of Appeal to overturn the acquittal because it found it to be unreasonable or unsupported by the evidence. On an appeal from an acquittal as opposed to an appeal from a conviction an appellate tribunal exceeds its jurisdiction if it attempts to reassess the facts in order to determine whether the trial judge's findings were reasonable. However, even if *Schuldt* had the effect of narrowing the scope of a question of law for purposes of an appeal from an acquittal pursuant to s. 605(1)(a), as was suggested by the British Columbia Court of Appeal in *R. v. Dixon* (1988), 26 B.C.L.R. (2d) 251, it only did so for cases in which the issue before the court is when, if ever, a finding of fact becomes a question of law.[[56]](#footnote-56)

[Underlining added]

1. The principle articulated by Lamer J. in *Schuldt* provides that, in the case of a decision to acquit based on a reasonable doubt, a finding of fact that is not supported by any evidence will constitute an error of law only if the law has transferred to the accused the burden of proving a given fact. However, this does not call into question the general principle that a finding of fact for which there is no supporting evidence constitutes an error of law.
2. In other words, the absence of evidence cannot be invoked as an error of law to challenge an acquittal based on reasonable doubt. Indeed, the absence of evidence can always justify reasonable doubt.[[57]](#footnote-57) However, the absence of evidence may be an error of law in cases where there is a reversal of the burden of proof, requiring the accused to prove a fact, and the accused fails to establish that fact.[[58]](#footnote-58)
3. The absence of evidence that explains reasonable doubt is therefore a circumstance that differs from one in which the accused has the burden of establishing certain facts. In the first case, the absence of evidence does not constitute an error of law, but it obviously does in the second. The general principle set out in *J.M.H.* remains intact: a finding of fact that is not supported by any evidence constitutes an error of law. This is the issue that arises in the present appeal.
4. On the other hand, there are other passages in *J.M.H.* that help to clarify the scope of *Schuldt* and reject the idea that the trial judge's assessment of the evidence can constitute an error of law for the purposes of permitting an appeal by the prosecution only in cases where there has been a shifting in the burden of proof to the accused.
5. Cromwell J. squarely addressed that argument in *J.M.H.*:

[33] Having reviewed four types of cases in which an alleged mishandling of the evidence may constitute an error of law alone, I return to the appellant’s submissions. He argues that on a Crown appeal from an acquittal, where the error of law is alleged to be a defect in the trial judge’s assessment of the evidence, a reviewable error arises only where four conditions are met: (a) an error of law has been committed; (b) the misapprehension of the evidence is not properly characterized as either an unreasonable verdict or a miscarriage of justice; (c) the Crown can show with a high degree of certainty that the error affected the verdict; and (d) there has been a shift in a legal burden to the accused. For reasons I will develop, I cannot accept this submission.

[…]

[37] The appellant’s fourth point is that a trial judge’s treatment of the evidence can never constitute an error of law for the purposes of permitting a Crown appeal unless there has been a shifting of the burden of proof. He bases this position on a statement by Lamer J. in *Schuldt*, at p. 604:

. . . a finding of fact that is made in the absence of any supportive evidence is an error of law. I must say, however, that that will happen as regards an acquittal only if there has been a transfer to the accused by law of the burden of proof of a given fact.

[38] The appellant contends that the Court’s decision in *Wild* should now be considered to have been wrongly decided.

[39] Respectfully, I do not accept either of these submissions. As I explained earlier, the principle set out in *Schuldt* (and many other cases) is that a reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt. The Court has twice, in *Schuldt* and *B. (G.)*, explained the proper basis of the decision in *Wild*. It is only where a reasonable doubt is tainted by a legal error that appellate intervention in an acquittal is permitted.

[Underlining added]

1. In my view, Cromwell J.'s conclusion is a complete answer to my colleague's interpretation of *Schuldt*. I haven't found any Canadian appellate decision that adopts the additional requirement he suggests.[[59]](#footnote-59)
2. As for the quest for consistency between the rights of appeal of the accused and that of the prosecution, this is not relevant. Indeed, “different policy considerations apply” between those rights of appeal and “there is no principle of parity of appellate access in the criminal process.”[[60]](#footnote-60)
3. I return to the facts of the case. The judge concluded, in the absence of evidence establishing this fact, that the complainant had invited the respondent to join her in bed. This determination was such as to support his conclusion that the complainant consented to sexual activity. This is a significant error of law. With regard to the second event, I therefore hold that “the verdict of acquittal would not necessarily have been the same had the error not occurred.”[[61]](#footnote-61)
4. In summary, a new trial must be ordered because of the inadequacy of reasons with respect to the three events and, for an additional ground with respect to the second event, because the judge drew a key finding of fact in the absence of evidence.
5. For these reasons, I propose that the Court order a new trial.

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| GUY COURNOYER, J.A. |

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| REASONS OF BACHAND, J.A. |
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1. With the greatest respect to the contrary opinion, I am of the view that, despite their undeniably laconic nature, the reasons given by the trial judge make it possible to understand what he decided and why. I also consider that the imperfections they contain did not undermine the exercise of the Crown’s right of appeal. Furthermore, I consider that the other grounds raised by the Crown are unfounded and that the appeal should therefore be dismissed.

