RDO OLR
1966
REVUE DE DROIT D'OTTAWA
OTTAWA LAW REVIEW

Sexual Assault, Fault and the *Charter*

Isabel Grant and Janine Benedet
Peter A. Allard School of Law, University of British Columbia

PUBLIÉ EN LIGNE | PUBLISHED ONLINE	VOLUME	NO	PAGES
Juillet 2026 | July 2026	57	1	155–196

CITATION RECOMMANDÉE · RECOMMENDED CITATION

FRANÇAIS

Isabel Grant et Janine Benedet, « Sexual Assault, Fault and the *Charter* » (2026) 57:1 RD Ottawa 155.

ENGLISH

Isabel Grant and Janine Benedet, "Sexual Assault, Fault and the *Charter*" (2026) 57:1 Ottawa L Rev 155.

rdo-olr.org · lawrev@uottawa.ca · 57 Louis-Pasteur, Ottawa ON K1N 6N5

ÉTABLIE EN · EST. 1966

UNIVERSITÉ D'OTTAWA
FACULTÉ DE DROIT
SECTION DE COMMON LAW

UNIVERSITY OF OTTAWA
FACULTY OF LAW
COMMON LAW SECTION

ARTICLE

"Something to Declare": Declaratory Relief as a Bulwark to Populist Uses of section 33 of the *Canadian Charter of Rights and Freedoms*

Tim Gulliver

THE SUPREME COURT of Canada's judgment in *English Montréal School Board, et al v Attorney General of Quebec, et al*, the constitutional challenge to Quebec's secularism law, will shed light on Quebec's invocation of section 33 of the *Canadian Charter of Rights and Freedoms*—the notwithstanding clause. In recent years, this once rarely used provision has drawn renewed scholarly and public attention. While one camp argues that invoking section 33 renders the statutes it shields non-justiciable for *Charter* breaches, a newer school of thought contends that courts can issue "declaratory relief": statements that a law would be unconstitutional but for the clause's use.

This article situates this academic divide in its sociopolitical context. It examines justifications for section 33's increased use in Ontario, New Brunswick, Quebec, and Saskatchewan. These uses reflect a populist ideology at odds with Canada's institutional and sociocultural commitment to the *Charter*. Judicial declarations of rights violations are proposed as a viable bulwark against these risks. The Supreme Court can—and should—consider these consequences within the remit of established judicial norms. Through constitutional interpretation and the exercise of judicial role morality, courts can preserve their authority to issue declarations of inconsistency, reaffirming their essential role in defining and protecting rights.

LA DÉCISION DE la Cour suprême du Canada dans l'affaire *Commission scolaire anglophone de Montréal, et al c Procureur général du Québec, et al*, soit le défi constitutionnel à la loi sur la laïcité du Québec, jettera de la lumière sur le recours du Québec à l'article 33 de la *Charte canadienne des droits et libertés* — la clause dérogatoire. Ces dernières années, cette disposition autrefois rarement utilisée a suscité un regain d'intérêt tant dans la doctrine que dans le débat public. Alors qu'un courant de pensée soutient que le recours à l'article 33 rend les lois qu'il protège non justiciables pour violation de la *Charte*, une école de pensée plus récente affirme que les tribunaux peuvent accorder un « redressement déclaratoire » : des déclarations selon lesquelles une loi serait inconstitutionnelle n'eût été l'invocation de la clause.

Cet article situe ce débat doctrinal dans son contexte sociopolitique. Il examine les justifications avancées pour le recours accru à l'article 33 en Ontario, au Nouveau-Brunswick, au Québec et en Saskatchewan. Ces recours reflètent une idéologie populiste en contradiction avec l'engagement institutionnel et socioculturel du Canada envers la *Charte*. Des déclarations judiciaires de violation des droits sont proposées comme rempart viable contre ces risques. La Cour suprême peut — et devrait — tenir compte de ces conséquences dans le cadre des

normes judiciaires établies. Par l'interprétation constitutionnelle et l'exercice de la moralité propre au rôle judiciaire, les tribunaux peuvent préserver leur autorité d'émettre des déclarations d'incompatibilité, réaffirmant ainsi leur rôle essentiel dans la définition et la protection des droits.

ARTICLE

Sexual Assault, Fault and the *Charter*

Isabel Grant and Janine Benedet

THE CANADIAN *CHARTER of Rights and Freedoms* and the criminal law of sexual assault have in many ways grown up together over the last four decades. In this article, we examine the impact of the *Charter* on the fault requirement for sexual assault and sexual offences against children. We argue that the *Charter* has been used repeatedly to undermine the early gains of feminist law reform. Courts are consistently reluctant to expect men to desist from sexual activity until they have the necessary information around the presence of consent or the age of the complainant. We urge the Supreme Court of Canada to clarify that the reasonable steps provision is a clear expression of legislative intent to modify the *mens rea* for the relevant offences and to add a constitutionally permissible objective component to that *mens rea*. Reasonable steps provisions were intended, and should operate, as an independent path to conviction where an accused fails to raise a reasonable doubt that such steps were taken or that he was mistaken about communicated consent.

LA *CHARTE CANADIENNE des droits et libertés* et le droit pénal en matière d'agression sexuelle ont, à bien des égards, évolué au même rythme au cours des quatre dernières décennies. Dans cet article, nous examinons l'impact de la *Charte* sur l'exigence en matière de faute dans les affaires d'agression sexuelle et d'infractions d'ordre sexuel à l'égard d'un enfant. Nous soutenons que la *Charte* a été utilisée à maintes reprises pour porter atteinte aux premiers avancements de la réforme du droit du mouvement féministe. Les tribunaux se montrent systématiquement réticents à exiger que les hommes s'abstiennent de toute activité sexuelle tant qu'ils n'ont pas toutes les informations nécessaires concernant le consentement ou l'âge de la plaignante ou du plaignant. Nous appelons la Cour suprême du Canada à préciser que la disposition relative aux mesures raisonnables est une expression claire de l'intention du législateur de modifier la *mens rea* pour les infractions pertinentes et d'y ajouter une composante objective constitutionnellement admissible. Les dispositions relatives aux mesures raisonnables ont été conçues, et devraient s'appliquer, comme une voie indépendante menant à la condamnation lorsque l'accusé ne parvient pas à soulever un doute raisonnable quant au fait que de telles mesures ont été prises ou qu'il s'est trompé au sujet du consentement exprimé.

CONTENTS

Sexual Assault, Fault and the *Charter*
Isabel Grant and Janine Benedet

I. Introduction **157**

II. Rape Law Reform and the *Charter* Era **159**

III. The *Mens Rea* of Sexual Offences and the *Charter* **161**
   A. Mistaken Belief in Consent and the "Air of Reality" **161**
   B. Mistake of Age and the Resurgence of the *Mens Rea* Requirement **167**

IV. Nullifying the Reasonable Steps Requirement for Consent **181**

V. Moral Innocence and the Extreme Intoxication Defence **187**

VI. Conclusions **193**

Sexual Assault, Fault and the *Charter*

Isabel Grant and Janine Benedet

I. INTRODUCTION

In a very real way, the law of sexual assault and the *Canadian Charter of Rights and Freedoms*[1] have grown up together. The *Charter*'s enactment in April 1982 entrenched both a series of legal rights for accused persons charged with an offence, and an equality rights provision promising sex equality for women.[2] Parliament delayed this provision's coming into force for three years to permit legislative reform to address discriminatory laws. In that interim period, the *Criminal Code* reforms of 1983 repealed the offences of rape and indecent assault, which had remained largely unchanged since before the first *Criminal Code* of 1892, replacing them with the sexual assault offences that we know today.[3]

While it would be an overstatement to say that the *Charter* precipitated reforms to sexual assault law—that process was an outgrowth of the second wave of the women's movement, and had been underway for some time prior to 1982[4]—it is true that courts interpreted and applied the

* The authors would like to thank Lillian Huang, Jules Mcleish and Tyleigh Massey-Leclerc for their research assistance on this paper. The paper was funded through an Insight grant from the Social Sciences and Humanities Research Council.

1 *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 [*Charter*].

2 *Ibid*, ss 11, 15.

3 *Criminal Code*, RSC 1985, c C-46, ss 271–73 [*Criminal Code*].

4 See generally Maria Łoś, "The Struggle to Redefine Rape in the Early 1980s" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 20 at 26–43; Jennifer Koshan, "The Criminalisation of Marital Rape and Law Reform in Canada: A Modest Feminist Success Story in Combating Marital Rape Myths" in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya*

modern law of sexual assault at the same time as they defined and deployed *Charter* rights to reshape the trial process and to strike down legislation as inconsistent with the rights of the accused.

