

Flaming Misogyny or Blindly Zealous Enforcement? The Bizarre Case of *R v George*

LUCINDA VANDERVORT*

ABSTRACT

This article examines the distinction between judicial reasoning flawed by errors on questions of law, properly addressed on appeal, and errors that constitute judicial misconduct and grounds for removal from the bench. Examples are from the transcripts and reasons for decision in *R v George* SKQB (2015), appealed to the Saskatchewan Court of Appeal (2016) and the Supreme Court of Canada (2017), and from the sentencing decision rendered by the same judge more than a decade earlier in *R v Edmondson* SKQB (2003). Both were sexual assault cases. In *George* a thirty-five-year-old woman with five children was tried and ultimately acquitted of sexual assault and sexual interference after she was assaulted in her home by a fourteen-year-old male. Striking similarities between the reasoning and language in the trial decision in *George* and the sentencing decision in *Edmondson* demonstrate entrenched antipathy for sexual assault law and the fundamental principles of justice, equality, and impartiality. This is arguably judicial misconduct, persisting despite access in the interim to many years of judicial education programming, not merely legal error. The problem

* Lucinda Vandervort, BA (Honours in Philosophy), Bryn Mawr; MA, PhD, McGill; JD, Queen's; LLM, Yale Law School, is a legal philosopher, lawyer and Professor in the College of Law, University of Saskatchewan, whose writings on sexual assault law and sexual consent are cited by the Supreme Court of Canada in decisions from *Seaboyer* (1991) to *Barton* (2019), by trial and appellate courts, and by legal scholars and law reformers internationally. This research was supported by grants awarded by the Foundation for Legal Research and the College of Law Endowment Fund. The author thanks the reviewers for their comments, Maria Shupenia, 2020 JD candidate at the University of Saskatchewan, for her research assistance, and Brendan Roziere, Student Editor, Manitoba Law Journal, for exemplary editorial work.

does not lie with the judge alone, however. A toxic mix of misogyny and blindly zealous enforcement of the law appears to have undermined the administration of justice in *George* from the outset at all levels. The problems are systemic. Were this not the case, it is likely that Barbara George would not have been charged.

Keywords: sexual assault; judicial misconduct; legal reasoning; victim-blaming; principles of fundamental justice; impartiality; equality; misogyny; racism; rape-myths; administration of criminal justice; *Judges Act*, s. 65.

I. INTRODUCTION

The back story of *R v George*¹ is not widely known or discussed. This article aims to change that in order to highlight questions this bizarre case raises about decision-making processes used in enforcing the sexual assault laws in Saskatchewan. These questions also have implications for child apprehension and protection cases handled by family services and for the administration of criminal justice in cases of alleged sexual abuse and exploitation of minors. Is discretion exercised by police and prosecutors in these cases in a manner that is consistent with fundamental principles of criminal justice? Were the police and prosecutors blind-sided in the *George* case by misogyny or simply blindly zealous in their effort to protect minors from sexual abuse and exploitation?

In *George* a thirty-five year old woman was prosecuted on criminal charges of sexual interference and sexual assault. She had been forcibly subjected to sexual intercourse in her own home by a fourteen and a half year old male who was a friend of her seventeen year old son. The trial judge found that the minor was the aggressor, initiated the sexual activity, and thereby clearly consented to it in fact. But a fourteen year old lacks legal capacity to consent to sexual contact with an adult of thirty-five years of age.² Following police interviews with the parties, George was charged with sexual assault and sexual interference. The minor was not charged.³ George

¹ *R v George* (27 February 2015), Regina NJ 53/2013 (SKQB).

² *Criminal Code*, RCS 1985, c C-46, s 150.1 [*Criminal Code*].

³ No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years. *Criminal Code*, *supra* note 2, s 13. Offenders between the age of 12 and 18 are subject to the *Youth Criminal Justice Act*, SC

was acquitted at trial, but the Crown appealed. On appeal, the acquittals were set aside, and a new trial was ordered by the provincial court of appeal in a 2-1 decision.⁴ George then appealed to the Supreme Court of Canada. The Court set aside the order for a new trial and restored the acquittals with written reasons to follow.⁵ After more than six years of uncertainty, George was discharged.

My review of the record in the *George* case led me to pose some questions about the handling of the case as it moved through the criminal justice system:

1) How was it possible for criminal charges to be prosecuted through two levels of appeal to the Supreme Court of Canada in the absence of evidence that the accused deliberately and voluntarily committed a criminal act? Without evidence to prove the *actus reus* of the offence, how is it possible to argue that the accused committed a criminal act...unless legal fundamentals are simply ignored?

2) Why was this fundamental error not identified by the judges presiding over the case and used to dismiss the case and discharge the accused forthwith? Does the judiciary not have a duty to oversee the use of the prosecutorial powers and inherent jurisdiction and authority at common law to take steps as appropriate and necessary to shield individuals from clear abuses of prosecutorial discretion?

3) Why was George charged? Why did the prosecution not withdraw the charges at an early stage or, at minimum, allow the acquittal at trial to stand unchallenged?

4) Why was the “complainant,” CD, not charged with sexual assault?⁶

2002, c 1.

⁴ *R v George*, 2016 SKCA 155 [*George* (SKCA)].

⁵ *R v George*, 2017 SCC 38 [*George* (SCC)].

⁶ At the end of preliminary inquiry, at which the accused, Barbara George, did not testify, the presiding judge reassured the complainant CD (who was under Cross-Examination by defence counsel) that “just to be clear, nothing has been indicated that would give rise to any possibility of charge, even if one wanted to lay one.” Defence counsel thanked the presiding judge and stated “That’s exactly correct, yeah. Yeah, in case you were worried about that leaving here.” See Cross-examination of CD, *R v George*, Regina NJ 53/2013 (Transcript of Preliminary Inquiry), Volume II, July 9th and August 14th,

The case does indeed raise fundamental questions about the conduct of the police investigation, the Crown's analysis of the evidence as the case progressed through the trial and appellate process, the allocation of police and prosecutorial resources in its handling of the case, and the approach to legal analysis and decision-making revealed in the trial judge's reasons for decision. Is this case aberrant? Or is the approach to enforcement of the sexual assault laws that was taken in this case typical and thus indicative of systemic short-comings in the administration of criminal justice in Saskatchewan? What roles, if any, did misogyny, stereotypes and related generalizations about child abuse and juvenile sexuality, tunnel vision, confirmation bias, and insufficient supervisory oversight have in the decision-making processes as the file moved forward, assigned, in turn, to a series of prosecutors, four in all?

Similar questions arise with respect to the decision of the Saskatchewan Office of Public Prosecutions to authorize the appeal from the trial acquittal and the righteous zeal plainly exhibited in the Crown prosecutor's written and oral arguments in the Supreme Court. The five members of the hearing panel at the Supreme Court of Canada made their criticisms of the Crown's written materials and reasoning abundantly clear during oral argument.⁷ There is indeed much to question here. The public interest was not well served by the decisions made by the Regina Police Service and the Saskatchewan Office of Public Prosecutions or the reasoning used by the trial judge. Close study of the record, including the transcripts of the preliminary inquiry and trial proceedings, provides strong evidence in support of the widely held public view that Canada needs a new approach to the handling of sexual assault cases. Personnel involved in investigation and prosecution of these cases need to bring experience and expertise to bear on the legal and factual challenges decision-making about sexuality and sexual activity often poses. Had the *George* case been investigated and prosecuted by professionals with specialized up-to-date training and experience in the legal analysis and impartial investigation and prosecution of sexual offences, perhaps the matter could have been dealt with in a

2013, Pages T105-T233) at T227 [*George*, "Preliminary Inquiry vol II"].

⁷ Supreme Court of Canada, "Webcast of the Hearing on 2017-04-28: 37372 *Barbara George v. Her Majesty the Queen*" (28 April 2017), online (video): <www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37372&id=2017/2017-04-28-37372&date=2017-04-28&fp=n&audio=n> [perma.cc/D2M7-686R].

manner more consistent with the principles of fundamental justice and equality before and under the law and the best interests of the public and the parties.

II. THE POLICE AND THE CROWN PROSECUTOR: THE DECISION TO LAY AND PROSECUTE CHARGES AGAINST GEORGE

In 2011, Barbara George applied for a position with the RCMP in Regina and completed a thirty-three page questionnaire as part of the intake screening process. One question asked whether she had ever engaged in sexual activity with a minor. She realized she was not sure. Because she was trying to provide detailed and accurate answers to all the questions she asked her seventeen year old son how old his friend CD was, and then answered the question with a “yes” together with a brief explanatory note indicating that the sexual activity occurred once only and that she “regretted” the incident. A retired RCMP officer who was working for the RCMP on contract reviewed George’s answers to the questionnaire, interviewed her by phone, and advised George that her application was declined. The RCMP disclosed the information received from George about her sexual activity with a minor to the Regina Police Service. Further investigation resulted in charges of sexual assault and sexual interference against George.

The child abuse and exploitation unit of the Family Services Office of the Regina Police Services did a video-taped interview with the complainant, CD (the male juvenile), at the Children’s Justice Centre. The record does not indicate whether members of the Regina Police Services met with George or simply relied on the contents of the notes in the file the RCMP forwarded to them as a “public interest” matter. Only some details from that file appear in the trial record, but it is clear that the police had at least two different partial accounts of the sexual activity between the parties. This is common in sexual assault cases. When investigators have no basis to accept the account provided by one party as reliable and that provided by the other party as unreliable, research data suggests that, although police practices differ widely, some police services have been inclined to classify such cases as unfounded and close the file, with or without review and consultation with the local prosecutor.⁸ In the *George* case, however, the parties were a

⁸ Robyn Doolittle “Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as

thirty-five year old female and a male who was fourteen years of age at the time of the alleged offence. The police may have laid the charges on the ground that the public interest requires the prosecution of all cases in which the facts, supported by some evidence that a trier of fact could find credible, suggest that a minor may have been subject to sexual exploitation or sexual assault. The Crown then decides whether to proceed to trial, stay, or withdraw the charges. Unfortunately, however, such a policy may make charges appear to the police to be inevitable in most such cases and, ironically, the very inevitability of charges may tend to discourage police from completing a full and comprehensive investigation before charges are laid. The policy may have a similar effect, in turn, on the exercise of prosecutorial discretion with respect to the decision to prosecute those same charges.⁹ The latter effect is likely compounded when the file obtained from the police is as incomplete as it appears to have been in this case.