\* \* \*

1. I begin by recalling that, under s. 676(1)(a) of the *Cr.C.*, the Crown may appeal a judgment of acquittal “on any ground of appeal that involves a question of law alone*/pour tout motif d’appel qui comporte une question de droit seulement*.” No provision of the *Criminal Code* allows it to appeal such a judgment on grounds involving questions of fact or of mixed fact and law.
2. As the Supreme Court recently noted in *Hodgson*, the restricted nature of the Crown’s ability to appeal “has deep roots in the principles that underlie our criminal justice system.”[[62]](#footnote-62) In that case, the Court also noted that avoiding wrongful convictions is one rationale that explains why the scope of the accused’s right of appeal is wider than the Crown’s,[[63]](#footnote-63) while adding that “[t]he most important justification behind the limited nature of the Crown’s right of appeal […] lies in the principle against double jeopardy.”[[64]](#footnote-64) It also emphasised the importance of respecting those limits:[[65]](#footnote-65)

[E]xpanding the Crown’s right of appeal beyond its proper scope would have a profound impact on the interests of accused persons, especially due to the considerable anxiety created by the prospect of a new trial after a person has been acquitted (see *Budai*, at para. 125, quoting *R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 890, per McLachlin J., concurring in the result). Allowing the Crown’s restricted right of appeal to expand beyond its scope would undermine the provision’s protection against wrongful convictions and double jeopardy.

1. In *Hodgson*, the Supreme Court also recalled that drawing the line between questions of law and questions of fact or of mixed fact and law can become challenging,[[66]](#footnote-66) and that this difficulty often arises when the alleged error concerns a trial judge’s assessment of the evidence.[[67]](#footnote-67) However, the Court reiterated what it had explained in *Chung*, namely that, in order to characterize the alleged error as an error of law, “[a]n appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof.”[[68]](#footnote-68)
2. With these principles in mind, I now turn to examine the grounds of appeal, beginning with that relating to the adequacy of reasons of the judgment under appeal.

\* \* \*

1. According to the Crown, the judge did not adequately explain why the facts as recounted by respondent led him to conclude that the complainant had consented to the three sexual acts. Furthermore, the judge allegedly erred in failing to address certain issues raised at trial, including the respondent's honest but mistaken belief that the complainant had consented, as well as the issue—specific to the third incident—of a possible vitiation in consent arising from a situation of abuse of power on the part of the respondent.
2. I consider these grounds to be unfounded.
3. As the Supreme Court explained in *G.F.*,[[69]](#footnote-69) the reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why.[[70]](#footnote-70) Factual sufficiency is a low bar, notably because it must be considered in the context of the record as a whole.[[71]](#footnote-71) It follows that “[i]t will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge’s findings.”[[72]](#footnote-72) As for legal sufficiency, the reasons must allow the aggrieved party to meaningfully exercise their right of appeal:[[73]](#footnote-73) “[l]awyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred.”[[74]](#footnote-74) Furthermore, in the context of this case, I consider it important to bear in mind another well-established principle, which was reiterated by the Supreme Court in *J.M.H.*: “[a] trial judge is not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed.”[[75]](#footnote-75)
4. Although the analysis provided in the judgment under appeal is very brief, three things are clear. First, the judge accepted the respondent's testimony. He did not do so peremptorily, but after finding that the respondent had testified sincerely, that his account was consistent, and that he had provided details that were both plausible and truthful. Second, the judge did not accept the complainant's testimony. He found it neither credible nor reliable because, first, the complainant had an interest in lying in order to improve her position in the child custody dispute and, second, because of the inconsistency between her claim that she was afraid of the respondent and the fact that she had offered to give him an introductory course in handgun use. Finally, the judge inferred from the facts as recounted by respondent — and from the audio recording, with regard to the third incident — that the complainant had subjectively and voluntarily consented to the three sexual acts.
5. In light of these findings, one understands why the judge accepted the respondent's version and rejected that of the complainant. Moreover, the Crown does not question the adequacy of the reasons supporting the analysis of the probative value of the respondent's testimony. Furthermore, with regard to the probative value of the complainant's testimony, the Crown’s submissions in support of its final ground of appeal show that it had no difficulty understanding the judge's reasoning and exercising its right of appeal.
6. The judge's reasons also help to understand why he concluded that the complainant had subjectively and voluntarily consented to the three sexual acts.
7. With regard to the first incident, the conclusion is understandable in light of the fact that the court had rejected the complainant's testimony — the only direct evidence of a lack of consent — and accepted the respondent's version that he had stopped kissing her after she told him she did not want to have sex.
8. With regard to the second incident, we gather from the judge's reasons and the defence theory that he concluded that the sexual activity was consensual on the basis of the respondent's testimony that the complainant was conscious and had spread her legs in response to the touching. I pause here to emphasize that the question is whether the judge's reasoning is *understandable*, not whether one *agrees* with it. The question of whether the judge could reasonably infer from these circumstantial facts that the complainant had consented to sexual activity is a question of fact, which is entirely different from the question of whether his reasons make his reasoning understandable.
9. Finally, with regard to the third incident, I note, first, that the Crown argued at trial that the complainant had withdrawn her consent to sexual intercourse and not that she had consented throughout the incident, but that her consent was vitiated. Therefore, the judge can hardly be faulted for not addressing the issue of vitiated consent. For the rest, we gather from his reasons and the defence theory that he concluded that the complainant's consent could be inferred from her actions and words and from the fact — confirmed by the audio recording — that she never asked the respondent to stop penetrating her. Again, the question is not whether this reasoning is convincing, but only whether it satisfies the requirements set out in *G.F.[[76]](#footnote-76)*. In my opinion, it does.
10. I would add that, because the judge concluded that the complainant had subjectively and voluntarily consented to the three sexual acts, he did not have to consider whether the respondent could rely on the defence of honest but mistaken belief in communicated consent. The fact that his reasons do not mention this is therefore of no consequence.
11. In light of these factors — and bearing in mind that the reasons given in first instance judgments do not have to be perfect,[[77]](#footnote-77) especially in the case of judgments rendered orally[[78]](#footnote-78) —, I am of the opinion that the judgment under appeal is sufficiently substantiated in fact and that the imperfections it contains did not prevent the Crown from exercising its right of appeal. All in all, I agree with the respondent that, under the guise of inadequacies in the reasons of the judgment under appeal, the Crown is in fact seeking to indirectly challenge findings of fact that it is not permitted to challenge because of the limited scope of its right of appeal. In the circumstances, it seems fitting to recall the teachings of *Walker*:[[79]](#footnote-79)