In this article, we explore these developments by focusing on the elements of the sexual assault offence (and some related offences such as sexual interference and internet luring) and, in particular, the ways in which the *Charter* has shaped and framed the fault requirements of these offences. We also look at recent developments in the defence of extreme intoxication, a defence which also raises the question of when sexual assault is blameworthy. We focus on the fault requirement because it lies at the heart of how we understand the blameworthiness of male behaviour in relation to sexual violence. We contend that arguments that were rejected by the Supreme Court of Canada and by Parliament in the early waves of sexual assault law reform have re-emerged in recent years in new forms. The most positive developments for complainants, in both legislation and case law, have been ushered in despite, and not because of, the *Charter*.[5] Statutory reforms to the understanding of consent are rarely challenged directly as unconstitutional, but the lack of a consistent substantive equality analysis has produced an approach to consent that is degendered and sometimes oblivious to male power.[6] The *Charter* has limited the ability of Parliament to achieve the ambitious goals of the rape law reformers who sought to shift our understanding of sexual assault from treating it as a misguided sexual encounter, in which men are often mistaken about what women want, to an act of violence predicated on male dominance and female subordination.

More fundamentally, we question whether the *Charter* acts to hide the continuing presumption of male sexual entitlement to the bodies of women and girls. While the courts have rejected the premise that Canadian women are walking around in a constant state of consent to sexual activity until they revoke that access,[7] it has been difficult to shift the

---

and Malawi (Oxford: Hart Publishing, 2017) 139; Diane Kinnon, *Report on Sexual Assault in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) at 36–52; Sheila McIntyre with contributions from Christine Boyle, Lee Lakeman & Elizabeth Sheehy, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" (2000) 20:3 Can Woman Studies 72.

5 We will address the *Charter*'s application to procedural rights and evidentiary rules in the trial of sexual offences in a future article.

6 The absence of a careful analysis of power in assessing consent is illustrated in what has come to be known as the Hockey Canada case (see *R v McLeod et al*, 2025 ONSC 4319 at paras 605–11).

7 *R v Ewanchuk*, 1998 ABCA 52 at para 67, Fraser CJA, dissenting, rev'd 1999 CanLII 711 (SCC).

legal paradigm to one that places any obligations on men, including, in some cases, to desist from seeking sexual contact until further information can be obtained. The incorrect idea that the presumption of innocence is equivalent to a presumption of consent on the part of the complainant, and the belief that a complete failure to consider consent or age is not blameworthy, risk constitutionalizing a backlash to the recognition of sexual assault as a gendered crime of violence.

II. RAPE LAW REFORM AND THE *CHARTER* ERA

As noted above, reforms to the law of rape were one of the projects that predated the *Charter*, with momentum for reform in Canada and the United States forming a significant part of the activism of the second-wave women's movement.[8] The *Charter* helped push this process along, but in a particular framework that favoured a formal version of equality rights. The sexual offences in the *Criminal Code* prior to the 1983 reforms were drafted such that they could largely only be committed by perpetrators of one sex and only against a single sex of victims.[9] At the same time, feminist activism was trying to shift public understanding away from thinking of rape as merely an unwanted sexual encounter to identifying it as a crime of violence.[10] These trends were reflected in the creation of the new sexual assault offences that replaced the crimes of rape and indecent assault with a three-tiered offence structured on the definition of physical assault, in which the penalties increased, not based on the sexual acts committed, but on the degree of additional violence accompanying the act.[11] Parliament made the offence sex-neutral on its face, so that anyone could commit it against anyone, regardless of sex or gender.

Reformers hoped these changes would lead to sexual assault being treated more seriously. The risk, however, of treating sexual violence just like another kind of assault was that it would be easy to forget the gendered nature of the offence, which is committed overwhelmingly by men against

8 Kinnon, *supra* note 4 at 36–52.

9 See e.g. *The Criminal Code, 1892*, SC 1892, c 29, ss 266 (rape), 259(a) (indecent assault on a female), 269 (carnal knowledge of a female under 14), 260 (indecent assault on a male), 174 (buggery).

10 See e.g. Lorenne MG Clark & Debra J Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Educational Press, 1977) at 159–70; Leah Cohen & Connie Backhouse, "Desexualizing Rape: A Dissenting View on the Proposed Rape Amendments" (1980) 2:4 Can Woman Studies 99; Łoś, *supra* note 4 at 31–34.

11 *Criminal Code*, *supra* note 3, ss 271–73.

women and girls.[12] Treating sexual violence as a species of assault and focusing on the "right" of every individual to control who touches them also risks putting women in a gatekeeping role that obscures the realities of how power, and male power in particular, operate in this context. Saying that women have a right to grant men access to their bodies says very little about the ways in which that decision-making is shaped by social relations of sex and gender or about women's pleasure or desire.

This does not mean that questions of substantive sex equality were absent from these debates or from the early judicial decisions considering the new offences. Recognition that sexual assault was a crime of violence that was both a cause and consequence of women's inequality appeared in the reasons of the Supreme Court's early cases, most often in the reasons of Justice L'Heureux-Dubé, but in the reasons of other judges as well.[13] These decisions drew a link between sexual assault as an act of sex discrimination and the need for a definition of consent focused on affirmative, voluntary agreement rather than a lack of resistance, as well as the ways in which fear, intoxication, authority, and other factors could influence this element.[14] This unresolved tension between understanding sexual assault as a degendered act of interference with bodily autonomy, and as a practice of sex inequality, has contributed to a lack of clarity as to how we understand the harm sexual violence causes and what makes it blameworthy on the part of the perpetrator. An approach to sexual violence that focuses on autonomy, rather than equality, positions participants as unsexed, genderless actors with equal power to control their bodily integrity and obscures the gendered reality of sexual violence in its social context.

This paper begins with a brief history of how the fault requirement for the 1983 sexual assault offence has evolved as a mistake of fact defence and the history of reasonable steps provisions in Canada. The paper examines some early *Charter* cases in which accused men have raised challenges to rules placing any limits on arguments that they did not know how old a girl was or whether a woman was consenting. From there, the paper moves to

12 See e.g. Statistics Canada, *Gender-Based Violence and Unwanted Sexual Behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces*, by Adam Cotter & Laura Savage, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 5 December 2019); Statistics Canada, *Recent Trends in Police-Reported Clearance Status of Sexual Assault and Other Violent Crime in Canada, 2017 to 2022*, by Shana Conroy, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 6 April 2024).

13 *R v Ewanchuk*, 1999 CanLII 711 at paras 68–80 (SCC) [*Ewanchuk*]; *R v Osolin*, 1993 CanLII 54 (SCC) [*Osolin* SCC].

14 See generally *R v Park*, 1995 CanLII 104 (SCC).

examine in more detail the problematic *Charter* case law dealing with child victims of sexual offences and mistakes regarding the age of the child. It is this case law, and specifically the decision in *R v Morrison*,[15] that has led to the undermining of reasonable steps provisions in the context of both age and consent. The discussion of these cases leads into an examination of how these cases regarding age have infiltrated sexual assault prosecutions involving adult complainants and effectively nullified reasonable steps provisions in that context. The paper then switches gears to briefly examine the defence of extreme intoxication, another area in which the courts have invoked the *Charter* to put constraints on our understanding of what is considered blameworthy in the context of sexual violence. The paper concludes by urging the Supreme Court of Canada to retain a meaningful role for the reasonable steps provisions. Parliament intended these provisions to make clear that, in the circumstances known to the accused, failing to take any steps to ascertain consent or, where relevant, age, constitutes a blameworthy mental state deserving of criminal sanction.

III. THE *MENS REA* OF SEXUAL OFFENCES AND THE *CHARTER*

A. Mistaken Belief in Consent and the "Air of Reality"

Historically, the *mens rea* of rape, later applied to sexual assault, was that the sexual contact was intentional, and the accused knew or was reckless about the fact that the complainant was not consenting to the sexual activity in question. While *mens rea* is part of the Crown's burden of proof, the Supreme Court of Canada recognized early on, in the pre-*Charter* case of *Pappajohn v the Queen*, that a denial of *mens rea* was best dealt with by treating it as an affirmative defence of mistake, such that the Crown would not be required to prove an absence of an honest belief in consent in every case:

> It would seem to me that if it is considered necessary in this case to charge the jury on the defence of mistake of fact, it would be necessary to do so in all cases where the complainant denies consent and an accused asserts it. To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, some evidence beyond the mere assertion of belief in consent by counsel for the appellant. This evidence

15 2019 SCC 15 [*Morrison*].

