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## CONFRONTING THE SEXUAL ASSAULT OF TEENAGE GIRLS: THE MISTAKE OF AGE DEFENCE IN CANADIAN SEXUAL ASSAULT LAW

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*Teenage girls experience high rates of sexual assault. The Criminal Code permits the Crown to substitute proof of young age for proof of non-consent for sexual assault and related offences applicable to young complainants. This paper focuses on the defence of mistaken belief in age. It provides a defence where the accused honestly believed that the complainant was at or above the age of consent and where the accused took all reasonable steps to ascertain her age. A review of the cases considering the defence indicates that it is often applied incorrectly, where the accused does not have any belief as to the complainant's age, or where he has not taken any steps to ascertain her age beyond a visual observation. These cases are vulnerable to stereotypical reasoning that girls are "old enough" based on appearance, dress, alcohol consumption and prior sexual experience. Even in cases where the accused has little reliable information about the complainant, he may be entitled to proceed with the information available at the time, rather than being required to refrain from sexual activity. The paper argues for a reconsideration of how the defence is applied to bring it more in line with other developments in sexual assault law.*

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*Les adolescentes sont très nombreuses à être victimes d'agressions sexuelles. En cas d'agression sexuelle et d'infractions connexes concernant de jeunes plaignantes, le Code criminel autorise la Couronne à remplacer la preuve de*

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*l'absence de consentement par celle du jeune âge. Le présent article est axé sur le moyen de défense de croyance erronée quant à l'âge, selon lequel l'accusé, d'une part, pensait en toute bonne foi que la plaignante avait l'âge de donner son consentement et, d'autre part, avait pris toutes les mesures raisonnables pour s'assurer de son âge. Un examen des affaires dans lesquelles le moyen de défense a été considéré indique qu'il est fréquemment appliqué incorrectement lorsque l'accusé n'a aucune croyance quant à l'âge de la plaignante ou lorsqu'il n'a pris aucune mesure dépassant l'observation visuelle pour vérifier son âge. Ces affaires sont sujettes au raisonnement fondé sur le stéréotype selon lequel les filles sont considérées comme étant « assez vieilles » sur la base de leur apparence, de leur habillement, de leur consommation d'alcool et de leur expérience sexuelle antérieure. Même dans les affaires où l'accusé possède très peu de renseignements fiables concernant la plaignante, il peut être autorisé à agir sur la foi de l'information dont il dispose au moment plutôt que d'être obligé d'éviter toute activité sexuelle. L'article milite pour un réexamen de la façon dont le moyen de défense est appliqué pour l'amener à mieux correspondre à d'autres évolutions du droit en matière d'agression sexuelle.*

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## Contents

Introduction .....	2
1. The Teenage Girl as Sexual Temptress .....	6
2. The Legislative Scheme .....	8
3. Judicial Interpretation of the Mistaken Belief in Age Defence .....	15
A) Incapacity to Consent as a Mere Formality .....	16
B) Evidence of Non-Consent not Considered .....	19
C) Was the Accused Actually Mistaken? .....	21
D) Doing Nothing Can Satisfy "All Reasonable Steps" .....	23
E) The Accused Is Never Required to Refrain From Sexual Activity .....	31
F) Problems with Sexual History Evidence .....	35
Conclusion .....	39
Addendum .....	41

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## Introduction

While children and adolescents make up approximately 20% of the Canadian population, they represent roughly 55% of victims of police-

reported sexual assault.<sup>1</sup> Adolescent girls, in particular, are more likely to report being sexually assaulted than females in any other age range, with 14 being the peak age for victimization.<sup>2</sup> Yet very little legal literature has addressed the barriers to successful prosecution of these cases. Sexual assault of adolescent girls takes place in a range of contexts. Many offences are committed by fathers, stepfathers and other family members.<sup>3</sup> Others are committed by teenage boyfriends and other peers.<sup>4</sup> Still others are committed by unrelated older men who prey on young girls.<sup>5</sup>

In this article, we focus on a particular defence to charges of sexual assault against girls—where the accused asserts that he mistakenly believed the complainant was at or above the age of consent.<sup>6</sup> The mistake of age defence operates to negate the *mens rea* of sexual interference or sexual assault where the Crown needs to prove the age of the complainant as the circumstance that makes the sexual touching culpable. For the defence to operate, the accused must raise a reasonable doubt that he honestly believed that the complainant was 16 years of age or older, and that he took all reasonable steps to ascertain the age of the complainant. Non-consent is not an element of these prosecutions; the Crown must prove instead that the complainant is under the age of 16. Because age is typically much easier for the Crown to prove than non-consent, the focus of these cases tend to be on the age of the complainant and whether the accused knew that age,

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<sup>1</sup> Statistics Canada, *Police-Reported Sexual Offences Against Youth and Children* by Adam Cotter & Pascale Beaupré, Catalogue No 85-002-X (Ottawa, Statistics Canada, 04 May 2014) [Cotter & Beaupré].

<sup>2</sup> *Ibid* at 10.

<sup>3</sup> For a breakdown of familial sexual assault perpetrators see Statistics Canada, *Children and Youth as Victims of Violent Crime* by Kathy AuCoin, Catalogue No 85-002-XIE (Ottawa, Statistics Canada, April 2005) [AuCoin]. Cotter & Beaupré, *supra* note 1 at 13 state that, “When the accused was between the ages of 12 and 17 and the victim was under the age of 12, the accused person was most frequently a family member (59%), such as a sibling, cousin, or other extended family, while about four in ten (37%) accused persons were acquaintances”.

<sup>4</sup> Cotter & Beaupré, *supra* note 1 at 11, 13. See also Statistics Canada, *Child and Youth Victims of Police-reported Violent Crime* by Lucie Ogrodnik, Catalogue No 85F0033M (Ottawa, Statistics Canada, March 2010) 3 at 5, 13; AuCoin, *supra* note 3 at 5.

<sup>5</sup> While Cotter & Beaupré, *supra* note 1 at 12–13 note that one-third of sexual offences committed against children or youth are committed by another youth, “[r]oughly half (51%) of all persons accused of a sexual offence against a child or youth were over the age of 25”. The average age of the accused person varies depending on the age of the victim: Cotter & Beaupré, *supra* note 1 at 13.

<sup>6</sup> Consistent with our previous work, we focus here on girls as victims. Girls make up 81% of the victims of police reported sexual assaults. In addition, the rate of victimization for boys is fairly steady from ages 5–16, while for girls it peaks sharply during early to mid-adolescence. This means that girls make up an even higher percentage of teenage victims: Cotter & Beaupré, *supra* note 1 at 3.

even though in some cases there is clear evidence that the complainant did not want the sexual activity to take place.

In 2008, the basic age of consent to sexual activity in Canada was raised from 14 to 16 years of age, although the age can be as low as 12 and as high as 18 depending on the age of the accused and the relationship between the accused and the complainant.<sup>7</sup> The changes responded to a number of acquittals of much older men who had sexual intercourse with 14 and 15-year-old teenagers and who were charged with the offence of sexual exploitation of a young person, which requires proof of a relationship of trust or authority in addition to proof of age.<sup>8</sup> There was also concern about cases involving adults of both sexes<sup>9</sup> who groomed and lured teenagers into sexual activity through online communications.<sup>10</sup> There was controversy about raising the age of consent to 16, despite the fact that this age is consistent with the threshold used in many other countries.<sup>11</sup> Some critics argued that it was unfair to criminalize sexual activity between a willing 14 or 15-year-old and an adult without proof of exploitation.<sup>12</sup> The available evidence makes clear, however, that the negative consequences of premature exposure to sexual activity with an

<sup>7</sup> *Tackling Violent Crime Act*, SC 2008, c 6, s 13(1).

<sup>8</sup> *Criminal Code*, RSC 1985, c C-46, s 153 [the *Code*]. See *R v Galbraith* (1994), 18 OR (3d) 247, 90 CCC (3d) 76 (CA) at 13–14 (no relationship of dependency created by 27-year-old accused who provided housing to 14-year-old girl); *R v GJG*, 2002 NBQB 104, 247 NBR (2d) 350 (accused not in position of trust toward 14-year-old girl who was his daughter's friend and was sleeping over at his home); *R v Poncelet*, 2008 BCSC 164 at paras 3, 36, 78 WCB (2d) 435 (40-year-old accused riding coach not in a position of trust or authority toward 15-year-old student).

<sup>9</sup> *R v Horeczy* (2006), 209 Man R (2d) 311, 72 WCB (2d) 154 (Prov Ct (Crim Div)); *R v Hepburn*, 2013 ABQB 520, 109 WCB (2d) 323.

<sup>10</sup> See *R v Legare*, 2009 SCC 56, [2009] 3 SCR 551. See also Janice Wolak et al, "Online Predators: Myth versus Reality" (2013) 25:1 *New Eng J Public Policy* 1; Georgia Winters, Leah Kaylor & Elizabeth Jeglic, "Sexual Offenders Contacting Children Online: An Examination of Transcripts of Sexual Grooming" (2017) 23:1 *J Sexual Aggression* 62; Nicola Davis, "[Online Grooming of Children Often 'Alarming Fast', Researchers Find](#)", *The Guardian* (8 September 2016), online: <[www.theguardian.com/society/2016/sep/08/online-grooming-of-children-often-alarming-fast-researchers-find](http://www.theguardian.com/society/2016/sep/08/online-grooming-of-children-often-alarming-fast-researchers-find)>.

<sup>11</sup> In the US, the median age of consent is 16, with the age in most states ranging from 16–18: Joseph J Fischel, "Per Se or Power? Age and Sexual Consent" (2010) 22:2 *Yale JL & Feminism* 279 at 300; Janine Benedet, "The Age of Innocence: A Cautious Defense of Raising the Age of Consent in Canadian Sexual Assault Law" (2010) 13:4 *New Crim L Rev* 665 at 672. A 2016 UNICEF report states that "the minimum age of sexual consent in Latin America and the Caribbean ranges from 12 to 18 years old. The average age is 15 and the median is 16 years old": *Legal Minimum Ages and the Realization of Adolescents' Rights: A Review of the Situation in Latin America and the Caribbean*, UNICEF (2015) 7 at 24.

<sup>12</sup> Julie Desrosiers, "Raising the Age of Sexual Consent: Renewing Legal Moralism" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's*

adult are significant for many young teenagers. Adolescent girls whose first sexual activity is with older men have higher rates of suicide, alcohol and drug use and unwanted pregnancy.<sup>13</sup> In addition, the girls most likely to engage in this kind of sexual activity are those living in poverty, those who have been subjected to abuse or neglect and those whose home lives are chaotic.<sup>14</sup> In other words, early intercourse with adult males is associated with negative conditions that both precede and flow from that exposure. For this reason, it is important that the criminal law in this area operate effectively to respond to such cases.

This article examines the use of the mistake of age defence in Canadian criminal law. We begin with a consideration of how criminal laws applicable to the sexual assault of adolescent girls have been influenced by the idea that while “good” girls need the law’s protection, girls who are “bad” may lead innocent men and boys astray. We explain the evolution of the current statutory scheme in the *Criminal Code* (“the *Code*”), which contains both a close-in-age exception to age of consent rules as well as the mistake of age defence. We review the judicial consideration of this defence with a view to evaluating whether it succeeds in avoiding these stereotypes. We argue that courts have yet to develop an approach that provides sufficient protection for girls who are targeted by older men. Instead, the same stereotypes that have infused consent and mistaken belief in consent determinations for adult women are also evident in determinations about whether the

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*Activism* (Ottawa: University of Ottawa Press, 2012) 569; Canadian AIDS Society, *Age of Consent: Position Statement* (Canada, 2006); EGALE Canada, [“EGALE’s Submission on Age of Consent to the Department of Justice Canada”](#) (2006), online: *Egale Human Rights Trust* <[www.egale.ca](http://www.egale.ca)>.

<sup>13</sup> See Harold Leitenberg & Heidi Saltzman, “A Statewide Survey of Age at First Intercourse for Adolescent Females and Age of Their Male Partners: Relation to Other Risk Behaviors and Statutory Rape Implications” (2000) 29:3 *Archives Sexual Behavior* 203 at 212, “For girls who first had intercourse in very early adolescence (11–12), much older partners were associated with more suicide attempts, more alcohol and drug abuse, and a higher incidence of pregnancy”; Irma Elo, Rosalind King & Frank Furstenberg Jr, “Adolescent Females: Their Sexual Partners and the Fathers of their Children” (1999) 61:1 *J Marriage & Family* 74 at 81 found that when age differences between partners increase (referring to first partners), the likelihood that the partner was a steady boyfriend and that the respondent’s first intercourse was voluntary decreases.