[W]hile the trial judge’s duty to give reasons applies generally to acquittals as much as to convictions, the content of the reasons necessary to give full effect to the right of appeal is governed by the different issues to which the reasons are directed on an acquittal (perhaps no more than the basis of a reasonable doubt) and a conviction (factual findings showing the pathway to conviction, explaining why significant elements of the evidence are accepted, rejected or fail to raise a reasonable doubt). Caution must be taken to avoid seizing on perceived deficiencies in a trial judge’s reasons for acquittal to create a ground of “unreasonable acquittal” which is not open to the court under the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”)). […]

[Italics in the original, underling added]

1. Therefore, in my opinion the ground of appeal based on the inadequacy of the trial judge’s reasons should be rejected.

\* \* \*

1. The Crown also challenges the judge's analysis of the respondent's version of events. Essentially, it argues that the facts as recounted by the latter — which the judge had necessarily accepted, since he found his testimony to be probative as a whole — established that the three sexual encounters were non-consensual. In its view, the errors allegedly made by the judge constituted errors of law, since they were errors relating to the legal consequences of facts that had been established or were undisputed within the meaning of *J.M.H.*.[[80]](#footnote-80) In other words, the judge allegedly drew incorrect legal conclusions from the facts as recounted by respondent as to the circumstances of the three sexual encounters.
2. In my view, the Crown is mistaken as to the nature of the issues raised by this part of its appeal.
3. Whether a complainant subjectively and voluntarily consented to sexual activity is a question of fact.[[81]](#footnote-81) In this case, the judge inferred from the facts as recounted by respondent — facts that were necessarily circumstantial, since an accused cannot testify directly as to a complainant’s state of mind[[82]](#footnote-82) — that the complainant had subjectively and voluntarily consented to sexual intercourse. Thus, if the judge erred, it was either in his analysis of the probative value of the respondent's testimony or in the factual inferences he drew from the facts as recounted by respondent. In either case, any error he may have made cannot be characterized as an error of law.[[83]](#footnote-83)
4. Therefore, I would not give effect to this ground of appeal.

\* \* \*

1. The Crown further argues that, in analysing the respondent's testimony regarding the second alleged sexual encounter, the judge committed another type of error of law. More specifically, the judge allegedly misinterpreted the substance of the respondent's account of comments allegedly made by the complainant shortly before the event. The relevant passage from the judgment reads as follows:[[84]](#footnote-84)

[translation]

The event in the bath: They spent the evening with friends in a club and ended up in a strip club. They took a bath and had a bottle (inaudible). They kissed, she masturbated him. She got out of the bath and told him she would wait for him in bed. She lay down in her son's room. He caressed her, she spread her legs, and they had sexual intercourse. The next day, after having sex with her, he told the complainant that he enjoyed it. She said to him, ‘I didn't know, I didn't want to.’

[Underlining added]

1. There is common ground that the respondent testified, rather, that he had told the complainant that he would wait for her in bed, and not the other way around. According to the Crown, the judge's misapprehension led him to draw a finding of fact that was tainted by an error of law, by lack of supporting evidence within the meaning of *J.M.H.*[[85]](#footnote-85). Furthermore, this error would have vitiated his entire analysis of the evidence relating to the second sexual encounter. It would therefore be overriding.
2. In my opinion, the Crown is mistaken as to the nature of the error it relies upon, because it gives too broad a scope to *J.M.H.*. While it is true that the Supreme Court stated in that decision that “it is an error of law to make a finding of fact for which there is no supporting evidence,”[[86]](#footnote-86) this statement must be placed in its proper context in order to properly understand its scope. The relevant excerpt reads as follows:[[87]](#footnote-87)

It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604. It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence. An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met. […]

1. In *Schuldt*, the accused had been charged with attempting to break and enter a gun shop with intent to commit an indictable offence. He was acquitted, as the trial judge concluded that the Crown had not proven beyond a reasonable doubt that the required intent existed. However, the acquittal was set aside on appeal, with the majority of judges in the Manitoba Court of Appeal finding that the facts in evidence “[were] more than enough from which to find or infer that the accused, in concert with another, attempted to break and enter the gun shop with intent to commit an indictable offence.”[[88]](#footnote-88)
2. In a unanimous judgment, per Lamer J., as he then was, the Supreme Court restored the acquittal. Although it acknowledged that “it is an error of law to make a finding of fact for which there is no supporting evidence,”[[89]](#footnote-89) it specified “that that will happen as regards an acquittal only if there has been a transfer to the accused by law of the burden of proof of a given fact.”[[90]](#footnote-90) It then summarized the main features of this particular category of error of law as follows:[[91]](#footnote-91)

In other words, absent a shifting of the burden of proof upon the accused there is always some evidence upon which to make a finding of fact favourable to the accused, and such a finding, if in error, is an error of fact. But when the burden of proof has been shifted (as is the case for proof of intent when a person is found in a place which he or she has broken into), it can be said, absent any evidence to the contrary, that there is no evidence upon which a reasonable doubt could exist as regards the intent of the accused, and an appeal against the ensuing acquittal raises a question of law alone.