> must appear from or be supported by sources other than the appellant in order to give it any air of reality.[16]

Justice Dickson (Justice Estey, concurring) dissented in the result in *Pappajohn*, but agreed with the majority that it was preferable to treat a denial of *mens rea* as a defence with an evidentiary threshold for the accused:

> Mistake is a defence, then, where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.
>
> If I am correct that: (i) s. 143 of the *Criminal Code* imports a *mens rea* requirement, and (ii) the *mens rea* of rape includes intention, or recklessness as to non-consent of the complainant, a mistake that negatives intention or recklessness entitles the accused to an acquittal.[17]

The accused challenged the constitutionality of this air of reality threshold under sections 7 and 11(d) of the *Charter* in *R v Osolin*,[18] marking the first direct challenge under the *Charter* to statutory modifications to the fault requirement. The accused was convicted of sexual assault and kidnapping of the 17-year-old complainant, and his conviction was affirmed by the Court of Appeal for British Columbia.[19] Both the trial judge and the Court of Appeal found that on the facts of the case there was no basis to instruct the jury on mistaken belief in consent.[20] As Justice Southin noted in the Court of Appeal "an argument that a man who, knowingly or recklessly, forcibly confined a woman against her will can have an honest belief that, during her confinement, she was freely consenting to his sexual advances has no air of reality about it at all."[21]

---

16 1980 CanLII 13 at 133 (SCC) [*Pappajohn*].

17 *Ibid* at 148. This was confirmed by the Supreme Court in relation to the offence of sexual assault, as opposed to rape (see *R v Robertson*, 1987 CanLII 61 at 932–33 (SCC)).

18 1991 CanLII 5748 (BCCA), rev'd on other grounds 1993 CanLII 54 (SCC).

19 *Ibid* at paras 1–2, 9, 108–109.

20 *Ibid* at paras 107–108.

21 *Ibid* at para 66.

On further appeal to the Supreme Court of Canada, a majority of the Court allowed the defence appeal and ordered a new trial on the basis that cross-examination on the complainant's medical records had been improperly curtailed at trial.[22]

The Court also considered the defence argument that the air of reality threshold for the claim of mistaken belief in consent, as expressed in subsection 265(4) of the *Criminal Code*, violated the presumption of innocence in section 11(d).[23] *Pappajohn* had concluded that the accused could argue that he mistakenly believed the complainant was consenting even where that belief was unreasonable, as long as the belief was honestly held.[24] The reasonableness of the belief was evidence of its honesty, but was not a requirement of the defence. Subsection 265(4), added after *Pappajohn*, reflects this distinction, and provides that where an accused claims a mistaken belief, the trial judge "if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence" must instruct the jury to consider "the presence or absence of reasonable grounds for that belief" in evaluating its honesty.[25] The wording of this provision effectively confirms that the defence will not be left with the trier of fact in every case. The Court in *Osolin* unanimously rejected the *Charter* challenge to this threshold requirement, noting that the air of reality standard was commonly used for other defences, and that to leave the jury with a defence without an evidentiary foundation would invite confusion.[26]

Justice Cory, writing for the majority on this point, held that the air of reality requirement did not violate the presumption of innocence because, if there is sufficient evidence for the defence to be left with the jury, the Crown bears the ultimate burden of disproving it.[27] The burden remained with the Crown to prove the *actus reus* and *mens rea* beyond a reasonable doubt. Justice Cory noted: "[i]t is always open to the jury even without the defence of mistake of fact as to consent to find that there was reasonable

22 *Osolin* SCC, *supra* note 13 at 692.

23 *Ibid* at 687–91.

24 *R v Sansregret*, 1985 CanLII 79 at para 15 (SCC) citing *Pappajohn*, *supra* note 16. In *Sansregret*, the Supreme Court of Canada held that while recklessness could not rule out a defence of honest mistaken belief in consent, wilful blindness was inconsistent with a finding of honest belief. Subsection 273.2(a)(ii) was enacted to overturn this finding and make clear that a finding of recklessness or wilful blindness rules out a defence of mistaken belief.

25 *Criminal Code*, *supra* note 3, s 265(4).

26 *Osolin* SCC, *supra* note 13 at 681–82.

27 *Ibid* at 690.

doubt as to the accused's *mens rea* and acquit."[28] Unfortunately, he failed to elaborate on the circumstances in which this could be the case, or how this squared with the language of *Pappajohn* about treating denials of *mens rea* as a defence, a problem that has re-emerged in recent appellate case law, as we discuss below.

Subsection 265(4) did not alter the fault requirement as set out in *Pappajohn*; it merely codified the principle that the reasonableness of a belief is evidence relevant to the assessment of whether it was honestly held. The *mens rea* of sexual assault was modified, however, in a further set of reforms to the *Criminal Code* in 1992, through the introduction of the reasonable steps provision.[29] With this addition, the law changed to require that, before an accused could argue that he mistakenly believed the complainant was consenting, he must have taken reasonable steps in the circumstances known to him at the time to ascertain consent, thus adding an objective component of reasonableness to the *mens rea*. The reasonable steps provision does not put a persuasive burden on the accused—if the accused raises an air of reality that he was in fact mistaken and that he took reasonable steps, the Crown must prove beyond a reasonable doubt either that he was not mistaken or that reasonable steps were not taken.[30] Nonetheless, feminist reformers who campaigned for this provision understood it as a paradigm shift that, for the first time, would legally require scrutiny of the accused's actions in relation to obtaining consent, rather

28 *Ibid.*

29 On dealing with all levels of sexual assault against adults see *An Act to amend the Criminal Code* (*sexual assault*), SC 1992, c 38, s 273.2(b). On dealing with mistaken belief in consent in the context of sexual exploitation of a person with a disability see also *Criminal Code*, *supra* note 3, s 153.1(5)(b). The reasonable steps provision dealing with age was enacted earlier as part of the 1987 reforms to child sexual offences (see *An Act to amend the Criminal Code and the Canada Evidence Act*, SC 1987, c 24, ss 150.1(4), (5)). The rest of s 273.2 responds to a number of distinct points about *mens rea* some of which were correcting problematic aspects of the case law. For example, s 273.2 (a)(ii) was necessary to clarify that recklessness was a sufficient *mens rea* to rule out a defence of mistake after the decision in *Sansregret*, *supra* note 24. Subsection 273.2(a)(i) was also added to reject the argument that a purely subjective *mens rea* with respect to non-consent would need to permit beliefs in consent that were the result of self-induced intoxication, a position supported by Chief Justice Dickson, dissenting, in *R v Bernard*, 1998 CanLII 22 at paras 47–50 (SCC). Subsection 273.2(c), added in 2018, codifies a standard of affirmative consent such that a mistake can only be based on a belief in communicated consent.

30 See e.g. *R v Westman*, 1995 CanLII 1811 at paras 20, 22 (BCCA); *R v Osborne*, 1992 CanLII 7117 at paras 41–49 (NLCA). See also *R v Gagnon*, 2018 CMAC 1 at para 28, aff'd 2018 SCC 41.

than putting the sole attention on whether the complainant expressed her disinterest in sex with the accused.[31]

In *R v Darrach*, the reasonable steps provision in relation to consent was challenged as violating the *Charter*.[32] This case is principally cited today for upholding the constitutionality of the so-called "rape shield" provisions dealing with evidence of other sexual activity in sections 276 and 277 of the *Criminal Code*. The accused in *Darrach* also challenged the constitutionality of the reasonable steps provision, arguing that the addition of an objective component to the *mens rea* violated section 7 of the *Charter*. The accused argued, relying on *R v Vaillancourt* and *R v Martineau*, that sexual assault was an offence of special stigma for which a subjective *mens rea* was constitutionally required.[33] This was based on the principle of fundamental justice that stigma and punishment be proportionate to moral blameworthiness. The Court of Appeal for Ontario rejected this argument, finding that while sexual assault is an offence with a significant stigma, it is not in the narrow category of offences, like murder and attempted murder, that require a purely subjective test.[34] The *mens rea* with the reasonable steps provision was still mostly subjective, since the reasonableness of the steps taken were evaluated based on what was subjectively known to the accused at the time. An unreasonable belief in consent would still be a defence, so long as it was honestly held and preceded by reasonable steps.

This aspect of the Court of Appeal's decision did not form part of the further appeal to the Supreme Court of Canada, which was limited to the issue of the constitutionality of sections 276 and 277. The Court of Appeal's reasoning in *Darrach* appeared to have settled the law on the constitutionality of reasonable steps. However, recent developments in cases involving youth victims have led to confusion and inconsistency across provinces in the approach to the reasonable steps provision as it relates to mistake of

31 See Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293 at 296–306. *Contra* Lucinda Vandervort, "The Prejudicial Effects of 'Reasonable Steps' in Analysis of Mens Rea and Sexual Consent: Two Solutions" (2018) 55:4 ALR 933 (Vandervort criticizes the reasonable steps provision as inadequate, noting that an accused's interpretation of the factual circumstances "may be based on wishful thinking, selective attention, and self-serving beliefs about the complainant and sexual consent that combine fantasy with sexualized gender stereotypes" at 944).

32 1998 CarswellOnt 684, 1998 CanLII 1648 (ONCA), aff'd 2000 SCC 46 [*Darrach*].

