COURT OF APPEAL OF YUKON

Citation: *R. v. Hadvick*,
2024 YKCA 2

Date: 20240306
Docket: 22-YU890

Between:

Rex

Appellant

And

Jared Marcus Alexander Hadvick

Respondent

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Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of Yukon, dated September 2, 2022 (*R. v. Hadvick*, Whitehorse Docket 21-01507).

Counsel for the Appellant:	K.M. Eldred
Counsel for the Respondent:	J. Whysall A. Tubinshlak
Place and Date of Hearing:	Vancouver, British Columbia September 29, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 6, 2024

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Newbury

Summary:

The Crown appeals acquittals from counts in an indictment charging Mr. Hadvick with: (1) touching a person under the age of 16 years, for a sexual purpose contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]; and (2) sexually assaulting the complainant contrary to s. 271 of the Code. The complainant was a 14-year-old Indigenous girl living in Faro, Yukon. Mr. Hadvick was 31 years old and in Faro for a construction project. At trial, Mr. Hadvick advanced a defence of mistake of age. He based his belief that the complainant was 19 years old primarily on the fact that he observed her serving, being served, and consuming alcohol in a licensed establishment. The Crown attempted to negate the defence by proving that Mr. Hadvick did not take "all reasonable steps" to ascertain the complainant's age as required by s. 150.1(4) of the Code. The Crown appeals on the basis that the trial judge erred in instructing the jury that they could consider evidence unknown to Mr. Hadvick relating to the complainant's level of maturity in considering whether Mr. Hadvick took all reasonable steps to ascertain the complainant's age. Held: Appeal dismissed.

The comments of the Court in R. v. George, 2017 SCC 38, were not intended to permit triers of fact to consider a broad range of evidence unknown to the accused. The judge erred in instructing the jury to consider evidence unknown to Mr. Hadvick and irrelevant to the jury's consideration of whether he took all reasonable steps to ascertain the complainant's age. However, the charge, taken as a whole, mitigated against the problematic instruction and properly equipped the jury to decide the case based on the evidence at trial. The judge's error in charging the jury on evidence unknown to Mr. Hadvick and the use they could make of such evidence, did not have a material bearing on the acquittal.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

Overview

[1] Jared Hadvick was charged with three counts arising out of events that took place between October 30 and 31, 2018 at Faro in the Yukon Territory. He was acquitted by a jury of all counts including: Count 1—touching L.M., a person under the age of 16 years, for a sexual purpose contrary to s. 151 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*]; and Count 2—sexually assaulting L.M., contrary to s. 271 of the *Code*. At the time, L.M. was 14 years old and Mr. Hadvick was 31 years old.

[2] At trial, Mr. Hadvick advanced a defence of mistake of age on the basis that he honestly believed L.M. was 16 years old or older and that he took all reasonable steps to ascertain L.M.'s age. The Crown attempted to negate this defence pursuant to, among other things, s. 150.1(4) of the *Code*.

[3] In *R. v. George*, 2017 SCC 38, the Court observed that through s. 150.1(4), Parliament has placed "the responsibility for preventing adult/youth sexual activity where it belongs: with adults": at para. 2. That provision limits the ability of an accused to rely on a defence of mistake of age if the Crown proves that the accused did not take all reasonable steps to ascertain the age of the complainant. This appeal concerns the proper interpretation and application of that provision.

[4] The Crown appeals the acquittals on Counts 1 and 2, arguing that the trial judge erred in law in admitting evidence unknown to Mr. Hadvick and in charging the jury about the use that could be made of that evidence in their consideration of whether the Crown had proved beyond a reasonable doubt that Mr. Hadvick had not taken all reasonable steps to ascertain the age of L.M. The respondent argues that the trial judge correctly admitted the contentious evidence and properly instructed the jury in accordance with the principles established in *George*.

[5] For the reasons that follow, I would dismiss the appeal.

Section 150.1(4)

[6] Prior to the enactment of s. 150.1(4) of the *Code*, s. 146 made it an offence for a male person to have sexual intercourse with a female under the age of 14 years, "whether or not he believes that she is fourteen years of age or more". In *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906, 1990 CanLII 89, the Court held that the section infringed s. 7 of the *Canadian Charter of Rights and Freedoms*, because it offended the principle of fundamental justice that a "true" criminal offence must have a *mens rea* component. The provision was objectionable because it expressly precluded an accused from arguing he had a *bona fide* belief that the female was 14 years of age or older.

[7] In 1985, s. 146 was repealed and new offences were introduced—sexual interference (s. 151), invitation to sexual touching (s. 152), and sexual exploitation (s. 153)—which were gender-neutral. At the same time, Parliament enacted s. 150.1, which provides that the consent of a complainant under the age of 16 years is not a defence to certain sexual offences, including those in ss. 151 and 271. It also establishes, in subsection 2.1, a "close-in-age" exception where the accused is less than five years older than a complainant who is 14 years of age or older, but under the age of 16. In particular, s. 150.1(4) sets out what I will refer to as the "all-reasonable-steps" standard.

[8] Section 150.1(4) provides:

> 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.
>
> [Emphasis added.]

[9] As noted by Isabel Grant and Janine Benedet in "Confronting Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019) 97:1 *Can Bar Rev* 1 at 10 ("Grant and Benedet"), the provision did not create, but limits, the defence of mistake:

> 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.
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> [Emphasis in original.]

[10] In *George*, the Court observed that the effect of s. 150.1(4) was to import "an objective element into the fault analysis" to provide enhanced protection for youth, and described the resulting *mens rea* requirement:

> [8] … As a result, to convict an accused person who demonstrates an "air of reality" to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take "all reasonable steps" to ascertain the complainant's age (the objective element) …
>
> [References omitted.]

[11] The Court noted that consideration of reasonable doubt in relation to the objective element—whether the accused did not take "all reasonable steps"—is necessarily contextual and fact-specific:

> [9] Determining what raises a reasonable doubt in respect of the objective element is a highly contextual, fact-specific exercise … In some cases, it may be reasonable to ask a partner's age. It would be an error, however, to insist that a reasonable person would ask a partner's age in every case … Conversely, it would be an error to assert that a reasonable person would do no more than ask a partner's age in every case, given the commonly recognized motivation for young people to misrepresent their age … Such narrow approaches would contradict the open-ended language of the reasonable steps provision. That said, at least one general rule may be recognized: the more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them. This follows inevitably from the phrasing of the provision ("all *reasonable* steps") and reflects the jurisprudence …, and academic commentary ….
>
> [References omitted; italic emphasis in original; emphasis added by underlining.]

[12] The language in s. 150.1(4) is open-ended and does not provide guidance on the proper application of the statutory limitation on the mistake of age defence.

Some academic commentators have criticized courts for not giving sufficient weight to the requirement that an accused cannot rely on the defence of mistake of age unless they have taken "all reasonable steps" to ascertain age. In Grant and Benedet at 15, the authors preface their analysis of the case law with this observation:

> 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.

[13] In many cases, courts have acquitted an accused based on a mistake of age defence where the accused has taken no steps to ascertain age beyond mere observation of the complainant: See, e.g., *R. v. Tannas*, 2015 SKCA 61. Indeed, appellate courts have consistently held that an "accused's visual observation of the complainant may be enough to constitute reasonable steps": *R. v. Duran*, 2013 ONCA 343 at para. 52.

[14] However, decisions have also emphasized the contextual nature of the inquiry and have tied that to the accused's knowledge base. In *R. v. L.T.P.* (1997), 113 C.C.C. (3d) 42, 1997 CanLII 12464 (B.C.C.A.), Justice Finch (as he then was) described the all-reasonable-steps analysis in the following terms:

> [20] In considering whether the Crown has proven beyond a reasonable doubt that the accused has not taken all reasonable steps to ascertain the complainant's age, the Court must ask what steps would have been reasonable for the accused to take in the circumstances. As suggested in *R. v. Hayes*, [1991] A.J. No. 1232, *supra*, sometimes a visual observation alone may suffice. Whether further steps would be reasonable would depend upon the apparent indicia of the complainant's age, and the accused's knowledge of same, including: the accused's knowledge of the complainant's physical appearance and behaviour; the ages and appearance of others in whose company the complainant is found; the activities engaged in either by the complainant individually, or as part of a group; and the times, places, and other circumstances in which the complainant and her conduct are observed by the accused. The Court should ask whether, looking at those indicia, a

> reasonable person would believe that the complainant was fourteen years of age or more without further inquiry, and if not, what further steps a reasonable person would take in the circumstances to ascertain her age. …
>
> [Emphasis added.]