And what of the failure to charge the fourteen year old with sexual assault? The partial information available to the police from their investigation clearly suggested George was an active participant in sexual activity that the complainant, CD, described as “mutual.” In the absence of a complaint by George and a full investigation and analysis that uncovered the additional facts subsequently established by the evidence at trial, it is likely the police did not consider laying charges against CD. Barbara George appears to have presented herself to the police as a mother who was responsible for a household of four children and was distressed by the sexual encounter in question. It is clear that she became even more distraught when she discovered that CD had been only 14 years of age when the sexual activity took place. Her impulse appears to have been to blame herself and assume responsibility for CD’s actions rather than viewing herself as the

Baseless”, *The Globe and Mail* (3 February 2017), online: <www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/> [perma.cc/Z2P4-23P6].

⁹ These observations suggest that charges of sexual assault and sexual interference with juveniles should be reviewed in the light of the experience seen in the *George* case. In some cases the decision to lay charges will trigger scrutiny by child protection officers and apprehension of children from the care and custody of the accused or another adult, resulting in the destruction of a family unit. Racism combined with misogyny can only exacerbate the socially destructive effects of enforcement decisions that are based on policy rather than evidence. It must also be recognized that convictions in many of these cases are based on a guilty plea by the accused without the benefit of a thorough investigation and without a legally informed analysis of the evidence and the law.

victim. In this she is no different than many other sexual assault victims who are often quick, with or without prompting by others, to blame themselves for “causing,” “facilitating,” or “provoking” the actions of their assailants.¹⁰ George did not report the assault against herself to the police at the time it took place and, in the whole of the circumstances, it is likely that she never considered doing so. Her trial testimony (reproduced below) shows that she experienced CD’s conduct as a serious breach of trust and was shocked by it, but she may not have appreciated that what CD did to her was the crime of “sexual assault.” This too is not uncommon. Failure to understand what constitutes sexual assault in law is widespread.¹¹

¹⁰ Subordinates in many social hierarchies are socialized to assume responsibility for events and misadventures they did not cause. Gender hierarchy is no different. In the case of sexual assault in the North American context, research studies have established that self-blame is a coping strategy used by many victims as they attempt to make sense of what happened. Blaming him/herself, even when it is patently contrary to the facts, allows a victim to believe s/he retains some measure of control over his/her life and thus may serve to alleviate emotional and psychological distress in the after-math of an assault. Individual differ in personality and circumstances, however. See Kirsten J Russell & Christopher J Hand, “Rape myth acceptance, victim blame attribution and Just World Beliefs: A rapid evidence assessment” (2017) 37 *Aggression & Violent Behavior* 153; Carin Perilloux, Joshua D Duntley & David M Buss, “Blame Attribution in Sexual Victimization” (2014) 63 *Personality & Individual Differences* 81; Sarah E Ullman, Liana C Peter-Hagene & Mark Relyea, “Coping, Emotion Regulation, and Self-Blame as Mediators of Sexual Abuse and Psychological Symptoms in Adult Sexual Assault” (2014) 23:1 *J Child Sexual Abuse* 74; Mary C Anders & F Scott Christopher, “A Socioecological Model of Rape Survivors’ Decisions to Aid in Case Prosecution” (2011) 35:1 *Psychology Women Q* 92; Sarah E Ullman et al, “Structural Models of the Relations of Assault Severity, Social Support, Avoidance Coping, Self-Blame, and PTSD Among Sexual Assault Survivors” (2007) 31 *Psychology Women Q* 23; Patricia A Frazier, Heather Mortensen, & Jason Steward, “Coping strategies as mediators of the relations among perceived control and distress in sexual assault survivors” (2005) 52:3 *J Counseling Psychology* 267; Nyla R Branscombe, “Counterfactual Thinking, Blame Assignment, and Well-Being in Rape Victims” (2003) 25:4 *Basic & Applied Soc Psychology* 265; Melanie L O’Neill & Patricia K Kerig, “Attributions of Self-Blame and Perceived Control as Moderators of Adjustment in Battered Women” (2000) 15:10 *J Interpersonal Violence* 1036; Patricia A Resick, “The Psychological Impact of Rape” (1993) 8:2 *J Interpersonal Violence* 223; Linda S Williams, “The Classic Rape: When Do Victims Report?” (1984) 31:4 *Soc Problems* 459.

¹¹ *Ibid.* A victim who blames him/herself for a sexual assault is less likely to define or label what occurred as sexual assault or to report it to the police. See also Lucinda Vandervort, “Mistake of Law and Sexual Assault: Consent and *Mens Rea*” (1987-1988) 2:2 *CJWL* 233 at nts 94-98 and discussion in accompanying text.

Officers from Family Services conducted a video-taped interview with CD. In that interview CD stated that he had previously engaged in what he described as “consensual” “sexual activity” with other older women, some of whom who were at least five years older than CD. CD explained in some detail how he typically groomed these women for “consensual” sexual intercourse just as he had with George.¹² If the Regina Police Service had interviewed some of these women and girls, the file prepared for the prosecutor’s office might have provided an evidentiary foundation for multiple charges against CD as a serial sexual offender who used a *modus operandi* with each of his victims that was similar if not identical to that he used with George. In the alternative, such “similar fact” evidence could have been adduced along with the other evidence to prove a single charge against CD with respect to his sexual assault against George. But the Regina police do not appear to have interviewed these women.

III. TRIAL PROCEEDINGS

The preliminary inquiry in *R v George* commenced November 29, 2012. The oral trial judgment acquitting Barbara George was issued February 27, 2015. The order for a new trial was issued by the Saskatchewan Court of Appeal in 2016. George appealed. On April 28, 2017, in a 5-0 decision, the Supreme Court of Canada restored the trial verdicts acquitting Barbara George on the charges of sexual assault and sexual interference. Written reasons for the decision by the Supreme Court of Canada were released July 7, 2017, approximately six years after the sexual activity in question was disclosed to the RCMP by Barbara George and roughly six and one-half years after CD assaulted her in early 2011.¹³

¹² CD provided testimony to the same effect at trial: see *R v George*, Regina NJ 53/2013 (Trial transcript, April 15, 2014 and May 21, 2014, Pages T1-T233) at T134-T165 [George, “Trial Transcript”].

¹³ The disclosure was contained in George’s written answers on the thirty-three page questionnaire she completed as part of her application for employment with the RCMP in June 2011. See testimony of Donald Ross Gervan, retired RCMP officer, sworn on a voir dire, who reviewed the questionnaire (Exhibit-1) and interviewed George in 2011, in *George*, “Trial Transcript”, *supra* note 12 at T13-T46. See also Examination in Chief and Cross-Examination of Barbara George, *George*, “Trial Transcript”, *supra* note 12 at T166-T-209, T-209-T223.

A. The Defence

The rationale for the decisions taken by defence counsel that contributed to shaping the manner in which the case unfolded in court are protected by solicitor-client privilege. Prior to the preliminary inquiry the Crown provided defence counsel with disclosure of the Crown's evidence, including a copy of the video-taped Family Services interview with the complainant, CD. The preliminary inquiry was conducted over four days-- November 29, 2012; January 23, 2013; July 9 and August 14, 2013.¹⁴ On July 9, 2013 defence counsel brought an application pursuant to s. 276.1 of the *Criminal Code* seeking a hearing under s. 276.2 to determine the admissibility of evidence that the complainant, CD, had engaged in sexual activity other than the sexual activity that formed the basis of the charge before the Court. At the hearing on the s. 276.1 application, defence counsel disclosed that George's defence was her mistaken belief at the time of the sexual activity at issue in the case, that CD was at least 16 years of age. Defence counsel argued that the sexual history evidence was probative on the issue of how the complainant presented himself socially and, in turn, how old he appeared to be at the time of the alleged offence. The Crown's position was that George had failed to take all reasonable steps to ascertain the complainant's age and therefore s. 150.1 of the *Criminal Code* barred her from raising a defence of belief in consent. The preliminary inquiry then adjourned to August 14, 2013, at which time the s. 276 application was denied on the ground that the application failed to specify when the alleged previous sexual activity had taken place. The complainant, CD, then testified as a Crown witness and was cross-examined at length by defence counsel. George attended the preliminary inquiry but was not obliged to testify and did not appear as a witness. In fact, the defence called no witnesses. At the conclusion of the preliminary inquiry the presiding provincial court judge held that the evidence was sufficient on the counts charged and committed the accused, Barbara George, to stand trial.

Strategically, mistake as to age was likely the best defence in this case, because it placed a burden on the Crown to identify "reasonable steps" George could have taken in the circumstances but did not. This afforded

¹⁴ Barbara George's fifth child was born in early 2013: Examination in Chief of Barbara George, *George*, "Trial Transcript", *supra* note 12 at T-167. When the infant cried during the preliminary inquiry on July 9, 2013, the presiding provincial court judge granted George permission to breast-feed the infant in the courtroom. See *George*, "Preliminary Inquiry vol II", *supra* note 6 at T130-T132.

George a good chance of acquittal at trial. In theory, two defences (failure to prove the *actus reus* and mistake of fact with respect to CD's age) could have been put forward in the alternative but that would have entailed greater complexity and the risk of apprehended inconsistency.¹⁵ In the end, defence counsel was undoubtedly influenced by her experience appearing before judges in the Regina district, but whether counsel considered arguing that the Crown had failed to prove the *actus reus* is unknown, protected by solicitor-client confidentiality. Arguing that the evidence rebutted the ordinary presumption or inference that the sexual activity involved voluntary and deliberate acts by George might have made sexual assault charges against CD more likely and in turn required George to assume the role of complainant. If these options were discussed, George may well have instructed her counsel not to pursue defences that risked embroiling her as a complainant in a case in which CD was the accused.

B. The Findings of Fact and the Decision at Trial

The trial judge summarized his findings with respect to the circumstances of the matters before the court as follows:¹⁶

Circumstances of the Offence

On the date in question, [J], together with several of his friends, had gathered at the George apartment. They had originally planned to go out drinking and driving around. However, Ms. George had convinced [J] to use the apartment and avoid the risk of drinking and driving. The group included [J] and Chelsey, [J]'s then current girlfriend, [M] and [A], [M]'s then current boyfriend, [B] (phonetic), [CD], and [D] (phonetic), and perhaps others.

Ms. George remained at the apartment but stayed discreetly in her bedroom, allowing the group to carry on. She left her bedroom on occasion to ensure the

¹⁵ E.g. Defences stated in the alternative as: "I committed no act and therefore am not criminally liable, but if I am found to have exercised agency and be accountable for my criminal actions, I must nonetheless be excused from criminal responsibility because I was relying on a mistake about the factual circumstances."