[Underlining added]

1. Then, applying this analytical framework to the facts of the case, the Court concluded that, since no burden rested on the accused with regard to the required intent, any error that the trial judge may have made in analysing this issue was an error of fact and not of law. The Crown’s appeal was therefore barred.
2. In light of the relevant excerpt from *J.M.H.* and the teachings of *Schuldt*, two clarifications must be made regarding the scope of the statement that “it is an error of law to make a finding of fact for which there is no supporting evidence.”[[92]](#footnote-92)
3. The first relates to the subject matter of this particular type of error of law: it applies only to the *finding of fact* for which there is no supporting evidence. This clarification is important in this case because, rather than challenging a finding that the judge made with respect to a disputed fact, the Crown is challenging a finding that the judge made in describing the substance of circumstantial evidence — namely, the respondent's testimony about what was said when the complainant got out of the bathtub — that was relied on in the context of a debate about an alleged lack of consent. However, as I understand it, nothing in *Schuldt* or in the earlier decisions cited by Lamer J. supports the proposition that a mistake as to the substance of evidence could, on its own, constitute an error of law. The focus in these cases is on findings relating to disputed facts, in this case the constituent elements of the offences with which the accused was charged. It follows that, in the present case, the applicability of the teachings of *J.M.H.* must be analysed with emphasis on the judge's finding that the complainant consented to the disputed sexual intercourse, and not on his finding that she told the respondent, as she was getting out of the bath, that she was waiting for him in bed.
4. Secondly, *Schuldt*, on which the Supreme Court relied in *J.M.H.* in stating that “it is an error of law to make a finding of fact for which there is no supporting evidence,”[[93]](#footnote-93) makes clear that an error of law giving rise to an appeal by the Crown exists only where the disputed finding relates to a matter in respect of which the burden of proof lay with the accused. However, in the present case, even if we were to accept for the sake of argument that the error committed by the judge led him to make a finding regarding the complainant's consent that was not supported by any evidence,[[94]](#footnote-94) the Crown's theory would run up against the fact that this is an element of the offence of sexual assault for which the burden of proof was not shifted to the respondent.
5. I find the proposition that any mistake as to the substance of evidence gives rise to an error of law for the purposes of s. 676(1)(a) of the *Cr.C.* problematic in other respects.
6. First, such a conclusion would introduce inconsistency in the characterization of the same error depending on whether it is invoked by the Crown or by the accused. In the context of an appeal against a conviction, a mistake as to the substance of evidence does not lead to “a wrong decision on a question of law*/* *une décision erronée sur une question de droit*” within the meaning of s. 686(1)(a)(ii) *Cr.C.*, but rather to an error capable of causing a “miscarriage of justice*/ erreur judiciaire*” within the meaning of s. 686(1)(a)(iii) *Cr.C.*[[95]](#footnote-95).
7. This inconsistency could also prove problematic at a more substantial level. An accused who alleges a miscarriage of justice arising from a mistake as to the substance of evidence must show that the error in question “go[es] to the substance rather than to the detail”[[96]](#footnote-96), that it indeed “be material rather than peripheral to the reasoning of the trial judge”[[97]](#footnote-97) and that it “play[ed] an essential part not just in the narrative of the judgment but “in the reasoning process resulting in a conviction”.”[[98]](#footnote-98) This is a “stringent standard.”[[99]](#footnote-99) However, in the context of an appeal against an acquittal, the burden on the Crown, although heavy,[[100]](#footnote-100) is limited to showing, “to a reasonable degree of certainty that the impugned error of law might have had a material bearing on the acquittal”[[101]](#footnote-101) — in other words, “that the verdict may well have been affected by [the error].”[[102]](#footnote-102) There therefore appears to be a real difference between these two burdens and, if this is indeed the case, the Crown’s theory could lead to the rather incongruous situation where an error of the same type would more readily lead to the setting aside of an acquittal than to the setting aside of a conviction.
8. Furthermore, I find it difficult to interpret the teachings of *J.M.H.* so broadly without disregarding those of *Chung* — referred to above[[103]](#footnote-103) — according to which “[a]n appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof.”[[104]](#footnote-104) However, in my view, any mistake by the trier of fact as to the substance of the evidence cannot be traced, either directly or indirectly, to any question of law whatsoever.
9. Finally, I am of the view that the recent teachings of *Hodgson* also preclude the broad interpretation that the Crown gives to *J.M.H.*. In addition to reiterating what it had stated in *Chung* and recalling the historical foundations and rationale for the Crown’s limited right of appeal[[105]](#footnote-105) — noting that it “seeks to prevent an appeal on the facts”[[106]](#footnote-106) —, the Supreme Court emphasized that appeal courts must guard against the risk of unduly broadening this “extraordinary remedy,”[[107]](#footnote-107) while adding that this risk “is especially high when the error pertains to an alleged shortcoming in the trial judge’s handling of the evidence.”[[108]](#footnote-108) *Hodgson*'s message is clear: appeal courts must continue to strictly adhere to the limits of the Crown's right of appeal and avoid labelling as errors of law errors in the assessment of evidence that are in no way related to any legal issue.
10. In short, a mistake as to the substance of evidence does not, in itself, raise a question of law for the purposes of permitting an appeal by the Crown.[[109]](#footnote-109) And since the respondent had no burden with respect to the disputed fact — namely, the complainant's consent — to which the circumstantial evidence that the judge allegedly misunderstood relates, the second ground of appeal raised by the Crown does not raise any question of law and is therefore barred also.

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1. Finally, the Crown challenges the judge's analysis of the credibility of the complainant's testimony. More specifically, the judge allegedly erred in law by relying on myths or stereotypes in two respects.
2. The first error was made when the judge took into account the fact that, in civil proceedings still pending at the time of the trial, the plaintiff was seeking sole parenting time with the two children she had with the respondent. The relevant passage from his judgment reads as follows:[[110]](#footnote-110)

[translation]

Another factor that tips the balance is the fact that she did not want shared custody; she wanted full and complete custody. And when we look at the sequence of events, three (3) days or so before the accused's motion was heard in Superior Court, he was arrested. Also, in her letter, she always mentioned that she wanted custody of the children, and she insisted on this point, repeating it several times during their arguments. This leaves the Court very sceptical.