33 *Ibid* at paras 84, 87.

34 *Ibid* at para 85.

age. In addition, some courts have extended this problematic interpretation to the fault requirement of sexual assault of adult complainants. As will be discussed below, this issue is currently before the Supreme Court of Canada in two cases,[35] heard in May 2026.[36]

In *R v Barton*, the Supreme Court of Canada made clear that the defence of mistaken belief in consent required that a mistaken belief must relate to the complainant's *communication* of consent.[37] If there were no words or actions on the part of the complainant affirmatively communicating consent, the defence is not available; a belief that silence, acquiescence, or prior consent constitutes consent is a mistake of law and no defence.[38] These principles have now been codified, with the *Criminal Code* requiring that the communicated consent be "affirmatively expressed by words or actively expressed by conduct",[39] another development that is part of the Notice of Constitutional Question filed at the Supreme Court. The Court in *Barton* also noted that the kinds of steps required may increase depending on the nature of the sexual activities involved and their intrusiveness or level of risk, a clarification that logically also applies to claims of mistake as to age. The decreased scope for the mistake defence has led defence counsel to shift their efforts to *mens rea* as a precursor requirement in an attempt to bypass some of these restrictions, as discussed in the next section of this article.

---

35 *R v Degale*, 2024 ONCA 720 [*Degale*], appeal as of right to the SCC, 41525 (1 November 2024). See also *R v Al-Akhali*, 2025 ONCA 229. For a more detailed discussion of *Degale*, see the text accompanying notes 145–149. *R v Bilinski*, 2025 ABCA 270 [*Bilinski*], appeal as of right to the SCC, 42030 (16 September 2025). While the defence has an appeal as of right on another issue, leave to appeal was granted on the proper approach to *mens rea* for sexual assault. See also *R v Hutton*, 2025 ABCA 356.

36 *R v Degale* (21 May 2026), 41525 (SCC) (Supplementary factum, Appellant) [Appellant's Supplementary Factum]. The appellant in *Degale* argued that the approach taken in British Columbia and supported in this paper is contrary to sections 7 and 11(d) of the *Charter*. To the contrary, the courts have upheld objective elements of *mens rea* especially when dealing with crimes that involve a threat to the bodily integrity of others. See *R v Creighton*, 1993 CanLII 61 (SCC) [*Creighton*] and *R v Naglik* [1993] 3 SCR 122.

37 2019 SCC 33 [*Barton*] ("[t]herefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an 'honest but mistaken belief in *communicated* consent'. This refinement is intended to focus all justice system participants on the crucial question of *communication* of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent" at para 92 [emphasis in original]).

38 See e.g. *R v GDL*, 2024 BCCA 193 [*GDL*] ("[w]hile the content of reasonable steps is highly contextual, silence or passivity on the part of the complainant cannot constitute a reasonable step to ascertain consent" at para 60).

39 *Criminal Code*, *supra* note 3, s 273.2(c).

B. Mistake of Age and the Resurgence of the *Mens Rea* Requirement

Some of the most consequential *Charter* litigation relating to the reasonable steps provisions has actually taken place in the context of child sexual offences, which have developed in parallel to offences related to adult victims. Prior to 1987, sexual offences against children were also defined based on the sex of the complainant and whether penile penetration took place. Thus, for example, offences were framed as indecent assault against a female[40] or male,[41] or sexual intercourse with a female under 14 years of age.[42] In 1987, Parliament replaced these offences with the broad, gender-neutral offences of sexual interference, invitation to sexual touching, and sexual exploitation.[43] Additional offences were enacted over the following 15 years including child luring, which was enacted in 2002 to criminalize "adults who, generally for illicit sexual purposes, troll the internet to attract and entice vulnerable children and adolescents."[44]

A child under 16 is deemed incapable of consenting to sexual activity in most circumstances, and thus the element of the *actus reus* of non-consent in sexual assault is replaced with proof of being under the age of consent. The general age of consent was raised from 14 to 16 in 2008.[45] The *mens rea*, in turn, focuses on the accused's knowledge or recklessness with respect to the complainant's age. There are several provisions in the *Criminal Code* requiring an accused to take reasonable steps to ascertain the age of a child complainant, which are parallel to the reasonable steps provisions related to non-consent for adults. Some of these provisions require reasonable steps,[46] while others require *all* reasonable steps.[47] Courts have not

40 *Criminal Code*, RSC 1970, c C-34, s 149 [*Criminal Code* 1970], as repealed by *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980-81-82-83, c 125, s 8.

41 *Ibid*, s 156.

42 *Ibid,* s 146.

43 *Criminal Code*, *supra* note 3, ss 151–52.

44 *R v Levigne*, 2010 SCC 25 at para 24.

45 Janine Benedet, "The Age of Innocence: A Cautious Defense of Raising the Age of Consent in Canadian Sexual Assault Law" (2010) 13:4 New Crim L Rev 665 at 665.

46 *Criminal Code*, *supra* note 3, ss 171.1(4) (making sexually explicit material available to a child), 172.1(4) (luring), 172.2(4) (agreeing with another person to commit a sexual offence against a child).

47 Subsection 150.1(4) requires that the accused take all reasonable steps to ascertain age in the context of sexual interference, invitation to sexual touching, bestiality, indecent exposure and all levels of sexual assault (see *ibid*, s 150.1(4)). Subsection 163.1(5) requires an accused to take all reasonable steps to ascertain age and all reasonable steps to

interpreted these provisions differently depending on whether the word "all" is used.[48] Notably, in the context of age, there is no limiting provision that requires the accused to only take steps in the circumstances known to them at the time. However, courts have read these provisions as if this limitation was there.[49]

One might expect that courts would give Parliament additional constitutional scope to legislate to protect children from sexual abuse given the vulnerability of children to sexual violence, and the difficulties in detecting and prosecuting such offences. Unlike with adult sexual activity, there is no possible competing social value at stake in adults having sexual activity with children. To the contrary, courts have shown little deference to Parliament in interpreting these provisions and it has been the cases regarding age that have done the most damage to reasonable step provisions.

In *R v Hess*,[50] one of the Supreme Court's early *Charter* cases, the Court dealt with the constitutionality of the *mens rea* for the crime of sexual intercourse ("carnal knowledge") with a female person under the age of 14, an offence that carried a maximum sentence of life imprisonment.[51] This offence specifically ruled out the defence of mistaken belief in age by indicating that the accused was guilty "whether or not he believe[d] that [the complainant was] fourteen years of age or more".[52]

A majority of the Supreme Court held that this provision violated section 7 of the *Charter* because it provided for imprisonment for someone who did not have the necessary blameworthy *mens rea*.[53] The Court had already identified the principle of fundamental justice, that absolute liability could not be coupled with the potential of imprisonment because it would deprive a person of liberty where they were morally innocent.[54]

While we agree that a rejection of mistaken belief of age was problematic in the absence of "close in age exceptions" that have since been added

---

determine whether a representation depicted a person as being a child in the context of child pornography (see *ibid*, s 163.1(5)).

48 *R v Angel*, 2019 BCCA 449 at para 46 [*Angel*], leave to appeal to SCC refused, 38957 (23 April 2020).

49 See e.g. *Morrison*, *supra* note 15 at para 105; *R v Thain*, 2009 ONCA 223 at para 37; *R v Dragos*, 2012 ONCA 538 at paras 35–41; *R v Ghotra*, 2016 ONSC 1324 at paras 153–54; *R v Pengelley*, 2010 ONSC 5488 at paras 8–17; *R v Mr E*, 2011 NUCJ 35 at paras 32, 96–97; *R v Tannas*, 2015 SKCA 61 at paras 22, 25, 28 [*Tannas*].

50 *R v Hess*, 1990 CanLII 89 (SCC) [*Hess*].

51 Note that until 2008, the age of consent in Canada was 14.

52 *Criminal Code* 1970, *supra* note 40, s 146.

53 *Hess*, *supra* note 50 at 913–18.

54 *Re BC Motor Vehicle Act*, 1985 CanLII 81 at para 73 (SCC) [*Motor Vehicle Reference*].

to the *Criminal Code*, and which avoid teenage boys close in age to the complainant from being prosecuted where the complainant voluntarily agreed to participate in the sexual activity, the analysis of moral innocence in *Hess* was lacking in nuance.[55] We do not believe an adult man who has sex with a 12- or 13-year-old girl is morally innocent, just because he is not sure of her age. It is not onerous to require him to make inquiries about age and, in circumstances where such inquiries are more difficult, such as where the complainant is a stranger or he is communicating with her online, he should refrain from sexual activity until age can be reliably verified.