<sup>14</sup> See e.g. Frank Mott et al, “The Determinants of First Sex by Age 14 in a High-Risk Adolescent Population” (1996) 28:1 *Perspectives on Sexual & Reproductive Health* 13; Cathy Spatz Wisdom & Joseph Kuhns, “Childhood Victimization and Subsequent Risk for Promiscuity, Prostitution, and Teenage Pregnancy: A Prospective Study” (2011) 86:11 *American J Public Health* 1607; Jamison D Fargo, “Pathways to Adult Sexual Revictimization: Direct and Indirect Behavioral Risk Factors Across the Lifespan” (2009) 24:11 *J Interpersonal Violence* 1771; Brent C Miller, Brad Benson & Kevin A Galbraith, “Family Relationships and Adolescent Pregnancy Risk: A Research Synthesis” (2001) 21:1 *Developmental Rev* 1.

accused was mistaken about the complainant's age and about the content of the steps required to ascertain the complainant's age. How a girl dresses, whether she wears makeup, whether she is out late at night, whether she consumes alcohol or smokes cigarettes and whether she appears to have prior sexual experience are all considered relevant to the determination of whether a man was mistaken about her age and what steps he is required to take to ascertain her age. In some cases, these stereotypes are so powerful that the accused is required to do absolutely nothing, beyond observing the complainant, to meet the requirement that he took *all* reasonable steps to ascertain her age.<sup>15</sup>

While courts have recognized the dangers of such stereotypes in sexual assault trials generally, these stereotypes are particularly powerful in cases involving teenage girls.<sup>16</sup> The result is that cases involving the most vulnerable girls, who may lack adequate adult support and supervision, or who may have been inappropriately sexualized at a young age, are the most difficult to prosecute. We contend that this defence is meant to be a narrow one. It requires indications that the complainant is 16 years of age or older that do not rely on such generalizations or stereotypes, and which go beyond mere evidence that the complainant could have been 16. Further, we argue that the accused must be required to raise a reasonable doubt that he was mistaken in his actual belief about the complainant's age, not that he did not know her age and made an incorrect guess. It appears that courts assume that, in every case, there are some steps the accused could have taken that would have justified his mistake and his decision to engage in sexual activity with the underage complainant. We argue, by contrast, that some situations present as so uncertain, and so inherently exploitative, that an accused should be required to refrain from sexual activity where he cannot reliably verify the age of the complainant.

## 1. The Teenage Girl as Sexual Temptress

A review of early scholarly criticism of “statutory rape” and “seduction” offences makes clear that most authors were concerned about the overreach of these offences and argued in favour of lowering the age of consent, recognizing a defence of mistake of age, or both. In so doing, they portray teenage girls as sexual temptresses who unfairly lead good and normal boys into ruin. In the United States, the 1923 case of *State v Snow* was often cited, with its conclusion that:

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<sup>15</sup> See e.g. *R v Tannas*, 2015 SKCA 61 at paras 27, 41, 123 WCB (2d) 402 [*Tannas*].

<sup>16</sup> See *R v ARD*, 2017 ABCA 237, 422 DLR (4th) 47, aff'd 2018 SCC 6, 422 DLR (4th) 469.

[T]his wretched girl was young in years, but old in sin and shame. A number of callow youths, of otherwise blameless lives ... fell under her seductive influence. They flocked about her ... like moths about the flame of a lighted candle and probably with the same result. The girl was a common prostitute ... [t]he boys were immature and doubtless more sinned against than sinning. They did not defile the girl. She was a mere "cistern for foul toads to knot and gender in."<sup>17</sup>

These writings also display a thinly veiled racism and class bias, emphasizing that girls from particular "communities" may have different standards of sexual morality.<sup>18</sup> The following excerpts are typical:

To be sure, there are many girls between the ages of twelve and fifteen who are so obviously immature in physique, dress, and deportment that they would be approached only by a person psychologically disturbed or coming from a subculture where the acceptable age-range is lower than the usual level in the United States. However, there are even more girls from twelve to fifteen whose appearance and behavior place them within, or on the vague border of, the average male's category of desirable females ... The great majority of these girls, however, are sexually mature and biologically ready for coitus.

...

Not only are teen-age girls capable of giving operative consent; the increasing sexual awareness and promiscuity currently evident at lower ages enhances the probability that sexual experimentation will be indulged in, and many times actively solicited by, the girl. "There are sexually promiscuous young girls in every neighborhood of a city whose favors can be bought by any boy or man for a pittance, and the amateur counterparts to these young professionals are even more numerous."<sup>19</sup>

These same attitudes were present in Canada as well, where the seduction offences that were designed to provide some measure of protection to girls over 15, applied only to victims who were of "previously chaste character".<sup>20</sup> In 1920, these offences were narrowed further to provide a defence where

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<sup>17</sup> *State v Snow* (1923), 252 SW 629 at 632 (Mo Sup Ct) [*Snow*].

<sup>18</sup> This is evident in the 1964 California Supreme Court decision in *People v Hernandez*, 61 Cal 2d 530 at 532, 8 ALR 3d 1092 (Sup Ct), where the court recognizes a claim of reasonable mistake of age exists in that state. Citing the "moths to the flame" passage from *Snow*, *supra* note 17 with approval, the court points out that: "both learning from the cultural group to which she is a member and her actual sexual experiences will determine her level of comprehension".

<sup>19</sup> Larry W Meyers, "Reasonable Mistake of Age: A Needed Defence to Statutory Rape" (1965) 64:1 Mich L Rev 105 at 121–22 [footnotes omitted].

<sup>20</sup> *The Criminal Code*, 1892, 55–56 Victoria c 29, ss 181–82.

the accused was not “wholly or chiefly to blame.”<sup>21</sup> It is important to keep this history of selective protection in mind in evaluating the application of sexual offences to teenage girls in the present day and to be alert for the re-emergence of these intersecting stereotypes.

While references in current cases are more subtly expressed, these attitudes have not been wholly expunged from legal thinking about the sexuality of teenage girls. For example, in the 2012 trial decision in *R v Barabash*, which focused on the private use defence to child pornography,<sup>22</sup> the 40 and 60-year-old male accused supplied two 14-year-old homeless girls with drugs and a place to stay after they had run away from a youth treatment centre. They then filmed the girls engaging in sexual acts with one of the accused and each other while high on crack cocaine. In acquitting the accused, the trial judge described the girls as “sexually experienced” and “provocative and exhibitionist.”<sup>23</sup> Rather than recognizing that this behaviour was likely evidence of the effects of past sexual exploitation by adults,<sup>24</sup> it was used to conclude that they were “in control” of the recording and its contents.

## 2. The Legislative Scheme

Prior to 1987, section 146 of the *Code* provided that sexual intercourse with a female under 14 years of age who was not the wife of the accused was a criminal offence subject to a maximum of life imprisonment.<sup>25</sup> It was no defence if the accused believed that the complainant was 14 or older because the provision explicitly removed the defence of mistaken

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<sup>21</sup> *Criminal Code*, RSC 1927, c 36, s 213(2): “On the trial of any offence against paragraph (b) of this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal”.

<sup>22</sup> This defence, recognized by the Supreme Court of Canada in *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 was designed to apply to young people who made consensual sexually explicit recordings or photographs for their own private use that would otherwise meet the definition of child pornography. Since the age of consent was 14 at the time the recordings were made, the accused tried to argue that they should also be able to rely on this defence.

<sup>23</sup> *R v Barabash*, 2012 ABQB 99 at paras 94, 92, 532 AR 364 [*Barabash*]. This decision was overturned by a 2:1 majority of the Court of Appeal of Alberta (*R v Barabash*, 2014 ABCA 126, 572 AR 289) and a further appeal as of right to the Supreme Court resulted in an order for a new trial: *R v Barabash*, 2015 SCC 29, [2015] 2 SCR 522.

<sup>24</sup> For example, there was evidence that one of the girls had been in prostitution since age 12 and that one of the accused had acted as her pimp: *Barabash*, *supra* note 23 at para 32.

<sup>25</sup> *Criminal Code*, RSC 1970, c C-34, s 146(1) .



belief.<sup>26</sup> In 1990, the Supreme Court of Canada, in *R v Hess*; *R v Nguyen*<sup>27</sup> held that section 146 violated section 7 of the *Charter*<sup>28</sup> because there was no due diligence defence available to the accused with respect to mistaken belief in age. In other words, an accused who *reasonably* believed that the complainant was 14 or older would still be convicted. A majority of the Court held that the section could not be upheld as a reasonable limit under section 1 of the *Charter*.<sup>29</sup>

By the time of the decision in *Hess*, section 146 had already been repealed, and new offences had been introduced that included sexual interference (section 151), invitation to sexual touching (section 152) and sexual exploitation (section 153). All of these offences were made gender-neutral so that they could be committed by and against persons of either sex. These offences expanded the scope of behaviours by adults that would be considered criminal beyond sexual intercourse to include sexual touching and enticements toward sexual touching<sup>30</sup> and created a separate provision for people in positions of authority over a young person.<sup>31</sup>

Section 150.1 was added along with these amendments; it provides that the consent of a minor is not a defence and sets out exceptions where the accused was close in age to the complainant. Section 150.1(4) provides that a mistaken belief on the part of the accused that the complainant was at or over the age of consent will only be a defence if the accused has taken all reasonable steps to ascertain her age.

While there was very little discussion of the choice of language for the “all reasonable steps” provision in the Parliamentary debates, then Minister of Justice Ray Hnatyshyn did speak about the new offences to protect children: “[w]ith the three new offences, and in fact all the provisions that would protect children, mistake of age will not be a defence

<sup>26</sup> *Ibid.*

<sup>27</sup> *R v Hess*, [1990] 2 SCR 906 at 10, 31, 11 WCB (2d) 199 [*Hess*].

<sup>28</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].

<sup>29</sup> *Hess*, *supra* note 27 at 31.

<sup>30</sup> Offences were also added in 1993 for possessing, making and distributing child pornography (s 163.1) and in 2002 for luring a young person by means of a computer system. (s 172.1). With regard to luring by means of a computer system, see e.g. *R v Hajar*, 2016 ABCA 222, WCB (2d) 523 [*Hajar*] and *R v Morrison*, 2017 ONCA 582, 136 OR (3d) 545, leave to appeal to SCC granted, 2017 CarswellOnt 19979.

<sup>31</sup> The *Code*, *supra* note 8, s 153(1.2).

unless the accused took every reasonable step to ascertain the age of the complainant.”<sup>32</sup>

The mistaken belief in age defence for complainants under 16 is analogous to the argument, for complainants over 16, that the accused was unaware that the complainant was not consenting to the sexual activity in question. In both contexts, the *mens rea* defence based on the accused’s lack of knowledge arises when the *actus reus* component of non-consent (for adult women) or young age (for those under the age of consent) has been established beyond a reasonable doubt by the Crown. In both contexts, Parliament has chosen to limit the scope of the *mens rea* defence available to an accused. A mistaken belief in and of itself is insufficient; steps must have been taken by the accused to apprise himself of the true circumstances. While there are similarities between these defences, there are also significant differences that are often overlooked in the case law. Section 150.1(4) reads as follows:

(4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.<sup>33</sup>

Section 150.1(4) is a limiting provision, not one that creates a broad defence of mistake. Common law rules regarding *mens rea* would allow an accused to raise a mistaken belief in age to negate the *mens rea* for the offence no matter how unreasonable that mistake was. Section 150.1(4) was meant to limit the circumstances in which a mistaken belief defence could operate. A mistake is no defence if it was based on taking no or even *some* steps to ascertain the complainant’s age; only a mistake founded on having taken *all* reasonable steps provides a defence.

The mistaken belief in consent defence in section 273.2 of the *Code*, by contrast, provides that an accused cannot raise the defence of honest mistaken belief in consent for an adult complainant where he did not “take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.”<sup>34</sup> This provision was originally drafted so as to require *all* reasonable steps, but this was

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<sup>32</sup> “Bill C-15, An Act to amend the Criminal Code and the Canada Evidence Act”, 2nd Reading, *House of Commons Debates*, 33-2, No 1 (4 November 1986) at 1038 (Hon Ray Hnatyshyn).

<sup>33</sup> The *Code*, *supra* note 8, s 150.1(4).

<sup>34</sup> *Ibid*, s 273(2).

revised prior to third reading because there were some concerns that “all reasonable steps” might not be *Charter* compliant.<sup>35</sup>

The second obvious difference between these defences is that the mistaken belief in consent defence requires only that the steps be reasonable “in the circumstances known to the accused at the time.”<sup>36</sup> There is no such qualifier in the mistake of age defence. However, courts rarely recognize this second difference and tend to treat section 150.1(4) as if it was worded identically to section 273.2.<sup>37</sup>

Canadian criminal law recognizes that a teenager’s capacity to give consent may vary depending on the age of the person with whom the young person is engaging in sexual activity and the potential for exploitation. While in most cases the age of consent is set at 16, the relevant age is 18 in cases involving pornography and sentencing for prostitution-related offences,<sup>38</sup> in recognition of the particularly exploitative nature of these acts. In addition, the age of consent is set at 18 where the accused is in a position of trust or authority over the complainant, or in a relationship of dependency or exploitation. There are also specific rules referred to as “close in age exceptions” for which proof of consent provides an affirmative defence if the accused is close in age to the complainant. These can apply to complainants as young as 12. For 12 and 13-year-old complainants, the accused may invoke a close in age exception if he is less than two years older than the complainant while for 14 and 15-year-old complainants, the accused must be less than five years older in order to rely on the close in age exception.<sup>39</sup> These close in age exceptions do not apply if the accused

<sup>35</sup> “Bill C-49, An Act to amend the Criminal Code (sexual assault)”, 3rd Reading, *House of Commons Debates*, 34-3, No 9 (15 June 1992) at 12046 (Hon Shirley Maheu).