[15] In *George,* the Court commented on certain evidence presented in that case and, in particular, about the admissibility and relevance of evidence that did not precede the sexual encounter or that was unknown to the accused.

[16] In *George*, the Crown had succeeded on appeal to the Saskatchewan Court of Appeal on the basis that the judge erred in law in his "all-reasonable-steps" analysis. The Supreme Court of Canada allowed the accused's appeal on the basis that the Crown could only appeal an acquittal on a question of law. It found that the Crown's arguments before the Court of Appeal and the Supreme Court of Canada raised alleged errors in the inferences drawn by the trial judge, findings which were owed deference on appeal.

[17] The Court commented on two alleged errors of the trial judge relied on by the Crown respondent. First, it rejected the Court of Appeal's conclusion that the judge had erred by relying on evidence about the sexual activity itself in deciding that the accused had taken all reasonable steps to ascertain age. It determined that the judge had not done so but had relied on the accused's evidence about the "obvious level of comfort with which [the complainant] approached the encounter…": at para. 18. The Court emphasized that the evidence the judge was referring to preceded the sexual activity and was thus relevant to the question of whether the accused had taken all reasonable steps: at paras. 18–19.

[18] Second, it rejected the finding that the trial judge had erred in considering other post sexual activity evidence. The Court noted that although the reasonable steps that must be taken by an accused must precede the sexual activity, it does not follow that the evidence tendered to prove that fact must also precede the sexual activity. As an example, the Court observed that a photograph of a complainant taken a week after the sexual encounter may be tendered as evidence depicting the complainant's physical appearance around that time, which could be relevant to

the reasonableness of the accused's perception of the complainant's age: at paras. 20–22.

[19] The Court also observed that evidence arising after the sexual encounter may be considered by the trier of fact if it properly informs the credibility or reliability of any witness, citing *R. v. Osborne*, [1992] N.J. No. 312, 1992 CanLII 7117 (Nfld. C.A.):

> [21] … However, evidence properly informing the credibility or reliability of any witness, even if that evidence arose after the sexual activity in question, may be considered by the trial judge. Similarly, evidence demonstrating the reasonableness of the accused person's perception of the complainant's age before sexual contact is relevant to adjudicating the reasonableness of the steps taken by the accused person (*Duran,* at paras. 51-54), even if that evidence happens to arise after the sexual activity or was not known to the accused before the sexual activity (see e.g. *Osborne*, at para. 22(4) and (5)).

[20] The Court's comments on these questions are central to the issues raised on this appeal. I will discuss the admissibility and relevance of evidence not known to the accused in greater detail below.

Background

[21] At the time, L.M. was a high-school student and worked four or five days a week as a server in the restaurant at the Faro Hotel, which was the only restaurant in the 300-person town. She is Indigenous. Mr. Hadvick, a resident of British Columbia, came to Faro in late September 2018 to work as a heavy equipment operator for Glacier Drilling on a dyke improvement project at the local mine. He stayed in Faro until November 2018 with the other members of a small crew that worked 12-hour shifts seven days a week.

[22] While in Faro, Mr. Hadvick and the other members of the Glacier Drilling crew went to the Faro Hotel after work four or five days a week. The hotel had a bar and a restaurant in close proximity, each with about four tables. L.M. testified that she waited on the Glacier Drilling crew in the restaurant most days when she worked. Mr. Hadvick, and his boss, Cole Mickey, testified that L.M. waited on and served alcohol to them in both the restaurant and the bar. L.M. denied serving alcohol to the

crew, but admitted that she had brought alcohol to other guests when she was working “once or twice”. L.M. described her limited interactions at the restaurant with Mr. Hadvick, prior to October 30, as “pretty normal” for a server and guest. His evidence was consistent with that view.

[23] The only other interaction between L.M. and Mr. Hadvick prior to the evening in question was at a Halloween house party at the home of L.M.’s aunt which took place a few days before October 30, 2018. At the party, L.M.’s mother introduced her to Mr. Hadvick. They spoke only briefly. The mother testified that she had told Mr. Hadvick that L.M. was 14 years old when she first met him at a birthday party about ten days before the Halloween party. He admitted meeting L.M.’s mother at the birthday party but denied having any discussion about L.M.’s age with her, or anyone else. Mr. Hadvick also admitted that L.M.’s mother was a little older than he was, perhaps in her mid-thirties.

[24] On October 30, 2018, L.M. worked the closing shift at the restaurant and then met in the bar with a potential employer to discuss a job opportunity at the Victoria Gold mining camp working as a cook or cleaner. When the meeting ended, Mr. Hadvick and his co-workers were in the bar playing darts. They bought L.M. drinks and she remained in the bar with the men. They continued drinking for more than two hours. L.M. recalls having three shots of tequila, three to five beers, and shots of “Sour Puss” during the course of the evening. She was intoxicated. She denied buying any drinks, but Mr. Mickey said she bought a round of shots and Mr. Hadvick testified that L.M. purchased some alcohol. Mr. Hadvick said that he had three shots and eight to ten beers and was quite intoxicated.

[25] At approximately 11:30 p.m., Mr. Mickey told the Glacier Drilling crew that it was time to get to bed. Mr. Hadvick testified that, as the crew was leaving, he and L.M. began flirting and kissing. They ended up at the end of a hallway against a door. L.M. remained clothed but she helped Mr. Hadvick remove his pants. He testified that she gave him oral sex. They were interrupted when Joe Mayo, the bar

manager, entered the room. L.M. testified that she had no recollection of those events.

[26] Mr. Hadvick got dressed and left the hotel with L.M. At the time, Mr. Hadvick was staying in one side of a duplex and the other side was under renovation. Mr. Hadvick brought L.M. to the vacant, unrenovated side of the duplex. L.M. testified that she recalled walking with her arm around Mr. Hadvick and ending up in the unrenovated duplex. Her next recollection was being awakened by the police in the morning. Mr. Hadvick testified that he helped remove L.M.'s clothes and that they were in the midst of "hooking up" but assumed they did not have intercourse because when he awoke at 5:15 the next morning, he was wearing pants. He unsuccessfully tried to awaken L.M. who was lying naked in the unheated building. He covered her with a towel and left for work. Shortly after Mr. Hadvick left, L.M. was discovered in the duplex by the building owner, who called the police. When she was awakened, L.M. was still intoxicated, stumbling and unsteady, but able to walk.

[27] Mr. Hadvick testified that at all times he thought that L.M. was 19 years old primarily because she was serving, ordering, and drinking alcohol in the hotel bar. He said he first learned that L.M. was 14 years old when he received a text message from L.M.'s family friend on the morning of October 31.

At trial

[28] In addition to L.M., the jury heard the testimony of L.M.'s close family friend, her mother, Mr. Mayo, the person who found L.M. on the morning of October 31, two police officers, Mr. Mickey, and Mr. Hadvick. In the course of the trial, the jury heard about L.M.'s interactions with Mr. Hadvick and a considerable amount of evidence, much of it through the defence questioning of L.M.'s mother, about L.M.'s activities outside of her work at the Faro Hotel.

[29] The issue raised on appeal—whether evidence unknown to Mr. Hadvick could be considered by the jury—was contentious at trial. The Crown objected to the defence questioning L.M. about events and activities that Mr. Hadvick was unaware of including: being grounded by her mother; her drug use; hanging out with an older

crowd; the circumstances of her running away from home; and other behaviour she was exhibiting at the time. At one point, when Crown counsel objected to a question to L.M. about why her mother had grounded her, the judge heard detailed submissions from the parties, in the absence of the jury, about the relevance of that kind of evidence.

[30] The defence submitted that the evidence was relevant "pursuant to *Osborne*, at para. 22, … because the actions that the complainant was taking at that time and behaviours that they were exhibiting and things that they were doing, even if it's a fact not known to the accused, if it goes to the degree of maturity that they may have portrayed, then it is a relevant factor". Crown counsel objected, arguing that the reasons for L.M. being grounded were not relevant to either Mr. Hadvick's subjective knowledge of her age, or to what would be reasonable steps for Mr. Hadvick to take to ascertain her age. The Crown submitted that "reasonable steps" taken by Mr. Hadvick must relate to his knowledge and circumstances, not the knowledge or circumstances of other people in Faro. Crown counsel also argued that the defence submissions were objectionable because they were inviting the jury to engage in reasoning that was similar to twin myths reasoning. The jury might reason that because L.M. was taking drugs, acting out with her mother, and hanging out with an older crowd, she must have presented herself to Mr. Hadvick as available for sexual encounters.