The law should be framed in such a way as to make mistakes about age truly the exception, and not the norm, given the resulting harm to children, and especially to girls.[56] Nonetheless, Justice Wilson, for the majority, simply assumed that if a man believed the complainant was 14 or over, he was blameless, meaning that an accused would not be at fault even where he had no actual belief about a girl's specific age but just thought she was probably "old enough" because she was drinking, smoking, or out late at night, a problematic line of reasoning that persists in the case law today.[57]

In the *Motor Vehicle Reference*, the majority had stressed that violations of section 7 would only be upheld as reasonable limits under section 1 in extreme situations like emergencies, pandemics and the like.[58] However, this statement was made in the context of the Crown trying to justify a limit on section 7 rights on the basis of administrative expediency in the regulatory context. Where the rationale is much more compelling, such as the need to protect children from sexual exploitation by adults, one might expect more openness. Given that *Hess* was a section 15 case, one might have also expected the section 1 analysis of the majority to at least consider the intersection of sex and age inequality in the context of the sexual abuse of girls in late childhood and early adolescence.[59] While the majority

55 In 1983, s 246.1(2) of the *Criminal Code* was enacted, which removed consent of the victim as a defence to sexual assault where the victim was under the age of 14 years, unless the accused was less than 3 years older than the victim. This provision did not apply to the offence in section 146 thus providing for no close in age exception (see *R v Ferguson*, 1987 CanLII 2643 at paras 98–101 (BCCA) [*Ferguson*]).

56 Isabel Grant, "The Slow Death of the Reasonable Steps Requirement for the Mistake of Age Defence" (2021) 44:4 Man LJ 1 at 1, 3–6.

57 *Hess*, *supra* note 50 at 913–14; Isabel Grant & Janine Benedet, "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019) 97:1 Can Bar Rev 1 at 5–6, 24. See also *Tannas*, *supra* note 49 at para 8; *R c Vasiloff*, 2017 QCCQ 15612 at para 23; *R v TQBN*, 2016 SKQB 10 at para 51.

58 *Supra* note 54 at para 125.

59 This analysis eventually appeared in *R v Friesen*, 2020 SCC 9 at para 54.

did accept that protecting young girls from premature sexual activity was a compelling objective, that was the end of any consideration of equality under section 1.[60]

The majority did concede that there was a rational connection between protecting young girls and removing the defence of mistaken belief in age, but found that the legislation failed at the minimal impairment branch of section 1.[61] The Crown had relied heavily on the argument of deterrence—that it was necessary to remove the defence of mistaken belief in age because it would make men more careful before having sex with girls.[62] Justice Wilson rejected deterrence in part on the basis that it would only protect girls close to the age of 14.[63] On her own analysis then, a defence of mistaken belief in age is only plausible in borderline cases and thus was only being ruled out in these cases.[64] In some respects, that analysis supports the suggestion that the violation is a minimal impairment, particularly in light of the fact that girls from 12 to 13 years of age are at the highest risk of sexual exploitation at any age across the female lifespan, and that extraordinary measures may be necessary to protect them.[65]

At the time of *Hess*, Parliament had already enacted a defence of mistaken belief in age for the new offences of sexual interference and invitation to sexual touching, limited by an all reasonable steps provision.[66] Justice Wilson put considerable weight on the fact that Parliament had enacted this qualified *mens rea* defence and saw it as proof that there was a less intrusive option than precluding the defence altogether.[67] She described the reasonable steps provision as a due diligence defence placing a persuasive burden on the accused, which of course is not how it has

60 *Hess*, *supra* note 50 at 920.

61 *Ibid* at 921, 926.

62 *Ibid* at 922–23.

63 *Ibid*.

64 *R v Stevens*, [1988] 1 SCR 1153 at 1181–82, 1988 CanLII 44 (SCC).

65 In her analysis of mistaken belief in age cases, Isabel Grant cites five reported cases involving mistake of age claims involving girls as young as 11 (see Grant, *supra* note 56). See also *R v Hope*, 2011 NLTD 143; *R v Lefthand*, 2019 ABPC 127; *R v Normand*, 2014 ONSC 3861; *R v John*, 2020 ONSC 3790 [*John*]; *R v ET*, 2010 ONSC 3913. The youngest male complainants in cases involving the mistaken belief in age defence in this time period were both 13 years of age (see *R v Crant*, 2018 ONSC 1479; *R v TSH*, 2008 ABPC 281 [*TSH*]). Only in *John* and *TSH* was the defence successful.

66 *Hess*, *supra* note 50 at 925.

67 *Ibid*.

been interpreted in subsequent cases that have maintained the persuasive burden on the Crown.[68]

The dissenting judgment of Justice McLachlin (as she then was) (Justice Gonthier, concurring) agreed with the majority on the section 7 analysis, but would have upheld the removal of the defence of mistake under section 1.[69] The dissent considered the compelling nature of the objective and the importance of protecting children from premature intercourse.[70] While on the Court of Appeal, Justice McLachlin had written the majority judgment in *R v Ferguson* which upheld the same legislation under section 1 of the *Charter*.[71] There she pointed to the fraught nature of a potential reasonable steps alternative, expressing concerns that have turned out to be somewhat prescient:

> What constitutes "all reasonable steps to ascertain the age of the complainant"? If the child has no proof of identification, would a simple inquiry suffice? If not, would requesting and obtaining proof of age in the form of a birth certificate or driver's licence suffice? Street children and those exploiting them may be expected to forge, borrow or steal appropriate documentation. Where then is found the protection of children and the deterrence of those who exploit them?[72]

In *Ferguson*, Justice McLachlin went on to conclude that the deterrent provided by ruling out a mistake of age in section 146 was much more effective than the proposed reasonable steps provision and constituted a minimal intrusion given the very compelling objective of protecting girls from premature intercourse.[73] Justice McLachlin reached the same conclusion in *Hess*, making her dissenting judgment a rare example of a Supreme Court Justice upholding a violation of section 7 under section 1.[74]

She concluded that no alternative to the removal of the defence would accomplish the deterrent objective as effectively as the provision in

---

68 *Ibid*. A due diligence defence requires the accused to prove the reasonableness of his or her actions on a balance of probabilities. The reasonable steps provisions have never placed a persuasive burden on the defence, and the Crown is required to negate reasonable steps beyond a reasonable doubt once the lower air of reality threshold is met, see the text accompanying note 30.

69 *Hess*, *supra* note 50 at 936, 939–40, 956, McLachlin J, dissenting.

70 *Ibid* at 948–49, McLachlin J, dissenting.

71 *Ferguson*, *supra* note 55 at para 147.

72 *Ibid* at para 134.

73 *Ibid* at para 135.

74 *Hess*, *supra* note 50 at 956, McLachlin J, dissenting.

question and thus it was minimally intrusive on an accused's rights.[75] She was also critical of reliance on the new "all reasonable steps" provision in finding that the minimal impairment test was not met.[76] Simply because Parliament has chosen to repeal a provision does not necessarily undermine its earlier assessment that removing the defence was warranted.[77] Most notably for the purposes of this paper, in assessing the proportionality branch of the *Oakes* test, Justice McLachlin acknowledged that the burden imposed on adults by removing the defence was minimal.[78] All a man has to do to avoid liability based on a mistake is desist from engaging in sexual activity with adolescent girls until he knows for certain they are old enough:

> Although one may postulate the case of a "morally blameless" person being convicted under s. 146(1), however rare that case may be, one must also remember *that all that a person need do to avoid the risk of this happening is to refrain from having sex with girls of less than adult age unless he knows for certain that they are over fourteen*. Viewed thus, the infringement on the freedom imposed by s. 146 of the *Criminal Code* does not appear unduly draconian, considering the great harms to which the section is directed.[79]

After *Hess*, *Charter* challenges to sexual offences involving youth victims continued, but mostly focused on evidentiary and procedural questions, such as the courtroom accommodations available to child complainants.[80] The main substantive challenge was to the child pornography offences, in which the Supreme Court invoked section 2(b) freedom of expression to read down the offence, but upheld the ability of Parliament to punish possession of child sexual abuse material.[81] It was not until three decades

75 *Ibid* at 951, McLachlin J, dissenting.

76 *Ibid* at 951–52, McLachlin J, dissenting.

77 *Ibid*.

78 *Ibid* at 954–56, McLachlin J, dissenting.

79 *Ibid* at 954–55, McLachlin J, dissenting [emphasis added]. Although not relevant to the *mens rea* analysis, the majority's section 15 analysis was also disappointing. While it upheld the crime of sexual intercourse with an underage girl, it did so on the basis of biological differences—that it was impossible for women to commit the same offence. As William Black and Isabel Grant have pointed out, there are dangers for women in allowing Parliament to rely on biological differences to justify a crime that can only be committed by members of one sex, especially where there are compelling social reasons that could have justified upholding the legislation under a substantive equality analysis (see William Black & Isabel Grant, "Equality and Biological Differences" (1990) 79 CR (3rd) 372 at 373).

