

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT MARTIAL APPEAL COURT)**

B E T W E E N :

WARRANT OFFICER J.G.A. GAGNON

Appellant  
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent  
(Appellant)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Intervener

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**FACTUM OF THE INTERVENER,  
WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.**  
*Pursuant to Rule 42 of the Rules of the Supreme Court of Canada*

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**PARTS I & II – OVERVIEW**  
**& LEAF’S POSITION ON THE QUESTIONS IN ISSUE**

1. In enacting subsection 273.2(b) of the *Criminal Code*, Parliament legislated crucial protection for the equality, sexual integrity, and autonomy of women.<sup>1</sup> This provision restricts the availability of the defence of honest but mistaken belief in consent to cases where the accused has taken “reasonable steps” to ascertain his partner’s voluntary agreement to the sexual activity in question, in the circumstances known to him at the time.<sup>2</sup>

2. Before Parliament enacted subsection 273.2(b), triers of fact could acquit accused persons on the basis of unreasonably-held beliefs in consent, including beliefs grounded in myths and stereotypes about women’s behaviour.<sup>3</sup> The “reasonable steps” requirement in s. 273.2(b) seeks to ensure that those accused of sexual assault cannot rely on circumstances surrounding the alleged assault or on their own discriminatory assumptions about women’s silence, passivity, or ambiguous conduct to ground a defence of mistaken belief.<sup>4</sup>

3. LEAF asks this Court to give meaning to Parliament’s stated legislative objective of enhancing the autonomy, sexual integrity and substantive equality of women by interpreting and applying s. 273.2(b) in a manner that:

- (a) Applies the “air of reality” threshold to the whole defence of mistaken belief in consent, including the statutory requirement that an accused take “reasonable steps” to ascertain consent, in order to prevent discriminatory myths and stereotypes from tainting the *mens rea* analysis;
- (b) Imposes the obligation on the accused to have taken active “reasonable steps” to ascertain communicated consent, in all circumstances where the defence is raised;

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<sup>1</sup> RSC, 1985, c C-46, s 273.2(b) [*Code*]; Preamble, *An Act to amend the Criminal Code (sexual assault)*, SC 1992, c 38 (“Bill C-49”).

<sup>2</sup> Rosemary Cairns Way, “Bill C-49 and the Politics of Constitutionalized Fault” (1993) 42 UNBLJ 325 at 329-30 [Cairns].

<sup>3</sup> See discussions in *R v Ewanchuk*, [1990] SCR 330 [Ewanchuk] at para 95 (L’Heureux-Dubé J, concurring); *R v Barton*, 2017 ABCA 216 [Barton] at paras 245-46.

<sup>4</sup> *R v Cornejo* (2003), 68 OR (3d) 117 [Cornejo] at para 21.

- (c) Requires that active reasonable steps be taken prior to each distinct sexual act in a particular encounter; and
- (d) Requires that the content of the accused's "reasonable steps" be proportionate to the circumstances known to him at the time, particularly any circumstances creating an imbalance of power or hierarchy between the accused and the complainant.

### **PART III – STATEMENT OF ARGUMENT**

#### **A. There must be an “air of reality” to the accused’s “reasonable steps”**

4. It is an error of law to put the defence of honest but mistaken belief in consent to the trier of fact if there is no “air of reality” that the accused was mistaken and that he took “reasonable steps” to ascertain that the complainant communicated her consent, as required by s. 273.2(b). The majority and dissenting opinions from the Court Martial Court of Appeal below agreed on this point.<sup>5</sup>

5. Before the defence of mistaken belief in consent is considered by the trier of fact, the accused must establish an “air of reality” in respect of each subjective and objective component of the defence.<sup>6</sup> As emphasized by the majority of this Court in *Cinous*, “the *whole defence* must have an air of reality, not just bits and pieces of the defence”.<sup>7</sup>