[31] At counsel's behest and prior to closing submissions, the judge made a ruling to clarify what evidence unknown to Mr. Hadvick was relevant to "the jury's consideration of the degree of maturity of L.M.". In doing so, he stated:

> In general, I agree that evidence of circumstances relating to [L.M.]'s activities, albeit unknown to Mr. Hadvick, in relation to the extent that it may corroborate the evidence of Mr. Hadvick regarding the degree of maturity that he observed … is properly put before the jury.

The judge then dealt with specific circumstances, ruling that the jury could consider evidence that L.M. had smoked crack cocaine and general evidence that she was hanging out with an older crowd. However, he ruled that the jury could not consider

evidence that she ran away from home or that she had attended poker games at the residence of an older friend.

[32] After charging the jury on whether the Crown had established subjective knowledge of L.M.'s age, either through actual knowledge or recklessness/willful blindness, he charged the jury on whether the Crown had proved that Mr. Hadvick had not taken all reasonable steps to ascertain her age. The following portions of that charge are relevant to the arguments raised on appeal:

> As I explained to you previously, s. 150.1(4) of the *Criminal Code* states that it is not a defence to a charge of sexual assault or sexual interference that an accused person believed that the complainant was 16 years of age or older unless the accused took all reasonable steps to ascertain the age of the complainant. An individual charged with sexual assault cannot simply say that they had an honest belief the complainant was 16 years of age or older. They must point to reasonable steps that they took to ascertain her age.
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> …
>
> Jared Hadvick's defence is that he believed [L.M.] was 19 years of age and that he took all reasonable steps to ascertain her age before engaging in sexual activity with her. The burden is on the Crown to disprove this defence. i.e., that is to disprove that he believed she was more than 16 years of age and that he took all reasonable steps to ascertain the age of [L.M.].
>
> I will now explain what the expression "all reasonable steps" means in this context.
>
> There is no specific checklist of what steps must be taken. What constitutes all reasonable steps can vary from one situation to another. It will depend on the context and all of the circumstances in each case. The test is not what Jared Hadvick thought were reasonable steps, but rather what a reasonable person would think amount to all reasonable steps in these circumstances.

[33] The judge noted that a reasonableness test is objective, meaning that the jury must look at all of the circumstances from the point of view of an objective observer. He stated that the steps must take into account factors personal to Mr. Hadvick including his knowledge of L.M., her appearance, and the nature of their relationship. The judge continued:

> In some circumstances, examining the demeanour, language, and social sophistication of the complainant cumulatively provides the reasonable steps that are necessary to ascertain that the complainant was 16 years of age or more. The place and context where the two people met may also be significant. Conducting a visual appraisal or assessment of the complainant's outward appearance in terms of clothing, hairstyle, makeup, and physical

> appearance in terms of the complainant's height, weight, and the presence or absence of physical maturity may also constitute reasonable steps.
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> Reasonable steps will often require direct inquiries to the other person about their age, including a request for identification. The response to those inquiries must be appraised in the context and circumstances of this case in deciding whether those inquiries and responses were sufficient to constitute reasonable steps.
>
> Generally, as the difference in age between an accused and a complainant increases, the accused is required to take more steps to ascertain the age of the complainant. It is generally understood that the less familiar the parties are, the more steps that are required to confirm the age of the complainant. The law normally expects more care from older, more mature accused's than from a young accused.
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> …
>
> [Emphasis added.]

[34] The judge referred to the evidence that Mr. Hadvick said led him to believe that L.M. was 19 years old and noted that it was "primarily the fact that he observed her on multiple occasions serving alcohol at the Faro Hotel restaurant as well as the fact that he saw her being served and consuming alcohol at the Faro Hotel bar on October 30, 2018, and also at a Halloween party held a few days previously". The judge listed other factors identified by Mr. Hadvick including: she discussed her employment prospects on October 30 without mentioning school activities; he observed her regularly smoking her own cigarettes and also observed her smoking marihuana in the hotel parking lot on October 30; her hairstyle, clothing choices, and use of makeup; her physical appearance including the development of breasts; and her outgoing demeanour.

[35] The judge then turned to other evidence that the jury could consider:

> In your determination of whether the Crown has satisfied you beyond a reasonable doubt that Jared Hadvick did not take all reasonable steps to ascertain the age of [L.M.] prior to engaging in sexual activity, you should consider whether there may be other evidence that was unknown to Mr. Hadvick that may reveal the general degree of maturity portrayed by [L.M.] around this time. This evidence may assist you in your assessment of Jared Hadvick's credibility generally and in particular your assessment of the reasonableness of the steps he took in this instance to ascertain [L.M.]'s age.
>
> In no particular order, you may wish to consider the following evidence regarding [L.M.]'s degree of maturity. Use your common sense and general

life experience in your consideration of this evidence as well as all of the other evidence that is before you in this matter.

1. [L.M.'s mother's] evidence that [L.M.] was running with an older crowd. In cross-examination, [L.M.'s mother] agreed that [L.M.] was, like most teenagers, out-of-control in October 2018.
2. [L.M.'s] evidence that she worked with older people at the hotel, agreeing with the suggestion that these coworkers were her friends. She also gave evidence regarding her regular interactions with her friend …, a person she described as being in her mid-20s.
3. Sgt. Christinger's evidence that [L.M.] dressed older than her age, referring to the fact that she wore makeup, tight fitting jeans, and tank tops, unlike other girls her age in the community, who wore baggy sweatpants. Sgt. Christinger told you that he had previously spoken to [L.M.] and that she didn't say much, was somewhat socially awkward and very giggly. He testified that [L.M.] had a very basic vocabulary and that she was more introverted than extroverted. You will recall, however, that he acknowledged in cross-examination that people can react nervously when interacting with police officers.
4. [L.M.'s] evidence that on three different occasions she was approached by intoxicated people she did not know while working at the Faro Hotel and asked to purchase off sales liquor. In each instance, [L.M.'s] response was to decline the request. The defence urges you to find that this evidence supports the notion that [L.M.] was generally perceived in the community to be of legal drinking age. In the absence of evidence as to the actual circumstances of three transactions, and specifically whether the prospective purchasers ever considered [L.M.'s] level of maturity, I would suggest that this evidence is of very limited if any assistance to you and your consideration of this case.
5. [L.M.'s] acknowledged drug use including marijuana and crack cocaine.
6. The contemporaneous photographs of [L.M.] identified by both [L.M.] and her mother… These photographs are an exhibit that will be with you in the jury room. You will recall that Cole Mickey also gave evidence regarding these same photographs as well as his perceptions as regards [L.M.'s] presented level of maturity around this time.
7. Finally, you may wish to consider Jared Hadvick's evidence that he knew virtually nothing about [L.M.'s] background or family situation.

This is just some of the evidence that you may want to consider relating to this issue.

… You must take all of the facts into account together to determine whether Jared Hadvick made all reasonable efforts to ascertain the age of the complainant.

[Emphasis added.]

On appeal

Position of the Crown

[36] The Crown argues that the judge erred in law by admitting evidence unknown to Mr. Hadvick and instructing the jury that it could consider that evidence in deciding whether he had taken all reasonable steps to ascertain the age of L.M. It submits that the question of whether the accused took all reasonable steps can only be judged against the circumstances known to the accused at the time the sexual contact occurred, citing *Duran* at paras. 53–55; and *R. v. Jerace*, 2021 BCCA 94 at para. 26. The Crown submits that the statements suggesting otherwise in *Osborne* and *George* are *obiter dicta*. Alternatively, it argues that, if *George* is binding precedent on this point, it does not support the broad range of evidence unknown to the accused that the trial judge admitted.

[37] Relying on *R. v. Morrison*, 2019 SCC 15, and *R. v. Barton*, 2019 SCC 33, the Crown argues that the phrase “in the circumstances known to the accused at the time” qualifies the all-reasonable-steps analysis.

[38] The Crown emphasizes that the admission of evidence that was unknown and entirely disconnected from what Mr. Hadvick knew or saw, cannot be probative of whether he took reasonable steps. Rather, such evidence would invite reasoning based on myths, stereotypes, and prejudices, none of which can be used to diminish an adult’s responsibility for sexual contact with children.