80 See e.g. *R v Levogiannis*, 1993 CanLII 47 (SCC).

81 *R v Sharpe*, 2001 SCC 2 at paras 129–30.

after *Hess*, in *Morrison*, that challenges to the fault requirement in sexual offences returned to the Supreme Court.[82] In *Morrison*, the 67-year-old accused was charged with internet luring of a person he believed to be a child by means of telecommunication, contrary to paragraph 172.1(1)(b) of the *Criminal Code*.[83] He challenged the evidentiary presumption that assisted the Crown in proving *mens rea* with respect to age, and the reasonable steps provision under subsections 172.1(3) and (4) of the *Criminal Code*, respectively.[84]

There are two components of internet luring that are important for understanding *Morrison*. First, internet luring is an unusual crime because it can be committed in two distinct ways, which are both defined by the same subsection of the *Criminal Code*.[85] An accused can be charged either with luring an actual child online or with luring a person the accused believes to be a child, usually an undercover police officer pretending to be a child. In the latter scenario, these so-called sting operations are a necessary tool to enforce the law against predators who learn how to take advantage of anonymity on the internet to exploit children.[86] Second, luring only criminalizes communications with a child online if those communications are made "for the purpose of facilitating the commission of an offence with respect to that person".[87] Those offences include sexual and abduction-related offences. While this purposive element has been interpreted fairly loosely, the specific intent element remains.[88]

In the police sting context, the *Criminal Code* requires that the accused must "believe" he is communicating with a child precisely because there

82 *Morrison*, *supra* note 15.

83 *Ibid* at para 4.

84 *Ibid* at paras 6–7.

85 *Criminal Code*, *supra* note 3, s 172.1(1).

86 Internet luring is the second most common sexual crime against children and there are increases in reported sexual offences against children generally (see Statistics Canada, *Police-Reported Crime Statistics in Canada, 2017*, by Mary Allen, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 23 July 2018)). The offence also accounts for most police-reported online sexual offences against children and youth in Canada. The rate of luring increased 69 percent between 2014 and 2022 and accounted for 75 percent of online sexual offences against children—with 82 percent of victims being between ages 12 and 17 and 84 percent of victims being girls (see Statistics Canada, *Online Child Sexual Exploitation: A Statistical Profile of Police-Reported Incidents in Canada, 2014 to 2022*, by Laura Savage, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 12 March 2024)).

87 *Criminal Code*, *supra* note 3, s 172.1(1)(a).

88 See e.g. *R v WW*, 2025 ONCA 115 at paras 41–46, aff'd 2025 SCC 37; *R v Bowers*, 2022 ONCA 852 at paras 15–17; *R v McSween*, 2020 ONCA 343 at paras 104–107, leave to appeal to SCC refused, 39314 (10 December 2020).

is no actual child, and thus the wrongfulness of the behaviour is based on both the belief in young age and the purpose of facilitating a further sexual offence.[89] Belief is generally interpreted to mean actual belief or wilful blindness, in other words, a suspicion that you are communicating with a child and a deliberate failure to find out the truth.[90] Where the accused has lured an actual underage child, recklessness is sufficient *mens rea* with respect to the complainant's age. Recklessness is less than wilful blindness and requires subjective awareness of a risk that the other person is underage.[91] Proving knowledge of age may be more challenging where communication takes place over the internet on anonymous forums between people who may have never met in person.

Both provisions that were challenged constitutionally in *Morrison* were designed to limit the contexts in which an accused could successfully argue that he did not know the age of the complainant. Subsection 172.1(3) made it easier for the Crown to prove that the accused subjectively believed he was communicating with a child where the person told the accused she was underage.[92] Where the complainant made a representation that she was underage, the accused was presumed to believe what he was told, unless he could point to some evidence that would give him reason to doubt that representation.[93] Subsection 172.1(4) precludes the defence of mistaken belief in age where the accused had not taken reasonable steps to ascertain that age.[94]

Evidentiary presumptions put a minimal burden on the accused to point to evidence capable of raising a reasonable doubt. One might think that there is a strong logical relationship between being told that the victim is underage and actually believing that the victim is underage. However, when one adds the internet into the equation, there remains the disturbing possibility that an adult is pretending to be a child not for the purposes of a sting operation, but for sexual gratification, so-called sexual abuse roleplay or "age play". It is this situation for which the accused in *Morrison* claimed constitutional protection.[95]

89 *Criminal Code*, *supra* note 3, s 172.1(1)(b).
90 *Morrison*, *supra* note 15 at paras 97, 100.
91 *Ibid* at paras 100–101.
92 *Ibid* at paras 54–62.
93 *Ibid*.
94 *Ibid* at para 7.
95 *Ibid* at para 24.

The Court approached the evidentiary presumption as applying primarily in the sting context, where an undercover police officer tells the accused that they are a child. But, of course, the provision also applies to actual children who state that they are under the age of consent. The legislation required the accused to take a statement about young age at face value.[96] Nonetheless, the Court held that this evidentiary presumption violated the presumption of innocence in section 11(d) because the fact that the person represented themselves as a child "does not lead 'inexorably' to the conclusion that the accused believed that representation".[97] After all, "it may simply be expected that true personal identities are concealed, even when there is no evidence suggesting a misrepresentation in the particular case."[98]

It was inevitable that this provision would be found to infringe section 11(d) given the Court's existing jurisprudence on evidentiary presumptions.[99] However, the legislation could easily have been construed as minimally intrusive on rights and upheld under section 1. But the Supreme Court rejected the Crown's section 1 arguments, concluding that the evidentiary presumption failed the minimal impairment test essentially on the basis that the presumption was not necessary for the luring offence to be effective.[100] Instead, triers of fact could be asked to draw an inference that the accused believed the representation as to age.[101] In other words, the Court held that having no legislative provision would be less intrusive of *Charter* rights than upholding it, which is always the case when dealing with a provision that limits rights.[102] The obvious problem this legislation was seeking to overcome was the ease with which a predator can argue that, while someone represented themselves as a child, he believed they were just engaged in role-playing child sexual abuse and that he was really talking to an adult. This was the very argument that carried sway with the trial judge in *Morrison,* with respect to a 67-year-old man arranging to meet for sex with someone who repeatedly held herself out to be 14.[103] This was

96 *Ibid* at para 48.

97 *Ibid* at para 57.

98 *Ibid* at para 59.

99 *R v Downey*, 1992 CanLII 109 (SCC). See also Isabel Grant & Janine Benedet, "Unreasonable Steps: Trying to Make Sense of *R v Morrison*" (2019) 67:1/2 Crim LQ 14 at 23–24. Note that this line of reasoning contradicts *Osolin* SCC (see *supra* note 13).

100 *Morrison*, *supra* note 15 at paras 69–70.

101 *Ibid* at para 69.

102 *Ibid* at para 70.

103 *Ibid* at para 29.

true despite the fact that there was no discussion of roleplay whatsoever between the accused and the undercover officer.[104]

The approach in *Morrison* means that men are never required to refrain from engaging in sexual activity or sexual conversations where they are not sure how old the complainant is or that she is an adult. Rather, the law is forced to adapt to the uncertainty of the internet context. *Morrison* effectively gives constitutional protection to the role-play of child sexual abuse. We believe that is misguided. Such activity normalizes the sexual abuse of children and encourages men to pursue such activity online where the dangers of luring a real child are very significant. If a man cannot know a person's age with certainty, he should refrain from pursuing sex where the person tells him she is a child. Requiring a man to simply raise a reasonable doubt that he actually did believe he was talking to an adult, when he was specifically told otherwise, is a trivial intrusion on his constitutional rights. Adults role-playing the sexual abuse of children online do not deserve this heightened level of constitutional protection.

The evidentiary presumption in *Morrison* was arguably unique because of difficulties in proving someone knew the age of the complainant in the context of the internet. There is one other similar evidentiary provision in subsection 171.1(3), in the context of making sexually explicit material available to a child. It states that if a person was represented to the accused as being under the relevant age of consent, an evidentiary presumption will require him to raise evidence to the contrary to rebut a finding that he knew how old the recipient was.[105] Presumably the constitutionality of this provision is now in doubt unless the Crown can offer a more robust justification under section 1.

The evidentiary presumption was not the only part of the internet luring offence to face *Charter* scrutiny; the reasonable steps provision was also challenged. In its interpretation upholding the provision, *Morrison* has undermined reasonable steps provisions more generally and has led to the current *Charter* challenge facing the Supreme Court in *Degale*. To understand the majority reasons in *Morrison*, it is helpful to set out the dissenting reasons of Justice Abella first. Justice Abella correctly interpreted the reasonable steps provision as ruling out a defence of mistaken belief in age absent evidence of reasonable steps.[106] However, she went one step

104 The only possible reference to this is found in his advertisement, "Daddy looking for his little girl", although this makes no mention of role-playing (see *ibid* at para 17).