6. LEAF submits that the air of reality test must apply to the “reasonable steps” requirement in s. 273.2(b) to prevent triers of fact from relying on groundless and discriminatory claims of “mistake”, instead of the applicable law and evidence of *mens rea*. Putting forward this defence in the absence of sufficient evidence of “reasonable steps” risks sowing confusion in the mind of the

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<sup>5</sup> *R v Gagnon*, 2018 CMAC 1 [*Gagnon*] at paras 18, 24-25 (Trudel JA), para 74 (Bell CJ dissenting). See also *Ewanchuk*, *supra* at paras 98-99 (L’Heureux-Dubé J concurring); *Cornejo*, *supra* at paras 18-19 (ONCA); *R v Despins*, 2007 SKCA 119 [*Despins*] at paras 11-12; *R v Malcolm*, 2000 MBCA 77 at paras 34-36; *R v Dippel*, 2011 ABCA 129 [*Dippel*] at paras 21-23; *Barton*, *supra* at paras 250, 254 (ABCA); *R v Aitken*, 2007 BCSC 1975 at paras 22-37; *R v Lebrun*, 1999 CanLii 13504 (QCCA). But see *Ewanchuk*, *supra* at para 60 (Major J).

<sup>6</sup> *R v Cinous*, 2002 SCC 29 [*Cinous*] at para 95.

<sup>7</sup> *Ibid* at para 97 [emphasis added]. See also *R v Park*, [1995] 2 SCR 836 [*Park*] at para 20.

trier of fact, and is particularly detrimental in the context of sexual assault, an area of the law that continues to be influenced by myths and stereotypes about women.<sup>8</sup>

7. There can also be no “air of reality” to the defence of mistaken belief where the accused’s “mistake” is rooted in a mistake of law, regarding, for example, the definition of consent.<sup>9</sup>

**B. Reasonable “steps” requires positive action on the part of the accused**

8. LEAF further submits that in order to satisfy the “reasonable steps” requirement in s. 273.2(b), the accused must have taken active, positive steps to ascertain consent.

9. The defence of mistaken belief in consent only arises if the Crown has proven the *actus reus* of the complainant’s subjective non-consent beyond a reasonable doubt. An accused may raise a reasonable doubt as to *mens rea* by asserting that he was mistaken as to the complainant’s communication of consent. Before an accused may rely on the defence of mistaken belief in consent, however, he must identify evidence of positive, active steps taken to confirm unambiguous and affirmative agreement in advance of sexual touching.

10. Interpreting “reasonable steps” as requiring positive action by the accused advances Parliament’s objective of protecting women’s “inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in”.<sup>10</sup> It does so by condemning those sexual assaults committed due to “miscommunications” grounded in discriminatory myths and assumptions about women’s behaviour, where the accused has not actively attempted to ascertain consent.<sup>11</sup> Such an interpretation is also consistent with this Court’s rejection of a belief in implied consent as a mistake of law and as inconsistent with women’s

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<sup>8</sup> *R v Osolin*, [1993] 4 SCR 595 at para 168 (Cory J), paras 49-50, 76 (L’Heureux-Dubé J, dissenting); *Park*, *supra* at paras 46-48 (L’Heureux-Dubé J, concurring); *Barton*, *supra* at para 1.

<sup>9</sup> *Ewanchuk*, *supra* at para 51; *Dippel*, *supra* at para 21; *Barton*, *supra* at paras 249, 254; *R v Gairdner*, 2017 BCCA 425 at para 18. See also C. Boyle & M. McCrimmon, *infra* at 213.

<sup>10</sup> *Park*, *supra* at para 42 (L’Heureux-Dubé J, concurring).