[39] The Crown also submits that the *Code* intends to criminalize adults’ sexual contact with children based on age, not level of maturity. It argues the judge erred by admitting evidence unknown to Mr. Hadvick for the purpose of assessing L.M.’s “degree of maturity”. The Crown submits that this instruction to the jury—to consider maturity, rather than age—also invited reasoning based on myths, stereotypes, and prejudices.

[40] The Crown further says that the judge erred in his charge to the jury by failing to specify evidence that the jury should *not* consider in the all-reasonable-steps analysis. In his earlier ruling, the judge determined that the jury could not rely on evidence of L.M. running away from home or attending a poker game when considering whether Mr. Hadvick took all reasonable steps. However, the judge failed to provide that instruction to the jury. Instead, he listed evidence the jury could consider and invited the jury to consider other unspecified evidence unknown to Mr. Hadvick. This is said to have left the jury free to use any evidence unknown to Mr. Hadvick, including the evidence that the judge had ruled was not relevant to that analysis.

[41] Finally, the Crown argues that the judge's errors had a material bearing on the verdict, which would not necessarily have been the same, but for the errors. By permitting the jury to consider evidence that is irrelevant to the all-reasonable-steps analysis, the Crown argues that the judge effectively imposed a heavier onus than he should have.

Position of the respondent

[42] Mr. Hadvick submits that the judge made no error in admitting evidence that was unknown to him, and in charging the jury on the use it could make of that evidence. He emphasizes that the all-reasonable-steps analysis is contextual and fact-dependent. He argues that the judge properly instructed the jury in accordance with the relevant law, including *George*. As noted in that case, any evidence that properly informs the credibility or reliability of any witness, even if it arose after the sexual activity in question, may be considered by the trier of fact.

[43] The respondent submits that the statements in *George* on the use of evidence unknown to an accused are not *obiter dicta* but binding authority. Referring to paras. 20–21 of *George*, he notes that the evidence that may be used to prove the reasonableness of the steps taken by an accused should not be conflated with the evidence establishing those steps. The former can include evidence that did not precede the sexual encounter and was unknown to the accused.

[44] The respondent argues that the evidence unknown to Mr. Hadvick that the judge instructed the jury to consider was admitted for the purpose of allowing the jury to assess his credibility. As established in *George*, this is a permitted purpose as it assists the jury in considering the reasonableness of the accused's perception of L.M.'s age.

[45] The respondent submits that, when considered as a whole, the charge was relevant, clear, and supported by the jurisprudence. Although the judge did not instruct the jury not to consider the evidence about L.M. running away from home or attending at a poker game as he had ruled, the judge did instruct the jury about the evidence they could consider. He argues that non-direction is not misdirection. Further, the judge did not err in instructing the jury to assess the general degree of maturity portrayed by L.M. at the time, as that is language used in the cases cited with approval in *George*. The respondent says that the charge did not invite or allow the jury to reason based on myths and stereotypes. Indeed, the judge gave an explicit charge warning against reliance on myth or stereotype including about Indigenous girls and women.

[46] Finally, the respondent emphasizes that the burden on the Crown to overturn an acquittal is very high. The verdict should not be overturned unless the errors are such that there is a reasonable degree of certainty that the outcome may have been affected. He submits that the errors alleged by the Crown at best raise a purely abstract or hypothetical possibility that Mr. Hadvick would have been convicted.

Issues

[47] In view of the submissions, I will address the grounds of appeal by considering the following issues:

a) Is the statement in *George* that evidence not known to the accused before the sexual activity can be considered by the trier of fact when considering whether an accused took all reasonable steps to ascertain the complainant's age *obiter dicta*?

b) Did the judge err in admitting evidence or charging the jury about the use that could be made of evidence unknown to Mr. Hadvick?

c) If so, has the Crown met the high burden of establishing that the errors had a material bearing on the verdict?

Standard of review

[48] The general principles of standard of review that govern the appeal are not contentious.

[49] The jurisdiction of this Court to entertain a Crown appeal is narrow, and limited to questions of law alone: *R. v. Saul*, 2015 BCCA 149 at para. 5. Section 676(1)(a) of the *Code* governs Crown appeals from acquittals:

> 676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

[50] The errors raised on this appeal—the interpretation and application of a legal standard and a misdirection in a charge to a jury—are questions of law: *R. v. Araujo*, 2000 SCC 65 at para. 18; *Barton* at para. 54. Questions of law are reviewable on a correctness standard: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[51] In *Barton*, the Court noted that, when considering misdirection, a jury charge must be reviewed as a whole, from a functional perspective:

> [54] In Canada, misdirection in a jury charge is an error of law from which the Crown may appeal. When considering arguments of alleged misdirection, the appellate court must review the charge as a whole from a functional perspective, asking whether the jury was properly, not perfectly, equipped to decide the case, keeping in mind that it is the substance of the charge, not adherence to a set formula, that matters (see *Jacquard*, at para. 62; *Daley*, at para. 30; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 49). Alleged errors must be examined "in the context of the entire charge and of the trial as a whole" (*Jaw*, at para. 32).

[52] The Crown bears the burden of demonstrating that any error or errors "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal". However, the Crown is not required to establish that the verdict would necessarily have been different: *Barton* at para. 160.

Analysis

Non-consent

[53] Before analyzing the suggested errors, I will make an observation about an issue that did not arise in this case: non-consent. The jury was not instructed to consider whether there was evidence of non-consent on the part of L.M. to the sexual activity with Mr. Hadvick. I use the term "non-consent" because, there could be no question of consent in light of the ages of L.M. and Mr. Hadvick. The record before us does not contain any discussion between counsel and the court about the potential question of non-consent and whether it had any relevance at trial. There are many reasons why the issue would not be explored and I do not want the comments that follow to be taken as criticism of counsel or the court in this case. My comments are directed at a potential problem that can arise in cases involving consideration of s. 150.1(4).

[54] The issue of a 14 or 15-year-old complainant's non-consent can be relevant to sexual assault and interference charges where the accused is more than five years older because, if the Crown can establish lack of consent to the sexual contact, the issue of the accused's perception of age is no longer relevant. Section 150.1(4) does not allow a mistake of age defence if the sexual contact with the child occurred in circumstances of non-consent.

[55] The potential problem that can arise in cases that focus on the s. 150.1(4) mistake of age defence is described in Grant and Benedet:

> 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. …
>
> [Emphasis added.]

[56] As the authors note, even though a child complainant is not capable of giving voluntary agreement to sexual activity with a much older accused, the child may be quite capable of knowing they do not want to engage in sexual activity with the accused. The authors suggest that where non-consent is an issue, it should be considered before considering the mistake of age defence, but recognize that can be difficult for a complainant:

> If the claim [for non-consent] 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 and many of these cases and fails to consider coercive actions by the accused.
>
> [Emphasis added.]

[57] I agree that where the issue of non-consent arises in a case in which the trier of fact must also consider the mistake of age defence permitted by s. 150.1(4), the allegation of non-consent should be considered before mistake of age. Courts must be careful not to ignore the issue of a complainant's non-consent, whether arising from expressions of non-consent or inability to consent for reasons other than age, in favour of exploring the mistake of age defence. In appropriate cases, both issues need to be examined.

Issue 1: Is the statement in *George obiter dicta*?

[58] The principle of *stare decisis* requires judges to follow the rulings of higher courts. However, at times it is difficult to determine what parts of an appellate decision are binding on lower courts. The traditional view—that the *ratio decidendi* is the only aspect of a decision that is binding—has been expanded to include the broader legal analysis and even *obiter dicta*. As explained by Justice Binnie, writing for the Court, in *R. v. Henry*, 2005 SCC 76:

> [57] The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.
>
> [Emphasis added.]

[59] In *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at para. 69, the Court provided a summary of *Henry* and its own decision in *R. v. Prokofiew*, 2010 ONCA 423, concluding that *Henry* and *Prokofiew* stand for the proposition that the actual words of the Supreme Court of Canada do not bind lower courts when those words are "sufficiently tangential to the disposition of the case".

[60] This Court has accepted and adopted the *Bedford* approach. When considering whether the words used by the Supreme Court of Canada must be followed, the question is whether they are "sufficiently tangential to the disposition of the case" to be non-binding *obiter*: See *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70 at paras. 62–69; *R. v. Wilson*, 2012 BCCA 517 at paras. 40–41.