¹⁶ This section, entitled "Circumstances of the Offence," and the section entitled "Conclusions," reproduced below, are from the Oral Reasons for decision at trial as recorded on February 27, 2015 and transcribed by the Court Reporter. The entire "Analysis" section of that unreported decision is reproduced in redacted form in the reasons for judgment by Jackson JA, dissenting in the Saskatchewan Court of Appeal in *George* (SKCA), *supra* note 4 at para 75. The findings of fact at trial are also summarized in the reasons for judgment by Gascon J for the Supreme Court of Canada, in *George* (SCC), *supra* note 5.

gathering remained under control. There were no problems. The group consumed mainly beer.

[M] visited her mother's bedroom several times during the evening. They were shopping online for a new bed comforter. Several other members of the group, including [CD], stopped by the bedroom on occasion to say "hi" or inquire how Ms. George was doing.

The gathering carried on until, approximately, 11:30 or midnight, by which time, most of the individuals had either gone home, passed out, or were sleeping somewhere in the apartment. This was not a totally uncommon occurrence. Indeed, [CD], who had an 11 PM curfew, at the suggestion of [J], had made arrangements, unbeknownst to Ms. George, to spend the evening.

Ms. George was lying in bed, using her laptop, searching for comforters. She was wearing her pajama bottoms, together with a tank top and t-shirt. [M] entered her bedroom to say goodnight. Ms. George brushed her teeth, closed her bedroom door, removed her pajama bottoms, and climbed under the blankets. She was still wearing underwear. She continued to use her laptop.

For some reason, [M] later knocked and re-entered her mother's bedroom. While she was there, [CD] also entered the bedroom. He had a brief conversation with [M]. She kissed her mother goodnight and left the room. [CD] remained. He and Ms. George started talking. According to Ms. George, this turned into a lengthy personal conversation. It involved discussion about music, custody issues, various of [CD]'s relationships, and difficulties he had meeting mature girlfriends.

[CD] was aware that Ms. George and her husband were separated. He had been present during a previous access exchange. His family was experiencing a similar dynamic. He had assumed the responsibility of assisting his mother ~ care for his siblings.

There is disagreement about how the issue of mature girlfriends arose, but the topic led to a discussion about old news reports addressing the story of an American school teacher who became romantically involved with a much younger male student.

Ms. George was lying at the head of the bed, propped up against the headboard, with a pillow behind her back and a blanket pulled up to her chest, under her laptop. [CD] was situated at the end of the bed, sitting crossways, with his back against the wall. At approximately 3 or 4 AM, things became rather more physical. While Ms. George was still at the head of the bed, [CD] asked if it "would be weird if he would kiss (her)". Almost simultaneously, he moved and leaned forward to kiss her. She backed away momentarily. He again moved towards her. She allowed him to complete the kiss.

The kiss lasted only a few seconds. It was followed, immediately, by [CD] moving on top of her, pushing the blankets down, lowering his pants, and moving her underwear to the side. She asked him what he was doing and to stop, several times to her recollection. He ignored the request and continued. She decided to simply let him finish. She described the encounter as being weird, awkward, and

quick. She didn't recall if he ejaculated. Ms. George testified that following the encounter, [CD] said, "I could, kind of, do that once a week though."¹⁷

Based on those findings of fact, the trial judge continued:

Conclusions

- (1) That wherever there is a conflict in the testimony between Ms. George and [CD], I accept the testimony of Ms. George.
- (2) That there was a sexual encounter between Ms. George and [CD], at Ms. George's apartment, between the dates stated in the indictment.
- (3) That the sexual encounter involved kissing and an act of intercourse.
- (4) That the sexual encounter was initiated by [CD], but continued with the willing participation of Ms. George.
- (5) That the sexual encounter was clearly consensual [on CD's part]¹⁸ from a factual perspective.
- (6) That Ms. George believed [CD] was 16 years old at the time.
- (7) That, regardless of her belief in [CD]'s age, Ms. George's conduct in allowing herself to be placed in the circumstance that she was in, alone in her bedroom with her teenaged son's friend, for an extended period of time, at that time of night, demonstrated an appalling lack of judgment.
- (8) That her lack of judgment aside, the reasonableness of steps taken by Ms. George to ascertain [CD]'s age must be assessed in context, and with an appreciation for the particular circumstances under review.
- (9) The onus is on the Crown to prove, beyond a reasonable doubt, that Ms. George did not take all reasonable steps to ascertain [CD]'s age.
- (10) That considering all of the evidence, and, in particular, the indicia outlined by Madam Justice Jackson in *Slater*, and [CD]'s apparent comfort and familiarity with matters sexual, as evidenced by his rather callous conduct at the time and his subsequent testimony in that regard, I am left with a reasonable doubt regarding sufficiency of the steps taken by Ms. George to ascertain [CD]'s age.
- (11) That doubt, regarding sufficiency, must be resolved in favour of the accused, and accordingly, I find Ms. George not guilty of both counts in the indictment.¹⁹

C. Evidence Not Addressed in the Trial Judge's Reasons for Decision

The trial judge's conclusion that George was a "willing" participant" in the sexual activity in question is extremely puzzling. In the reasons for decision the trial judge states that whenever there is a conflict in the testimony between George and CD, he accepts George's testimony, but his analysis omits any reference to crucial portions of Barbara George's trial

¹⁷ *R v George* (27 February 2015), Regina NJ 53/2013 (Sask QB) at T4-T6 [George, "Oral Reasons"].

¹⁸ As specified in the Oral Reasons, *supra* note 17; and see text below at note 25.

¹⁹ *George*, "Oral Reasons", *supra* note 17 at T6-T12.

testimony in which she provided detailed evidence about the words and conduct of the parties and her own state of mind.²⁰ George's testimony, reproduced below, shows that subjectively, in her own mind, she was "unwilling" rather than "willing" and that her words and conduct were objectively consistent with an "unwilling" state of mind. The trial judge's conclusion that George was a "willing" participant lacked any evidentiary support other than the testimony of CD, which the trial judge said he rejected when it conflicted with George's testimony.

Moreover, her testimony shows that the sexual activity in question consisted of acts by CD that brought his body into physical contact with George's body, not acts by George. George's conduct did not violate the criminal law, she did not initiate, commit, or "do" any acts of a sexual nature²¹ and therefore the Crown failed to prove the *actus reus* of the offences on which George was indicted.²² As a consequence, the presence or absence of *mens rea* was not at issue and no "reasonable steps" analysis was required. George was entitled to be acquitted on the ground that the Crown had failed to prove that she committed either of the offences on which she had been indicted. It appears that the trial judge simply assumed that the Crown had proven the *actus reus* of the offences with which George was charged, without actually directing his mind to that issue and then proceeded to analyze the evidence in the case as if the presence or absence of *mens rea* or criminal responsibility for the offences George was assumed

²⁰ See excerpts from the trial transcript reproduced below in the text at notes 23 and 24.

²¹ Whether the "kiss" George tried to avoid, and then allowed CD to complete (when CD suddenly kissed her without waiting for her permission to do so) is categorized as "an act," as unconscious and automatic social "mirroring" behavior, or as a "reflex" in response to the pressure of CD's lips on hers, it is undeniable that a kiss is a far less intimate activity than sexual intercourse. Not all "kisses" are or would be classified by objective third party observers as being "of a sexual nature," as violating "sexual integrity," or to be motivated by a desire for "sexual gratification." In addition, in many cultural and social contexts a kiss may signify respect, friendship, or affection, whereas sexual intercourse is ordinarily seen to be unequivocally "of a sexual nature." In her twenties Barbara George, had moved from Quebec to Saskatchewan. In Quebec, friends and acquaintances routinely exchange affectionate hugs and kisses on both cheeks (or in the air next to the cheek). In my experience, this is rare in Saskatchewan. A Francophone from birth, in 2011 George spoke English with an accent and sometimes hesitated as she searched for words in English. Linguistic and cultural differences may have affected multiple aspects of the case and its investigation and prosecution.

²² Unless the argument is that George was vicariously liable for CD's acts and his acts were to be attributed to her.

to have committed was the only issue to be decided. The presumption of innocence was apparently presumed not to apply or was simply not considered. Quite an odd approach for a criminal trial. Just how odd or discordant the trial judge's approach was, given the facts established by the evidence adduced at trial, becomes yet more striking, if that is possible, when viewed in the light of the specific details addressed in George's testimony--which the trial judge said he accepted whenever it conflicted with CD's.

Excerpts from the Examination in Chief of Barbara George at trial:²³

Q Let's start with the basics: Did ~ did the situation get physical at one point, physical interaction?

A I remember ~ because we were ~ like, I was on the laptop; right. And I remember ~ I think it was three ~ three ~ three ~ like, it was between three and four in the morning when I looked at the time once. And I remember that because it was just before we were talking and I said to CD that, you know, it was actually nice to be able to have a conversation like that and ~ and, you know, share different topics of life and

Q So you were telling him, you appreciated the connection?

A Yeah. It was nice to ~ you know, to have a good conversation with someone and ~ and just ~ it was nice to be able to share that with somebody. [T189] And after I said that, CD asked me if I thought it was ~ would be weird if he would kiss me. And I ~ kind of ~ I was in the ~

Q So he said that ~ he said that to you?

A Yeah. I wasn't expecting that ~ so I, kind of ~ and I didn't really have time to answer anything because he was, kind of, leaning forward to kiss me.

Q Did you lean in, as well?

A No. I, kind of, backed away a little bit because I was, kind of, caught off-guard. I wasn't expecting that. And then he, kind of, came back, and ~ and then I kissed him back at that point.

Q Okay. You kissed him ~ okay. The ~ so it was ~ how he describes it, this, sort of, 50/50 mutual thing, you kissed back at that point?

A No. It ~ it wasn't really 50/50 to start with, no. I ~ you know, he ~ leaned forward, and then I, kind of ~ got ~ caught off-guard. And then ~ then I ~ I let him kiss me.

Q Yes. Sure, sure. Okay. And, now, about the timing ~ okay, so if you talked for ~ for ~ you know, six, seven hours, where in the time-line does [T 190] this kiss come in?

A Say, when we ~ when I looked and it was about ~ between 3:30 and four ~ we talked. Then, you know, I brought up the fact that I enjoyed the conversation and all of that. And we kept talking.

Q Oh, so it wasn't right at that point?

²³ Examination in Chief of Barbara George, *George*, "Trial Transcript", *supra* note 12 at T188-T197. Many, but not all, non-substantive mono-syllables interjected by counsel have been deleted from the excerpt of the redacted transcript reproduced here.

A No, no. We kept talking about stuff. And he showed me a song and stuff like that. Like, we kept chit-chatting and listening to some music.

And it was a good two hours, if not a little bit more, before ~ after ~ then the kiss happened.

Q Okay, so you just-you tell him, "I'm really enjoying this, it's a connection," and- and then you just keep connecting ~ for a couple more hours?