105 *Criminal Code*, *supra* note 3, s 171.1(3).

106 *Morrison*, *supra* note 15 at para 214, Abella J, dissenting.

further, holding that the reasonable steps provision in the luring context violated sections 7 and 11(d) of the *Charter* by denying the accused the right to make full answer and defence.[107] It did this, in her view, because it may be impossible to take reasonable steps in the context of the internet, "ensnar[ing] the accused in the web of liability created by the offence."[108] We agree with Justice Abella that there are two paths to conviction in the context of a reasonable steps provision. The Crown may prove beyond a reasonable doubt either that the accused did not believe the complainant was above the age of consent (the subjective path) or that the accused failed to take any reasonable steps to ascertain age (the modified objective path). The crux of her reasoning can be found in the following paragraph:

> Under s. 172.1(4), the accused is barred from arguing that he or she did not believe that the online communicant was a child unless he or she took steps to ascertain the communicant's age that were objectively reasonable in the circumstances. In my view, any defence will be largely illusory for an accused who believed that he or she was communicating with an adult. What steps can an accused possibly take on the Internet to reasonably verify the communicant was not under the relevant age in order to escape objective liability? The effect is a nearly insurmountable barrier to the accused's ability to raise and defend his or her innocent belief.[109]

The analysis of Justice Abella is premised on the notion that the accused must have some way to assert a mistaken belief in age—that it is never blameworthy to be mistaken about age; that the law can never require a man to simply desist until age can be ascertained with more certainty. In a situation where there is no reasonable way to assert that he got it wrong and no reasonable basis for his belief that he is talking to a child, she considers that the only conclusion is that his *Charter* rights are violated. As Justice McLachlin observed in *Hess*, where it is truly impossible to ascertain age, an accused only has to refrain from engaging in sexual conversations and planning further sexual activity with that person.[110]

In fact, of course, there are steps one can take to ascertain age over the internet—asking for photo identification after having a video call with the complainant and before arranging to meet up for sex might be one of them. It is true that there is a greater risk that a person will be wrong

107 *Ibid* at para 223, Abella J, dissenting.
108 *Ibid* at para 196, Abella J, dissenting.
109 *Ibid* at para 217, Abella J, dissenting.
110 *Hess*, *supra* note 50 at 954–55, McLachlin J, dissenting.

after taking reasonable steps in the internet context, because of the level of deception the internet facilitates. But the reasonable steps defence has never required the accused to reach the correct conclusion—by definition it is only necessary where the accused acknowledges a mistake about age or consent. The law only requires that the accused take steps to increase the chances of avoiding such a mistake.[111] The Court in *Barton*, in the context of sexual assault of an adult, held shortly after *Morrison* that where the risk of mistake is great, the reasonable steps requirement in the context of consent must be heightened.[112] The fact that the anonymity of the internet makes it harder to ascertain age should heighten the reasonable steps requirement, not invalidate it.

The majority judgment, written by Justice Moldaver, upheld the reasonable steps provision but rendered it meaningless in its application, a result which has led to uncertainty and significant negative consequences for reasonable steps provisions in other offences. Instead of allowing the Crown to prove *either* path to conviction as set out by Justice Abella, Justice Moldaver required the Crown to prove *both* that the accused failed to take reasonable steps to ascertain age and that the accused knew the complainant was under the age of consent. This effectively eliminates any role for the reasonable steps provision and instead makes it a further hurdle that the Crown must negate. In other words, even if the Crown proves beyond a reasonable doubt that the accused failed to take any reasonable steps, something the Court had recently held was sufficient to rule out a defence of mistake with respect to consent in *R v Gagnon*,[113] it must still go on to prove beyond a reasonable doubt that the accused knew the complainant was underage. Less than a year after *Morrison*, the Supreme Court in *Barton* confirmed that the pre-*Morrison* approach to reasonable steps continues in the context of non-consent for adult complainants. There the Court held that reasonable steps operate as "a precondition to the defence of honest but mistaken belief in communicated consent—no reasonable steps, no defence."[114] What is not clear is why the same interpretation would not apply to reasonable steps in the context of age.

Morrison has created significant problems in subsequent cases because the majority was unclear about the scope of its ruling. While the majority

111 Some cases have gone so far as to hold that no actual steps are required in some circumstances (see e.g. *Tannas*, *supra* note 49).

112 *Barton*, *supra* note 37 at para 108.

113 2006 SCC 17 [*Gagnon*].

114 *Barton*, *supra* note 37 at para 104.

explicitly refers to the internet sting context several times,[115] it is the unfortunate reference to the decision in *R v George*,[116] a case dealing with mistake of age in the context of sexual interference, that has led to real confusion.

Appellate courts in British Columbia and Ontario have taken different approaches to *Morrison* (and most recently Alberta has adopted the Ontario approach, and Manitoba has adopted the British Columbia approach). We have argued elsewhere that the British Columbia approach, which limits the reasoning in *Morrison* to sting operations, is more consistent with the long history of reasonable steps provisions, and recognizes the distinct role that "belief" plays in the sting context.[117] The Court of Appeal for Ontario, by contrast, has changed its approach to reasonable steps in the context of age generally and more recently extended this to consent.[118] Justice Moldaver in *Morrison* made the following ambiguous statement about *George*, a case in which the female accused was acquitted of sexual interference on the basis of mistaken belief in age:

> [T]here were two alternate ways by which the Crown could negate the defence of mistaken belief in age once the air of reality test had been met. First, the Crown could prove that the accused did not honestly believe the complainant was at least 16; or, second, the Crown could prove that the accused did not take "all reasonable steps" to ascertain the complainant's age. While the Crown had to prove at least one of these propositions to negate the defence of mistaken belief, doing so would not, from a legal perspective, inevitably lead to a conviction. As a legal matter, to obtain a conviction for sexual interference or sexual assault of a person under the age of 16, the Crown had to go further and prove beyond a reasonable doubt that the accused believed the complainant was under 16. As a practical matter, once Ms. George's sole defence was negated, her conviction was a virtual certainty.[119]

The reason this passage is so confusing is because the Court made clear in *George* that the reasonable steps provision added an objective component to the fault requirement such that failure to take reasonable steps is

115 *Morrison*, *supra* note 15 at paras 49, 55, 81, 84–85, 95, 101–102. See also Grant & Benedet, *supra* note 99 at 32, n 64.

116 2017 SCC 38 [*George*].

117 Grant & Benedet, *supra* note 99.

118 *R v Carbone*, 2020 ONCA 394 [*Carbone*].

119 *Morrison*, *supra* note 15 at para 88.

an independent path to conviction.[120] How, then, can something be an independent path to conviction, but not an inevitable one?

In *R v Carbone*, while acknowledging that the *Morrison* Court limited its analysis to the internet sting context—and therefore its reasoning did not bind courts considering other offences—the Court of Appeal for Ontario relied on this confusing statement about *George* to reject an absence of reasonable steps as an independent path to conviction for invitation to sexual touching:

> As I read the above-quoted passage, it is no longer, strictly speaking, correct to define the required *mens rea* with respect to the complainant's age by reference, only to the absence of reasonable steps to determine the complainant's age. There is a *mens rea* requirement that focuses exclusively on the accused's state of mind. The Crown is required to prove the accused believed the complainant was underage. The requisite proof is not provided by the Crown's negation of the defence created by s. 150.1(4).[121]

The Court of Appeal does limit the scope of its judgment by stressing that an accused who gives no thought to the complainant's age will, *in most circumstances*, be reckless—even though that appears to be inconsistent with the subjective recklessness requirement, which requires an actual awareness of risk.[122] The Court of Appeal stresses that this decision will have a limited impact as "few situations in which a person who engages in sexual activity with an underaged person and does not take reasonable steps to determine the age of that person, will not be found to have been at least reckless as to the true age of the complainant."[123] It is only those cases where "the circumstances did not permit the inference that in proceeding without regard to the complainant's age, the accused decided to treat her age as irrelevant to his conduct."[124] Grant has argued that *Carbone* effectively leaves the most marginalized girls without the protection of the reasonable steps provision, such as girls who are engaged in risk-taking behaviours or who do not have adequate adult supervision.[125]

In a subsequent decision, the Court of Appeal acknowledged that "ordinary people would likely find it counterintuitive and surprising that

120 *George*, *supra* note 116 at para 8.
121 *Carbone*, *supra* note 118 at paras 92–93, 120.
122 *Ibid* at para 126.
123 *Ibid* at para 130.
124 *Ibid* at para 131.
125 Grant, *supra* note 56 at 28.

accused persons could, even in rare circumstances, be acquitted of sexual offences against children despite having failed to turn their minds to the complainant's age and take all reasonable steps to ascertain that age".[126] The Court of Appeal indicated that until the Supreme Court clarifies what it meant in *Morrison*, that will be the law in Ontario.[127] The Court of Appeal noted that the Court of Appeal for British Columbia has taken a different approach to offences other than luring—not requiring any further proof of *mens rea* once the reasonable steps inquiry has been negated by the Crown.[128] In fact, in *R v Jerace*, the Court of Appeal for British Columbia declined to follow *Carbone*, returning instead to the language of *George* that lack of reasonable steps is an independent path to conviction.[129] Justice Hunter stated that, "I share the reservations of my colleagues in *Angel* concerning the clarity of the Court's judgment in *Morrison*, but there can be no such reservations about the clear language in *George*, which is binding on this Court".[130] The British Columbia approach retains a meaningful role for reasonable steps provisions and is more consistent with Parliament's clear intent to make blameworthy a failure to take any steps to ascertain either age or consent.