[61] Applying this approach to *George*, I would first note that the statement in question was *obiter*. The *ratio decidendi* in *George* was very narrow: the Court decided that the Saskatchewan Court of Appeal erred in concluding that the trial judge had made any legal error, and thus lacked jurisdiction to interfere with the trial judgment: at paras. 15–17. However, the Court's comments about the nature of the evidence that could be relevant to the all-reasonable-steps analysis were made in support of the Court's conclusion. The question here is whether the statement in

George—that evidence demonstrating the reasonableness of the accused person's perception of the complainant's age before sexual contact is relevant to adjudicating the reasonableness of the steps taken by the accused "even if that evidence happens to arise after the sexual activity or was not known to the accused before the sexual activity"—was sufficiently tangential to the disposition of the case to be non-binding *obiter*? Or to rephrase that positively, was the Court's statement intended for the guidance of trial courts and should it be accepted as binding? This requires a closer examination of *George*.

Application to George

[62] In *R. v. George*, 2016 SKCA 155, the Saskatchewan Court of Appeal found that the judge erred in law in considering evidence of the sexual encounter itself and evidence arising after that encounter. The post-encounter evidence in question was "the callous way in which [the complainant] conducted himself following the liaison with Ms. George and the "cocky" nature of [the complainant's] testimony at trial": at para. 34.

[63] On appeal, the Supreme Court of Canada found that the evidence in question was admissible, reasoning:

> [23] The evidence arising after the sexual activity considered by the trial judge in this case, to which the majority objected (at para. 34), did not detract from and was consistent with Ms. George's testimony as to how C.D. appeared to her and acted in her presence during the several months they knew each other before the sexual encounter. To that extent, it was admissible for the purpose of assessing her credibility at large, which included her testimony as to how the complainant appeared to her in the months preceding the sexual activity.

The Court went on to note that the majority's real complaint about the post-encounter evidence was the trial judge's treatment of the factual inferences to be drawn or the weight to be given to that evidence, matters which cannot amount to legal error. The Court explained that "[w]hen determining the relevance of evidence in this context, both its purpose and its timing must be considered": at para. 21. The Court then went on to specify types of evidence that may or may not be relevant, in

consideration of both their purpose and timing, including the point at issue in this case:

> [21] … Similarly, evidence demonstrating the reasonableness of the accused person's perception of the complainant's age before sexual contact is relevant to adjudicating the reasonableness of the steps taken by the accused person (*Duran*, at paras. 51-54), even if that evidence happens to arise after the sexual activity or was not known to the accused before the sexual activity (see e.g. *Osborne*, at para. 22(4) and (5)).
>
> [Emphasis added.]

[64] The statement that evidence "not known to the accused before the sexual activity" can be relevant to adjudicating the reasonableness of the steps taken by the accused appears to widen the scope of evidence that might be considered under s. 150.1(4). However, it must be noted that in *George*, there was no consideration of evidence completely unknown to the accused; only reference to evidence that was learned by the accused immediately after the sexual activity and was closely linked to her evidence about her interactions with the complainant. If the statement were taken to include a broad category of evidence that was unknown to the accused, it would significantly enlarge the scope of potentially relevant evidence, and would do so without any foundation in the *George* factual matrix.

[65] The Court's statement was supported by reference to *Osborne*, and by the observation that a photograph of a complainant taken after the impugned sexual activity could be tendered as evidence, not because the accused had seen and relied on it, but because it could "be relevant to the accused person's perception of the complainant's age": at para. 22. The reference to *Osborne* is more difficult to assess. The relevant paragraph in that case merely lists eight items of evidence "in respect of the knowledge of the [accused] as to the age of the complainant", that the trial judge could have accepted or rejected "as a basis for a reasonable doubt". The two subparagraphs referred to state:

> (4) The complainant had been keeping company with an 18 year old boy. (This fact was not known to the respondent and is only material with regard to the degree of maturity that the complainant might have portrayed);
>
> (5) The complainant passed for 19 and had been admitted to a bar without an ID on at least one occasion. (This fact was not known to the respondent and

> is again only material with regard to the degree of maturity that the complainant might have portrayed);
>
> …

[66] In *Osborne*, the trial judge did not comment on the admissibility of evidence unknown to the accused, and neither did the Court of Appeal, other than providing the general list of evidence from trial. In rejecting the Crown's appeal, the Court of Appeal emphasized that an accused merely had to raise a reasonable doubt about whether all reasonable steps had been taken by the accused. It noted that "while it is only necessary for an accused to create a reasonable doubt, the evidence which he uses to establish such a doubt must be directed to the word 'all'…": at para. 59. It concluded that there was evidence before the judge that could support the verdict:

> [65] There was evidence before the trial judge that the respondent took steps - such as asking the complainant her age and observing the appearances of the complainant and her companions and concluding therefrom that they were 16 or 17. There were other steps he might have taken but were these reasonably required? The trial judge thought not. He had heard the complainant, two of her female companions, Mr. Malloy and the respondent testify and must have had a better feeling for the prevailing circumstances than would be apparent to the Court of Appeal from the transcript. The judge had more than a reasonable doubt; he found that the respondent had taken all such steps. That is the ultimate fact. This Court on the facts of this case is not able to say that the trial judge was in error in his finding.

[67] It is not clear how the two pieces of evidence from *Osborne* referred to in *George*, may have had any persuasive force, let alone relevance in that case and the Court in *George* said nothing to clarify that. Indeed, in *Osborne*, the trial judge did not even mention the evidence referred to in *George* at para. 21 (*Osborne* at para. 22(4) and (5)). However, the comment in *George* at para. 22 about how photographic evidence unknown to an accused may be relevant is more instructive. The Court noted that relevance is determined by considering both the timing (i.e., when the evidence came into existence) and the purpose for which it was adduced. When considered under those criteria, it is evident why a photograph of a complainant that an accused had never seen, but was taken around the time of the sexual contact, may be relevant.

[68] Returning to the question of whether the Court's statement is binding, I first note that not all *obiter* has the same weight and not every phrase in a judgment of the Supreme Court of Canada is to be treated "as if enacted in a statute": *Henry* at para. 57. The comments about evidence unknown to an accused must be read in the context of the reasons as a whole. In *George*, the Court found that the Court of Appeal had erred in finding that the trial judge had made legal errors in his assessment of the evidence in two respects. The first—about evidence that came into existence after the sexual encounter—was closely tied to the Court's disposition of the case. In my view the statement about that evidence is clearly important to the Court's decision and, therefore, not tangential.

[69] The statement regarding the second category—evidence unknown to the accused—is more difficult to assess, especially as the only issue about evidence not known to the accused in *George* concerned the evidence that the accused learned immediately after the sexual activity. However, it is my view that the statement was intended to provide clarification on the challenging question of the scope of evidence that may be relevant to the analysis under s. 150.1(4), and the proper approach to evidentiary issues that can arise under that section. Consideration of the two points (evidence arising after the sexual activity, and evidence unknown to an accused before the sexual activity) make it clear that the relevance of individual pieces of evidence is not as straightforward as it might first appear. The timing and purpose of individual items of evidence may allow such additional evidence to be admitted and considered in the analysis.

[70] Accordingly, it is my view that the statement in *George* about evidence not known to the accused before the sexual contact was not so tangential to the Court's decision as to be non-binding. It was intended to provide guidance and to be accepted as authoritative in respect of the scope of evidence that may be relevant to the analysis under s. 150.1(4). However, as I will explain below, I am of the view that the comments of the Court were not intended to permit triers of fact to consider a broad range of evidence unknown to the accused that would not be useful to the trier of fact in assessing the accused's perception of the complainant's age.

Issue 2: Did the judge err in admitting evidence or charging the jury about the use that could be made of evidence unknown to Mr. Hadvick?

[71] The Crown argues in the case at bar that the trial judge erred either in admitting evidence unknown to Mr. Hadvick that was not relevant to the jury's consideration of the reasonableness of the steps he took to ascertain L.M.'s age, or in charging the jury regarding the use that could be made of that evidence. The judge set out the evidence that the jury could consider for that adjudication. I will deal with the specific items of evidence referred to by the judge and challenged by the Crown, but before doing so, I will make some preliminary observations.

The issue is whether the jury was adequately charged

[72] The Crown argues that the errors asserted involved both the admission of evidence and the charge to the jury about the use of that evidence. Its position suggests that the error can be examined under either ground, and that examination of the judge's ruling on admissibility and his instructions on the use the jury could make of the evidence should lead to the same conclusion. While the issue of admissibility arises in respect of some of the impugned evidence, I am of the view that the real issue here is whether the jury was adequately charged about the use that it could make of the evidence in question.