A Well, yeah, I was ~ enjoying the talk, and just talking about ~ like, just ~ you know? It was just nice to be talking with someone.

Q Okay. Okay, so ~ so then what happens at ~ at the kiss?

A (No audible response.)

Q So the kiss ~ how long was that kiss?

[T191] A I don't ~ I don't even think it lasts 20 seconds. It was ~ everything happened so fast after that. So he came forward to kiss me. I, kind of, backed away. And then ~ then I let him kiss me. And then as soon as I did it, CD was on his way on top of me. And ~ and I asked him what he was doing, and he didn't answer me. So I ~ I was completely surprised. I wasn't expecting anything like that.

Q But were ~ sorry. Were the blankets still on you at this point?

A When I asked him what ~ what he was ~ like, what he was doing? Yeah, they were. Then he wouldn't answer. And then I asked him again. I said, "Okay, what are you doing?" And as I asked him again, he was pulling ~ like, pushing the blankets down. Because the blankets were, like, in the middle of my tummy and my ~ and my breast at that point. [T192] Like ~ and so he, kind of, pushed them down. And it happened ~ like, I felt him pulling his pants down and pushing my ~ my underwear out of the way. It just happened so fast.

Q So ~ so if I understand it, well, what ~ what clothing came off for the two of you, which clothing came off?

A None of my clothes came off.

Q None?

A And his ~ his pants didn't come off. I ~ if ~ like, from what I felt, they just came down.

Q Yes. What was he wearing that night?

A He was wearing a pair of jeans ~ and he had a t-shirt, and, like a ~ actually, the only clothing that came off that night was his hoodie ~ earlier in the night. He was wearing a red hoodie, and he had a t-shirt under.

Q Mmhmm. Okay. Okay, so ~ so was there any oral sex or ~

A No. Not at all, no.

Q None at all?

A There was ~ no oral sex or caressing. Like, it was absolutely nothing besides that kiss. [T193]

Q Was there anything fondling or caressing?

A No.

Q Did he touch your ~ did he pay any attention to your chest or ~

A No, not at all, no. He was on top of me, but his hands weren't on me. And, like I said, I asked him what he was doing. And after that, it just happened so fast. And then I said to him, "Look, this is wrong." "Can you, please, stop." And he wasn't responding. And he was just, kind of, looking at me. And so I just ~ I don't know.

I ~ honestly, I was so surprised and ~ I wasn't expecting a kiss to turn into this, that I just ~

Q Yes. Did you ~ did you push him off or try to fight him?

A No. I ~ I ~ you know, I should have been ~ but I think I was just ~ so surprised and shocked, I just ~ I mean, and at this point, I had asked him more than twice to ~ if he could stop and that ~ that this is ~ was wrong. And nothing was happening. So I ~ and I, kind of ~ I think I, kind of, felt guilty because I kissed him back, so I thought maybe ~ so I just thought, okay ~ I, kind of, just let him finish.

Q Yes, yes. What was he doing, what was he doing during all of this?

A (No audible response.)

Q Did ~ did he say anything or ~ or ~

A No, it was just ~

Q ~ other than doing his thing?

A It was just so weird. It ~ nothing. [T194]

Q Did he ejaculate?

A I don't ~ honestly, I don't know because it was so awkward. There was no ~ I'm sorry. I don't ~ there was ~ there was no ~ he wasn't making any noise or moaning. Do you know what I mean?

Q M m h m m .

A There was absolutely nothing. I ~ he was just looking at me, and I was just ~ like, okay, what is this? Like, I ~ I just ~

Q And so you just let him finish?

A And it was so quick, too.

Q Yes. How quick?

A I don't even think it lasted five minutes. I ~ it was just ~ it happened so quick ~ and it was done so quick, too.

Q Okay.

A So I just ~ I was just completely frozen. I ~

Q Okay. Okay, so how did it end?

A (No audible response.)

Q How ~ how did it ~ how did that physical stuff end?

A He just got off me and ~ like, he, kind of, pulled himself off at the end of the bed, and he pulled his pants back up. And he said to me, "Holy ~" if I remember the right words, he said, "Holy shit, [J] can't find out about it." And I said, "No kidding." And then at this point, I grabbed my PJ pants because I didn't feel good at all. I just ~ I wanted to put them back on right away. And he said, "You know, I could, kind of, do that once a week though." And I said, "Do you know what, CD, that's not funny at all, so let's just ~ you know ~[T195] - let's just ~ end this right now, and not talk about it, please."

Q Did you ~ did he stay in your room any longer after that?

A No. I asked him to leave.

Q CD said something about [J] ~ [J] recommending he go sleep in your mom's ~ in your room?

A No.

Q Did you hear ~ see ~ observe any of that?

A No, never. And it ~ you see, I didn't understand why he made that comment because he was ~ I mean, if he brought up the fact to me, you know, "Holy shit, [J] can't find out," then why would [J] give you permission to ~ no.

Q Well, yes ~

A It makes ~ no sense to me.

Q Yes ~ no, I know. And that's ~ we'll ~ talk about that. Yes, that's argument for the end ~ for the end, but, yes. Okay, so did ~did Mr. D wear a condom or ~

A I don't see where he would have had time to wear one. I'm sorry, but it's the truth. [T196] And if he did, I didn't noticed (sic) it.

Q Okay. So through all of ~ even the romantic talk with him that night, and, you know, romance and ex-girlfriends and stuff, did you ~ did the two of you speak of having sex at all?

A Never.

Q Was there-any discussion?

A ~ It was never brought up. I mean, I ~ to ~ for me, personally, I was ~ you know, yeah, I was loving the conversation and the sharing part of ~ you know, but, I mean ~ and, yeah, I did ~ I let him kiss me back, but ~ I mean, no, I never had any sexual intention or ~ it never ~

Q That's not ~

A ~ I mean ~

Q ~ what you ~

A ~ it was ~

Q ~ were set out to do that night, is what ~

A Well, I was ~ in my PJ pants all night, and I was ~ no, I wasn't ~ no.

Q Okay. Okay, so ~ and at that time, when you're thinking, no, no, that wasn't my intention, or when ~ when you testify about that, are the reasons that you thought, no, no, because he's too young, or ~ or were you ~

A No. That ~

Q That your mind ~ [T197] - didn't even go there?

A Well, the thing is, you know, to me, he was [J]'s age, and I don't care if he would have been 26. He ~ he's my son's friend. You don't do things like this. It's ~

Q Did you feel bad about that, about being the-

A Well, I ~ felt bad about the kiss, yeah, because ~ and, I mean, it ~ because it turned into this right away, too. I ~ you know, I thought, like, oh, my gosh, like ~ okay, this is your son's friend. And he's ~ like, he ~ what's going on here.

Q Yes. Okay. Okay, so at any point in the evening did you turn your mind to thinking he's too young for me?

A Never ~ I didn't have those intentions, so ~ I was just ~ honestly, I was just enjoying the conversation. And I think at this point, some ~ you know, some topic he was talking about, like, his ex-girlfriend and stuff like that, yeah, you, kind of, share an emotional connection, too. But, you know, sharing an emotional connection and a conversation ~ does ~ has nothing to do with sexual intercourse and it ~ no. I never thought of going to bed with my son's friend, no.

Excerpts from Cross-Examination of Barbara George by the Crown prosecutor at trial:²⁴

Q And then I suggest to you, in fact, you wanted to get intimate with him?

A No, I never did. The reason why CD ended up coming closer to me on the bed, it's when he wanted to play that song for me. And I turned my laptop. Then he came and put the song on. That's the only reason why CD ever got closer to me.

Q I suggest to you that you would ~ it was ~ you were the one who asked if it was weird if you wanted to kiss him?

A No, I did not.

Q And subsequently, you and him both kissed?

A I'm sorry.

Q And then you and him both kissed; is that correct?

A No. CD reached to kiss me. And like I explained with Christina [defence counsel], I ~ I, kind of, backed away. I was, kind of, surprised. And then he came back, and then I kissed him back. But I never invited him to a kiss.

Q And after the kissing, then you began to touch each other, it was a physical [T217] contact between you and CD?

A There was absolutely no physical touch that night, beside my lips that touched his lips, and him on top of me. There was no ~ with my hands or his hands, there was actually no contact or no caressing or none of that happened that night.

Q If I suggest to you that after the kissing, you took your clothes off?

A I never removed any of my clothes off. The only moment in that night where I removed a piece of my clothes off is when I came back from the washroom, I closed my door, and I removed by [sic] P] pants to go under my blanket. That's the only moment where any of my clothes came off that night. [Ed. Note: here G refers to a point before CD came into her bedroom]

Q And I suggest to you that, in fact, you and CD engaged in oral sex?

A Never.

Q And then you then had sexual intercourse with CD?

A I'm sorry?

Q You then had sexual intercourse with CD?

A If I had sexual intercourse with CD?

Q Yes.

A Yeah, it happened, yeah, but not because I wanted to.

Q So there was a physical contact between you and CD?

A Yeah, from after the kiss, yeah, CD came on top of me, and ~ yeah, so it did create physical contact, yeah.

D. Analysis of the Grounds for Acquittal

The trial judge's oral reasons for decision succinctly state his conclusions on a number of crucial issues:

²⁴ Cross-Examination of Barbara George, *George*, "Trial Transcript", *supra* note 12 at T215-T217.

There is no dispute that an act of intercourse occurred between Ms. George and [CD]. There is similarly no dispute that, although reluctant at first, Ms. George was a willing participant. I find, as a fact, that [CD] actually initiated both the kiss and the intercourse. In reaching this conclusion, I specifically accept the testimony of Ms. George over the testimony of [CD]. Factual consent on the part of [CD] is abundantly clear, however, considering his age, he was incapable of consenting in law.²⁵

The trial judge found that George believed that CD was at least 16 years of age and then turned to discussion of the defence of honest mistake of age and the requirement, pursuant to s. 150.1 of the *Criminal Code*, that to rely on the defence she must have taken all reasonable steps to ascertain CD's age. No other ground for acquittal was raised by counsel and none is considered in the decision. Instead the trial judge focused his attention and subsequent analysis on evidence related to the defence under s. 150.1, not the case as a whole, and acquitted George on the ground that the Crown had failed to prove beyond a reasonable doubt that George failed to take all reasonable steps to ascertain CD's age. George was found not guilty on both counts in the indictment.²⁶

But George's evidence, accepted by the trial judge on all disputed points of fact, shows that the Crown had actually failed to prove the *actus reus* of the offences on which George had been indicted. George was therefore entitled to acquittal on both counts on that ground alone. The excerpts from the trial transcript, reproduced above, show that the accused, Barbara George, did not voluntarily and deliberately touch the complainant, CD, in

²⁵ From the unreported Oral Reasons at trial in *R v George* at T6, and reproduced in redacted form in the dissenting reasons for judgment by Jackson JA in the Saskatchewan Court of Appeal, *George* (SKCA), *supra* note 4 at para 75.