<sup>11</sup> *R v Barton*, *supra* at paras 259, 261; *R v Esau*, [1997] 2 SCR 777 [*Esau*] at para 49-51 (McLachlin J dissenting); see also *R v JA*, [2011] 2 SCR 440 [*JA*] at para 65; *Park*, *supra* at para 43 (L’Heureux-Dubé J concurring).

equality rights.<sup>12</sup> Finally, it accords with the plain meaning of s. 273.2(b), which expressly requires “steps” – or action – on the part of the accused.<sup>13</sup>

11. LEAF submits, in particular, that any interpretation of “reasonable steps” that permits “no steps” to be taken must be rejected as contrary to Parliament’s stated objective of promoting women’s equality and security of the person.<sup>14</sup>

12. For the reasons argued below, the “reasonable steps” requirement in s. 273.2(b) is not satisfied by mere observation of the complainant or knowledge of the surrounding circumstances. Thus, an accused cannot rely, as his reasonable steps, solely on:

- (a) the surrounding circumstances of the sexual activity;
- (b) ambiguous conduct or passivity on the part of the complainant; or
- (c) consent to a prior or different sexual act.

13. Further, “reasonable steps” are required in every circumstance where the defence is raised, not only where the accused is subjectively aware that an inquiry into consent is necessary.

- (a) Observations of passivity or ambiguous conduct are not “reasonable steps”

14. It is not open to an accused to rely only on his observations or perceptions of ambiguous non-verbal conduct to satisfy the “reasonable steps” requirement under s. 273.2(b).<sup>15</sup> To do so would be a mistake of law, not fact. An honest mistaken belief must relate to the communication of consent. Passivity or ambiguous conduct is not communication of consent.<sup>16</sup> In order for the accused to rely on the defence of mistaken belief, “the evidence must show that he believed that the complainant *communicated consent to engage in the sexual activity in question*”,<sup>17</sup> and that this belief arose from reasonable steps taken in the circumstances known to him at the time.

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<sup>12</sup> *Ewanchuk, supra* at paras 31, 51; *Barton, supra* at paras 259-60.

<sup>13</sup> Compare e.g., s. 34(1) of the *Code*, which requires a “belief on reasonable grounds”.

<sup>14</sup> *Barton, supra* at para 256.

<sup>15</sup> *Ibid* at para 256.

<sup>16</sup> *Ewanchuk, supra* at para 51.

<sup>17</sup> *Ibid* at para 46 [emphasis in original].

15. In dissenting reasons, the Chief Justice of the Court Martial Appeal Court concluded that the accused “did not fail to take reasonable steps” due to “words and specific acts on the part of the complainant that led him to believe she was consenting”, including that she opened her mouth, let out a little cry, displayed no “reluctance” to the touching of her breasts, let herself be undressed, and lifted her buttocks as he removed her underwear.<sup>18</sup>

16. Parliament, however, introduced s. 273.2(b) recognizing that behavioural indicators of consent are often ambiguous and open to multiple interpretations. They have proven inadequate to convey the presence or absence of consent reliably, resulting in violence against women and the unequal protection and benefit of the law. In *Park*, Justice L’Heureux-Dubé, observed a “clear communication gap between how most women *experience* consent, and how many men *perceive* consent”, attributable in part to “the myths and stereotypes that many men hold about consent.”<sup>19</sup>

17. With the enactment of s. 273.2(b), an accused may not infer consent from ambiguous non-verbal responses or conduct, on the basis of generalized assumptions about passivity or silence, or fantasized stereotypes about how women communicate pleasure or desire.<sup>20</sup> In particular, the defence of mistaken belief is unavailable where an accused assumes consent exists based on equivocal conduct – such as noises,<sup>21</sup> steady breathing,<sup>22</sup> neutral or ambiguous bodily movements,<sup>23</sup> or involuntary responses<sup>24</sup> – rather than a complainant’s unambiguous agreement, communicated either by verbal or clear non-verbal conduct.<sup>25</sup> When faced with so-called “mixed messages” in the form of ambiguous conduct, Parliament requires an accused, acting reasonably, to seek clarification as to its meaning.

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<sup>18</sup> *Gagnon*, *supra* at paras 94-99 (Bell CJ dissenting). See also *Malcolm*, *supra* at para 24; *R v Osvath* (1996), 87 OAC 274 (ONCA) [*Osvath*] at para 22; *R v Cornejo*, *supra* at paras 22, 30.