[73] I arrive at this conclusion on two bases. First, as emphasized in *George*, the relevance of evidence adduced for the s. 150.1(4) analysis depends on the *purpose* for which it may be used. Evidence that is not relevant to the all-reasonable-steps analysis may well be unobjectionable as narrative or to assess credibility generally. In a jury trial, it is through the charge to the jury that the judge directs the proper purpose for which particular items of evidence may be used.

[74] Second, the evidence that may be considered to assess credibility generally is necessarily much broader than the evidence that is relevant to the all-reasonable-steps analysis. As noted in *R. v. C.M.M.*, 2020 BCCA 56, a jury's assessment of credibility involves considering the evidence as a whole:

> [122] It is well-established that a "jury's determination of which witnesses to find credible is a holistic exercise that involves assessing the plausibility and coherence of a given witness's testimony throughout the course of the trial": *R. v. Goldfinch*, 2019 SCC 38 at para. 123, Moldaver and Rowe JJ., concurring (emphasis added). A legally incorrect approach to that assessment runs the risk that the final step in the trial process, the weighing of the evidence, will be flawed: *R. v. B. (G.)* at 77.
>
> [Emphasis in original.]

[75] Here, some of the evidence that is admissible and relevant to the general credibility of the complainant is not relevant to the all-reasonable-steps analysis.

Reasonableness must be assessed in light of the circumstances known to the accused

[76] The Crown submits that if *George* permitted consideration of evidence unknown to the accused, it has been overtaken by *Morrison* and *Barton*. Those cases concern different sections of the *Code* (s. 172.1(4) and s. 273.2(b), respectively), both of which set a lower requirement: that an accused must have taken "reasonable steps": to ascertain age in s. 172.1(4); and to ascertain consent in s. 273.2(b). In both cases, the Court observed that where the *Code* requires an accused to take steps that are objectively reasonable, reasonableness must be assessed in light of the circumstances *known to the accused at the time*. The Crown submits that the same qualification must apply to s. 150(1)(4), which establishes the higher "*all* reasonable steps" standard.

[77] In my view it is not necessary to consider whether *Morrison* and *Barton* have overtaken *George* to conclude that s. 150.1(4) requires the trier of fact to assess the reasonableness of the accused's steps taken to ascertain the age of the complainant *in light of the circumstances known to the accused at the time*. A plain reading of the provision can lead to no other conclusion. As the Crown submits, it would be anomalous if the analyses required for the "reasonable steps" assessment under ss. 172.1(4) and 273.2(b) were properly qualified by what the accused knew at the time, but the all-reasonable-steps analysis under s. 150.1(4) was not.

[78] In addition, nothing in *George* suggests that the objective reasonableness of the steps taken by an accused is not based on the circumstances known to the accused at the time. *George* instructs that evidence unknown to the accused may be relevant because the fact that requires proof—that an accused took all reasonable steps—should not be conflated with the evidence that may be used to establish that. Some evidence unknown to the accused, like a contemporaneous photograph, may assist. But, nothing in *George* suggests that the trier of fact should attempt to arrive at a perception of the complainant's age at the time based on information about the complainant's friends, habits, lifestyle, clothing, etc. that was unknown to the accused. That is not the inquiry. The question here is what steps should an accused, who is more than five years older than the complainant, be reasonably required to take to ascertain the complainant's age, in the circumstances known to them before the sexual activity.

Maturity

[79] The Crown argues that by instructing the jury to consider evidence "unknown to Mr. Hadvick that may reveal the general degree of maturity portrayed by [L.M.]", the judge incorrectly charged the jury to focus on her level of maturity, rather than her age. It argues that the *Code* criminalizes adults' sexual contact based on the age of the child not on the child's level of maturity. By improperly directing the jury to consider maturity, the Crown argues that the charge effectively invited the jury to give L.M., a child who appeared to be mature, a reduced level of protection from sexual predation by adults. Further, it allowed the jury to consider behaviour that could be described as discreditable conduct for children, such as smoking crack, playing poker, and skipping school. In this way, the judge's charge effectively invited the jury to afford reduced protection to those children who require it the most: vulnerable children including Indigenous children and children from disadvantaged communities.

[80] The Crown is correct to note that it is an accused's perception of the complainant's age that is relevant to the all-reasonable-steps analysis, not the accused's perception of the complainant's level of maturity. There is no doubt that a

mature child under 16 years of age is entitled to the same protection under the *Code* provisions as any other child of that age. Further, *George* did not endorse the use of the accused's perception of the complainant's maturity as the relevant consideration. The Court was clear about the nature of the inquiry:

> [21] … evidence demonstrating the reasonableness of the accused person's perception of the complainant's age before sexual contact is relevant to adjudicating the reasonableness of the steps taken by the accused person…
>
> [Emphasis added.]

[81] The difficulty arises here because, as set out above, in the same paragraph in *George*, the Court referred to para. 22(4) and (5) of *Osborne* for the proposition that evidence "not known" to the accused before the sexual activity may be considered. The subparagraphs in *Osborne* might be taken to suggest that evidence unknown to the accused may be "material with regard to the degree of maturity that the complainant might have portrayed". The trial judge here used the language from *Osborne* to instruct the jury, rather than the statutory language. He instructed the jury to "consider whether there may be other evidence that was unknown to Mr. Hadvick that may reveal the general degree of maturity portrayed by [L.M.] around this time".

[82] The instruction is potentially problematic for two reasons: first, it is not in accord with the statutory language; and second, asking the jury to consider how an accused may have assessed a complainant's general degree of maturity could lower the all-reasonable-steps standard.

[83] "Mature" is defined in the *Concise Oxford English Dictionary* as "having reached a stage of mental or emotional development characteristic of an adult; grown-up". Not only by definition, but in common parlance, one's level of maturity is considered to be a measure or indicator of age. In using this language, the judge invited the jury to use maturity as a proxy for perception of age. However, that terminology does not accord with the statutory language or statement in *George*.

Parliament used "age" not "maturity" as the standard in s. 150.1 of the *Code*—a provision designed to protect children: *R. v. Friesen*, 2020 SCC 9 at para. 51.

[84] Courts have routinely upheld Parliament's decision in drawing a bright-line age of protection for children. For example, in *R. v. A.B.*, 2015 ONCA 803, the Court rejected a constitutional challenge to s. 150.1 of the *Code*. The case involved a long-term relationship between the accused and a girl who was six years younger. They met at a dance studio when the complainant was 11 and danced as a pair for four years before commencing an intimate relationship. The mistake of age defence was not in issue. The accused argued that the relationship was not exploitive and the trial judge agreed. She stayed the charge finding that s. 150.1 was overbroad and violated the accused's s. 7 *Charter* rights.

[85] The Crown's summary conviction appeal was allowed and the stay was set aside. The accused's further appeal was dismissed. At the Court of Appeal, the appellant challenged the close-in-age exception portion of s. 150.1 arguing, among other things, that "age is an imperfect proxy for exploitation and that age disparity does not necessarily match life experience and maturity": at para. 29. The Court dismissed that argument. In doing so, it concluded that the legislative scheme—establishing an "age of protection of 16 years" and carving out "a five-year close-in-age exception"—was consistent with the protective purpose of the legislative scheme which is "not just to prevent sexual exploitation of children, but to protect them from sexual contact with adults because of the power imbalance and the consequences that flow from that…": at para. 54.

[86] The Court made the following comment relevant to this appeal:

> [42] I note that there are a number of other contexts in which legislatures use age-based criteria to achieve their interest in protecting children. The need for society, through government and the courts, to protect children is recognized, not only through the criminal law, but in the family context and is manifested in a number of laws and doctrines. In custody and child support matters, courts are to be guided by the best interests of the child, while child protection orders under child welfare legislation are based on whether a child is found to be in need of protection. In both cases, the applicable legislation defines a "child" in terms of age: see e.g. *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 18(2); *Child and Family Services Act*, R.S.O. 1990, c. C.11,

> s. 3(1). The applicability of these doctrines and laws does not depend on the attributes of a particular child, such as maturity or independence: see, on this point, McLachlin C.J.'s concurring opinion in *A.C.*, at paras. 143-145.
>
> [Emphasis added.]