<sup>36</sup> *The Code*, *supra* note 8, s 273(2).

<sup>37</sup> See e.g. *R v E*, 2011 NUCJ 35, 98 WCB (2d) 779 [*R v E*].

<sup>38</sup> It is now illegal to purchase or offer to purchase sexual services from a person of any age, with the penalties higher where the person bought is under 18: See s 286.1 of the *Code*, *supra* note 8.

<sup>39</sup> Sections 150.1(2) and 150.1(2.1) of the *Code* read as follows:

(2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than two years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

(2.1) If an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age

has exploited a position of trust or authority or if the complainant is in a relationship of dependency in relation to the accused. Where the accused fits within one of these exceptions, “consent” to sexual activity will be a defence. These provisions recognize that, while a young person may be capable of consenting to sexual activity with someone close in age, they are incapable of consent where the accused is significantly older. A 15-year-old girl, for example, may be legally capable of consenting to sex with an 18-year-old but not capable of consenting to sex with a 35-year-old. This recognizes that as the age disparity increases, the imbalance of power and the potential for harm increase.<sup>40</sup>

The close in age exceptions reflect a recognition that younger teenagers do engage in sexual experimentation with each other and that the criminal law is not the appropriate tool for protecting teenagers from the consequences of all such activity. However, where men are outside of the close in age exceptions, there should be a significant responsibility on them to make sure that the girls with whom they are engaging in sexual activity are 16 years of age or older.

The allocation of the burden of proof when dealing with sexual assault is particularly important because credibility is such an important variable. Where the close in age exceptions apply, consent is described as a “defence”, suggesting that the onus is on the accused either to prove it on a balance of probabilities or to at least satisfy the air of reality threshold. There are few cases in which the close in age exception is even potentially applicable and so there has not been much judicial consideration of this question. The few cases that have considered the question of proof are divided as to who has the burden of proof for the close in age exceptions.<sup>41</sup> By comparison,

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or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than five years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

The close in age exceptions survived a *Charter* challenge on the basis of overbreadth in *R v B(A)*, 2015 ONCA 803, 25 CR (7th) 52.

<sup>40</sup> Section 153 of the *Code* creates the crime of sexual exploitation and s 153(1.2) explicitly allows the trier of fact to draw an inference of exploitation from circumstances, including the age of complainant and the age disparity between the parties.

<sup>41</sup> See *R v Thompson* (1992), 131 AR 317, 76 CCC (3d) 142 (CA) [*Thompson*], which states that the burden is on the accused to prove the consent defence provided. In *Thompson* at para 6, the Court states that, “[t]he worth of the submission obviously hinges on where the burden of proof that the defence exception provided in ss. 150.1(2)(a) and (b) rests. I think it is clear that it does not rest upon the Crown.” However, in *R v S(W)*, 2015

despite the high threshold created by section 150.1(4), the mistake of age defence in Canada has been consistently interpreted as requiring only that the accused raise an air of reality that he was mistaken and that he took all reasonable steps to ascertain the complainant's age in order for the defence to go to the jury.<sup>42</sup> There is no persuasive burden on the accused to prove that he was mistaken about the complainant's age or that he took all reasonable steps to ascertain it.<sup>43</sup>

It is not sufficient, however, if the accused raises an air of reality that he took *some* reasonable steps; rather the evidentiary burden must relate to *all* reasonable steps having been taken. Once the accused raises an air of reality, the Crown is required to prove beyond a reasonable doubt that the accused did not take all reasonable steps. This will often, although

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ONCJ 744, 127 WCB (2d) 326 the Court at para 5 states that, "the Crown offered helpful submissions in framing the debate by suggesting that there are two ways to view section 150(1). First, s 150.1 can be seen as an exception available to the accused to put the issue of consent into issue, as a defence. On this view, s 150.1 would impose a burden of proof on the accused relating to "consent". Alternatively, s 150(1) can be understood to be a provision that, for some offences in some circumstances, adds consent to the elements of the offence the Crown must prove. Specifically, where the accused shows that the circumstances set out in sub-sections 150.1(2)–(2.2) apply, to succeed in prosecuting s 151, 153 or 173(2) offences, the Crown must also prove that the complainant did not consent".

<sup>42</sup> Although there has been some uncertainty as to whether the air of reality threshold applies to the reasonable steps component of the defence, in a recent decision on mistaken belief in consent in the military context, the Court Martial Appeals court held that the air of reality threshold applies to both the mistaken belief in consent and reasonable steps. *R c Gagnon*, 2018 CMAC 1 at para 5, 146 WCB (2d) 103, aff'd 2018 SCC 41 [*Gagnon*]; See also *R v Barton*, 2017 ABCA 216 at paras 296–99, 140 WCB (2d) 605, leave to appeal granted, 2018 CarswellAlta 444, (March 8, 2018) [*Barton*]. The Supreme Court of Canada in *Gagnon* upheld the decision of the Court Martial Appeals Court from the bench without discussing this issue. The appeal in *Barton* has been heard and the decision is under consideration. This approach differs from the approach taken by the majority of the Supreme Court in *R v Esau*, [1997] 2 SCR 777, 148 DLR (4th) 662, which can be read as holding that reasonable steps to ascertain consent are not part of the air of reality threshold for leaving the defence with the jury.

<sup>43</sup> *R v Westman*, [1995] BCJ No 2124, 28 WCB (2d) 440 (CA) at para 20; *R v Osborne* (1992), 102 Nfld & PEIR 194, 17 WCB (2d) 581 (CA) at 17–18 [*Osborne*]. It was not inevitable that the burden of proof be placed on the Crown. In Tasmania, for example, the accused must prove on a balance of probabilities that he had an honest belief that the complainant was of the age of majority, which in Tasmania is 17 (*Criminal Code Act 1924* (Tas), s 124(1)). In Canada, because of the jurisprudence under ss 7 and 11(d), putting the burden of proof on the accused, even for a defence, can only be justified if it is a reasonable limit under s 1 of the *Charter* (*R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200; *R v Chaulk*, [1990] 3 SCR 1303, 69 Man R (2d) 161).

not always, require as a practical matter that the accused testify as to his mistake.<sup>44</sup>

One issue that remains undecided is whether the accused can raise a defence of mistake based not on his belief that the complainant was 16 years of age or older, but rather a mistaken belief that her age brought him within the close in age exceptions. For example, this could be a 17-year-old accused who wants to argue that he honestly believed that the complainant was 15 when she was in fact 12. The *Code* is not clearly drafted on this point but section 150.1(6) seems to indicate that such a defence can be raised, stating “An accused cannot raise a mistaken belief in the age of the complainant in order to invoke a defence under subsection (2) or (2.1) [the close in age exceptions] unless the accused took all reasonable steps to ascertain the age of the complainant.”<sup>45</sup> Some courts have allowed the defence while others have rejected it.

In *R v O(D)*, the Court acquitted the accused on the basis of a reasonable doubt that the 18-year-old accused honestly believed the complainant was 15 which would have brought the 12-year-old complainant within the close in age exception.<sup>46</sup> The Court went on to apply the all reasonable steps requirement and found that the accused’s observations were not inconsistent with the complainant’s Facebook profile, which said that she was almost 16 and thus allowed the defence.<sup>47</sup> In *R v UHC*,<sup>48</sup> the Nova Scotia Provincial Court preferred the argument that no such defence existed for the following reasons:

I believe that the purpose of section 150.1 is to limit strictly the resort to mistaken belief in age in the following manner. First, sub-s. 150.1(6) makes clear that sub-ss. 150.1(2) and (2.1) may be invoked *only* as a part of a defence of mistake of age, so that mistake will be inadmissible unless the actual close-in-age criteria of sub-ss. 150(2) and (2.1) are met; furthermore, sub-s. 150.1(4) makes clear that the only mistake that will be admissible *in any case* is a belief that the complainant was at least 16 years of age. Accordingly, for a 16 year old accused to come into court and admit to sexual activity with a 12 year old, but seek to excuse it by asserting a belief that the complainant was 14 would amount to a mistake of law.<sup>49</sup>

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<sup>44</sup> *R v Slater*, 2005 SKCA 87 at para 26, 269 Sask R 42 [*Slater*]; the Nova Scotia Court of Appeal has overturned a conviction and ordered a new trial on the basis that defence counsel failed to advise the accused at the risks of not testifying: *R v Ross*, 2012 NSCA 56 at paras 58, 61–62, 317 NSR (2d) 243.

<sup>45</sup> The *Code*, *supra* note 8 at 150.1(6).

<sup>46</sup> *R v O (D)*, 2017 ONSC 2027, 138 WCB (2d) 407.

<sup>47</sup> *Ibid* at paras 18, 20.

<sup>48</sup> *R v UHC*, 2015 NSPC 10 at paras 14–15, 119 WCB (2d) 651.

<sup>49</sup> *Ibid* at para 14.

Despite this interpretation the Court applied the defence, relying on the Nova Scotia Court of Appeal decision in *R v Ross*, even though that case did not clearly decide this issue.<sup>50</sup> More recently in *R v JM*, the Newfoundland and Labrador Supreme Court rejected this defence stating that, “Parliament has drawn a bright line that makes it illegal for an accused to engage in sexual activity with a complainant who is five years or more younger than him or her.”<sup>51</sup>

A mistaken belief that the complainant is within the close in age exceptions can only be raised by accused who are themselves adolescents or young adults, not the much older men that we saw in many of the cases. However, the complainant in such cases will necessarily be a young adolescent or even a child. The accused is essentially arguing a defence (a mistaken belief in age) that entitles him to another defence through the close in age exception, namely that the complainant actually consented. It is very important that the courts not treat a reasonable doubt as to the complainant being within the close in age exception as ending the inquiry. Courts must give real meaning to the “all reasonable steps” requirement and also be satisfied that this is not a case of actual non-consent.

### 3. Judicial Interpretation of the Mistaken Belief in Age Defence

It is important to preface our examination of the case law with what may seem like an obvious observation. In every one of the cases discussed in this section, the accused is acknowledging that he was mistaken about the complainant’s age. Thus, in every one of these cases, the accused is conceding that whatever steps he took to ascertain her age were inadequate to do just that. This fact is rarely acknowledged by judges and should, in our view, lead to the conclusion that the all reasonable steps requirement should be applied narrowly and that only in exceptional cases should an accused be acquitted notwithstanding having taken steps that were factually inadequate. Yet many courts fail to give real weight to this requirement.

The other fact that should be noted at the outset is that the majority of these cases do not involve young men just outside the close in age

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<sup>50</sup> *R v Ross*, 2012 NSCA 56 at para 13, 317 NSR (2d) 243.

<sup>51</sup> *R v JM*, 2017 NLTD(G) 110 at para 61, 139 WCB (2d) 250. The 1984 Badgley Report that led to the modernization of sexual offences against youth was against the idea of close in age exceptions altogether noting that the close in age exceptions could influence prosecutors in charging decisions in difficult cases where the accused was within the close in age exceptions even where the complainant had claimed that she did not agree to the sexual activity. See Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children in Canada: Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Minister of Supply and Services Canada, 1984).

exceptions. Rather, many of these cases involve much older men, sometimes in their 30s and 40s, having sex with girls as young as 12. Men often target young girls deliberately on the Internet, sometimes making child pornography out of that sexual activity,<sup>52</sup> and sometimes grooming the girls over a considerable period of time.<sup>53</sup> In a significant number of cases, these girls live in troubled family situations or group homes<sup>54</sup> and thus are particularly vulnerable to sexual predators. While only a few cases mention whether the complainant is Indigenous, we know that Indigenous children are vastly overrepresented among children in state care and thus are likely to bear the brunt of this reality.<sup>55</sup>

In a larger study we are conducting on sexual assault against adolescent girls from ages 12–17 over a three-year time frame, we found 26 cases where the accused was asserting a mistaken belief and that he had taken all reasonable steps to ascertain the complainant’s age. For the 21 cases for which the age of both parties was given, the average age difference between the complainant and the accused was just over 13 years. This disparity is particularly significant given that we are talking about girls who are 12 to 15 years of age, as it means in some cases the accused is more than twice as old as the complainant.

In the following section, we demonstrate a number of concerns about the approach taken by the courts and why those concerns render cases involving the most vulnerable complainants the most difficult to prosecute.

### **A) Incapacity to Consent as a Mere Formality**

Many courts see the rule that a child under 16 cannot consent as a formal requirement and not a substantive one. The old language of “statutory rape” suggested that these cases were not *real* rape, but rather labelled rape as a technicality. The same reasoning is seen in some of the mistaken belief cases. In many cases, judges still make reference to the fact that

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<sup>52</sup> See e.g. *R v Harden*, 2016 SKQB 32, 128 WCB (2d) 404 [*Harden*]; *R v Sims*, 2006 BCSC 651, 70 WCB (2d) 454.