<sup>19</sup> *Park*, *supra* at para 40 (concurring reasons).

<sup>20</sup> See e.g., *Cornejo*, *supra* at para 21.

<sup>21</sup> *Barton*, *supra* at para 229.

<sup>22</sup> *Dippel*, *supra* at para 18.

<sup>23</sup> *Gagnon*, *supra* at para 50 (Trudel JA); *Dippel*, *supra* at para 18; *Despins*, *supra* at para 10; *Cornejo*, *supra* at para 15.

<sup>24</sup> *Gagnon*, *supra* at para 94 (Bell CJ dissenting).

<sup>25</sup> By analogy, *Esau*, *supra* at paras 80-81 (McLachlin J dissenting).



(b) “No steps” based on surrounding circumstances are not “reasonable steps”

18. The circumstances surrounding the sexual touching cannot obviate the requirement to take active, reasonable steps to ascertain consent under s. 273.2(b), as the majority of the Court Martial Appeal Court properly recognized below.<sup>26</sup> In the case at bar, such circumstances included the sequence of events, the location and setting of the alleged assault, and topics of conversation leading to the sexual touching.<sup>27</sup> In other cases, such circumstances have included prior sexual history between the accused and the complainant, or the accused’s ignorance of any incapacity on the part of the complainant.<sup>28</sup>

19. Appellate courts interpreting s. 273.2(b) have rejected the idea that “no steps” can constitute reasonable steps, regardless of the circumstances surrounding the sexual encounter.<sup>29</sup> Similarly, when considering the requirement under s. 172.1(4) of the *Code* to take reasonable steps to ascertain age in the context of child luring, this Court held that it was not “reasonable” nor a “step” for the accused in that case simply to rely on surrounding circumstances, rather than taking positive steps to ascertain his interlocutor’s age.<sup>30</sup>

20. An accused’s knowledge of circumstances surrounding the sexual touching may be relevant to determining the specific steps that will reasonably be required of an accused to ascertain consent. Subsection 273.2(b) creates a “proportionate relationship” between the reasonable steps an accused must take to ascertain his partner is consenting, and the circumstances known to him at the time,<sup>31</sup> such that “reasonable” steps may range from minimal to quite substantial depending on the circumstances. However, it will never suffice for the accused to rely on those circumstances to fail to take any steps at all.

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<sup>26</sup> *Gagnon, supra* at paras 29-30, 50-51 (Trudel JA).

<sup>27</sup> *Ibid* at para 50 (Trudel JA).

<sup>28</sup> *Osvath, supra* at paras 20-22; Melanie Randall, “Sexual Assault in Spousal Relationships, ‘Continuous Consent’, and the Law: Honest but Mistaken Judicial Beliefs” (2008) 32 Man LJ 144.

<sup>29</sup> *Barton, supra* at para 259; *Dippel, supra* at para 23; *R v Flaviano*, 2013 ABCA 219 at para 29. But see *Malcolm, supra* at para 21.

<sup>30</sup> *R v Levigne*, [2010] 2 SCR 3 at para 41. But see *R v Tannas*, 2015 SKCA 61; *R v George*, [2017] 1 SCR 1021 [*George*] at paras 9, 28.

<sup>31</sup> *R v RG* (1994), 38 CR (4<sup>th</sup>) 123, [1994] BCJ No 3094 (BCCA) [*RG*] at para 29.

(c) Reasonable steps must be taken prior to each distinct sexual act

21. The obligation to take reasonable steps to ascertain consent in order to raise a defence of mistaken belief arises independently in respect of “every sexual act in a particular encounter”.<sup>32</sup> The law clearly requires that consent be voluntary, affirmative, and ongoing, and that it can be revoked at any time.<sup>33</sup> A mistake based on a complainant’s communication of consent to a different or prior sexual act is a mistake of law and not a mistake of fact. Accordingly, in order to uphold the equality, autonomy, and sexual integrity of women, this Court must reject an interpretation of s. 273.2(b) that allows the accused to interpret consent to one sexual act as agreement to other forms of sexual activity.