²⁶ George testified that she had no intention to engage in sexual activity with CD; that eventuality had not crossed her mind. Unless she was curious about CD's age, or a question of how old he was had somehow come up in the course of their conversation, she had no reason to ask CD his age before he assaulted her. The fact that she did not anticipate CD's assault made it impossible in practice for her to comply with the legal requirement to take reasonable steps to ascertain CD's age or take evasive action before he initiated physical contact with her. 'Ought' implies 'can,' while 'cannot' or 'impossible' suspend the effect of an obligation. *Cf R v Tannas*, 2015 SKCA 61, decided in June 2015 (after the oral reasons for decision in *George* were delivered by the trial judge February 27, 2015) in which the Court held that the circumstances of the case obviated the need to make a direct inquiry about the complainant's age. The *Tannas* decision should have been considered by the Office of Public Prosecutions before the Crown proceeded with the oral hearing in the Crown's appeal from Barbara George's acquittal.

a sexual manner. The principles of fundamental justice encompass the long-standing proposition that individuals are not criminally liable for acts they are alleged to have committed unless they committed those acts freely and voluntarily.²⁷ In the circumstances of the offences she allegedly committed, Barbara George had no real opportunity to exercise agency, to make relevant choices, and act accordingly. Where there is no act, questions about whether the act was deliberate and voluntary simply cannot arise. To conclude, as the trial judge did, that George was a “willing participant” is to intimate that she actively and voluntarily engaged in the sexual activity at issue in this case even though her evidence, evidence accepted by the trial judge, shows that she did not.

E. “Willing Participant”

The trial judge’s assertion that there is “no dispute that, although reluctant at first, George was a willing participant”²⁸ is curious. This is a criminal case, not a civil matter, and the onus is on the Crown to prove all elements of the alleged offence, including commission of a voluntary act. To suggest there is “no dispute” about this issue is to relieve the Crown of the burden of proof on an essential issue. The record contains no indication that the defence waived proof of the *actus reus* of the offences on which George had been indicted.

The trial judge’s statement is also ambiguous. The trial judge does not indicate whether the finding: 1) is with respect to George as the accused who is thereby said to have voluntarily and deliberately performed acts of participation that constitute the offences with which she is charged, or 2) is intended to serve as a finding that George consented to the sexual encounter initiated by CD and therefore was not sexually assaulted by CD. Either way, the conclusion was an error on a question of law on multiple grounds. First, with respect to George as the accused, it was an unreasonable conclusion in that it was inconsistent with the evidence the judge accepted. On the other hand, if it was intended to address the question of whether the sexual encounter was consensual on George’s part, the assertion—that George was a “willing” participant—shows that the trial judge misdirected himself with respect to the legal meaning or definition of consent, a

²⁷ Michael Manning & Peter Sankoff, *Mewett, Manning & Sankoff on Criminal Law*, 5th ed (Toronto: Lexis-Nexis Canada, 2015) at 151-158; Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 115-142.

²⁸ See the text above at note 25.

question of law governed by the common law and the statutory definition of sexual consent in s. 273.1 of the *Criminal Code*.²⁹

Furthermore, the conclusion that George was a “willing participant” in the first respect violates principles of fundamental justice in that it fails to acknowledge that in the circumstances George had no meaningful opportunity to choose to perform or not perform any sexual act for which she, as the accused, was being required to account at criminal law.³⁰ The sexual contact between her body and the complainant’s body that took place was the result of CD’s conduct, not George’s conduct. CD engaged in sexual activity and touched George’s body with his body for the purpose of sexual intercourse and sexual gratification. George did not initiate the activity or reciprocate. Furthermore, given the evidence the trial judge accepted, the conclusion—although arguably merely *obiter* given that George was the accused in the matter before the court, not the complainant—that she was a “willing” participant in the second respect also had the practical effect of denying George equal protection and benefit of the common law and statutory definitions of sexual consent and was therefore a violation of s. 15 of the *Charter*.

The trial judge specifically stated that he accepted George’s testimony over that of the complainant, CD, on all points in conflict.³¹ The evidence accepted by the trial judge shows that George did not subjectively want or intend to engage in sexual activity with CD; nor did she initiate the sexual activity or communicate affirmative consent or voluntary agreement to the sexual activity in question by her words or conduct. Under s. 273.1 of the *Criminal Code*, as at common law, passivity, resistance, and refusal, all signify the absence of the communication of voluntary agreement, that is, consent.³² The trial evidence reproduced above shows that the complainant, CD, initiated the sexual activity and used force in order to have sexual intercourse with her, a circumstance s. 265(3)(a) of the *Criminal Code* identifies as one in which consent is not obtained. In the absence of

²⁹ This is an error of law, not a mistake of fact. See *R v Ewanchuk*, [1999] 1 SCR 330 at para 21, [1999] SCJ No 10 [*Ewanchuk*].

³⁰ To find George liable to conviction in these circumstances is contrary to s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

³¹ Text above at note 25.

³² See *Ewanchuk*, *supra* note 29 at para 51: “For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3.”

evidence to show that George voluntarily and deliberately touched CD in a sexual manner, there was no *actus reus*, no criminal act, no crime for which she could be lawfully convicted. An acquittal was the only correct verdict available in law. Whether George knew how old the complainant was and whether George had taken all reasonable steps to ascertain the complainant's age were both immaterial questions in these circumstances.

As the trial judge found, the evidence makes it clear that CD, not Barbara George, initiated all aspects of the sexual activity. George's testimony shows that CD's attack took her by surprise. She resisted and repeatedly objected but to no avail. CD ignored her words and conduct. She testified that she finally gave up and "just let him finish." This is acquiescence, not consent. The trial judge's characterization of the evidence as showing that "although reluctant at first, she was a willing participant"~ is an outmoded perspective³³ that disregards decades of development in Canadian sexual assault law. Moreover, the trial judge not only disregards the fact that George was the victim of the piece, but in addition ignores the circumstances and faults her for exercising "bad judgment" in allowing CD be in her bedroom for an extended period of time at night.³⁴ This is classic

³³ See e.g. *R v Hindle* (1978), 39 CCC (2d) 529 (BCCA), [1978] BCJ No 1148 (QL) in which the judge in instructing the jury at trial stated "...if the woman first resisted and then later consented to the act of intercourse because she yielded to her own passion, then this would be a genuine consent, notwithstanding the fact that she at first objected or resisted the advances made to her" (at 530). A recent example of this same perspective~whereby intercourse by the assailant is taken to demonstrate that the complainant may have consented is seen in the recent trial decision in *R v Adeoju*, 2014 ABCA 100, in which lengthy resistance, followed by what the complainant explained was resignation, resulted in an acquittal on the ground of doubt about the absence of consent. On appeal the Court substituted a conviction. The false equation of 'resistance subdued' or 'compliance obtained' with 'doubt about the absence of consent' has long been a recurrent motif in sexual assault cases. Current law prohibits this type of reasoning by: 1) requiring affirmative consent and defining it as the communication of voluntary agreement by words or conduct as provided in s 273.1(1) of the *Criminal Code*; and, in addition, 2) specifying that "no consent is obtained" when "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity" as provided in s 273.1(2)(d).

³⁴ George was supervising, not participating in, a house party of teenagers organized by her teenage son. She had asked her son to party at home to ensure that he and his friends would not be drinking and driving. She had no reason to regard CD any differently than any of the other half dozen or so young people, including her own children, who were spending the night in her home that evening. She had no reason to anticipate and did not anticipate that her interactions with any of these young people would become sexualized. Moreover, neither she nor CD were drinking alcohol, unlike

victim-blaming misogyny, especially poignant in a case where it is the alleged accused who is criticized for her own vulnerability—apparently ‘conversing while female in the security of one’s home’ is like ‘driving while Black’ or ‘walking while Indigenous.’ Such statements about a victim’s bad judgment are gratuitous slap downs, signaling judicial bias and a lack of judicial impartiality and can only perpetuate outmoded beliefs and attitudes that have no place in judgments issued by judges in the 21st century. Law students and the legal professionals who read those judgments should not be burdened with the task of disabusing their minds of such prejudicial claptrap. It inevitably wears on the unconscious mind of the reader like water on a stone and can only reinforce implicit social and cultural biases.

To re-cap—George’s testimony showed that she was not a “willing participant” in the sexual activity and that she was not even a “participant” in any proper sense. The sexual activity consisted entirely of acts by CD. Absent proof that George committed an act prohibited by the definition of the offences on which she was indicted, there was no *actus reus*, and acquittal was required by law. Analysis of *mens rea* was not required in the circumstances. Whether George could or should have known or inquired about CD’s age was immaterial in the absence of the commission of a prohibited act by her.

It follows that the trial judge was required to acquit George on the ground that the Crown failed to prove that George had committed either of the offences with which she was charged.³⁵ Instead, without analyzing the legal significance of the facts in evidence that were of material relevance to the issues before the court, the trial judge appears to have based his reasons for decision on the assumption, contrary to the evidence, that: 1) George committed one or more prohibited acts or omissions, and 2) that she did so “willingly.” To say that an act is committed is to assert that the actor controlled the means used to commit the act, made a deliberate choice to

some attendees. There was no reason for her to anticipate that CD would act as he did or for her to appreciate that she needed to take steps to protect herself from an attack by him. She knew CD only slightly as someone who was her teen-age son’s friend and had been in her home with her son a number of times in the past. She was aware that CD helped his mother care for his younger siblings. She clearly believed him to be a responsible young person and she trusted him. In the whole of the circumstances that was not inappropriate. See Examination in Chief and Cross-Examination of Barbara George, *George*, “Trial Transcript”, *supra* note 12 at T166-T-209, T-209-T223.

³⁵ Had the trial judge done so, the prosecution of George on the charges in question should have been at an end.

commit the act, and had a real opportunity to do otherwise. The term “willingly” suggests that any acts an individual is alleged to have performed were undertaken without coercion, freely and voluntarily, and were consistent with that individual’s wishes and desires. George’s testimony, however, provides no support for the first conclusion—that she deliberately “chose,” in any meaningful sense of the word, to participate in the sexual activity—or for the second conclusion—that she did so “willingly.”