<sup>53</sup> In *Harden*, *supra* note 52 the accused church leader in his late 30s groomed a young girl who was having difficulties with her adoptive family over a number of years; *R v Mastel*, 2011 SKCA 16, 366 Sask R 193 [*Mastel*].

<sup>54</sup> See e.g. *R v Cummer*, 2014 MBQB 62, 304 Man R (2d) 152 [*Cummer*]; *R v Arook*, 2016 ABQB 528, 133 WCB (2d) 190; *R v Campbell* (1995), 28 WCB (2d) 111, 100 WAC 236 (BC CA).

<sup>55</sup> Sandrina de Finney, “Playing Indian and Other Settler Stories: Disrupting Western Narratives of Indigenous Girlhood” (2015) 29:2 *J Media & Cultural Studies* 169 at 170 [de Finney, “Narratives of Indigenous Girlhood”]. See also Statistics Canada, *Study: Living Arrangements of Aboriginal Children Aged 14 and Under, 2011*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 13 April 2016).



the underage complainant consented, without acknowledging that girls under 16 cannot give consent where there is a sufficient difference in age between the two parties. In *R v Nguyen*, for example, the Court of Appeal for Saskatchewan introduced the facts by saying that the 13-year-old complainant “had consensual sex” with the 32-year-old accused, who was the best friend of her stepfather.<sup>56</sup>

Some judges talk about the difference between *de facto* consent, which a child is able to give, and *de jure* consent, which she is not.<sup>57</sup> The *Code* unfortunately uses language that could be seen to support this analysis when it says that “it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.”<sup>58</sup> While this may seem to be just a question of semantics, how this sexual encounter is portrayed shapes the courts’ perception of the events in question. In declaring the presence of consent, the complainant becomes an equal participant, not a child who was too young to understand the exploitative nature of sex with a much older adult.<sup>59</sup> It seems to us that some judges are erroneously equating consent with a failure to object and defining non-consent in this context in terms of violence by the accused and resistance by the complainant. This overlooks the fact that, in most cases, the accused does not need to use violence because he is able to exploit the complainant’s youth.

In a sentencing decision dealing with the offence of sexual interference, a five-judge panel of the Court of Appeal of Alberta has underlined that a girl under 16 is *not capable* of giving consent, and that it is inappropriate to speak of the sexual activity in such terms. In *R v Hajar*,<sup>60</sup> the Court

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<sup>56</sup> *R v Nguyen*, 2017 SKCA 30 at paras 4, 7, 138 WCB (2d) 509 [*Nguyen*]. See also *Osborne*, *supra* note 43 at para 62 where the Court describes the law criminalizing sex with someone under age “notwithstanding that the encounter may be consensual”.

<sup>57</sup> See *Tannas*, *supra* note 15 at para 20; *Nguyen*, *supra* note 56 at para 4.

<sup>58</sup> The *Code*, *supra* note 8, s 150.1(1).

<sup>59</sup> See e.g. *Tannas*, *supra* note 15 at para 23 where the Court states that, “[w]hat this means is that if a defendant’s honestly-held but mistaken belief as to a consenting complainant’s age is *objectively* reasonable on the evidence before the court (i.e., because the defendant has taken all reasonable steps to ascertain the complainant’s age), then the defendant’s mistake as to the complainant’s age effectively negates the *mens rea* element of the offence”. See also *R v Clarke*, 2016 SKCA 80 at para 2, 480 Sask R 277 where the appellate Court states that, “The trial judge found that the complainant had consented in fact to sexual intercourse and he had a reasonable doubt about whether Mr. Clarke knew she was under the age of 16 years”; *Cummer*, *supra* note 54 at para 48 finds that “the complainant did initially consent”; *R v Hubert*, 2016 BCPC 288 at para 11, 133 WCB (2d) 391 states that, “I am satisfied that Mr. Hubert might have had an honest but mistaken belief that B.B. and O.B. were consenting”.

<sup>60</sup> *Hajar*, *supra* note 30 at paras 88–90.

acknowledged that using “de facto consent” as a mitigating factor in sentencing fails to recognize that children under 16 are not capable of giving true consent to sexual activity:

In raising the age of consent, Parliament determined that children in the protected category are incapable of consenting to sexual activity with older persons outside the close in age exceptions. That is because of the power imbalance inherent in the relationships between children and those older persons coupled with the particular vulnerability of children. *Put simply, children in the protected category are not capable of making such an important, personal and potentially life-altering decision.*

Why is this so? Children have limited experience and psychological resources and a very limited comprehension of the psycho-social aspects of sex. Add to this that adults have enhanced power and standing in the eyes of children and are seen as authority figures by virtue of age. And it is understandable why, as a result, it is very difficult for a child to assert herself or himself against an adult ... In addition, in many circumstances where the child is female and the adult male, there will be the added element of gender [in]equality. Also relevant, and perhaps less obvious, is the role played by fear, confusion, coercion and desire for affection and attention. At their developmental stage, children in the protected category may be emotionally needy and easily confuse sexual predation for affection and attention. On top of this, the general trend in this type of relationship is for an adult to gradually convince a child to accede to the sexual relationship because the child falsely perceives that he or she has consented to it.<sup>61</sup>

The Court acknowledged that the concept of *de facto* consent is not actual consent and that the concept “suffers from all the misconceptions as to what is meant by ‘consent’ that predated the Supreme Court decision in *R v Ewanchuk*.”<sup>62</sup>

When courts fall into the trap of talking about consensual sex between an adult and a child under 16, they distort the very nature of the sexual encounter in question and make it more likely that the steps taken by the accused will be seen to be reasonable. Children are portrayed as sexual aggressors, equally responsible for the ensuing sexual activity. For example, in *R v E*,<sup>63</sup> the Court describes the 12-year-old complainant as having “repeatedly pursued the accused as the target of her sexual interest.”<sup>64</sup>

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<sup>61</sup> *Ibid* [footnotes omitted, emphasis added].

<sup>62</sup> *Hajar*, *supra* note 30 at para 86.

<sup>63</sup> *R v E*, *supra* note 37.

<sup>64</sup> *Ibid* at para 93.

We agree with the reasoning in *Hajar* and hope that it is adopted in other jurisdictions. The fact that a child is pursuing sexual contact with an adult means that it is likely that the child has already been inappropriately sexualized by one or more adults in the past.<sup>65</sup> It is the responsibility of the adult to decline sexual contact with the young person, regardless of how it was initiated.

## **B) Evidence of Non-Consent not Considered**

In many of these cases, there was evidence of non-consent which would have made the sexual activity criminal regardless of the age of the complainant. However, evidence of the complainant's non-consent tends to disappear in cases where the accused alleges he was mistaken about the complainant's age. The very fact that the accused raises the mistake of age defence shifts the focus away from the complainant's expression of non-consent to the age of the complainant and the accused's knowledge thereof. In a number of the cases we reviewed, the complainant contacted police not because she came to realize that the accused had taken advantage of her youth, but because she claimed that the accused imposed himself sexually on her in a way that she did not want at the time it took place.<sup>66</sup>

At first glance, it may seem contradictory for us to speak of the complainant's lack of consent when we are claiming that her youth makes her incapable of consent. However, as we have argued elsewhere, in the context of complainants with mental disabilities, there is a difference between the capacity to give voluntary agreement to sexual activity and the capacity to know that you do not want to be touched sexually by the accused.<sup>67</sup> We contend that the capacity to say yes to sexual activity requires a more advanced state of development or understanding than the capacity to say no which simply requires that the complainant know that she does not want to be touched sexually. A 14-year-old girl, who is incapable of

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<sup>65</sup> Evidence of sexually inappropriate behaviour is used as a diagnostic indicator of child sexual abuse: see e.g. Jon McClellan et al, "Age of Onset of Sexual Abuse: Relationship to Sexually Inappropriate Behaviours" (1996) 35:10 *J Am Academy Child & Adolescent Psychiatry* 1375; Kathleen A Kendall-Tackett, Linda Meyer Williams & David Finkelhor, "The Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies" (1993) 113:1 *Psychology Bull* 164.

<sup>66</sup> See e.g. *R v Holloway*, 2013 ONCA 374, 107 WCB (2d) 313 [*Holloway*]; *R v MC*, 2011 NLTD(G) 93, 95 WCB (2d) 541 [*MC*]; *R v LTP* (1997), 33 WCB (2d) 292, 142 WAC 20 (BC CA) [*LTP*].

<sup>67</sup> Janine Benedet & Isabel Grant, "A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law" (2013) 43:1 *Ottawa L Rev* 1 at 20. See also Isabel Grant & Janine Benedet, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017), 37 *CR* (7th) 375.

giving voluntary agreement to sexual activity with a 30-year-old man, may be quite capable of knowing that she does not want to have sex with him.

In those cases where courts consider non-consent, they do not recognize this distinction.<sup>68</sup> In *R v Holloway*,<sup>69</sup> for example, the trial judge acquitted the accused on the basis of mistaken belief in age after she concluded that the sexual activity was not “forced,” a misunderstanding of the legal meaning of non-consent. This was notwithstanding the fact that both sides agreed that the complainant:

[I]nitially expressly refused to engage in the sexual activity sought by the respondent when she arrived at his home. It was common ground that they argued and the argument became somewhat vociferous. It was common ground that at some point after the complainant had been in the respondent’s home for four or five hours she fled the home. It was common ground that she had some significant physical injuries when she left the home.<sup>70</sup>

In *R v MC*, the complainant testified that the accused sexually assaulted her in a hot tub.<sup>71</sup> Instead, the trial judge characterized her as “complicit” in the sexual activity, a term which suggests that the complainant is to blame for the violence perpetrated against her.<sup>72</sup> There is no legal concept of complicity in Canadian sexual assault law.

If a girl has lied about her age to the accused or others, it may have an impact on her credibility when she asserts that the sexual activity was non-consensual. In *R v Beckford*,<sup>73</sup> for example, the complainant had lied about her age to the accused, the police and to potential pimps when she was entering prostitution. As a result of this, the trial judge said her evidence on non-consent was not sufficiently reliable to accept.

On balance, we think it is more faithful to the complainant’s understanding of the harm done to her to deal with the issue of whether the complainant did not want to participate in the sexual activity first, but only if the court is able to recognize that the failure to prove non-consent does not mean that she consented to the sexual activity or that she is a liar. It is simply a failure of proof by the Crown to the high standard of beyond

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<sup>68</sup> For an example of the recognition of this distinction by American courts in the context of an adult complainant with a mental disability, see *People v Thompson* (2006), 142 Cal App (4th) 1426.

<sup>69</sup> *Holloway*, *supra* note 66 at para 14.

<sup>70</sup> *Ibid* at para 13.

<sup>71</sup> *MC*, *supra* note 66 at paras 10–13.

<sup>72</sup> *Ibid* at para 55.

<sup>73</sup> *R v Beckford*, 2016 ONSC 1066, 128 WCB (2d) 298 at para 31.

a reasonable doubt. Nor should this conclusion be used to reduce what steps the accused is required to take to support a mistaken belief in age.

We recognize that encouraging courts to consider non-consent before considering mistake of age can be fraught for complainants. If the claim does not succeed, the complainant's overall credibility may be damaged because she was not believed on this issue. It may also lead the court to the erroneous conclusion that the complainant actually consented even though she is legally incapable of consent. But failing to consider the allegation of non-consent, and turning immediately to the question of age, ignores the gravamen of the complaint in many of these cases and fails to consider coercive actions by the accused.

### **C) Was the Accused Actually Mistaken?**

There are two inquiries mandated by section 150.1(4): first, did the accused actually believe (mistakenly) that the complainant was 16 or older? Second, did he take all reasonable steps to ascertain her age? The focus in the cases tends to be on the latter inquiry at the expense of examining the accused's actual belief. Some courts appear to overlook that section 150.1(4) requires that an accused *actually believe* that the complainant was 16 or older. It does not create a defence where the accused simply *does not know or care* how old the complainant is. If the accused believes the complainant is "around 17"<sup>74</sup> then the accused does not have an honest belief in the complainant's age. Estimating or guessing a complainant's age is different than mistakenly believing the complainant is 16 or older.

Lucinda Vandervort, in her article about juvenile prostitution, points out that where the accused is relying on the complainant's appearance or her unconfirmed representations about her age, he will almost always *not actually know how old the complainant is*.<sup>75</sup> We understand Vandervort to be using the word "know" in this context to mean an actual good faith belief that the complainant is a particular age, as opposed to an assumption or a belief that the complainant might be "old enough." An accused who simply makes an assumption based on these factors should be convicted on the basis of willful blindness or recklessness.<sup>76</sup> Confusing assumptions

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<sup>74</sup> *R v George*, 2017 SCC 38 at para 6, [2017] 1 SCR 1021[*George*]. For a recent example, see *R v CJC*, 2018 NLCA 68 where the trial judge found that the 36-year-old accused believed the complainant was "at least 16" (para 37") or "16 or 17" (para 49).