22. A substantive equality analysis consistent with the definition of consent mandates that “reasonable steps” be taken to ascertain consent to “the sexual activity *in question*,” as that activity may change during the course of an encounter. As properly accepted by the majority of the Court Martial Appeal Court in the case at bar, steps taken to ascertain consent to a kiss cannot form the basis for a mistaken belief in consent to intercourse.<sup>34</sup> Further, a complainant’s expression of consent to a particular act does not relieve the accused of the obligation to take reasonable steps to ascertain consent to a different act.<sup>35</sup> In addition, more invasive or dangerous sexual acts require heightened reasonable steps.

23. It is not open to an accused to “test the waters” with sexual touching as a way of seeking the communication of consent.<sup>36</sup> Sexual touching without consent is sexual assault, and can never in and of itself constitute a “reasonable step.”<sup>37</sup>

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<sup>32</sup> *R v JA*, *supra* at para 31.

<sup>33</sup> *Ibid* at para 43. See also, s. 273.1 of the *Code*.

<sup>34</sup> *Gagnon*, *supra* at para 54 (Trudel JA).

<sup>35</sup> *Cornejo*, *supra* at paras 31-32; *Despins*, *supra* at paras 10-11; *Dippel*, *supra* at paras 17, 23; *Gairdner*, *supra* at para 17.

<sup>36</sup> *Ewanchuk*, *supra* at para 52.

<sup>37</sup> *Dippel*, *supra* at para 23; see also *Cornejo*, *supra* at paras 16, 31-32; *George*, *supra* at para 18.

(d) “Reasonable steps” requirement is not triggered only by a signal of non-consent

24. The requirement that an accused take “reasonable steps” in order to raise the defence of mistaken belief applies in all circumstances, whether or not the accused is subjectively aware of a risk the complainant is not consenting.<sup>38</sup> There is no onus on the complainant to resist or communicate non-consent to trigger the “reasonable steps” requirement of the defence.<sup>39</sup> Rather, “[u]nder any circumstances [where the defence is raised], there is a responsibility, prior to engaging in sexual activity, to take reasonable steps to ascertain consent”.<sup>40</sup>

25. To limit the requirement to take “reasonable steps” to circumstances where the accused is aware of some prior signal of non-consent is to presume that women are consenting to sexual activity until or unless they object, contrary to the clear direction of this Court.<sup>41</sup> As explained by the Court of Appeal for Alberta in *Dippel*, whether or not a complainant “[made] it clear through previous communications that [she was] not interested in any sexual contact”, the onus falls on the accused to “take real steps that [meet] the reasonable steps threshold to ensure that the complainant voluntarily agreed to engage in sexual activity with him”, before he may rely on the defence of mistaken belief in consent.<sup>42</sup>

26. This Court must interpret s. 273.2 in a manner that gives distinct meaning to 273.2(a) and 273.2(b) as intended by Parliament. Subsection 273.2(b) would be rendered redundant if the duty to take reasonable steps arose only after a complainant signaled non-consent or resisted a sexual advance. An accused who is aware of the risk that a complainant is not consenting is reckless and therefore has no access to the defence of mistaken belief pursuant to s. 273.2(a)(ii) of the *Code*.<sup>43</sup> Awareness of the absence or involuntariness of consent may be evidence of recklessness or wilful

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<sup>38</sup> Cairns, *supra* at 330.

<sup>39</sup> *Park*, *supra* at paras 39, 47 (L’Heureux-Dubé J concurring). But see *RG*, *supra* at para 32; *Malcolm*, *supra* at para 23; *Cornejo*, *supra* at para 22, citing Kent Roach, *Criminal Law*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2000) at 157-58), and 25.