F. At the Saskatchewan Court of Appeal—Roads Not Taken by the Crown, Defence, and the Court

1. The Crown

Following George’s acquittal at trial on the ground of reasonable doubt that she failed to take all reasonable steps to ascertain CD’s age, the Crown could have accepted the verdict, decided whether to charge CD with sexual assault of George, and closed the file. Instead, the Office of Public Prosecutions filed an appeal requesting a re-trial on the ground of alleged judicial errors on questions of law dealing with application of the reasonable steps provision in s. 150.1 of the *Criminal Code*. Interpretation and application of s. 150.1 is a matter of interest to judges, prosecutors and criminal defence lawyers. Yet in this case the accused was not only acquitted at trial but also arguably shown—by evidence the trial judge accepted—to have been wrongfully accused in the first place. The appeal placed her at fresh risk of wrongful conviction. The direct and indirect harm the criminal proceedings had likely already caused George and her young family could hardly have been insignificant. The appeal was oppressive and an abuse of discretion.

The legal resources consumed by the appeal were not insignificant either. Appeals from acquittals on charges that patently lack a lawful foundation oppress and torment hapless accused and divert public resources sorely needed for legitimate purposes, including adequate review and supervision of prosecutions. Such appeals further undermine public confidence in the administration of justice. Before authorizing the appeal in the *George* case, the Office of Public Prosecutions should have reviewed the entire record with care and taken due note of the findings of fact at trial and the evidence in the trial record. Instead, the record shows that the Crown proceeded with the appeal on the basis of the understanding of the facts and theory of the case the prosecution relied on at trial. This is

puzzling. Was there no review of the record? Or was the review conducted only with respect to the trial judge's interpretation and application of s. 150.1 of the *Criminal Code*? A portion of the substantial resources required to appeal the case to the Saskatchewan Court of Appeal and to the Supreme Court of Canada should have been devoted to a comprehensive review of the facts and the law, based on the whole of the evidence in the case, as it emerged in the pre-trial and trial stages. The public interest required a decision not to appeal the acquittal. Appellate jurisprudence dealing with proper judicial application of s. 150.1 could have been developed in a case in which s. 150.1 was actually material to the verdict.

2. *The Defence*

The evidence in trial record afforded the defence an opportunity to oppose the Crown's appeal of the acquittal and request for a new trial on the ground, identified above, that the Crown had failed to prove that the accused, George, had committed any voluntary act of sexual touching. She was entitled to acquittal on that ground alone. The errors on questions of law raised in the Crown's appeal were immaterial to the outcome. A trial judge's failure to consider a defence for which there is sufficient evidence is an error on a question of law that affords the accused a ground of appeal. "The accused is entitled to have all available defences founded on a proper basis considered by the court, whether he raises them or not."³⁶ Nonetheless, the defence did not take this approach and chose not to augment the grounds relied on, instead limiting its arguments in the appeal to the issues raised by the Crown. Defence counsel, following consultation with the client, may have made strategic choices at both the trial and appellate levels that reflected counsel's professional experience and knowledge of judges serving on the courts in Saskatchewan.

3. *The Court*

Similarly, it was open to the Saskatchewan Court of Appeal to dismiss the appeal and affirm the verdict of acquittal on the ground that the record showed that Crown had failed to adduce any evidence to prove the *actus reus* of the offences in the indictment. Clearly the Court did not do so. Moreover, the reasons for judgment by the Chief Justice of the

³⁶ *Ewanchuk*, *supra* note 29 at para 55, citing *R v Bulmer*, [1987] 1 SCR 782 at 789, [1987] SCJ No 28.

Saskatchewan Court of Appeal for the majority largely adopted the Crown's view of the facts rather than the findings of fact made by the trial judge.³⁷

G. Duty of the Judiciary: Appealable Errors Versus Disciplinable Conduct

The trial judge's handling of the *George* case arguably bridges the divide between errors on questions of law, subject to challenge on appeal, and judicial misconduct, subject to discipline. The trial judge's alleged errors on questions of law with respect to interpretation and application of the reasonable steps requirement under s. 150.1 could be and were appealed.³⁸ The other errors of law identified above, were not raised as grounds of appeal but could have been. The remaining question is whether there is evidence of judicial misconduct on the part of the trial judge.

The trial judge in question is experienced, having sat as a superior court judge in Saskatchewan for many years. The judge is presumed to be competent, knowledgeable in the law, and cognizant of developments in the law of sexual assault including enactment of the amendments to the sexual assault provisions in the *Criminal Code* in 1992 and subsequent years. If the reasons for decision in *George* do not reflect current law and fundamental legal principles, it is fair to assume this is due to choices the trial judge made and was not due to his lack of relevant legal knowledge, as has occurred with

³⁷ *George* (SKCA), *supra* note 4. In the judgment for the Supreme Court of Canada in the further appeal, Gascon J observed that Richards, CJS writing for the majority in the Saskatchewan Court of Appeal had translated "strong opposition to the trial judge's factual inferences (severity) into supposed legal errors (character). Here, that was an improper approach, and it disregarded the restraint required by Parliament's choice to limit Crown appeals from acquittals in proceedings by indictment to "question[s] of law alone" (*George* (SCC), *supra* note 5 at para 17, citing *Criminal Code*, *supra* note 2, s 676(1)(a).

³⁸ Richards CJS, writing for the majority of the Saskatchewan Court of Appeal, allowed the appeal, quashed the acquittals and ordered a new trial (*George* (SKCA), *supra* note 4 at paras 50-51), holding that the trial judge had erred in law: (1) by considering evidence from during or after the sexual encounter in assessing the reasonableness of the steps taken by Ms. George before the encounter; and (2) by relying on questionable factual inferences regarding whether C.D. may have looked mature for his age at the time of the sexual activity (at paras 41-46). Richards CJS ruled that those legal errors were "central" to the trial judge's analysis and were therefore material to the verdict, justifying appellate intervention (at paras 48-49); *George* (SCC), *supra* note 5 at para 12. The Supreme Court of Canada, in turn, held the trial judge had not erred in law, dismissed the Crown appeal, and restored the acquittals.

judges newly appointed to the bench with limited prior professional experience in criminal law.³⁹ It is therefore arguable that the trial judge's failure to decide the case on the evidence and apply the law correctly were not merely errors on questions of law but instead errors on questions of law by choice, a "wilful refusal" and therefore misconduct.⁴⁰

A further aspect of the trial judge's "wilful refusal" to apply current law that is apparent on the face of the reasons for decision in *George* lies in the extent to which the trial judge's reasoning relies on and reinforces classic rape myths. This arguably demonstrates the trial judge's antipathy for current sexual assault law and fundamental legal principles of equality and impartiality. The trial judge acquitted Barbara George on the ground of mistake of fact with respect to age--affirming, in effect, that mistake with respect to age can be a highly effective defence for persons accused of sexual assault. Yet the reasons for decision also advise the community, the police, and prosecutors that in Saskatchewan anyone who is kissed and subjected to sexual intercourse even though they did not communicate affirmative consent, must have been "willing" even if the complainant says s/he refused, resisted, and ultimately just acquiesced. This is a classic rape myth--that no one can be "raped" against his or her will. The net effect will inevitably be to continue to deter complainants from reporting, police from laying charges, and prosecutors from proceeding to trial. Trial judges who perpetuate such myths abuse the judicial role, violate public trust, and should be removed from the bench because such conduct erodes public confidence in the administration of justice and places persons who are vulnerable to sexual assault at enhanced risk of assault, including repeated assaults by serial offenders.⁴¹

The characterization of Barbara George as a "willing participant" precludes the conclusion that she was sexually assaulted and implies,

³⁹ For example, in *R v Vader* 2016 ABQB 505 the trial judge rendered a verdict of murder by relying on s 230(a) of the *Criminal Code*, a provision that has not been in effect since the Supreme Court of Canada held the section to be unconstitutional in *R v Martineau*, [1990] 2 SCR 633, [1990] SCJ No 84. But the Code provision had not been repealed and therefore still appeared in the published consolidated version of the Code. In those circumstances the cause of the error was the judge's lack of training and experience in the practice of criminal law, not a "wilful refusal" to apply the law.

⁴⁰ Cf *In the Matter of an Inquiry Pursuant to S. 63(1) of the Judges Act, R.S., c. J-1: Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp*, (Ottawa: CJC, 2017) at para 83 [Camp Report].

⁴¹ *Ibid* at paras 115, 116, 165, 241.

without deciding, that her conduct was voluntary and deliberate conduct for which she was liable to be held to account at criminal law. In acquitting George, the trial judge would have been able to assume that the defence would not file an appeal, and that any grounds of appeal the Crown might rely on likely would be limited to issues related to interpretation of the “all reasonable steps” requirement under s. 150.1. The trial judge could have been confident that the Crown would not raise questions in an appeal about presumptions about voluntariness as an element of the *actus reus* of sexual assault or the legal definition of sexual consent, or, of course, how either might apply to the facts of the case if George rather than CD were the complainant.

The trial judge’s comment, noted above, that George exercised “an appalling lack of judgment” in allowing herself to be alone in her bedroom for an extended period of time at night with her teen-aged son’s friend, is gratuitous victim-blaming. This is a classic form of discriminatory reasoning in which responsibility is deflected from an actor to a victim in a rhetorical slap-down that purports to justify a conclusion that gives effect to misogyny or racism or both and thereby reinforces a hierarchical social order.⁴² The decision to include such a comment in the trial judge’s reasons for decision provides further evidence of the trial judge’s conscious or unconscious reliance on long-discredited rape myths that the Supreme Court of Canada has repeatedly denounced as discriminatory in their effects.

Are these comments indicative of deeply held beliefs and attitudes that may affect this trial judge’s ability to exercise impartiality in other cases or are the trial judge’s comments and approach in the *George* case uncharacteristic and atypical? To begin to answer this question it is useful to review the sentencing decision by this same judge in 2003 in another high profile sexual assault case, *R v Edmondson*.⁴³ The case arose from drunken sexual assaults on a twelve year old Indigenous female by three non-Indigenous males in their twenties as they drove around the Saskatchewan country-side on a summer afternoon. Edmondson was tried and convicted by a jury. Brown and Kindrat, were tried together in a separate jury trial and acquitted. The trial judge in *George* also presided over both the *Edmondson* trial and the first *Brown and Kindrat* trial.⁴⁴

⁴² Cf Kate Manne, *Down Girl: The Logic of Misogyny*, (Oxford: Oxford University Press, 2018) at 62-67.

⁴³ *R v Edmondson*, (4 September 2003) JCM QBC No 1358/02 (Sask QB) [*Edmondson*].