<sup>75</sup> Lucinda Vandervort, "Too Young to Sell Me Sex!?' *Mens Rea*, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker" (2012) 58:3 *Crim LQ* 355 at 360–61.

<sup>76</sup> The line between recklessness and wilful blindness is sometimes a confusing one in criminal law. In *R v Sansregret*, [1985] 1 SCR 570 at 584, 35 Man R (2d) 1[footnotes omitted], the Supreme Court of Canada describes the difference between wilful blindness and recklessness:

or guesses with belief results in the defence being given a much broader scope than simply applying it to those who believed the complainant was of age. It is being applied where the trier of fact has a reasonable doubt that the accused thought the complainant was probably about 16 or older, even though in fact the accused did not have a belief as to how old she was and knew that she might be under 16. In one case, the trial judge allowed the defence because there was evidence that could support a belief that the complainant was 16 even though there was no evidence that the accused himself held this belief.<sup>77</sup>

A pro forma question meant only to satisfy the legal standard should also not be sufficient. For example, in *R v Slater*, the accused had asked a 16-year-old girl how old she was before he paid her for sex. She responded that she was “over 18” which clearly was directed to the legal standard involved. The trial judge correctly found that that was not an earnest inquiry and that more questioning was necessary.<sup>78</sup>

In *R v George*, the 35-year-old female accused did not know how old the 14-year-old male complainant was and took no steps to inquire until a few months later when she applied to be an RCMP officer and was asked whether she had ever had sex with someone under 16. At that time, she went back and asked her son about the complainant’s age. George’s acquittal at trial was upheld by the Supreme Court of Canada, yet it is unclear that George ever held any belief in the complainant’s age.<sup>79</sup>

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Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry.

<sup>77</sup> See e.g. *R v Moise*, 2016 SKCA 133 at para 31, 134 WCB (2d) 306 where the Court of Appeal found that the fact that there was evidence that could support a mistaken belief “shed no light on whether he had the requisite belief and did not allow even an inference to be drawn that Mr. Moise believed [the complainant] to be 16 years of age. The trial judge engaged in conjecture or speculation that these factors could have created Mr. Moise’s belief regarding [the complainant’s] age.” The trial judge had concluded since there was a basis for a reasonable mistake that there was no reason to make inquiries. The Court of Appeal also found this to be an error and held that the trial judge never should have gotten to the all reasonable steps requirement because there was no evidence that the accused was actually mistaken.

<sup>78</sup> *Slater*, *supra* note 44.

<sup>79</sup> *R v George*, 2016 SKCA 155, 135 WCB (2d) 536 [*George* 2016], *rev’d George*, *supra* note 74.

The Court of Appeal for Saskatchewan, which had overturned the acquittal, had stated as follows: “[a]s for the first issue, honest belief, the trial judge concluded that Ms. George had no knowledge of C.D.’s actual age at the time of the sexual encounter. He found as a fact that she honestly believed C.D. to have been at least 16 years of age.”<sup>80</sup> An accused who has no belief in the complainant’s actual age does not have a mistaken belief. The trial judge noted the complainant’s physical appearance, his association with older boys, the fact that he smoked, his cocky and callous attitude with respect to the sexual encounter and his familiarity with sexual activity.<sup>81</sup> None of these factors gave the accused any information about how old the complainant actually was but rather just shaped her assumptions, to the extent she thought about it all. The fact that when she was asked a question on a job application about whether she had had sex with an underage boy she thought back to the complainant reveals at the very least that she had a suspicion that the complainant was under age, which should have at least raised the possibility of wilful blindness, which equates deliberately closing your mind to the facts with actual knowledge.<sup>82</sup>

Sometimes the inquiries as to the accused’s mistaken belief and the steps he took to ascertain age are merged such that the evidence supporting reasonable steps is used to establish that the accused was actually mistaken. In these cases, the fact that there was some evidence that the accused *could have believed* that the complainant was above the age of consent is used to establish that the accused actually did make such a mistake. In *Slater*, for example, the accused did not testify, nor did he present any evidence.<sup>83</sup> Yet all of the appellate court’s focus was on what steps he had taken to ascertain the complainants’ ages. There was no analysis about whether the accused was actually mistaken as to the complainants’ ages when he offered them money for sex.

## D) Doing Nothing Can Satisfy “All Reasonable Steps”

One of the most problematic features of the case law on the mistake of age defence is that the mistake of age defence succeeds in cases where the accused has done absolutely nothing to inquire into the age of the

<sup>80</sup> *Ibid* at para 18.

<sup>81</sup> *Ibid* at para 19.

<sup>82</sup> The facts of *George*, *supra* note 74 are very unusual, and not merely because they involve a female accused and a male complainant. *George* is the only case we are aware of involving a female accused where there was not some sort of relationship of trust or authority and/or some attempt to cultivate an exploitative relationship over a period of time. In *George*’s initial description of the sexual activity, she could be understood as saying that the accused sexually assaulted her, although at trial the case proceeded on the basis that she was consenting.

<sup>83</sup> *Slater*, *supra* note 44 at paras 24, 28.

complainant beyond observing her and making assumptions based on her appearance or her behaviour. In several cases, courts have held that mere observation can obviate the need for taking any steps.<sup>84</sup>

If the complainant dresses like a 16-year-old (whatever that means), or spends time with other young people over 16, smokes cigarettes or consumes alcohol, initiates sexual activity or appears to have had any kind of prior sexual experience, courts are more likely to say that an accused has to do *nothing* beyond observing the complainant to ascertain her age. He does not need to ask the complainant her age, nor does he need to ask adults who know the complainant. Rather, the accused is allowed to infer age from his simple observation of the way a complainant presents herself as compared to his stereotypical assumptions about how a 16-year-old girl should present herself.<sup>85</sup>

Stereotypes about how girls and young women dress and carry themselves, whether they consume alcohol and at what age certain behaviours are likely to be demonstrated are particularly pervasive in these cases.<sup>86</sup> These assumptions are founded on the same stereotypes that infuse the consent determinations for women over the age of consent and reveal the same tendency toward victim blaming we see with adult women. The stereotype for women is that if they dress in a particular way or consume intoxicants, they are inviting sexual attention or are open to sex with anyone; the stereotype for girls is that if they are dressing in a particular way or consuming intoxicants, they are ready for sexual activity, and therefore must be old enough.

Courts describe these circumstances as “[obviating] the need for an inquiry.”<sup>87</sup> What this means is substituting inferences based on stereotypes

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<sup>84</sup> See e.g. *Tannas*, *supra* note 15; *LTP*, *supra* note 66; *R v Mastel*, 2010 SKPC 66, 88 WCB (2d) 399; *R v RR*, 2014 ONCJ 96, 112 WCB (2d) 302 [RR].

<sup>85</sup> *Tannas*, *supra* note 15 at paras 32, 33.

<sup>86</sup> See e.g. *RR*, *supra* note 84 at para 15; *Tannas*, *supra* note 15 at paras 8–9, 33–34. In *R v Chapman*, 2016 ONCA 310, 130 OR (3d) 515, leave to appeal to SCC refused, 2016 CarswellOnt 16185 (13 October 2016) [*Chapman*], the Crown appealed the trial decision to acquit the accused of all charges. Sexually suggestive and mature behaviour, appearance and demeanour were cited in establishing that the accused had taken all reasonable steps to ascertain the complainant’s age. Ultimately, the appeal was dismissed. In *R v Poirier*, 2011 ABPC 350 at paras 76–82, [2011] AJ No 1283, the trial judge, in finding a reasonable doubt about all reasonable steps, referred to the complainant’s consumption of alcohol and other related behaviours. This decision was upheld on appeal: *R v Poirier*, 2014 ABCA 59, 112 WCB (2d) 93 [*Poirier*].

<sup>87</sup> In *Osborne*, *supra* note 43 at para 62 the Court states: “Parliament made the act a crime and expects of citizens engaging in sexual activity with young people to make a reasonable effort to ascertain the age of prospective partners. It is more than a casual requirement. There must be an earnest inquiry or some other compelling factor that



for actual steps or inquiries to ascertain age. This is true even where the accused may not have even asked the complainant how old she is. Often, significant quantities of alcohol have been consumed by the teenaged complainant before the sexual activity in question.<sup>88</sup> This is seen as strengthening the accused's defence because of her adult behaviour, rather than as making the complainant a more vulnerable target for sexual exploitation.

The idea that a visual observation of the complainant could be enough to constitute "all reasonable steps" first emerged in the 1997 decision of the British Columbia Court of Appeal in *R v LTP*.<sup>89</sup> In that case, decided at a time when the age of consent was 14, both the complainant (aged 13) and the accused (aged 16) were teenagers. They were at a party on a riverbank. The complainant alleged that the accused pushed her down and raped her. The Court never considered this claim, focusing instead on the mistake of age claim. The trial judge found that the accused gave no thought whatsoever to the complainant's age, but the Court of Appeal overturned this factual determination largely on the basis that it was reasonable in the circumstances for the accused not to think about it:

As the cases show, it may not necessarily be unreasonable to rely only on a visual observation. The reasonableness of a failure to take further steps will depend upon a consideration of all the circumstances, including the indicia of the complainant's age and the accused's knowledge of those indicia ... Here, the learned trial judge did not instruct himself in that way. He did not ask himself whether the complainant's appearance, and all of the other circumstances, were such as to give rise to a reasonable doubt as to whether it would have been reasonable for the accused to be put on his inquiry, and whether it was reasonable for him not to put his mind to the complainant's age in the circumstances.<sup>90</sup>

This passage incorrectly extends the availability of the defence beyond the statutory language to circumstances where it would be reasonable for the accused not to think about the complainant's age.

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obviates the need for an inquiry." This passage is quoted in *Mastel*, *supra* note 53 at para 21 and is cited in *Tannas*, *supra* note 15 at para 25.

<sup>88</sup> See *Poirier*, *supra* note 86 and *R v B(JB)*, 2013 ABPC 191, 2013 CarswellAlta 1434. In these cases, a significant quantity of alcohol was consumed. In *R v H(JJ)*, 2011 PESC 8, 308 Nfld & PEIR 252, the accused's suggestion that the complainant was too drunk to remember what happened was not accepted by the Court. However, in all three cases, the Court did convict on the basis of non-consent.

<sup>89</sup> *LTP*, *supra* note 66.

<sup>90</sup> *Ibid* at para 27.

It seems to us that the cases in which a visual observation will be sufficient should be exceedingly rare.<sup>91</sup> Perhaps if the complainant is observed driving a car in rush hour traffic, or meets the accused in a law school orientation program, there are non-stereotypical indicia to support an honest belief that the complainant is at least 16. Drinking, smoking and hanging out with people a grade or two older are not equivalent.<sup>92</sup>

Even more troubling is that in many of the cases that apply *LTP* in this way, the accused is not a teenager but is instead many years older than the complainant. This is most clearly demonstrated in the Court of Appeal for Saskatchewan decision in *R v Tannas*.<sup>93</sup> The complainant C.W. was a 13-year-old girl who organized a birthday party for her mother, inviting several of her mother's friends and coworkers. The accused was 26 years old and came to the party as the date of an 18-year-old. The younger guests at the party, including C.W., congregated in one room while the older guests, including C.W.'s parents, were upstairs. Both groups were drinking alcohol and smoking marijuana and, according to the testimony of the accused, the complainant did drink alcohol.<sup>94</sup> At about 1:00 a.m., the younger group went to another house to continue the party and C.W., with her mother's permission, went with them. More drugs were consumed and C.W. smoked "honey oil" with the others. Eventually, when only the complainant and the accused remained awake, there was sexual activity, including unprotected sexual intercourse.

The complainant denied that she had been a willing participant, a claim that was quickly dismissed by the trial judge. The accused testified to what the Court of Appeal described as "consensual sex". The trial judge accepted the accused's version of events, namely that C.W. agreed to engage in sexual activity, but found that the accused had not taken all reasonable steps to ascertain her age. The trial judge was particularly concerned about the age disparity between the complainant and the accused, suggesting that a significant age disparity may heighten what steps needed to be taken. The Court of Appeal overturned the conviction and entered an acquittal,<sup>95</sup> conceding that the accused "made no inquiry whatsoever as to C.W.'s age" but added that the law did not require him to do so.<sup>96</sup>

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<sup>91</sup> See the approach of the Newfoundland Court of Appeal in *Osborne*, *supra* note 43 at para 62 where the court noted that the "all reasonable steps" requirement is "more than a casual requirement. There must be an earnest inquiry or some other compelling factor that obviates the need for an inquiry".

<sup>92</sup> *Mastel*, *supra* note 53 at para 8.

<sup>93</sup> *Tannas*, *supra* note 15.

<sup>94</sup> *Ibid* at paras 15, 33.

<sup>95</sup> *Ibid* at para 41.

<sup>96</sup> *Ibid* at para 27.