<sup>40</sup> *R v RR* (2001), 151 OAC 1 (ONCA) [*RR*] at para 57 [emphasis added].

<sup>41</sup> *Ewanchuk*, *supra* at paras 31, 51; *JA*, *supra* at para 41. See also *Barton*, *supra* at paras 259-60.

<sup>42</sup> *Dippel*, *supra* at paras 7, 26. See also, *Barton*, *supra* at paras 259-262.

<sup>43</sup> *Ewanchuk*, *supra* at para 52 (Major J); *Esau*, *supra* at paras 70, 79 (McLachlin J dissenting).

blindness under s 273.2 (a), and is otherwise only relevant to assessing the “reasonableness” of the steps taken to ascertain consent.

**C. More substantial steps are reasonably required in circumstances of imbalance of power between the accused and the complainant**

27. In determining the content of the requirement to take reasonable steps, the Court must consider the circumstances subjectively known to the accused at the time. Applying an equality analysis, these circumstances must include the proposed activity, the relationship between the complainant and the accused, and any facts giving rise to an imbalance of power or hierarchy between them.<sup>44</sup>

28. Courts have previously acknowledged that the existence of a power imbalance is a relevant factor to be considered when assessing what steps are reasonable in the “circumstances known to the accused.” More significant steps have been required, for instance, where a complainant has a developmental disability,<sup>45</sup> where a complainant has already communicated her refusal,<sup>46</sup> where a significant age disparity exists between the complainant and the accused,<sup>47</sup> where a complainant was under the physical and financial control of the accused or is aware of a prior use of force or threat against the complainant,<sup>48</sup> and in the workplace.

29. In the military setting of the case at bar, this Court should consider the impact of a hierarchical working environment that prioritizes obedience and conformity, and the systemic barriers such an environment may create for women to express an objection to unwanted sexual contact.<sup>49</sup> Justice Marie Deschamps, in the *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, described the organizational structure of the military as “deeply hierarchical,” with power imbalances arising from differences in rank “affect[ing]

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<sup>44</sup> Christine Boyle & Marilyn McCrimmon, “The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered” (1998) 41 Crim LQ 198 at 218-19.

<sup>45</sup> *RR*, *supra* at para 57.

<sup>46</sup> See e.g., *Ewanchuk*, *supra* at para 99 (L’Heureux- Dubé J concurring).

<sup>47</sup> In the context of s. 150.1(4) of the *Code*: *R v RAK* (1996), 175 NBR (2d) 225 (NBCA).

<sup>48</sup> *RG*, *supra* at paras 23, 33.

<sup>49</sup> See e.g., Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (2015) at 15-16 [*External Review*].

almost all work and social interactions.”<sup>50</sup> The report observed that senior-ranking officers may influence a complainant’s employment, including “career advancement, transfer, or deployment.” In this context, “some junior (more likely female) members [feel] that they have little choice to but to go along with the sexual advances of more senior (more likely male) members.”<sup>51</sup>

30. In the military context, therefore, an accused’s subjective knowledge of his higher rank must enhance the steps that are reasonably required of him to ascertain the consent of a lower ranking complainant, consistent with the *Charter* value of substantive equality.

#### **D. Conclusion**

31. Interpreted in light of Parliament’s stated objective to advance women’s equality, the “reasonable steps” requirement in s. 273.2(b) requires positive action on the part of the accused in all circumstances where the defence is raised. It is not a “reasonable step” for an accused to assume consent is present based on observations of a complainant’s ambiguous non-verbal conduct, surrounding circumstances, or prior consent to a different sexual act.

32. Any circumstances of imbalance of power between the accused and the complainant must also inform the “reasonableness” of the accused’s steps and therefore require more substantial steps on the part of the accused to ascertain consent.