1. In the Crown’s view, the judge could not consider the complainant less credible because of her request for sole parenting time: this would be a stereotypical generalization with no basis in the evidence.
2. Here again, the Crown advances an argument which, on reflection, proves to be barred.
3. As the Supreme Court has recently noted in *Kruk*, “[w]hile it is a myth that women regularly fabricate allegations of sexual assault, it is not an error to consider whether the circumstances of a particular case support the existence of a motive to fabricate.”[[111]](#footnote-111) To the contrary, it went on to say, “where the defence adduces evidence on this point, a trial judge is obliged to consider it to give full effect to the presumption of innocence.”[[112]](#footnote-112) That is precisely what the judge did in this case. It is important to note, as the respondent rightly points out, that the judge's concern was not simply that the complainant was seeking sole parenting time with the children. Rather, it related to the timing of the complainant's criminal complaint and the filing of her civil claim, a circumstantial fact that the judge could take into consideration in determining whether the complainant had a motive to lie.[[113]](#footnote-113) Therefore, any error he may have made in analysing the complainant's interest in the outcome of this case cannot be characterized as an error of law.
4. Finally, the judge allegedly made another error in the following passage of his judgment:[[114]](#footnote-114)

[translation]

Another factor that the Court considers is that she mentioned several times that she was afraid of him. However, it should not be forgotten that on his birthday, she gave him an introductory course in handgun use.

1. According to the Crown, the judge erred in comparing the complainant's behaviour to that of a perfect victim, i.e., the typical behaviour of a victim of sexual assault who claims to fear her attacker. He therefore relied on a myth or stereotype that discriminates against complainants in sexual assault cases and, in doing so, committed an error of law.
2. In my opinion, the Crown is mistaken. Although the above quoted passage of the judgment under appeal is not entirely clear, I believe that, in all probability, the judge probably was not engaged in a plausibility analysis based on generalization, but rather in an analysis of the internal consistency of the complainant's testimony. Since such an analysis is undoubtedly a matter of fact, any error the judge may have made in this part of his analysis cannot be characterized as an error of law.
3. Furthermore, even assuming that the judge did resort to a generalization in the above passage, it would likely be a generalization about human behaviour in the broad sense, and not a generalization about the behaviour expected of a victim of sexual assault towards their aggressor.[[115]](#footnote-115) This distinction is crucial: while it is accepted that the use of generalizations corresponding to a discriminatory myth or stereotype against complainants in sexual assault cases is likely to give rise to an error of law,[[116]](#footnote-116) the general rule — as clarified by the Supreme Court in *Kruk* — is that the erroneous reliance on a generalization about human behaviour in assessing the probative value of evidence gives rise to an error of fact and not of law.[[117]](#footnote-117) It follows that, assuming the judge erred in finding that the complainant's credibility was undermined by the fact that she offered the respondent an introductory course in handgun use, this would constitute an error of fact with respect to which the Crown has no right of appeal.

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1. For these reasons I propose that the Court dismiss the appeal.