⁴⁴ Following the acquittal of Brown and Kindrat and a Crown appeal in which the Crown

Here, however, my attention is not directed to this judge's conduct of those trials—in which he referred to the accused, all adults in their 20's, as “the boys”—but rather to his reasons for decision at the sentencing hearing in *Edmondson*. The sentence imposed in the *Edmondson* case was a conditional sentence of two years less a day to be served in the community and was widely criticized on the ground that such a sentence was shockingly lenient in the circumstances of the case.⁴⁵ At the time, the bench-mark sentence in Saskatchewan for sexual assault was three years. Sentencing appeals followed. What, if anything, do those reasons reveal about the judge's beliefs and attitudes towards sexual assault, sexual assault complainants, and persons accused of sexual assault? Do those beliefs and attitudes undermine his ability to perform his duties impartially and with respect for equality consistent with the requirements of the law and fundamental principles of justice?⁴⁶ Are there similarities between the biased reasoning and bigotry apparent on the face of the reasons for decision in *George* and the reasoning the trial judge used to justify his sentencing decision in *Edmondson*?

There are indeed striking similarities between the reasons for these decisions. The twin themes of “willing participation” and “victim-blaming” found in the reasons for the trial decision in *George* are central to the sentencing decision in *Edmondson*. The sentencing decision included fourteen paragraphs (as well as extensive excerpts from testimony by an expert witness at trial) in which the judge reviewed his impressions of the twelve year old complainant's life history and personal circumstances at length. He concluded that she “chose” albeit “naively” to accept a ride with

obtained an order from the Saskatchewan Court of Appeal for a re-trial, the cases of Brown and Kindrat were severed and each accused was re-tried in separate jury trials with different judges presiding.

⁴⁵ For a more detailed examination of the criminal proceedings in these cases, see Lucinda Vandervort, “Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 111.

See also Kathleen Ward, *Land of Rape and Honey: Settler Colonialism in the Canadian West* (PhD Thesis, University of Edinburgh, 2014); James McNinch, “‘I thought Pocahontas was a movie’: using critical discourse analysis to understand race and sex as social constraints” in Carole Schick & James McNinch, eds, *‘I Thought Pocahontas was a Movie’: Perspectives on Race/culture Binaries in Education and Service Professions*, (Regina: CPRC Press, 2009) 151.

⁴⁶ Cf Camp Report, *supra* note 40 at para 249.

the three young adults, she drank beer they offered her, she was a “willing” participant in the sexual activity and she may have even been the sexual aggressor in the incident in question.

In support of the latter proposition, the sentencing judge referred to the expert witness’s testimony at trial suggesting that children who have previously been sexually abused may be precociously sexually aggressive. The sentencing judge explained that:

There is a difference from a sentencing perspective, in my opinion, between a situation where a 12-year-old is picked up off the street walking home from school against his or her will and forcibly sexually assaulted, and a situation where that same 12-year-old, for whatever complex set of reasons may be operative, while attempting to act or appear older than he or she really is, naively but willingly enters into a motor vehicle with three older male strangers, accepts and consumes a significant amount of alcohol, and subsequently becomes involved in sexual activity with at least one and possibly more of those individuals.⁴⁷

He then described further aspects of the complainant’s personal life experience, labeled them as “tragic,” and continued:

That being said, and to the extent that what happened to her life prior to September 30, 2001 may have affected what she did or how she may have reacted to a situation on that date, is, in my opinion, at least a relevant consideration or relevant information for a court to consider in sentencing.⁴⁸

In the remainder of the sentencing decision the judge relied heavily on his personal observations about the extent to which the complainant’s choices contributed to her own victimization and again intimated that she might have been the sexual aggressor. The net effect within the context of decision is to deflect responsibility from the accused to the victim, treating the twelve-year-old victim’s personal history and life-experience as if it constituted a mitigating factor in sentencing the twenty-four-year-old accused.

By contrast, the judge’s observations in the sentencing decision about Edmondson’s life-experience and situation were markedly different in tone. The judge mentioned a variety of facts personal to Edmondson and his family, including fifty-three letters of support from members of the community in Tisdale, Saskatchewan, as mitigating factors for sentencing purposes. The accused’s alcohol consumption was identified as a factor that contributed to commission of the offence. However, Edmondson’s alcohol

⁴⁷ *Edmondson*, *supra* note 43 at para 11.

⁴⁸ *Ibid* at para 13.

use was not taken to form part of a pattern of personal and community social dysfunction that shaped the personal history and life experience of the accused and merited sustained rehabilitative attention in the context of sentencing. Instead Edmondson was simply required to abstain from the possession and consumption of alcohol and non-prescription drugs and comply with such treatment programs as might be proposed by his probation supervisor. Similarly, the decision did not acknowledge any need to provide Edmondson with educational experiences and opportunities designed to help him become more aware of learned biases and attitudes that may have limited his ability to avoid actions that were discriminatory and had misogynist and racist effects.

The judge's review of sentencing decisions in Saskatchewan showed that the sentence he imposed in Edmondson's case was exceptionally lenient. He acknowledged this and clearly intended the rationale offered in his decision to explain why he believed leniency was appropriate in this case. But at no point in the reasons for sentence does the judge acknowledge that the complainant child was Aboriginal or Indigenous and the accused was not. Nor is reference made to the concerns about the case and its handling by the criminal justice system that Indigenous individuals and groups in the community and across the country had raised.⁴⁹

The readily apparent similarities between the fundamental flaws in the reasoning used in the *Edmondson* sentencing decision and the reasons for decision at trial in *George* show that any continuing judicial education programs this judge may have attended since 2003 have not brought his approach to legal reasoning into line with national standards of judicial conduct. If members of the legal profession in Saskatchewan assume that the conduct of the trial judge in *George* does comply with national standards of judicial conduct, what is the effect on *de facto* standards of conduct for legal professionals in the province generally? Left unchallenged, are decisions such as these taken as licence by other judges and legal professionals in the province to engage in similar types of discriminatory reasoning? What direct and indirect cumulative impact does such conduct have on public confidence in the judiciary? On the police and Crown prosecutors?

⁴⁹ The *Edmondson*, *Brown* and *Kindrat* cases "touched off a firestorm in several Saskatchewan communities as [A]boriginal people accused the justice system of racism. The jury at Kindrat's first trial was all white, as it was for the retrial." Darren Bernhardt "Not guilty verdict draws protest", *The Star Phoenix* (27 March 2007).

The similarities in the abuse of the judicial role in these two cases suggest that discriminatory reasoning may be a persistent pattern of judicial misconduct by this judge, not an aberration.⁵⁰ If it is, this indicates that this judge—and any other judge whose conduct in exercise of the judicial function repeatedly exhibits similar flaws despite participation in continuing judicial education programs—either refuses or is incapable of executing judicial functions in a lawful manner and in either case must resign or be removed from the bench.⁵¹ The public must be able to have confidence in the judiciary’s ability and commitment to rendering rulings and decisions that are impartial and respect the equal right of all persons to the protection and benefit of the law. Vulnerable and marginalized individuals need to have confidence in the administration of justice and must be able to anticipate that members of the judiciary will preside over legal proceedings and engage in legal analysis and legal reasoning in a manner that is free of discriminatory beliefs and attitudes, myths and stereotypes, and does not have misogynist or racist effects. A person’s vulnerability or marginalization is not, and cannot be, permitted to function as an excuse to harm her.

IV. CONCLUSION

In undertaking a close examination of the *George* case, initially I did not realize that doing so would lead me to revisit the cases of *Edmondson*, *Brown*, and *Kindrat*, and review the evidence of misogyny and racism found in the records of those cases. But when I did look at these cases, with particular attention to the approach and reasoning process used in the sentencing decision in *Edmondson*, I found strikingly similar forms of discriminatory beliefs and argumentation in *George* (2015, SKQB) and *Edmondson* (2003, SKQB) even though the decisions were drafted more than a decade apart. As recently as 2015, this superior court judge continued to work under the influence of deeply misogynist beliefs, assumptions, and patterns of reasoning that rendered him incapable of executing the judicial role in the

⁵⁰ A judicial investigatory committee would undoubtedly review decisions and rulings by this judge in addition to the two discussed here before making a disciplinary recommendation to the Canadian Judicial Council.

⁵¹ The *Judges Act*, RSC 1985, c J-1, s 65(2) specifies the criteria for removal of superior court judges following an inquiry or investigation by the Canadian Judicial Council as provided in s 65(1) of the Act.

administration of justice in sexual assault cases impartially and in a manner that respected the principles of fundamental justice and equality.⁵² In 2019 the judge continues to sit as a member of the Saskatchewan Court of Queen's Bench.

Research shows that law enforcement and the criminal justice process continue to be strongly influenced by outmoded beliefs, attitudes, and assumptions in handling of sexual offences.⁵³ This is now widely recognized and steps are currently being taken by law enforcement agencies in many jurisdictions across Canada to address problems of inadequate investigation and the erroneous classification of sexual assault cases. The United Nations has proposed the creation of specialized tribunals to handle the prosecution and trial of sexual assault cases⁵⁴ and that approach is presently under active consideration by a non-partisan Committee of legislators in Quebec.⁵⁵ In a period in which the courts are over-worked and one cause of poor enforcement in sexual assault cases is budgetary—resulting in the lack of sufficient resources to investigate, analyse and prosecute sexual assault cases

⁵² Evidence of the continuing significance of racism for public confidence in the administration of justice in Saskatchewan is seen in the recent case of *R v Stanley* (9 February 2018), Battleford CRIM 40/2017 (Sask QB). See Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen's University Press, 2019).

⁵³ The reasons for judgment in appeals from trial and appellate decisions in sexual assault cases provide ample evidence in support of this assertion; for example, see the reasons for judgment by the Supreme Court of Canada in cases involving sexual assault from *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, [1991] SCJ No 62 (QL) to *R v Barton*, 2019 SCC 33.

⁵⁴ United Nations, *Handbook for Legislation on Violence Against Women*, (New York: United Nations, 2010), online (pdf): <www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> [perma.cc/9VEF-D85D].

⁵⁵ The Committee has a broad mandate, the support of all four parties in the provincial legislature, and one year to produce a report. Quebec Justice, Press Release, "Formation d'un comité d'experts sur l'accompagnement des victimes d'agressions sexuelles et de violence conjugale" (18 March 2019) online: <www.newswire.ca/fr/news-releases/formation-d-un-comite-d-experts-sur-l-accompagnement-des-victimes-d-agressions-sexuelles-et-de-violence-conjugale-821349374.html> [perma.cc/UPR9-9FG2]; "Quebec looks at better ways to support victims of sexual assault", *CBC News* (18 March 2019), online: <www.cbc.ca/news/canada/montreal/quebec-sexual-assault-committee-1.5050305> [perma.cc/MLJ8-FNK5]. See also Toula Drimonis "Proposed sexual assault court in Quebec long overdue", *Canada's National Observer*, (28 January 2019), online: <www.nationalobserver.com/2019/01/28/opinion/proposed-sexual-assault-court-quebec-long-overdue> [perma.cc/PD7T-V7QU].

properly and in a timely manner—the handling of the *George* case is particularly noteworthy. Were the decisions taken by the Crown in *George* the result of law enforcement zeal enflamed and blinded by misogyny and outmoded myths and stereotypes? Or is the case instead a leading example of the effects of poor administration, lack of supervision and review, and the misallocation of prosecutorial resources and priorities? Or were all of these factors in play and mutually reinforcing?