#### **PARTS IV & V – COSTS & ORDER REQUESTED**

33. LEAF seeks no costs, and requests that none be awarded against it. LEAF takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, on August 7, 2018

 Nasha Nijhawan / Shaun O’Brien / Kelly McMillan

<sup>50</sup> *External Review*, *supra* at 44, 51.

<sup>51</sup> *Ibid* at 51. See also: Adam Cotter, *Sexual Misconduct in the Canadian Armed Forces*, 2016 (Statistics Canada). The Canadian Armed Forces has accepted the recommendations of the *External Review* in principle: *Action Plan on Inappropriate Sexual Behaviour: Addressing the External Review Authority Report’s Recommendation* (30 April 2015).

**PART VI – TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Paragraph(s)</b>
<a href="#"><i>R v Aitken</i>, 2007 BCSC 1975</a>	22-37
<a href="#"><i>R v Barton</i>, 2017 ABCA 216</a>	1, 229, 245-246, 249, 250, 254, 256, 259, 260, 261
<a href="#"><i>R v Cinous</i>, 2002 SCC 29</a>	95, 97
<a href="#"><i>R v Cornejo</i> (2003), 68 OR (3d) 117 (ONCA)</a>	15, 16, 18-19, 21, 22, 25, 30, 31-32
<a href="#"><i>R v Despins</i>, 2007 SKCA 119</a>	10, 11-12,
<a href="#"><i>R v Dippel</i>, 2011 ABCA 129</a>	7, 17, 18, 21-23, 26
<a href="#"><i>R v Esau</i>, [1997] 2 SCR 777</a>	49-51, 70, 79, 80-81
<a href="#"><i>R v Ewanchuk</i>, [1999] 1 SCR 330</a>	31, 46, 47, 51, 52, 60, 95, 98, 99
<a href="#"><i>R v Flaviano</i>, 2013 ABCA 219</a>	29
<a href="#"><i>R v Gagnon</i>, 2018 CMAC 1</a>	18, 24-25, 29-30, 50, 51, 54, 74, 94-99
<a href="#"><i>R v Gairdner</i>, 2017 BCCA 425</a>	17, 18
<a href="#"><i>R v George</i>, [2017] 1 SCR 1021</a>	9, 18, 28
<a href="#"><i>R v JA</i>, [2011] 2 SCR 440</a>	31, 41, 43, 65
<a href="#"><i>R v Lebrun</i>, 1999 CanLii 13504 (QCCA)</a>	
<a href="#"><i>R v Levigne</i>, [2010] 2 SCR 3</a>	41

<a href="#"><i>R v Malcolm</i>, 2000 MBCA 77</a>	21, 23, 24, 34-36
<a href="#"><i>R v Osolin</i>, [1993] 4 SCR 595</a>	49-50, 76, 168
<a href="#"><i>R v Osvath</i> (1996), 87 OAC 274 (ONCA)</a>	20, 21, 22
<a href="#"><i>R v Park</i>, [1995] 2 SCR 836</a>	20, 39, 40, 42, 43, 46, 47, 48
<a href="#"><i>R v RAK</i> (1996), 175 NBR (2d) 225 (NBCA)</a>	
<a href="#"><i>R v RG</i> (1994), 38 CR (4th) 123, [1994] BCJ No 3094 (BCCA)</a>	23, 29, 32, 33
<a href="#"><i>R v RR</i> (2001), 151 OAC 1, [2001] OJ No 4254 (QL)</a>	57
<a href="#"><i>R v Tannas</i>, 2015 SKCA 61</a>	