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| FRÉDÉRIC BACHAND, J.A. |

1. *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247 (Ont. C.A.), para. 23, leave to appeal denied [2005] 1 S.C.R. xiv; *R. c. D.I.Du.B*, 2006 QCCA 460, para. 102; *R. c. L.G.*, 2005 QCCA 749, para. 97; *R. c. Laflamme*, 2014 CACM 7, para. 16; *R. v. Brunet*, 2011 ONCA 262, para. 2; *R. v. Nelson*, (2004), 1 M.V.R. (5th) 17 (C.A. Ont.), para. 18; *R. v. Anglin*, [2005] O.J. No. 1093 (C.A. Ont.), para. 9. [↑](#footnote-ref-1)
2. *R. v. Feeney*, [1997] 2 S.C.R. 13, para. 32; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, paras. 44‑45; *R. c. Bertrand*, 2011 QCCA 1412, para. 73; *R. c. Dorval*, 2010 QCCA 2287, para. 21. [↑](#footnote-ref-2)
3. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 33. [↑](#footnote-ref-3)
4. I will comment further below on the drafting of a single count relating to several separate events. [↑](#footnote-ref-4)
5. *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, para. 22. [↑](#footnote-ref-5)
6. *Id.* [↑](#footnote-ref-6)
7. *R. v. W.(D.)*, [1991] 1 S.C.R. 742. [↑](#footnote-ref-7)
8. *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801. [↑](#footnote-ref-8)
9. *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440. [↑](#footnote-ref-9)
10. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. [↑](#footnote-ref-10)
11. *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, para. 66. [↑](#footnote-ref-11)
12. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869. [↑](#footnote-ref-12)
13. *Id.*, para. 55. [↑](#footnote-ref-13)
14. *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903, para. 29. [↑](#footnote-ref-14)
15. *Lessard c. R.*, 2022 QCCA 1396, para. 21. [↑](#footnote-ref-15)
16. 2015 QCCA 39, para. 3. [↑](#footnote-ref-16)
17. *Lessard c. R.*, 2022 QCCA 1396. [↑](#footnote-ref-17)
18. *R. v. Burns*, [1994] 1 S.C.R. 656, pp. 664-665; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, para. 74. [↑](#footnote-ref-18)
19. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 35 [italics added]. [↑](#footnote-ref-19)
20. *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, para. 46. [↑](#footnote-ref-20)
21. *R. v. R.E.M*., 2008 SCC 51, [2008] 3 S.C.R. 3, para. 50. [↑](#footnote-ref-21)
22. *Id.*, para. 51. [↑](#footnote-ref-22)
23. *Id.*, para. 44. See also *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, para. 27. [↑](#footnote-ref-23)
24. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, para. 22. [↑](#footnote-ref-24)
25. *R. v. Mills*, [1999] 3 S.C.R. 668, para. 72. [↑](#footnote-ref-25)
26. *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801. [↑](#footnote-ref-26)
27. *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801. [↑](#footnote-ref-27)
28. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 53. [↑](#footnote-ref-28)
29. *Id.*, para. 55, point 4. [↑](#footnote-ref-29)
30. *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903, para. 25. [↑](#footnote-ref-30)
31. *R. v. Kruk*, 2024 SCC 7. [↑](#footnote-ref-31)
32. *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245. [↑](#footnote-ref-32)
33. *R. v. Aiken*, 2021 ONCA 298. [↑](#footnote-ref-33)
34. *R. v. Hodgson*, 2024 SCC 25, para. 40. [↑](#footnote-ref-34)
35. *Sheppard*, para. 55, point 7; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, para. 45. [↑](#footnote-ref-35)
36. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 26. [↑](#footnote-ref-36)
37. *R. v. W.(D.)*, [1991] 1 S.C.R. 742, p. 757: “In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue”; *R. v. Kruk*, 2024 SCC 7, para. 62. [↑](#footnote-ref-37)
38. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 55, point 6; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, para. 44; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, para. 27. [↑](#footnote-ref-38)
39. *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247 (Ont. C.A.), para. 23, leave to appeal denied [2005] 1 S.C.R. xiv; *R. c. D.I.Du.B*, 2006 QCCA 460, para. 102; *R. c. L.G.*, 2005 QCCA 749, para. 97; *R. c. Laflamme*, 2014 CACM 7, para. 16; *R. v. Brunet*, 2011 ONCA 262, para. 2; *R. v. Nelson*, (2004), 1 M.V.R. (5th) 17 (C.A. Ont.), para. 18; *R. v. Anglin*, [2005] O.J. No. 1093 (C.A. Ont.), para. 9. [↑](#footnote-ref-39)
40. *R. v. Feeney*, [1997] 2 S.C.R. 13, para. 32; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 44‑45; *R. c. Bertrand*, 2011 QCCA 1412, para. 73; *R. c. Dorval*, 2010 QCCA 2287, para. 21. [↑](#footnote-ref-40)
41. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 33. [↑](#footnote-ref-41)
42. See K. Roach, “Sexual Assault Law” (2022), 70 C.L.Q. 1; H. Stewart, “The Fault Element of Sexual Assault” (2022), 70 C.L.Q. 4; M. Plaxton, “Sexual Assault’s Strangely Intractable Fault Problem” (2022), 70 C.L.Q. 33; I. Grant and J. Benedet, “The Meaning of Capacity and Consent in Sexual Assault: *R. v. G.F.”* (2022), 70 C.L.Q. 78; N. Kaschuk, “Intoxication, Sexual Assault, and Consent” (2022), 70 C.L.Q. 113; H. Stewart, “Fault and “Reasonable Steps”: The Troubling Implications of *Morrison* and *Barton”* (2019), 24 Can. Crim. L. Rev. 379. [↑](#footnote-ref-42)
43. See, for example, *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, where “[t]he evidence dealt with 11 incidents relating to 4 counts respecting the complainant” (para. 6). On this issue, see: *R. v. Schoer*, 2019 ONCA 105, para. 62; *R. v. L.F.P.*, 2017 ONCA 132, para. 3; *R. v. Chamot*, 2012 ONCA 903, para. 49; *R. v. Sandhu*, 2009 ONCA 102, para. 19; *Charrière c. R.*, 2021 QCCA 1338, paras. 96-101. [↑](#footnote-ref-43)
44. *R. v. M.R.H.*, 2019 SCC 46, [2019] 3 S.C.R. 563, para. 5. [↑](#footnote-ref-44)