The Court of Appeal begins by saying that it might seem obvious that the accused could have asked the complainant how old she was. However, the Court held that the accused's failure to make this simple inquiry was not dispositive of whether he had taken *all* reasonable steps. Instead, the Crown had to prove that there were no circumstances that obviated the need for an inquiry.<sup>97</sup> Through the use of a double negative, this incorrectly turns the all reasonable steps requirement on its head. The *Code* requires that all reasonable steps be taken before an accused can assert a mistaken belief. Once the accused raises an air of reality that he was mistaken and that he had taken *all* reasonable steps, then the Crown must disprove that he took such steps beyond a reasonable doubt. The Crown should not be required to prove that reasonable steps are required at all in a particular case. The fact that the complainant was under age is sufficient to trigger the all reasonable steps requirement.

The Court held that the accused's visual observation obviated the need for any inquiry on the part of the accused, and that the trial judge had erred in putting too much weight on the age disparity between the parties because the judge failed to turn his mind to whether a reasonable person in the accused's circumstances would have objectively perceived the subject of age disparity. Here the Court is reading words into section 150.1(4), which Parliament deliberately chose to leave out of the section. The mistaken belief in consent defence explicitly provides that the accused must take reasonable steps "in the circumstances known" to him. Section 150.1(4) does not include this limitation in the mistake of age defence. It simply says the accused must take all reasonable steps.

The Court of Appeal was particularly critical of the trial judge for failing to state what reasonable step was missing in this case. This is particularly troubling when the accused was in a house with a significant number of people who knew the complainant's age and had ample opportunity to ask the complainant herself. This is not to suggest that simply asking the complainant her age would have been enough in this case, particularly given that teenagers are known to lie about their ages for a variety of reasons.<sup>98</sup> However, when there are such obvious steps untaken, how can it be said that the Crown had not discharged its onus?

Why did the Court not require the accused to do anything? Witnesses testified that C.W. was mature in her appearance, attire and attitude. Some

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<sup>97</sup> *Ibid.*

<sup>98</sup> Much of the research on lies told by teenagers is focused on the topic of social media and Internet presence. One scholar notes: "most teenagers I interviewed confessed to having lied about their age when they registered for instant messaging or social networking sites": Karen Bradley, "Internet Lives: Social Context and Moral Domain in Adolescent Development" (2006) 108:1 *New Directions for Youth Development* 57 at 66. In fact, one

other people at the party thought that she was at least 16. She smoked marijuana and drank alcohol. These circumstances, and the fact that they had just met, were relevant to what steps a reasonable person would have taken in the Court's view. The Court could see "no *reasonable* steps left untaken by Mr. Tannas."<sup>99</sup> The Court in *Tannas* effectively reduces "all reasonable steps" to whatever steps seem necessary based on the accused's stereotyped assumptions about how 16, but not 13, year-old girls are supposed to look and act. The suggestion that an accused has a lower obligation because he had just met the complainant is problematic. Surely if the complainant is a virtual stranger to the accused, the requirement to take reasonable steps is heightened because of the greater potential for mistake given one's lack of information.<sup>100</sup> The Court of Appeal held that the trial judge erred in putting too much weight on the age disparity between the complainant and the accused.<sup>101</sup> Other courts have confirmed that the greater the apparent disparity in ages, the greater the requirement to make inquiries about the complainant's age.<sup>102</sup>

In *R v Mastel*,<sup>103</sup> the accused, who was 43 years old at the time of the offence, had sexual intercourse with a 15-year-old grade 10 student. They had met regularly at minor league hockey games they both attended where the complainant sat in the "Kids Zone" reserved for children up to

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news source reports that "more than 80% of children lie about their age when using social media": Mark Sweeney, "[More Than 80% of Children Lie About Their Age to Use Sites Like Facebook](#)", *The Guardian* (26 July 2013), online: <[www.theguardian.com/media/2013/jul/26/children-lie-age-facebook-asa](http://www.theguardian.com/media/2013/jul/26/children-lie-age-facebook-asa)>.

<sup>99</sup> *Tannas*, *supra* note 15 at para 35 [emphasis in original].

<sup>100</sup> See also *R v Nguyen*, 2017 SKCA 30 at para 19, 138 WCB (2d) 509, where the Court finds the accused willfully blind for not inquiring into her age but goes on to say, "if the evidence were such that Mr. Nguyen had first met the complainant just before they had sex, the inference in this regard might have been unavailable." Other cases do acknowledge that not knowing the complainant heightens the responsibility to make inquiries. See e.g. *R v RKD*, 2012 ABPC 205, 546 AR 168, where the trial judge noted that the accused and the complainant did not know each other prior to the night in question. Relying on case law on reasonable steps to ascertain consent, the trial judge at para 67 held that "the less acquainted partners are with each other, the more steps are required to confirm that they consent to sexual activity".

<sup>101</sup> *Tannas*, *supra* note 15 at para 30.

<sup>102</sup> See *R v RAK*, [1996] NBJ No 104 at para 11, 175 NBR (2d) 225 [RAK]. See also *R v P(LT)*, [1997] BCJ No 24 at para 18, 86 BCAC 20, where the Court appears to adopt the reasoning in *RAK* that "the greater the disparity in ages between the two parties, the greater the level of inquiry to be called for on the accused's part", which goes to whether or not the accused took all reasonable steps; *R v Quintanilla*, 1999 ABQB 769 at para 118, 251 AR 59 also supports the Court's decision in *RAK* in that "a substantial age differential ... will invariably require a greater amount of inquiry on the part of an accused, and is one factor to be considered in determining whether reasonable steps have been taken".

<sup>103</sup> *Mastel*, *supra* note 53.

15 years of age. On the night in question, the teenaged complainant was staying with a girlfriend and she snuck out and met the accused. He gave her alcohol to the point where her friends testified she could barely walk or speak. He refused to tell her his last name and warned her not to tell anybody of their sexual encounter.

The trial judge acquitted the accused even though he found that the accused had made “little effort to ascertain her age”.<sup>104</sup> The trial judge held that this was one of those cases where visual observation of the complainant was sufficient. No further steps were necessary because “on the night in question, the complainant took the initiative to meet with the accused, admitted she had experience with alcohol, initiated the sexual contact and was familiar with oral sex.”<sup>105</sup> The Court of Appeal overturned this finding because the accused had done *nothing* to ascertain her age:

In this case, the respondent knew the complainant was a young girl when he first met her. He observed her over the course of approximately two years. The trial judge found it was likely that the complainant had told the respondent she was in grade 10. The respondent testified he knew she was in middle school prior to attending high school when he first started talking to her. Through this lengthy period of time, the respondent took no steps to ascertain her age. According to his testimony, they had numerous conversations over the years and the respondent was 41 years of age at the time of their first meeting and again he never asked the complainant her age.<sup>106</sup>

Reliance on how a girl looks should never be sufficient to constitute all reasonable steps. Teenagers mature at different rates in both physical and emotional terms, with girls often developing physically earlier than boys. Many 14 and 15-year-olds could pass for 16 and vice versa. The idea that a man could distinguish between a girl who is, for example, 14 and a girl who is 16 from mere observation is patently unrealistic. Just as physiological and emotional maturity vary considerably, so does behaviour. By requiring an accused to take all reasonable steps, Parliament could not have meant that the accused did not have to take any steps if he got the impression from a girl’s behaviour that she could be 16.

The interpretation by courts that assumptions about the complainant’s behaviour will relieve the accused from taking any steps leads inevitably to the conclusion that sexual abuse involving the most vulnerable girls will be the most difficult to prosecute. Many children under the age of 16 live lives that are outside the idealized view of the normal life of a young

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<sup>104</sup> *Ibid* at para 14.

<sup>105</sup> *Ibid* at para 18.

<sup>106</sup> *Ibid* at para 16.

person, possibly because they have been inappropriately sexualized in the past and/or consigned to inadequate state care. A girl who is living on the street, for example, may well be out at all hours of the night. She is more likely to have “sexual experience”, probably in the form of sexual assault or exploitation in prostitution. Allowing inferences about age to be drawn from mere observation will inevitably have a disproportionate impact on Indigenous girls who are more likely to be in state care. In addition, there is a clear pattern of sexualizing Indigenous girls at younger ages than non-Indigenous girls, based on racist assumptions about their hypersexuality.<sup>107</sup>

Even where young people are not in positions of extreme vulnerability, some parents allow their children to consume alcohol or smoke cigarettes in their presence,<sup>108</sup> or stay out late at night.<sup>109</sup> Stereotypes that a girl under 16 dresses in loose-fitting clothes and sneakers, does not smoke, does not drink, is never out late at night and never initiates sexual activity, feed into this construction of the ideal child victim.<sup>110</sup> In essence, reliance on these factors mirrors, through the proxy of age, the doctrine of implied consent rejected by the Supreme Court of Canada in *Ewanchuk*.<sup>111</sup>

These stereotypes are particularly powerful in cases involving girls engaging in risky behaviours. For example, in *R v Chapman*,<sup>112</sup> the 40-year-old accused picked up two girls hitchhiking at night. The girls, aged 14 and 15, made sexually explicit comments while in the car, wore makeup and smoked cigarettes. They told the accused they had just come from a college party. The accused took them to his parents’ house, gave them alcohol and had sexual intercourse with both girls. The accused did not ask their ages, nor did they volunteer that information. Despite the fact that the accused made no effort to ascertain their ages, the trial judge acquitted the accused on the basis that he had taken all reasonable steps to ascertain their age. The Court of Appeal upheld those acquittals and confirmed that all reasonable steps can be satisfied by mere observation:

Of course, this does not mean that a complainant’s conduct and appearance will always obviate the need for further inquiry about the complainant’s age. A reasonable person would appreciate that underage children may apply make-up

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<sup>107</sup> Tracey Lindberg, Priscilla Campeau & Maria Campbell, “Indigenous Women and Sexual Assault in Canada” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 87.

<sup>108</sup> *Tannas*, *supra* note 15 at para 33.

<sup>109</sup> *R v Akinsuyi*, 2016 ONSC 2103 at paras 19, 22, 129 WCB (2d) 515 [*Akinsuyi*].

<sup>110</sup> Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2011) 22:2 CJWL 397 at 398, 413 [Randall, “Ideal Victims”].

<sup>111</sup> *R v Ewanchuk*, 1999 SCC 711, [1999] 1 SCR 330.

<sup>112</sup> *Chapman*, *supra* note 86.

and dress and act so as to appear older. However, in this case, it is my view that the combined effect of the evidence of the information provided to the respondent and the observations made by him justified the trial judge's conclusion that the need to inquire further about the complainants' ages was obviated.<sup>113</sup>

The Court's long list of factors relevant to the reasonable steps defence all relate to criticisms of the complainants and the degree to which they tried to portray themselves as older. The fact that a young person has been previously sexualized is an unreliable marker of age. Many girls younger than 16 have sexual experience just as many girls over 16 do not.<sup>114</sup> For girls under 16, much of that sexual experience will have been non-consensual or at the very least exploitative. The Court of Appeal put significant blame on the complainants, stressing how they *purposely* did not disclose their ages although the same motivation is not attributed to the accused, who *purposely* never asked. Instead, 14 and 15-year-old girls are portrayed as temptresses, enticing a 40-year-old man into a sexual liaison which he could hardly be expected to resist. He thought they were "17 or 18 years old"<sup>115</sup> thus admitting he did not know how old they were and that he believed them to be adolescents. This is evidence that the accused was, at a minimum, reckless as to the age of the complainants, namely that he saw the risk that they were less than 16 but took the chance anyway. He did absolutely nothing to ascertain their ages and doing nothing was found to be sufficient to constitute taking "all reasonable steps".<sup>116</sup>

### **E) The Accused Is Never Required to Refrain From Sexual Activity**

The judicial interpretation of the all reasonable steps provision in these cases assumes that there is always some basis for being mistaken and that there are always some steps (obviously inadequate because the accused remains mistaken) that can be taken. We simply do not see courts suggesting that in particularly problematic circumstances the accused should have refrained from engaging in sexual activity with the girl in

<sup>113</sup> *Ibid* at para 53.

<sup>114</sup> According to Statistics Canada, "about 94% of girls aged 15 to 19 reported having sexual intercourse in the previous 12 months, and their average age at first intercourse was 15.8 years": Statistics Canada, *Women in Canada: A Gender-based Statistical Report*, Catalogue No 89-503-X (Ottawa: Statistics Canada, March 2016) at 16. Similarly, in an extensive survey conducted in 2005, researchers found that 27% of Canadian girls were sexually active at a mean age of 15: Frappier et al, "Sex and Sexual Health: A Survey of Canadian Youth and Mothers" (2008) 13:1 *Paediatrics & Child Health* 25 at 27.

<sup>115</sup> *Chapman*, *supra* note 86 at para 9.