[87] In *R. v. Alfred*, 2020 BCCA 256, this Court made similar observations about the bright-line drawn by s. 150.1, noting that children under the age of 16 are at great risk of exploitation by adults:

> [33] The Supreme Court has ruled unequivocally that children under the age of 16 do not have the capacity to consent to sexual activity with adults. Furthermore, sexual activity between adults and children is inherently exploitive because of children's lack of maturity, judgment, and experience. The Court has identified the purpose of s. 150.1 in a manner much broader than that advanced by the appellant, and it has emphasized that protecting children is one of the most fundamental values of Canadian society. The Code provisions addressing sexual offences against children, including s. 150.1, prohibit *all* sexual activity with adults in order to protect "the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children": *Friesen* at para. 51.
>
> [Emphasis in original.]

[88] It is clear then, that the proper application of the defence of mistake of age should not depend on the maturity, life experience, or independence of the child complainant. Accordingly, it is my view that the language from *Osborne* should not be imported into a charge instructing a jury on how to consider evidence unknown to an accused for the purpose of the defence. The difficulty that can arise from importing that language into the charge is that it asks the jury to focus on something other than what the accused did to ascertain the complainant's age. It is easier to assess an individual's general degree of maturity than it is to ascertain their age. Many children strive to appear older than their years whether through the way they dress, communicate, or engage in adult activities. If a jury is asked to assess the general degree of maturity portrayed by a complainant, rather than to consider whether the accused took all reasonable steps to ascertain age, there is a danger that the all-reasonable-steps standard is lowered. To return to the criticism expressed in Grant and Benedet, this could lead a jury to conclude, in circumstances where it would be unreasonable to do so, that mere observation of a complainant by an accused is enough to satisfy that requirement.

[89] Nevertheless, it is my view that when the charge in this case is considered as a whole, that difficulty does not arise. Although the judge instructed the jury to consider "other evidence that was unknown to Mr. Hadvick that may reveal the general degree of maturity portrayed", he also redirected the jury back to the proper analysis. He told them to consider the evidence in relation to "the reasonableness of the steps [Mr. Hadvick] took … to ascertain [L.M.]'s age". In other words, he continued to refer the jury back to the inquiry required by the statutory language. While that inquiry will always involve consideration of evidence about the appearance, behaviour and general degree of maturity of the complainant, it maintains the proper focus on ascertainment of age.

[90] Accordingly, I conclude that the judge's instructions about the "general degree of maturity" portrayed by L.M. do not amount to legal error. When the charge is considered as whole, those references did not have the effect of lowering the all-reasonable-steps standard that Mr. Hadvick was to be measured against and which the Crown was required to rebut.

Analysis of evidence unknown to Mr. Hadvick

[91] The Crown argues that *George* should not be applied so as to permit a trier of fact to consider a broad range of evidence unknown to an accused. It says the proper interpretation of *George* is that evidence unknown to the accused can only be used in the all-reasonable-steps analysis to consider the credibility or reliability of the factual bases that the accused asserts for their belief that the complainant was 16 years of age or older. I agree.

[92] As *George* emphasizes, the question to ask with any evidence that might be considered for the all-reasonable-steps analysis is what purpose is served by considering that piece of evidence. As I will elaborate below, members of the jury must not be invited to make their own assessment of how they would have ascertained the complainant's age using evidence of which the accused was unaware. The exception is for evidence, like the photograph referred to in *George*, that can be used to assess the credibility or reliability of the accused's assertion.

[93] In this case, in his charge to the jury on the all-reasonable-steps analysis, the trial judge instructed the jury to consider the following evidence unknown to Mr. Hadvick to assess the degree of maturity L.M. portrayed:

a) L.M.'s mother's evidence that L.M. was:

   i. running with an older crowd;

   ii. out of control;

b) L.M.'s evidence that she worked with, and was friends with, older people;

c) Sgt. Christinger's evidence that L.M. dressed older than her age, was socially awkward, giggly, introverted, and had a very basic vocabulary;

d) L.M.'s evidence that she:

   i. was approached three times while working by unknown intoxicated persons asking for her to purchase them liquor;

   ii. used crack cocaine; and

e) contemporaneous photographs of L.M.

[94] The trial judge also instructed the jury that "this is just some of the evidence" they may wish to consider. He did not instruct the jury that they could not consider evidence unknown to the accused that he had previously ruled, in the absence of the jury, that they could *not* consider, including:

a) L.M. attending a poker game at the residence of an older friend; and

b) L.M. running away from home.

[95] In my view, the judge erred by permitting the jury to consider evidence that was unknown to Mr. Hadvick and irrelevant to the assessment of the reasonableness of his perception of L.M.'s age. I will address each piece of this evidence below.

Running with an older crowd

[96] L.M.'s mother testified that L.M. was "running with an older crowd". L.M. stated that she would "hang out" at houses of older friends where she would drink and smoke weed and that she considered her older coworkers to be her friends.

[97] The relevance of this evidence is certainly marginal. Someone who is young and immature, and portrays them self as such, can still run with an older crowd. As the Crown argued on appeal, this evidence is particularly unhelpful in light of L.M.'s testimony at trial that Faro is a very small community, and "there's not a lot of people around your age […] the friends that you have are not the friends you pick. They're your friends because that's all you got".

[98] While Mr. Hadvick did not know that L.M. hung out with an older crowd, he had seen L.M. partying with adults at the Halloween party and observed her with the Glacier Drilling crew. These instances allowed him the opportunity to see her interact with older people.

[99] For the purpose of the objective *mens rea* test, the reasonableness of Mr. Hadvick's perception of L.M.'s age must be measured against some standard. While the evidence was of limited use, it demonstrated how L.M. carried or presented herself to Mr. Hadvick and other adults in the restaurant and bar. In my view, the judge did not err in instructing the jury that they could make use of this evidence. It could be used for the purpose of considering the reasonableness of Mr. Hadvick's perception of L.M.'s age—as opposed to assessing her "general degree of maturity".

Being out of control and using crack cocaine

[100] I arrive at a different conclusion about this evidence which is irrelevant to Mr. Hadvick's perception of L.M.'s age.

[101] L.M.'s mother gave evidence that "like most teenagers" L.M. was "out of control" and L.M. gave evidence that she had used crack cocaine and been

grounded for running away from home on a “drug binge”. Mr. Hadvick knew none of this.

[102] Mr. Hadvick testified that he based his belief that L.M. was 19 years old on only a few factors: his observations of L.M.’s physical appearance; her demeanor and actions at work including that she was serving alcohol; the fact that she drank alcohol at work and at the Halloween party; the fact that he saw L.M. smoking marihuana; and their discussions on the night of the sexual contact. The evidence that L.M.’s mother perceived her to be “out of control” and that she used crack cocaine, is not connected with any of theses factors, and thus cannot be used to corroborate or assess Mr. Hadvick’s credibility, or the reasonable steps that he may have been required to take.

[103] As Mr. Hadvick was unaware of these circumstances, they could not have had any effect on his perception of her age. Inviting the jury to consider irrelevant evidence—entirely unknown to Mr. Hadvick and unrelated to any of his considerations—to inform the reasonableness of his perception of L.M.’s age was an error of law.

[104] Asking the jury to consider this evidence invited the jury to make their own assessment of L.M.’s age based on behaviour unknown to Mr. Hadvick. Not only did the evidence have no probative value, the evidence about L.M.’s use of cocaine was prejudicial. That evidence should not have been admitted for any purpose.

Being approached to purchase alcohol

[105] L.M. gave evidence that she was approached on a few occasions by intoxicated persons she did not know at her workplace who asked her to purchase alcohol for them. In my view, the behavior of unknown intoxicated persons could not be relevant to Mr. Hadvick’s perception of L.M.’s age. While it is possible to infer that these persons asked L.M. to buy them alcohol because they perceived her to be over the age of 19, it is equally possible to infer that they asked her to do so simply because she was an employee at the hotel who may have had access to the alcohol. Without any evidence as to why the intoxicated persons asked her to buy

them alcohol, the fact that she was asked had no probative value and was not the kind of evidence contemplated by the Court in *George*.

[106] Like the evidence about L.M.'s behaviour that was unknown to Mr. Hadvick, allowing the jury to consider this evidence invited them to make their own assessment of L.M.'s age based on information completely unknown to Mr. Hadvick. In fairness to the judge, in referring to this evidence he suggested "that this evidence is of very limited if any assistance to you and your consideration of this case".