45. *Foomani c. R.*, 2023 QCCA 232, para. 141; *Perron c. R.*, 2022 QCCA 1674, para. 28; *R.B. c. R.*, 2021 QCCA 1813, para. 23. [↑](#footnote-ref-45)
46. The respondent maintains that there was no sexual intercourse or touching of a sexual nature. There was no discussion at trial regarding the specific legal basis for a finding of guilt in respect of this first incident. That said, given the recorded exchange that I have reproduced, the use of force or the threat of force in a sexual context (*R. v. Chase*, [1987] 2 S.C.R. 293, p. 302) raised the question of whether the respondent's conduct constituted sexual assault. Although I am of the view that the judge's finding regarding the existence of consent is inadequately reasoned, the judge must nevertheless have determined that the respondent's conduct was sexual in nature before finding that consent existed. [↑](#footnote-ref-46)
47. *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, para. 31: “consent [is] the conscious agreement of the complainant to engage in every sexual act in a particular encounter.” [↑](#footnote-ref-47)
48. *LSJPA — 152*, 2015 QCCA 39, para. 3. [↑](#footnote-ref-48)
49. *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, para. 22. [↑](#footnote-ref-49)
50. *R. v. Ste-Marie*, 2022 SCC 3, [2022] 1 S.C.R. 14, para. 14. [↑](#footnote-ref-50)
51. *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197. [↑](#footnote-ref-51)
52. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592. [↑](#footnote-ref-52)
53. *R. v. Hodgson*, 2024 SCC 25. [↑](#footnote-ref-53)
54. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, p. 598. [↑](#footnote-ref-54)
55. *Id.*, p. 604. [↑](#footnote-ref-55)
56. *R. v. B.(G.)*, [1990] 2 S.C.R. 57, pp. 69-71. [↑](#footnote-ref-56)
57. *R. v. Lifchus*, [1997] 3 S.C.R. 320, para. 36; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, para. 25. As Cromwell J. explained in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, para. 28: “[r]easonable doubt is not an inference or a finding of fact that needs support in the evidence presented at trial.” [↑](#footnote-ref-57)
58. M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales*, 31st Ed., Éditions Yvon-Blais, 2024, paras. 51.74, pp. 1375-1376. [↑](#footnote-ref-58)
59. *R. v. Tubongbanua*, 2022 ONCA 601, paras. 29-30; *R. v. Knezevic*, 2016 ONCA 914, para. 28; *R. v. Everard*, 2016 ABCA 300, paras. 7-9; *R. v. Ammar*, 2020 ABCA 336, para. 49; *R. v. Pearson*, 2024 ABCA 245, para. 62; *R. v. Correia*, 2024 BCCA 361, para. 14; *R. v. Ukabam*, 2024 SKCA 15, para. 20; *R. v. Omeasoo et al.*, 2019 MBCA 43, para. 26; *R. v. C.J.C.*, 2018 NLCA 68, para. 22. See also the legal literature E. G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, vol. 2, 3rd Ed., Thomson Reuters, 2022 (loose leaf, update no. 9, December 2024) § 23:23; S. Penney, V. Rondinelli and J. Stibopoulos, *Criminal Procedure in Canada*, LexisNexis, 2022, § 18.16, p. 1269; S. Coughlan, *Criminal Procedure*, 4th Ed., Toronto, Irwin Law, 2020, pp. 588-589. [↑](#footnote-ref-59)
60. *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, para. 33. [↑](#footnote-ref-60)
61. *R. v. Hodgson*, 2024 SCC 25, para. 36. [↑](#footnote-ref-61)
62. *R. v. Hodgson*, 2024 SCC 25, para. 22. [↑](#footnote-ref-62)
63. *Id.*, para. 27. [↑](#footnote-ref-63)
64. *Id.*, para. 29. [↑](#footnote-ref-64)
65. *Id.*, para. 31. See also *R. v. T.J.F.*, 2024 SCC 38, para. 42: “in a criminal legal system built on the presumption of innocence, acquittals are not set aside lightly.” [↑](#footnote-ref-65)
66. *Id.*, para. 34. [↑](#footnote-ref-66)
67. *Ibid.* [↑](#footnote-ref-67)
68. *Ibid.*, citing *R. v. Chung*, 2020 SCC 8, para. 10. [↑](#footnote-ref-68)
69. *R. v. G.F.*, 2021 SCC 20, para. 71. [↑](#footnote-ref-69)
70. *Ibid.* [↑](#footnote-ref-70)
71. *Ibid.* [↑](#footnote-ref-71)
72. *Ibid.* [↑](#footnote-ref-72)
73. *Id.*, para. 74. [↑](#footnote-ref-73)
74. *Ibid.* [↑](#footnote-ref-74)
75. *R. v. J.M.H.*, 2011 SCC 45, para. 32. [↑](#footnote-ref-75)
76. *R. v. G.F.*, 2021 SCC 20. [↑](#footnote-ref-76)
77. *Id.*, para. 102. [↑](#footnote-ref-77)
78. *Perron c. R*., 2022 QCCA 1339, para. 3; *R. c. Diabo*, 2020 QCCA 849, para. 15; *Arif c. R*., 2020 QCCA 848, para. 61. [↑](#footnote-ref-78)
79. *R. v. Walker*, 2008 SCC 34, para. 2. See also paras. 21-22 of that decision, as well as: *R. v. J.M.H*., 2011 SCC 45, para. 32; *R. c. Strapatsas*, 2021 QCCA 1619, para. 17; *R. c. Addala*, 2022 QCCA 538, para. 23; *R. c. Comtois*, 2024 QCCA 300, paras. 19-20. [↑](#footnote-ref-79)
80. *R. v. J.M.H.*, 2011 SCC 45, para. 28. [↑](#footnote-ref-80)
81. See, e.g., *R. v. G.F.*, 2021 SCC 20, para. 31. [↑](#footnote-ref-81)
82. See: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 29; *R. v. Barton*, 2019 SCC 33, para. 89; *R. v. Kishayinew*, 2020 SCC 34, para. 1; *R. v. Kirkpatrick,* 2022 SCC 33, para. 28. [↑](#footnote-ref-82)
83. As the Supreme Court recently noted, “no legal error arises from mere disagreements over factual inferences or the weight of evidence” (*R. v. Hodgson*, 2024 SCC 25, para. 41, quoting *R. v. George*, 2017 SCC 38, para. 24). See also: *R. v. B.(G.)*, [1990] 2 S.C.R. 57, p. 51 (“[a]n acquittal based on an erroneous conclusion of reasonable doubt constitutes a question of law where the trial judge has erred as to the legal effect of undisputed or found facts rather than the inferences to be drawn from such facts”); *R. v. Kent*, [1994] 3 S.C.R. 133, p. 143 (“[t]he question of whether the proper inference has been drawn by a trial judge from the facts established in evidence is a question of fact”, “[e]videntiary sufficiency is also a question of fact”). [↑](#footnote-ref-83)
84. Judgment under appeal, p. 8. [↑](#footnote-ref-84)