<b>Secondary Sources</b>	<b>Paragraph(s)</b>
<a href="#"><i>Adam Cotter, Sexual Misconduct in the Canadian Armed Forces</i> (Statistics Canada, 2016)</a>	
<a href="#"><i>Canadian Armed Forces Strategic Team on Sexual Misconduct, Action Plan on Inappropriate Sexual Behaviour, Addressing the External Review Authority Report's Recommendations</i> (National Defence, 2015)</a>	
Christine Boyle & Marilyn McCrimmon, “ <i>The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered</i> ” (1998) 41 Crim LQ 198	218-219
<a href="#"><i>Deschamps, Marie, External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces</i> (2015)</a>	15-16, 44, 51
<a href="#"><i>Melanie Randall, “Sexual Assault in Spousal Relationships, ‘Continuous Consent’, and the Law: Honest but Mistaken Judicial Beliefs</i>” (2008) 32 Man LJ 144</a>	
Rosemary Cairns Way, “ <i>Bill C-49 and the Politics of Constitutionalized Fault</i> ” (1993) 42 UNBLJ 325	329-330

## PART VII – LEGISLATION

<u><b>Criminal Code, R.S.C., 1985, c. C-46</b></u>	<u><b>Code criminel (L.R.C. (1985), ch. C-46)</b></u>
<p><b>Defence of Person</b></p> <p>34 (1) A person is not guilty of an offence if</p> <p style="padding-left: 40px;">(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;</p> <p style="padding-left: 40px;">(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and</p> <p style="padding-left: 40px;">(c) the act committed is reasonable in the circumstances.</p> <p><b>Sexual Offences</b></p> <p><u>Mistake of age</u></p> <p>150.1(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.</p> <p><u>No defence</u></p> <p>172.1 (4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.</p>	<p><b>Défense de la personne</b></p> <p><u>Défense — emploi ou menace d’emploi de la force</u></p> <p>34 (1) N’est pas coupable d’une infraction la personne qui, à la fois :</p> <p style="padding-left: 40px;">a) croit, pour des motifs raisonnables, que la force est employée contre elle ou une autre personne ou qu’on menace de l’employer contre elle ou une autre personne;</p> <p style="padding-left: 40px;">b) commet l’acte constituant l’infraction dans le but de se défendre ou de se protéger — ou de défendre ou de protéger une autre personne — contre l’emploi ou la menace d’emploi de la force;</p> <p style="padding-left: 40px;">c) agit de façon raisonnable dans les circonstances.</p> <p><b>Infractions d’ordre sexuel</b></p> <p><u>Inadmissibilité de l’erreur</u></p> <p>150.1(4) Le fait que l’accusé croyait que le plaignant était âgé de seize ans au moins au moment de la perpétration de l’infraction reprochée ne constitue un moyen de défense contre une accusation portée en vertu des articles 151 ou 152, des paragraphes 160(3) ou 173(2) ou des articles 271, 272 ou 273 que si l’accusé a pris toutes les mesures raisonnables pour s’assurer de l’âge du plaignant.</p> <p><u>Moyen de défense</u></p>



<p><u>Meaning of consent</u></p> <p>273.1 (1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.</p> <p><u>Where belief in consent not a defence</u></p> <p>273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where</p> <p style="padding-left: 40px;">(a) the accused's belief arose from the accused's</p> <p style="padding-left: 80px;">(i) self-induced intoxication, or</p> <p style="padding-left: 80px;">(ii) recklessness or wilful blindness; or</p> <p style="padding-left: 40px;">(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.</p>	<p>172.1 (4) Le fait pour l'accusé de croire que la personne visée aux alinéas (1)a, b) ou c) était âgée d'au moins dix-huit, seize ou quatorze ans, selon le cas, ne constitue un moyen de défense contre une accusation fondée sur le paragraphe (1) que s'il a pris des mesures raisonnables pour s'assurer de l'âge de la personne.</p> <p><u>Définition de consentement</u></p> <p>273.1 (1) Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.</p> <p><u>Exclusion du moyen de défense fondé sur la croyance au consentement</u></p> <p>273.2 Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas :</p> <p style="padding-left: 40px;">a) cette croyance provient :</p> <p style="padding-left: 80px;">(i) soit de l'affaiblissement volontaire de ses facultés,</p> <p style="padding-left: 80px;">(ii) soit de son insouciance ou d'un aveuglement volontaire;</p> <p style="padding-left: 40px;">b) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.</p>
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