<sup>116</sup> See also *Akinsuyi*, *supra* note 109 at para 22, where the Court pointed to the fact that "C.W. did not act like a 14-year-old living with her parents. She stayed out all night. She came to visit Mr. Akinsuyi unannounced late in the evening".

question at that time. Rather, the accused is always entitled to proceed and the lack of information he has access to at that moment seems to lower rather than raise his obligations. This endorsement of male sexual entitlement is deeply troubling.

For example, in *R v Gashikanyi*, the 33-year-old accused picked up two hungry teenage runaways, one 18 and the other 14, at a bus stop at 3 AM. The younger girl was not wearing shoes. He offered to take them home and feed them, which he did, and then had sexual intercourse with each girl twice. The accused did not use a condom for the second act of intercourse with the 14-year-old. The police found the 14-year-old complainant the next day “wearing pants bloodstained in the crotch. The attending police officer described her as withdrawn, dehydrated, fatigued and scared.”<sup>117</sup> The accused was convicted on the basis that the steps he took (asking the older girl how old her cousin was) were inadequate. We would go further and argue that in this context there were no steps the accused could have taken that would have justified having unprotected sexual intercourse with a girl he just met and knew to be a teenager.<sup>118</sup> These girls, and particularly the younger one, were obviously vulnerable and in a situation where they were unlikely to be forthcoming about their ages. The accused claimed that he thought the girls were in prostitution (although he did not pay them other than giving them \$10 for bus fare when he dropped them off) and believed that the 14-year-old was in fact 17. However, even if this belief were correct, he would still be intentionally committing the offence of purchasing sexual services from a person under the age of 18.<sup>119</sup> In other words, the accused was admitting he thought she was a child prostitute, which should not improve his position.<sup>120</sup>

The accused did not ask the complainant her age although he did ask her cousin, who lied about the other girl’s age. However, teenagers running away from home, found at 3 AM, may well lie about their ages to avoid getting in trouble. So, a simple inquiry about how old the complainant

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<sup>117</sup> *R v Gashikanyi*, 2015 ABCA 1 at para 5, 588 AR 386 [*Gashikanyi*].

<sup>118</sup> *Ibid.* Some of the facts are taken from a Crown appeal of the sentencing decision: *R v Gashikanyi*, 2017 ABCA 194, 140 WCB (2d) 107.

<sup>119</sup> Obtaining sexual services for money is now a crime regardless of the age of the person bought: Section 286.1 of the *Code*, *supra* note 8.

<sup>120</sup> *Ibid.* There was no evidence in this case that he exchanged money for sexual services although he did feed the hungry girls. A similar defence was raised in *R v Merrlles* (2015), 133 WCB (2d) 294 at 8, 10, 2015 CarswellSask 912. The accused testified that the complainant offered to sell him sex for money and that she told him she was 16 years old. There is no discussion in the judgment of the fact that purchasing sex from a 16-year-old is a criminal offence. The accused’s testimony was rejected, and he was convicted. The conviction was upheld on appeal: *R v Merrlles*, 2016 SKCA 128 at para 9, 133 WCB (2d) 489.



was would likely have been insufficient in this context. The circumstances of this case were such that there were not many steps available at that moment that the accused could have taken to ascertain the age of the complainant, although he certainly could have asked her directly. Where the circumstances prevent the accused from taking sufficient reasonable steps, surely the law should require that he refrain from having sex until those steps can be taken.<sup>121</sup>

The law fails to protect the most vulnerable children if it says that an accused can proceed in situations where multiple red flags were raised but no obvious steps were available to the accused. This situation is most likely to arise where the accused encounters the complainant in a setting divorced from any context that might identify her age. This is more likely when the accused and complainant meet online, or where the complainant is a runaway or homeless. This approach by the courts inevitably denies the protection of the law to our most vulnerable girls precisely because they are vulnerable. It disproportionately impacts Indigenous girls who are more likely to be sexualized at younger ages than non-Indigenous girls, often through sexual assault.<sup>122</sup>

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<sup>121</sup> In *R v Lewis*, 2015 SKQB 291, 483 Sask R 123, a 48 year-old man had sex with a 16-year-old girl in exchange for money. The complainant apparently told the accused she was 23 and he accepted that information. At para 82, the trial judge found that “[a]part from asking for some identification bearing K.O.’s date of birth, I can think of no further step he could have taken in the circumstances.” It never occurs to the trial judge to suggest that the accused should refrain from engaging in sexual activity until making sure the complainant is in fact 18 years of age, or that asking for identification would be entirely logical in the context of the accused’s portrayal of the exchange as a commercial transaction.

<sup>122</sup> See de Finney, “Narratives of Indigenous Girlhood”, *supra* note 55 at 170: “Indigenous girls in the West live the intergenerational effects of systemic racialized/gendered/sexualized/classed colonialism that excludes them from normative notions of Western girlhood. Their positioning as perpetual ‘others’ to white Canadian citizenship directly contradicts neoliberal demands on girls to self-actualize. They are disproportionately represented in indicators of social exclusion and are most at risk of poverty, racialized violence and sexual exploitation—due in part to persistent colonial images of Indigenous girls and women as drunk, passive, mysterious—romanticized versions of colonial property.” Robyn Bourgeois, “Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada” (2015) 62:6 *UCLA L Rev* 1426 at 1462–63 notes that the disturbing number of Indigenous children in the child welfare system who have experienced dislocation and family disruption also heightens the risk of sexual violence.” See also Canada, Representative for Children and Youth, *Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care* (Victoria: Representative for Children and Youth, 2016) at 8: “Aboriginal girls and young women experience especially high rates of sexualized violence because of issues related to poverty, intergenerational trauma, isolation and devaluing attitudes toward them within society”; See also Judith Mosoff et al., “Intersecting Challenges: Mothers and Child Protection Law in BC” (2017) 50:2 *UBC L Rev* 435.

This failure to require men to desist is evident in *R v Hoffart*, a case which presents a more sympathetic accused than many of the cases we reviewed.<sup>123</sup> In *Hoffart* the accused was 28 years old. He met the 15-year-old complainant online; she listed her age as 20. Her online name was “Dimples 1993” which reflected her actual birth year, although the accused testified that this fact never occurred to him. The complainant told the accused that she lived with a roommate and that she had previously worked as an assistant buyer in Ontario. She spoke about other men in their late 20s who were currently pursuing her. The accused thought the complainant looked young, but when he repeatedly asked her age she maintained that she was in fact 20. He testified that he thought she was “Asian or Native” and that he had heard that Asian and Native women often looked younger and smaller than other women.<sup>124</sup> The complainant was in fact an Indigenous girl living with adoptive parents and having difficulty with her adoptive father. She arranged to meet the accused at a gas station, saying that her roommate did not want to be disturbed. On their second meeting, they engaged in sexual activity in his truck. The complainant’s parents learned what had happened and the accused was arrested.

The trial judge acquitted the accused, finding that he honestly believed that the complainant was over 16. It is not clear, however, what the accused did that could amount to all reasonable steps. It is true that the complainant offered more details than in most cases to bolster her claim that she was an adult. However, all of these details came from the complainant herself. It would have been easy for the accused to wait to initiate a sexual relationship until he was able to see the complainant in the context of her job or to meet her family or friends. He was clearly suspicious about her age as he asked her about it multiple times. The Court seems to be asking whether there was anything more that could be done to determine the complainant’s age *on that occasion in the gas station parking lot*, instead of whether there were other reasonable steps instead of meeting up with her in that clandestine setting.

We found one case, *R v HL*, that does recognize that some circumstances are simply inadequate to allow for all reasonable steps.<sup>125</sup> In that case the accused, aged 25, and the complainant, aged 14, met online. Both the accused and the complainant were Punjabi and the accused tried to rely on this fact to bolster his claim that he was inexperienced in dealing with women. The complainant had intellectual disabilities that were apparent to the accused in her communication and her behaviour.

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<sup>123</sup> *R v Hoffart*, 2010 ABPC 122 at paras 2, 9, 495 AR 57 [*Hoffart*].

<sup>124</sup> *Ibid* at para 9, the trial judge stated “[h]e has never had a Native or Asian girlfriend and or even known any personally. He has heard and believes that they often look much younger than their actual age”.

<sup>125</sup> *R v HL*, 2017 ONSC 6205, 143 WCB (2d) 173 [*HL*].

After a couple of brief non-sexual meetings in the accused's car, they had unprotected intercourse and fellatio in a hotel room. The Court found that the complainant was both incapable of consenting due to mental disability and that the accused had failed to take all reasonable steps to ascertain her age.<sup>126</sup>

The Court's reasoning unfortunately keeps these two lines of inquiry mostly separate,<sup>127</sup> even though it was clear that disability and youth were both operating simultaneously for the complainant.<sup>128</sup> Nonetheless, the analysis of mistake of age is more rigorous than what we have seen in many other cases. Justice Harris held that, given the conflicting evidence about whether the complainant told the accused she was 16, he had a reasonable doubt on the question of the accused's actual belief.<sup>129</sup> However, the Court emphasized that the accused's belief and the factors that informed it were not the focus of the all reasonable steps inquiry because it is those steps that are supposed to provide the basis of the belief. In addition, reasonable steps cannot be based on the sexual activity itself.<sup>130</sup>

The Court held that what would constitute all reasonable steps was heightened given that the accused believed that the complainant was just 16, her obvious difficulties in communication and the fact that they did not know each other well.<sup>131</sup> The only reasonable step the Court is able to identify is asking the complainant for identification, which the Court recognized that the complainant might not be able to provide. We hope that in those circumstances the accused would have been required to desist for the time being, rather to proceed on the basis that he had done what he could.

## F) Problems with Sexual History Evidence

Finally, we saw problems with the courts' use of evidence about a girl's prior sexual history in these cases. Parliament has developed a legal regime,

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<sup>126</sup> *Ibid* at paras 19, 109.

<sup>127</sup> The decision treats the question of capacity to consent on the basis of disability as relevant to the sexual assault count, and the defence of mistake of age as relevant to the sexual interference count. In fact, the rejection of the mistake of age defence could have applied equally to secure a conviction on both counts and it was not necessary to devote significant attention to finding the complainant incapable of consenting on the basis of her disability.

<sup>128</sup> *HL*, *supra* note 125 at para 107.

<sup>129</sup> *Ibid* at para 101.

<sup>130</sup> *Ibid* at para 105.

<sup>131</sup> *Ibid* at para 105, Justice Harris also indicates that the difference between reasonable steps and all reasonable steps does not amount to much in practical terms. This is contrary to the legislative record, which makes clear that this distinction was deliberate.

delineated in section 276 of the *Code*, for determining whether evidence of the complainant's past sexual history is admissible as being relevant to an issue at trial. Such evidence is not admissible to perpetuate the myth that past sexual experience makes it more likely that the complainant consented to the sexual activity in question or the myth that she is less credible because of her sexual history.<sup>132</sup> Sexual history evidence is a particularly complex part of mistaken belief in age cases because the evidence is relied on not to support the myth that by reason of her prior experience the complainant was more likely to consent, but rather to support the argument that the accused was mistaken about the complainant's age or that the reasonable steps required to ascertain age were less because he believed that the complainant had engaged in sexual activity in the past. In some cases, this evidence comes from the complainant herself and may be entirely fabricated. In this respect, her *actual* sexual history may be less important than the accused's *perception* of her sexual history since the evidence is going to his mistaken belief. In other words, sexual history evidence does not even need to be true, so long as the accused believes it to be true, in order to be asserted as relevant to the accused's mistaken belief.<sup>133</sup>

In some cases, we saw the section 276 process ignored altogether. In *R v E*,<sup>134</sup> the complainant, who was 12 years old at the time of the sexual activity, was cross-examined "about the fact that around the time she was having sex with Mr. E., she was also sexually involved with other older boys or young men around his age."<sup>135</sup> The case gives no indication that a section 276 application was brought to determine the admissibility of the sexual history evidence even though it was clearly required. This evidence was part of the portrayal of this young girl as the sexual aggressor rather than as a child who had clearly been inappropriately sexualized by older men.

At trial, the complainant testified by way of video. She was 14 years old when testifying about offences that took place when she was 12. The trial judge's assessment of the video was to "agree with Defence counsel, Ms. Stevens, that the video certainly does not portray, as Counsel puts it, "the body of a child".<sup>136</sup> He went on to describe her as a girl "who had the anatomical development of breasts consistent with teenage years, and that this is something which would have been obvious to the accused as a visual impression."<sup>137</sup> Aside from the fact that her physical development at the age of 14 tells us nothing about how old she looked when she was 12,

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<sup>132</sup> Section 276 of the *Code*, *supra* note 8.

<sup>133</sup> See *Hoffart*, *supra* note 123 at paras 11, 15; *Chapman*, *supra* note 86.

<sup>134</sup> *R v E*, *supra* note 37.

<sup>135</sup> *Ibid* at para 41.

<sup>136</sup> *Ibid* at para 70.

<sup>137</sup> *Ibid* at para 72.

or the fact that most girls will have developed breasts before the age of 16, allowing men to rely on the development of breasts or inappropriate sexual behaviour to conclude that a child is 16 undercuts the objective of the “all reasonable steps” provision.

