are either the complainant's silence or ambiguous in themselves. Consent must be affirmatively communicated through express words or unambiguous affirmative conduct. To suggest otherwise is wrong in law.

[257] Fourth, the jury should have been given guidance about how to evaluate Barton's claimed mistaken belief in consent. At a minimum, the jury should have been told:[115]

> I am instructing you as a matter of law that a mistake by Barton that Gladue's silence, passivity or ambiguous conduct constituted consent to the sexual activity in question provides no defence. Nor does Barton's speculation about what was going on in Gladue's mind provide any defence. A mistaken belief in consent cannot be based on any of these considerations.

v. Instructions on Reasonable Steps Were Inadequate

[258] The trial judge did tell the jury that the defence was only available if Barton took reasonable steps in the circumstances known to him to ascertain her consent. But the jury needed to know what s 273.2(b) of the *Code* required of them. Under this section, mistaken belief in consent is not a defence where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting." This requires the application of a "quasi-objective test". The jury would first need to decide the circumstances known to Barton and then decide on an objective basis what reasonable steps should have been taken to ascertain consent.

[259] Reasonable steps depend on the circumstances and these may be as many and varied as the cases in which the issue arises. That said, we reject the view that reasonable steps can equal no steps whatsoever. An accused's asking himself whether he should take a reasonable step is not itself a reasonable step. To suggest that reasonable steps means *no steps* flies in the face of the definition of "consent" under s 273.1(1) and Parliament's requirement under s 273.2(b) that an accused must have taken reasonable steps to ascertain *consent* in order to advance the defence of mistaken belief in consent. This idea resurrects yet again the debunked theory that unless and until a woman objects to, or resists, sexual activity, she is consenting to that activity.

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[115] This wording is consistent with the decision of the majority of the Supreme Court in ***Ewanchuk***, ***supra*** at para 51. We leave the precise wording to others. We appreciate that in theory, mistaken belief in consent should not even be put to the jury if it is based on silence or lack of resistance. Judges know this as a matter of law. But jurors do not. To avoid jurors wrongly thinking that any of these would ground a mistaken belief in consent defence, they need to be told that.

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[260] It also assumes that all women in Canada, single, married or in an intimate relationship, are walking around this country – whether in their home, on a date, at work, at a restaurant or wherever – in a state of continuous consent to sexual activity unless and until they say "no". This is not the law. As for those who question, as defence counsel did here, "what's a man to do", the answer can be summed up in one word: "ask".[116] This is hardly an onerous obligation to impose on anyone intent on engaging in sexual activity with another person. It is respectful of sexual autonomy and human dignity. It is also consistent with the equality rights of women.[117]

[261] Parliament introduced the reasonable steps requirement to prevent sexual assault through miscommunication. Its objective in doing so was to restrain a defence based on an unreasonable belief in consent. There is no doubt that the reasonable steps requirement was intended to remedy an unfair imbalance in the criminal law as between men and women involving sexual offences. Mistaken belief in consent is a common law defence. It was the judiciary that decided this defence could be advanced no matter how unreasonable an accused's belief might be. Parliament overruled these discriminatory aspects of the common law through amendments to the *Code*.

[262] Section 273.2(b) is one of several statutory reforms implemented through the years in an effort to overcome the inequities that disadvantaged women under the common law. Section 28 of the *Charter* provides that notwithstanding anything in the *Charter*, the rights and freedoms contained therein are guaranteed equally to male and female persons. This includes not only equality rights under s 15 but also the right to security of the person under s 7. Given women's equality rights, including s 28 of the *Charter*, the criminal law in substance and in application must balance rights so that women substantively enjoy the equal benefit and equal protection of the law as do men. Sexual prerogative is not a guaranteed right under the *Charter*. But equality is. In the context of sexual offences, it comes down to this. An accused is entitled to a fair trial, not a fixed one.

[263] Therefore, this jury needed to understand that they were required to consider:

> (1) What facts were known to Barton when he decided to repeatedly thrust his hand up and into Gladue's vagina with an increased degree of force, invasiveness and duration?

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[116] We are not suggesting that this need be done literally. There are ways to ask that involve sending a clear message through other than express words. But the point is that there be an "ask".

[117] Those equality rights under the *Charter* are also grounded in Canada's international human rights obligations: see *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, Can T S 1982 No 31 (entered into force 3 September 1981, ratification by Canada 9 January 1982); *Declaration on the Elimination of Violence Against Women*, 20 December 1993, A/RES/48/104; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 October 1999, A/RES/54/4.

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