85. *R. v. J.M.H.*, 2011 SCC 45. [↑](#footnote-ref-85)
86. *Id.*, para. 25. [↑](#footnote-ref-86)
87. *Ibid.* [↑](#footnote-ref-87)
88. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, p. 598 (citing *R. v. Schuldt*, (1983) 23 Man. R. (d) 75, 1983 CanLII 3758 (C.A. Man.), para. 3). [↑](#footnote-ref-88)
89. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, p. 604. The judgment reiterates the principles established in *Sunbeam Corporation (Canada) Limited v. The Queen*, [1969] S.C.R. 221, and *Lampard v. R.*, [1969] S.C.R. 373. On that subject, see John Sopinka, Mark A. Gelowitz and W. David Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal*, 5th Ed., Toronto, LexisNexis, pp. 231-235 (nos. 3.18‑3.20). [↑](#footnote-ref-89)
90. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, p. 604. [↑](#footnote-ref-90)
91. *Id.*, p. 610. See also John Sopinka, Mark A. Gelowitz and W. David Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal*, 5th Ed., Toronto, LexisNexis, p. 229 (no. 3.20): “*In* Schuldt v. R.*, the Supreme Court reaffirmed the principle that an evidentiary foundation need not be present to support of finding of fact made in favour of an accused”*. [↑](#footnote-ref-91)
92. *R. v. J.M.H.*, 2011 SCC 45, para. 25. [↑](#footnote-ref-92)
93. *Ibid*. [↑](#footnote-ref-93)
94. I find it difficult to assert that the judge's error had such an effect, since his finding regarding the complainant's consent was also — indeed primarily — based on the respondent's testimony that the complainant was conscious and had spread her legs in response to the touching (*supra*, para. 102). [↑](#footnote-ref-94)
95. *R. v. Lohrer*, 2004 SCC 80. See also: *R. v. C.L.Y.*, 2008 SCC 2, paras. 13-19; *R. v. Tayo Tompouba*, 2024 SCC 16, para. 73. [↑](#footnote-ref-95)
96. *R. v. Lohrer*, 2004 SCC 80, para. 2. [↑](#footnote-ref-96)
97. *Ibid.* [↑](#footnote-ref-97)
98. *Ibid.*, citing *R. v. Morrissey*, (1995) 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A. Ont.), p. 541. [↑](#footnote-ref-98)
99. *Id.*, para. 2. [↑](#footnote-ref-99)
100. *R. v. Morin*, [1988] 2 S.C.R. 345, p. 374; *R. v. Graveline*, 2006 SCC 16, para. 15*.* [↑](#footnote-ref-100)
101. *R. v. Cowan*, 2021 SCC 45, para. 46*.* [↑](#footnote-ref-101)
102. *Ibid.* [↑](#footnote-ref-102)
103. *Supra*, para. 93. [↑](#footnote-ref-103)
104. *R. v. Chung*, 2020 SCC 8, para. 10. [↑](#footnote-ref-104)
105. *Supra*, para. 92. [↑](#footnote-ref-105)
106. *R. v. Hodgson*, 2024 SCC 25, para. 30, quoting Kasirer, J.A., as he then was, in *LSJPA – 151*, 2015 QCCA 35, para. 57. [↑](#footnote-ref-106)
107. *Id.*, para. 24, quoting the description provided in Minister of Justice and Public Safety, *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*, 2022 (on line), pp. 23‑2. [↑](#footnote-ref-107)
108. *Id.*, para. 40. [↑](#footnote-ref-108)
109. See, in this regard: *R. v. Percy*, 2020 NSCA 11, paras. 120 et seq.; John Sopinka, Mark A. Gelowitz and W. David Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal*, 5th Ed., Toronto, LexisNexis, 2022, pp. 231-235 (nos. 3.16-3.21 and 3.27-3.35) and in particular the conclusion reached in paragraph 3.35, where the authors quote *Percy* with approval: “in a Crown appeal against an acquittal, the allegation that the trial judge misapprehended the evidence will not amount to an error of law grounding an appeal unless the failure to appreciate the evidence is based on a misapprehension of an applicable legal principle*.*” See also Eugene G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 3rd Ed., Vol. 2 Thomson Reuters, 2022 (loose leaf, update no. 9, December 2024), para. 23:19 (“A misapprehension of evidence may arise […] by a mistake as to substance of the evidence […] A misapprehension of evidence does not, with the exception of an error as to the legal effect of found facts, constitute a question of law but constitutes, at most, a “mistake of mixed law and fact” with the result that the Crown, generally, cannot appeal an acquittal on the ground of a misapprehension of evidence unless it also involves a misapprehension of a “legal principle*”*” [references omitted]), as well as the words of Doherty, J.A. in *R. v. Morrissey*, (1995) 22 O.R. (3d) 514, 1995 CanLII 3498 (C.A. Ont.), p. 538, finding that the Supreme Court cases of *Harper v. The Queen*, [1982] 1 S.C.R. 2, *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, *R. v. Roman*, [1989] 1 S.C.R. 230, *R. v. B.(G.)*, [1990] 2 S.C.R. 57, and *R. v. Morin*, [1992] 3 S.C.R. 286, established that “most errors which fall under the rubric of a misapprehension of evidence will not be regarded as involving a question of law.” [↑](#footnote-ref-109)
110. Judgment under appeal, pp. 12-13. [↑](#footnote-ref-110)
111. *R. v. Kruk*, 2024 SCC 7, para. 65. [↑](#footnote-ref-111)
112. *Ibid.* [↑](#footnote-ref-112)
113. See, e.g.,: *R. c. D.V.*, 2003 CanLII 47924 (QC CA), para. 60; *R. v. S.G*., 2022 ONCA 727, para. 43; *R. v. Greif*, 2021 BCCA 187 (application for leave to appeal to the Supreme Court dismissed, November 4, 2021, no. 39689), para. 63. [↑](#footnote-ref-113)
114. Judgment under appeal, p. 13. [↑](#footnote-ref-114)
115. It should be added that any lingering doubt as to the scope of the generalization to which the judge may have resorted should be resolved in favour of the respondent: “Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error: R. v. C.L.Y., 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 10-12, citing R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), at pp. 523-25”: (*R. v. G.F.*, 2021 SCC 20, para. 79). [↑](#footnote-ref-115)
116. *R. v. Kruk*, 2024 SCC 7, paras. 29 et seq. [↑](#footnote-ref-116)
117. *Id.*, paras. 94-99. [↑](#footnote-ref-117)