In addition to specific sexual history evidence, it is common to see the accused try to admit evidence that when he had sex with the complainant, she appeared to be sexually experienced. A claim that she initiated the sexual activity, or was familiar with how to perform oral sex, is used to imply a previous sexual history without actually bringing in evidence of one. Such evidence is premised on the same myths and stereotypes that section 276 guards against. The stereotype in these cases is that a girl’s prior sexualization makes it more likely that she is over 16 and thus sexually available to the accused. Given the prevalence of child sexual abuse, and the prevalence of sexual activity amongst young teenagers, evidence of sexual experience is not helpful in determining the complainant’s age.

In *R v Quinones*<sup>138</sup> where the 24-year-old accused was asked about why he thought the complainant was older than her actual age of 12, he stated “the experience, the way—the way everything—the—the way we kissed, the way we hold hands and everything. It was—it was not new to her.”<sup>139</sup> The Court went on to clarify that the complainant confirmed that she did have sexual experience and was using birth control. This information was not available to the accused prior to initiating sexual activity with her; and could not have shaped any mistaken belief. All it tells us, sadly, is that this girl was sexually abused before the age of 12. By definition, this sexual activity would have been without consent because a girl younger than 12 is not capable of consenting to sex with anyone. The reality is that this abuse may have been by her father, her mother’s boyfriend, a family friend or an older man. In addition, the issue is not whether the accused believed the complainant to be older than 12, it is whether he believed her to be at least 16.

The Court of Appeal for Saskatchewan in *George* states compellingly that evidence that a complainant was comfortable in participating in sexual activity is not legally relevant:

I note as well on this front that the fact a sexual act itself reveals a child to be sexually aware or sexually experienced cannot, as a matter of law, have any relevance to the nature of the steps and accused should have taken to ascertain the age of the child in the first place. The essential foundation of s. 150.1 of the *Code* is the notion that children under the age of 16 are not legally competent to consent to sexual activity.

<sup>138</sup> *R v Quinones*, 2012 BCCA 94, 100 WCB (2d) 122.

<sup>139</sup> *Ibid* at para 44.

The provision is designed, at least in meaningful part, to protect those children who, because of their involvement in the sex trade or otherwise, have become familiar with sex and sexual acts. It would be entirely perverse to allow the fact that a child ultimately turns out to be sexually experienced to diminish or limit the steps a person in Ms. George's position might reasonably be expected to have taken in advance of the sexual encounter to ensure the child is at least 16 years of age.<sup>140</sup>

We believe that the following principles ought to apply in these cases. The accused should not be able to rely on the complainant's apparent familiarity with sex to support his mistaken belief in age claim. If the accused learns this from the sex acts he is engaging in with the complainant, the sexual assault is already underway. The accused cannot rely on a belief in age developed after the fact. It also ignores the fact that, given the prevalence of child sexual abuse, familiarity with sex acts tells us nothing useful about someone's age.

If the accused wants to rely on his knowledge of past sexual acts with others of which he is aware, these need to be subjected to a section 276 application. To pass the threshold for admissibility, the defence needs to offer evidence of specific instances of sexual activity, and the evidence must have significant probative value not substantially outweighed by its prejudicial effect. Evidence that the complainant appeared to be sexually experienced is akin to evidence of sexual reputation, which is deemed inadmissible under section 277.

In cases where the complainant provides the accused with descriptions of past relationships that meet the threshold of "specific instances of sexual activity", the balancing of probative value and prejudicial effect is required. The inquiry ought to focus on whether the evidence could support a belief that the complainant was 16 or older and whether the evidence may call on discriminatory beliefs. In *Hoffart*, the complainant described in detail (imaginary) relationships with several men in their late 20s, describing their bad behaviours and eliciting the accused's support in the course of their online conversations. This evidence was specific, detailed and not inherently unbelievable and should pass the section 276 threshold. It could have supported a belief that the complainant was an adult, without invading her privacy or depicting her as promiscuous.<sup>141</sup>

By contrast, the bragging of the hitchhiking teenage runaways in *Chapman* about their supposed sexual exploits with both male and female partners was far less probative and much more prejudicial. It should have put the accused on high alert that the complainants were trying to appear

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<sup>140</sup> George 2016, *supra* note 79 at para 40.

<sup>141</sup> *Hoffart*, *supra* note 123.

worldly and could not on its own have supported a belief that they were old enough to consent. It had limited probative value on the question of their age and was highly prejudicial to the complainants, painting them as promiscuous and sexually indiscriminate.<sup>142</sup> This prejudice would be heightened in a case where the Crown is trying to prove non-consent apart from the issue of age. In such a case, the risk that the evidence will be improperly used to infer actual consent, reasoning expressly prohibited by section 276, is very high.

## Conclusion

Many of the cases in which a defence of mistake of age are raised are ones in which the sexual activity occurs soon after the complainant and accused meet, in circumstances where the accused does not wait to find out anything about the complainant's life, her friends or her family. Other cases involve grooming behaviour over a period of time during which the complainant is encouraged to keep her relationship with the accused a secret from those around her. In almost every case we looked at, the accused either did not turn his mind to the complainant's age or asserted a belief that the complainant was an older teenager, that is, somewhere close to the age of consent. If the accused does not even consider the complainant's age, there should be no defence because the accused does not have an honest belief in the complainant's age. If the accused believes the complainant is somewhere in her late teens, the accused is aware of the danger that the complainant may be below the age of consent, meaning that the all reasonable steps requirement must be given real content before there can be a reasonable doubt that the accused genuinely believed the complainant was 16 or older. Anything less is simply willful blindness, which the criminal law treats as equivalent to actual knowledge.

We found many cases in which the accused made assumptions about the complainant's age based on observations based on stereotypes that do not accord with the reality of adolescent behaviour or development for many girls. Unfortunately, instead of giving meaning to the all reasonable steps requirement, courts too often endorse this kind of reasoning and find that the accused did not have to do anything, effectively blaming the victim for her own exploitation. Such an approach inevitably singles out for particular disadvantage Indigenous girls who are more likely to be living in unstable home situations and who have already been sexually exploited. The following description of a young complainant by a judge demonstrates the power that multiple stereotypes have when they are applied together:

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<sup>142</sup> *Chapman, supra* note 86.

She lied to the Accused at some point about her age. The complainant portrayed herself as older than she really was. She wore makeup. She dressed older. She frequently stayed out late. She posted pictures of herself on Facebook designed to make her look sexually mature. She hung around with girls who were known by both of them to be 15 and 16. While there is more than four years age difference between them, the complainant appeared in her video statement given at the time of the events and later in court to be a girl who looked older than she really was. M.T.'s text messages reveal a vocabulary and imagery concerning sexual matters similar to that of a much older girl.<sup>143</sup>

The girl described in this paragraph was *12 years old* at the time of the sexual activity. Yet the Court is endorsing the very stereotypes which formed the basis of the accused's apparent mistake.

These cases demonstrate that the same stereotypes that have for so long infiltrated case law involving adult women complainants, and the accompanying suggestion that women are responsible for the sexual violence committed against them,<sup>144</sup> are evident in cases dealing with adolescent girls even if they are reproduced in slightly different forms. In both contexts, victims are constructed as "asking for it" based on their appearance and risky behaviours.

When speaking about the mistaken belief in consent defence, the Supreme Court of Canada has said that the defence should only succeed in rare circumstances, noting that people do not often commit sexual assault *per incuriam*.<sup>145</sup> We believe that the mistaken belief in age defence should be similarly rare. It should be the unusual circumstance where, after all reasonable steps to ascertain a person's age are taken, a reasonable person would have a genuine mistaken belief that a girl was 16 years of age or older when in fact she was not. We saw many cases in which the accused appeared to be looking for justifications in the complainant's behaviour that would allow him to proceed with plausible deniability, rather than trying to actually verify how old the complainant was. We need to move beyond the assumption that there must always be a way for men to proceed with sexual activity, no matter how little reliable information they have about an adolescent's true age.

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<sup>143</sup> *RR*, *supra* note 84 at para 15.

<sup>144</sup> See Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 *Akron L Rev* 865 at 878–79, 882, 886, 891; Randall, "Ideal Victims", *supra* note 110 at 409, 414.

<sup>145</sup> *R v Pappajohn*, [1980] 2 SCR 120 at para 155, 111 DLR (3d) 1, Dickson J, dissenting; *R v Osolin*, [1993] 4 SCR 595 at para 73, 109 DLR (4th) 478.



## ADDENDUM

On March 15, 2019, after this paper was completed, the Supreme Court of Canada released *R v Morrison*<sup>146</sup>, a decision about the offence of internet luring of a child contrary to s. 172.1 of the *Criminal Code*. *Morrison* struck down the evidentiary presumption requiring that, if a person represented themselves to be under the relevant age of consent, the accused would have to raise evidence to the contrary to show that he did not believe the representation. Because luring is sometimes prosecuted on the basis of a police sting operation, where there is no actual underage child, the accused's belief about the person with whom he is corresponding is central to these prosecutions. However, the majority went beyond this narrow holding to consider the mistaken belief in age defence, and the reasonable steps requirement as applied to the luring offences. Notably this defence does not require "all reasonable steps" be taken, as is the case with other sexual offences against children, but rather only "reasonable steps" to ascertain the age of the person with whom the accused is corresponding.

A number of the findings in this case are relevant to the arguments made in our article. The majority judgment can be read as undermining the long-standing conception of the role of honest belief in sexual assault as a defence of mistake that requires an air of reality before it goes to the trier of fact. Instead, the majority holds that failure to comply with the reasonable steps requirement does not necessarily lead to conviction, contradicting its recent ruling in *R v Gagnon*, which holds that for sexual assault, reasonable steps are part of the air of reality threshold.<sup>147</sup> Justice Moldaver states in *Morrison*: "[i]n short, there is but one pathway to conviction: proof beyond a reasonable doubt that the accused believed the other person was underage. Nothing less will suffice."<sup>148</sup> The majority is not clear what role reasonable steps could ever play in this analysis or when it would arise. If the Crown can prove subjective knowledge of age, the accused will be convicted, and if the Crown cannot prove this

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<sup>146</sup> 2019 SCC 15, 2019 CSC 15 [*Morrison*].

<sup>147</sup> 2018 SCC 41, 427 DLR (4th) 426. The majority in *Morrison* purports to incorporate an air of reality threshold to the reasonable steps defence (paras 118–22) but renders it meaningless where it says, at para 124, that where the Crown disproves reasonable steps it is only the accused's ability to raise the defence that is affected: "This does not relieve the Crown of its burden of proving beyond a reasonable doubt that the accused believed the other person was underage"; and again (at para 126): "put simply, whether the accused is convicted or put it does not hinge on whether the accused took reasonable steps: it hinges on whether the Crown can prove the accused's belief beyond a reasonable doubt. The presence or absence of reasonable steps is not essential for either conviction or acquittal".

<sup>148</sup> *Supra* note 146 at para 83.

knowledge, the analysis will not proceed to reasonable steps. In this way, the reasonable steps requirement disappears.

A number of other findings in the case relate to arguments in this paper. For example, we highlighted the difference between the reasonable steps provision relating to mistaken belief in consent and the all reasonable steps provision relating to mistaken belief in age, in that only the former requires that the steps be assessed in the context of “the circumstances known to the accused at the time.” The majority in *Morrison* reads this limiting phrase into s. 172.1(4) even though these words are left out of the reasonable steps provisions dealing with age in the *Criminal Code*.<sup>149</sup> The majority makes much of the fact that the mistaken belief defence does not contain the word “all” before reasonable steps and thus we would argue that this part of the decision should be limited to the offence of internet luring. Yet the majority also undermines its own decision in *George*,<sup>150</sup> a case about mistaken belief in age outside of the internet luring context. The Court in *George* confirmed that failure to take all reasonable steps could lead to conviction where the accused was asserting a mistaken belief. In *Morrison*, by contrast, Moldaver J provides that if the trier of fact has a reasonable doubt as to a mistaken belief in age, the accused is entitled to an acquittal, regardless of whether he or she has taken the required reasonable steps: “[a]s a legal matter, to obtain a conviction for sexual interference or sexual assault of a person under the age of 16, the Crown had to go further and prove beyond a reasonable doubt that the accused believed the complainant was under 16.”<sup>151</sup>

The majority in *Morrison* goes out of its way to limit its judgment to the context of internet luring where there is no actual underage child.<sup>152</sup> The judgment of Justice Abella, dissenting on this issue, that would have struck down the reasonable steps provision under s. 7 of the *Charter*, also limits the constitutional analysis to the context of the internet luring provision.<sup>153</sup> Although the reasoning of both judgments is potentially much broader than these cautions suggest, we hope this case will be interpreted in light of these explicit statements about its intended limited scope.

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<sup>149</sup> *Ibid* at para 105.

<sup>150</sup> *Supra* note 74.

<sup>151</sup> *Supra* note 146 at para 88.

<sup>152</sup> *Ibid* at paras 55, 84, 85, 101.

<sup>153</sup> *Ibid* at para 215.