The *George* case arguably does illustrate how easily the exercise of discretion in law enforcement decisions can be distorted by confirmation bias and tunnel vision. Priority was accorded to: 1) the protection of minors from sexual interference and assault, and 2) the development of jurisprudence with respect to the interpretation and application of *Criminal Code* provisions that affect the prosecution of assailants who assault minors. Other important policy objectives were ignored. The consequences for Barbara George were severe. What about protection of the equal right of all persons, including Barbara George, not to be sexually assaulted? To enjoy equal protection by law of the right to sexual integrity and self-determination? To have complaints investigated and assessed in a manner that is free of discriminatory attitudes, beliefs, and stereotypes that have misogynist effects? Are women who are assaulted by minors or adults much younger than themselves and, unlike George, report it to the police, to have their complaints simply ignored or not selected for prosecution on the ground that conviction is unlikely?⁵⁶ What if the assailant sexually assaults the same complainant more than once?⁵⁷

At present the investigation, analysis, and prosecution of sexual assault and other sexual offences takes place in a politically fraught climate. Few decision-makers would claim that their experience with and understanding of sexual assault law is anything other than a work in progress.⁵⁸ Under these conditions, the exercise of discretion, if it is not strictly constrained by the limits imposed by requirements of justice and legality, is easily influenced by prejudice, whether due to misogyny, racism, or other explicit or implicit

⁵⁶ Are one or more classic “rape-myths” to continue to shape the exercise of discretion in law enforcement in such cases?

⁵⁷ Does the report of multiple assaults against one individual constitute grounds for investigation of the alleged assailant as a potential serial offender? Or will it be believed to be “obvious” that both reports are “false”? The shift from the second response to the first has the potential to make a significant difference and is over-due.

⁵⁸ The same may be said of most members of the public.

discriminatory attitudes and beliefs. Accordingly, analysis of sexual assault cases requires painstakingly scrupulous attention to fundamental legal principles. In the end, cases must be and be seen to be decided on the basis of the law and the facts as proven by the evidence. When it becomes apparent that fundamental principles of justice and standards of legality are not and cannot be met, charges should not be laid or should be withdrawn by the Crown, as needed. Similarly, cases ought to be prosecuted when there is evidence, which the trier of fact could find credible, that supports all elements of the offence as defined in law.⁵⁹ Failure to prosecute such cases is a selective suspension of the rule of law. Enforcement followed by a constructive sentencing decision is the better alternative by far.

In *George*, when the Crown prosecutors—despite being in possession of the entire trial record, transcripts of the preliminary hearing, and interviews with the complainant and accused—chose to appeal the acquittal and request a re-trial, they ignored fundamental legal requirements and principles of justice. The evidence adduced and admitted at trial placed ordinary assumptions and presumptions about voluntariness and deliberate action by the accused in doubt. This is patently obvious. In the absence of evidence to prove the contrary beyond a reasonable doubt—to prove that *George* voluntarily and deliberately committed the criminal acts with which she was charged and thereby establish the *actus reus*—the decision to seek a re-trial was an illegitimate use and abuse of prosecutorial discretion and led to the misallocation of prosecutorial resources.

The measure of the quality of justice available from the Canadian criminal justice system lies in its handling of cases at the pre-trial and trial levels. That is where most criminal matters are decided, many, arguably far too many, on the basis of guilty pleas. Few cases are appealed. If the legal system is to have the capacity to produce sound decisions in sexual assault and sexual interference cases, the resources allocated to the investigatory, pre-trial and trial stages of the criminal justice system must be sufficient to ensure that all essential tasks can be performed expertly and effectively even when the case-load fluctuates.⁶⁰

⁵⁹ Police and prosecutors who base their decisions about whether to charge or proceed to trial on a prediction about whether the trier of fact will find a witness credible at trial arguably act in excess of jurisdiction. Credibility is for the trier of fact to assess at trial; that assessment is only possible in the context of the whole of the evidence actually adduced and admitted at trial.

⁶⁰ The proportion of sexual offences that are reported to the police increases and decreases in response to current events and changes in the law. Following the explosion of

On reading the reasons for decision and the transcripts in *George*, one might easily conclude that in Saskatchewan, anyone under the age of 16 may sexually assault adults who are at least five years older than they are with impunity. Such assaults will generally not come to the attention of the police due to low rates of reporting. When such cases are reported, the working precedent set by the *George* case may suggest that whenever a minor sexually assaults an adult in Saskatchewan, it is the adult, not the minor, who will be viewed as the responsible party and charged, regardless of the factual circumstances. Yet Statistics Canada reports that in 13% of the sexual assault cases reported to the police in Canada, a minor or young adult is alleged to have sexually abused an “older” complainant.⁶¹ Such cases are thus not rare. Moreover, where the assailant is sixteen years or more younger than the victim, the charging, conviction, and incarceration rates for Canada as a whole are all higher than the average rates for sexual assault cases generally.⁶²

widespread public awareness of and participation in the #MeToo movement in October 2017, Saskatchewan was one of the few jurisdictions in Canada in which there was only a modest increase but no spike in the number of complainants reporting sexual assault to the police. It is unclear whether this signified lack of confidence in the criminal justice process or other factors, such as lack of access to support services and legal advice. See Cristine Rotenberg & Adam Cotter, “Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017” (2018) 38:1 Juristat 1 online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54979-eng.pdf?st=k49Ft6q> [perma.cc/7TMH4B8N].

⁶¹ See also Cristine Rotenberg, “Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile” (2017) 37:1 Juristat 1, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54866-eng.pdf?st=1VLN5PJp> [perma.cc/W4T5-9GQ9] at 14-16 for Charts 5 and 6 on age disparities and note, at 14, that 83% of accused are older than their victim, 4% are the same age, and 13% are younger.

⁶² Cristine Rotenberg, analyst with Statistics Canada, explains: Notwithstanding that most sexual assaults involve an accused several years older than their victim (Rotenberg 2017), incidents involving an accused who was far younger than their victim had the greatest chance of conviction: three in five (61%) cases where the accused was 16 or more years younger than the victim were convicted compared with less than half (46%) of cases where the accused was either the same age or within 1 to 5 years younger than the victim (Chart 11, primary axis). Upon sentencing, the greater the age difference between the victim and the accused, the more likely the accused was sentenced to custody (Table 3). This was true in either direction, whether the accused was significantly older than the victim or whether the accused was far younger, in both adult and youth court. To simplify and contextualize the findings, it may be suggested that middle-aged to older women sexually assaulted by young men were most likely to see their assailant go to court and be convicted, whereas younger female and male victims of sexual assault (including children) who were victimized by middle-aged to older men many years older

The age difference between CD and George was twenty-one years. The failure to even charge CD is therefore quite anomalous when compared with the treatment of similar cases nationally.

CD openly acknowledged that this was not the first time he had engaged in sexual intercourse with “older women.” In his trial testimony CD agreed that he was “Good with the ladies” and then immediately asserted, without prompting, “I still am.” He explained that he had used the same techniques “lots of times before.”⁶³ CD’s assault on George was likely not the last time CD seized an opportunity to demonstrate his sexual “prowess” by engaging in non-consensual sexual intercourse with a casual acquaintance.⁶⁴ Apparently no one had explained to CD that striking up a lengthy conversation with someone, then kissing them, uninvited and without their agreement, and then, again without their invitation or agreement, lying on top of them and moving your penis in and out of the other person’s mouth, vagina, or anus, does not signify that the other party consents to the physical contact. Then again, perhaps none of the professionals involved with the case, including the police, the prosecutors and the trial judge, appreciated that what the trial evidence shows CD did to Barbara George, was done without her consent and therefore was a “crime.”

In the end, the *George* case does indeed raise extremely troubling questions about the administration of justice in sexual assault cases in Saskatchewan, questions that are far broader than any single judge’s conduct on the bench.⁶⁵

than them were less likely to see the same course of justice.

In “From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014: A Statistical Profile” (2017) 37:1 *Juristat* 1 at 30-31, online: <www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm#a10> [perma.cc/F5CU-QMNB] [emphasis added].

⁶³ Examination in Chief and Cross-Examination of CD in *George*, “Trial Transcript”, *supra* note 12 at T111-T138, T138-T165.

⁶⁴ CD is not the only sexual assailant who has held fond albeit self-serving, delusional beliefs about his victim’s attitude toward the sexual activity and the assailant. Some even send flowers to their new “loves”/“conquests.” In *Rape: the Price of Coercive Sexuality*, (Toronto: The Women’s Press, 1977) at 105, Lorenne MG Clark & Debra J Lewis suggest, with reference to one such accused, “this is the sort of action one would expect from a man who feels pleased with himself at having accomplished a seduction, and not from someone who feels sorry about having raped a woman.”

⁶⁵ Domestic and intimate personal violence cases raise similar questions about the effects of misogyny on legal reasoning in Saskatchewan. Consider, for example, *R v Fontaine* 2017 SKCA 72, in which the Court of Appeal held that an alleged assault was a “reflex

action,” not a voluntary act. The accused’s common-law partner, standing at the foot of their bed, violently shook the accused’s leg to wake him up. Suddenly aroused, the accused did not simply jerk his leg in response and happen to hit his partner because she was standing close by. Instead he “got up off the bed ‘quite quickly,’” (at para 7), and hit his partner in the face with his hand. Ordinarily, actions of that sort are taken to be voluntary acts, committed deliberately. By contrast, the term “reflex” has traditionally been used to signify lack of conscious control over one’s bodily movements, as when a leg jerks in response to a physician’s hammer tap just below the knee-cap or one is startled, jerks or whirls around, and accidentally collides with someone or something. However the ruling in *Fontaine* appears to approve use of the term to include any bodily movement the decision-maker decides to characterize as a “reflex.” The legal effect is to transform the “act” in question into a “non-act” for which the accused (in the absence of proof of contributory negligence) is not criminally liable. Expert evidence is not required, even where, as in *Fontaine*, the act in question may appear to be voluntary and deliberate. It seems obvious that the ruling in *Fontaine* invites highly discretionary enforcement of the laws prohibiting assault and may seriously impede the prosecution of domestic violence cases. Police who are aware of the *Fontaine* case may be less likely to lay assault charges in cases involving domestic or intimate personal violence.