Being described as dressing older than her age, socially awkward, giggly, introverted, and having a very basic vocabulary

[107] Pursuant to *George*, the judge did not err in including evidence of L.M.'s general demeanor and the clothes she wore at the time proffered by the police officer in the jury charge as it could demonstrate the reasonableness of Mr. Hadvick's perception of L.M.'s age. The police officer testified and his perceptions were tested in cross examination. Mr. Hadvick spoke with L.M. and noticed her clothing. While these were only observations that he did not elaborate on in any detail, he indicated that her appearance and her interactions with the Glacier Drilling crew formed part of his perception of her age. The police officer's observations of L.M.'s demeanour and appearance around the time of the sexual contact was similar to the example of the contemporaneous photograph provided in *George*. That evidence could be relevant to the reasonableness of Mr. Hadvick's perception of L.M.'s age.

Contemporaneous photograph of L.M.

[108] This is the same type of evidence referred to in *George* at para. 22. A photograph of L.M. taken around the time of the sexual contact was relevant evidence for the jury in their assessment of the reasonableness of the steps Mr. Hadvick took to ascertain L.M.'s age because it was evidence of how she may have appeared to him. This evidence could assist the jury in considering how his observations of L.M. might have informed his perception of her age at the time.

Attending a poker game and running away from home

[109] L.M. gave evidence that she went to a poker game at the house of an older friend and that she had run away from home. As I have noted, the judge ruled that this evidence was not relevant to the all-reasonable-steps analysis. While the jury was not given any information about that ruling, the judge's instruction that "there may be other evidence that was unknown to Mr. Hadvick that may reveal the general degree of maturity portrayed by [L.M.]" indirectly invited the jury to consider this evidence.

[110] Mr. Hadvick was not aware of this evidence. It has no connection to the factors that he identified as informing his perception of L.M.'s age. Accordingly, there was no basis upon which this evidence could be relevant to the jury's assessment of the reasonableness of Mr. Hadvick's perception of L.M.'s age.

Summary

[111] In summary, I am of the view that the judge erred in law in instructing the jury to consider, directly or indirectly, the following evidence that was irrelevant to the jury's consideration of whether Mr. Hadvick took all reasonable steps to ascertain L.M.'s age: (1) L.M. was "out of control"; (2) L.M. used crack cocaine; (3) L.M. was approached by strangers to purchase alcohol; (4) L.M. attended a poker game; and (5) L.M. had run away from home. The jury should not have been instructed that this evidence could be used for that purpose.

Issue 3: Were the errors material?

[112] As stated above, there is a high bar for appellate intervention on a Crown appeal from an acquittal. The principles were recently summarized in *Barton*:

> [160] In considering these questions, this Court must keep in mind that a jury acquittal is not set aside lightly (see *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2). To secure a new trial, the Crown bears a heavy burden: it must demonstrate that the error or errors in question "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). A mere hypothetical possibility that the accused would have been convicted but for the error or errors will not suffice

> (see *ibid.*). However, the Crown is not required to demonstrate that the verdict would necessarily have been different (see *ibid.*).

[113] I have concluded that the judge erred in his instructions to the jury about the relevance to the all-reasonable-steps inquiry of some of the evidence unknown to Mr. Hadvick. As with any misdirection, it is important to consider the charge as a whole from a functional perspective. When I do that, I find that the error did not have a material bearing on the acquittal.

[114] Apart from the misdirection, the judge's instructions to the jury were thorough and clear. As I have noted, the judge began his instruction on the mistake of age defence by properly describing the question the jury had to consider. The judge instructed that an accused in Mr. Hadvick's position "must point to reasonable steps that they took to ascertain her age", and that the Crown had to disprove that "he believed she was more than 16 years of age and that he took all reasonable steps to ascertain the age of [L.M.]". While the judge later referred to her general degree of maturity when giving the charge about other evidence unknown to him, the initial charge accurately used the statutory language and, as I have noted above, the judge correctly redirected the jury to consider the proper question—examination of the steps taken by Mr. Hadvick to ascertain L.M.'s age.

[115] The Crown submits that by inviting the jury to consider evidence unknown to Mr. Hadvick that might have reflected L.M.'s general degree of maturity, the charge permitted or encouraged the jury to reason using myths and stereotypes about Indigenous girls and women. Considering the charge as a whole, I am of the view that the erroneous instruction regarding evidence unknown to Mr. Hadvick would not have had that effect. The charge provided clear instructions about myths and stereotypes and the importance of engaging with evidence free from bias:

> Our highest court, the Supreme Court of Canada, has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within our criminal justice system. In particular, the Supreme Court had recognized that indigenous people are the target of hurtful biases, stereotypes, and assumptions, including stereotypes about their credibility, their worthiness, and their criminal propensity.
>
> Recently, the Supreme Court of Canada stated, and I quote:

> there is no denying that Indigenous people - and in particular Indigenous women, girls, and sex workers - have endured serious injustices, including high rates of sexual violence against women.
>
> Bias, both conscious and unconscious, may be in part the product of stereotypes. Stereotypes can pervade our thinking and give rise to unconscious bias. One particular myth or stereotype that I would bring to your specific attention relative to this case is the myth or stereotype that Indigenous girls and women often appear or present as more worldly or sophisticated than is actually the case.
>
> …
>
> Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or stereotypes.

[116] It is also my view that the judge's charge on how to approach the all-reasonable-steps analysis, set out at para. 35 above, properly instructed the jury to engage in the kind of contextual fact-driven exercise directed by *George*. He noted that the jury should consider whether steps in addition to assessment of the usual indicators of age made through observing L.M. were required, such as a direct inquiry about age or a request for identification. He also instructed the jury to consider the circumstances that may have called out for additional inquiries—Mr. Hadvick's lack of familiarity with L.M. and the considerable age difference between them—in assessing what reasonable steps would be required:

> Generally, as the difference in age between an accused and a complainant increases, the accused is required to take more steps to ascertain the age of the complainant. It is generally understood that the less familiar the parties are, the more steps that are required to confirm the age of the complainant. The law normally expects more care from older, more mature accuseds than from a young accused.

[117] Additionally, it must be remembered that the test for the adequacy of a charge is not whether the jury was perfectly instructed, but whether the instructions were such that the jury was properly equipped to decide the case: *R. v. Jacquard*, [1997] 1 S.C.R. 314, 1997 CanLII 374 at para. 62. Taken as a whole, the charge mitigated against the problematic instruction to look at evidence unknown to Mr. Hadvick and properly equipped the jury to decide the case, particularly when the question of all-reasonable-steps is considered in light of the evidence at trial.

[118] Looking at the "concrete reality of the case", I am of the view that the error did not have a material bearing on the acquittal. Although the judge invited the jury to consider some evidence that was irrelevant, that evidence was peripheral to the evidentiary focus at trial. Mr. Hadvick stated that he based his belief that L.M. was 19 years old primarily on the fact that he had seen her on multiple occasions being served and consuming alcohol in the Faro Hotel. Over four weeks, prior to October 30, 2018, Mr. Hadvick had been drinking and dining at the Faro Hotel restaurant/bar and L.M. had been serving the Glacier Drilling crew four or five days a week. Although she denied serving alcohol to that crew or buying drinks for them, the jury may have accepted the contrary evidence of Mr. Hadvick, which was supported by Mr. Mickey's testimony.

[119] While the evidence as to whether L.M. served liquor to customers was somewhat contentious, she admitted to delivering drinks to patrons on occasion. Further, there was no serious challenge to the evidence establishing that L.M. was served and consumed liquor in the licensed establishment where she worked. Indeed, the evidence established that Mr. Mayo, the bartender, was convicted of providing liquor to L.M., a person under the age of 19 years, on October 30, 2018, contrary to the territorial liquor statute.

[120] Collectively, the evidence about serving and being served liquor was highly persuasive evidence supporting the inference that L.M. was of legal drinking age and certainly over the age of 16 years. The effect this evidence would have on the all-reasonable-steps analysis is obvious. As noted in *George*, "the more reasonable an accused's perception of the complainant's age, the fewer the steps reasonably required of them." It is not difficult to see how the evidence would at least raise a reasonable doubt in the minds of the jury about whether Mr. Hadvick did not take all reasonable steps to ascertain L.M.'s age.

[121] By contrast, the evidence unknown to Mr. Hadvick that the jury was erroneously invited to consider was equivocal at best. To the extent that it may have invited the jury to make their own assessment of L.M.'s age based on behaviour

unknown to Mr. Hadvick, I consider it unlikely that it weighed heavily in their adjudication of whether Mr. Hadvick took all reasonable steps to ascertain her age. Further, the judge specifically instructed the jury to consider that question objectively; in light of all of the circumstances and from the point of view of a reasonable person. As Mr. Hadvick argues, the possibility that the error impacted the verdict does not rise above the abstract or hypothetical.

Disposition

[122] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Newbury"