IV. NULLIFYING THE REASONABLE STEPS REQUIREMENT FOR CONSENT

The inevitable next step after *Carbone* was to see attempts to apply the same reasoning to sexual assault dealing with mistakes regarding consent instead of age. The Court of Appeal for Ontario has done just that in *R v HW*,[131] following the lead of the Court Martial Appeal Court in *R v*

126 *R v Hason*, 2024 ONCA 369 at para 51.

127 *Ibid*.

128 *Angel*, *supra* note 48 at para 45. See also *R v Jerace*, 2021 BCCA 94 at paras 30, 37 and 40 [*Jerace*]; *R v Seangio*, 2024 BCCA 143 at para 90; *R v Tallcree*, 2023 ABKB 211 at para 241; *R v DS*, 2023 ABKB 154 at para 11.

129 *Jerace,* supra note 128.

130 *Ibid* at para 37. Thus far the Manitoba Court of Appeal has stopped short of a full endorsement of this aspect of *Carbone*. In *R v Gratton*, the Court limited *Morrison* to cases involving a real child victim (see 2023 MBCA 29 at para 13) and in *R v Schroeder*, the Court avoided the issue (see 2025 MBCA 10). The Quebec Court of Appeal declined to decide the matter, but noted that conviction is almost certain once the defence of mistaken belief in age is rejected (see *Nzeyimana c R*, 2023 QCCA 12 at para 15). See also *Norman c R*, 2025 QCCS 132 at para 2.

131 2022 ONCA 15 [*HW*].

MacIntyre.[132] In *MacIntyre*, Justice Bennett suggested that requiring proof of *mens rea* even where reasonable steps have been negated has always been the law in Canada.[133] She used the example of intoxication. She acknowledged the long-standing rule that self-induced intoxication is not a defence to general intent crimes such as sexual assault, yet suggested that if the reason the accused did not know the complainant was not consenting was his intoxication, that would be relevant to *mens rea*:

> [W]hen the accused is charged with a general intent offence, the defence [of intoxication] is unavailable. Nevertheless, an appellate court would not be warranted in interfering if a trial or military judge were to charge the jury that the Crown must prove that general intent beyond a reasonable doubt. In *Tatton*, Justice Moldaver found that arson is an offence of general intent.... Its *mens rea* is the intentional or reckless damaging of property by fire.... Yet it would still be correct for a trial judge to charge the jury on the *mens rea* requirement even in circumstances where intoxication would be the only real way to disprove that requirement for the simple reason that intention remains an element of the offence. A trial judge can provide their view that the jury will have little difficulty in concluding that the element is met, but, ultimately, it is for the jury to decide whether it actually is.[134]

The reference to intoxication somehow being relevant to fault for a general intent crime is concerning. The defence of intoxication has always been a *mens rea* defence, as Justice Bennett notes. It has long been inapplicable to general intent crimes such as sexual assault, and this was recently affirmed by the Supreme Court of Canada.[135] To suggest that it could nonetheless be used by a jury to negate *mens rea* is flatly inconsistent with this long-established principle. Speaking of intoxication being the "only real way to disprove [general intent]" in a given case makes no sense, because intoxication does not negate general intent.[136] Nor can the defence of intoxication come in through the back door in the sexual assault context by forming part of the basis for the accused's belief in consent, as this is specifically

---

132 2019 CMAC 3 at para 48 [*MacIntyre*], leave to appeal to SCC refused, 38838 (9 January 2020). This finding is contrary to the Supreme Court of Canada's holding in *Gagnon*, *supra* note 113 at para 24.

133 *MacIntyre, supra* note 132 at para 51.

134 *MacIntyre*, *supra* note 132 at para 48 [citations omitted].

135 Recently, the Supreme Court of Canada confirmed the rule that "intoxication short of automatism is not a defence to violent crimes of general intent in this country" (see *R v Brown*, 2022 SCC 18 at para 5 [*Brown*]).

136 *MacIntyre*, *supra* note 132 at para 48.

rejected in the *Criminal Code*.[137] In other words, "I didn't know she wasn't consenting because I was too intoxicated" has long been ruled out as a defence to sexual assault in Canada.[138]

Perhaps recognizing this problem, *MacIntyre* later changes the hypothetical to an accused who is not just intoxicated, but *involuntarily* intoxicated, such that, "through no fault of [his] own", he is not able to appreciate the risk that the complainant is not consenting.[139] Undermining the reasonable steps provision to address this unusual situation is unnecessary. An accused whose actions are involuntary lacks the *actus reus* of the offence. Where his state of automatism is self-induced, he faces some statutory limits on his defence, but there are no such limits where the involuntariness is caused by the actions of someone else.[140] Of course, involuntary intoxication does not automatically equate to involuntary action, but courts tend to be generous in assessing involuntariness where a person is drugged without their knowledge, although this is still treated as a defence requiring the accused to raise an air of reality.[141] It should not be put to the trier of fact in every case.[142]

The *HW* Court built on *MacIntyre* and held that, even where there was no air of reality to the defence of honest but mistaken belief in communicated consent, the Crown must prove knowledge, wilful blindness, or recklessness beyond a reasonable doubt.[143] While the Court is correct that there is no principled reason to distinguish the reasoning in *Carbone* from the adult sexual assault context,[144] the response should not be to jettison the reasonable steps provision for non-consent, but rather to recognize that the expansive approach of *Carbone* was deeply problematic. The Court of Appeal does attempt to limit its judgment by indicating that once reasonable steps have been negated, evidence that the accused was mistaken is not relevant to whether the accused knew the complainant was not consenting. Otherwise, the accused would be sidestepping the

137 *Criminal Code*, *supra* note 3, s 273.2(a)(i).

138 *R v Moreau*, 1986 CanLII 4618 at 378–79 (ONCA). See also *Leary v The Queen*, 1977 CanLII 2 (SCC).

139 *MacIntyre*, *supra* note 132 at para 65.

140 *Criminal Code*, *supra* note 3, s 33.1. The authors discuss this provision in more detail in Part V, *below*.

141 See e.g. *R v McGrath*, 2013 ONCJ 528 and *R v Harris*, 2019 BCCA 166 at paras 21 and 49.

142 A person who is incapable of appreciating a risk does not even meet the standard for objective fault in negligence-based offences: *R v Hundal*, 1993 CanLII 120 (SCC); *Creighton*, *supra* note 36.

143 *HW*, *supra* note 131 at para 8.

144 *Ibid* at para 67.

requirements of the reasonable steps provision in the defence of honest mistaken belief. Lack of knowledge will have to be proven through some other means, presumably as suggested in *MacIntyre*, by the fact that the accused was (involuntarily) intoxicated. The Court thus develops, as in *Carbone*, complicated instructions for the jury that are meant to narrow the risk of unjustified acquittals but are enormously complex and illogical. After rejecting the mistaken belief defence, the jury should be instructed to proceed on the basis that the accused did not have a mistaken belief that the complainant was consenting. The jury should not consider evidence that he was mistaken, and the judge should instruct the jury on what that evidence might be. This has come to be known as the "little difficulty" instruction, which appears to have originated in a footnote from the Court of Appeal of Alberta in *Barton* that was adopted in *MacIntyre*.[145] In *HW*, the Court stated:

> If there is an air of reality to a defence that the accused did not know of the lack of the complainant's consent on a basis other than a belief in consent (for example, the type of situation envisaged in the *MacIntyre* hypothetical), the jury should be directed to the evidence that they should consider on this issue.
>
> Where there is no air of reality to the defence of honest but mistaken belief in communicated consent, and no air of reality to a defence that the accused did not know of the absence of consent by the complainant on another basis, the trial judge may tell the jury that it should not be difficult for them to find that the accused knew that the complainant was not consenting, or was reckless or wilfully blind to the absence of consent.[146]

The *HW* Court here is trying to differentiate a mistake from an absence of knowledge. So, if intoxication leads to a mistaken belief in consent, that is not legally relevant, but if intoxication leads to a reasonable doubt that an accused was *not thinking* about consent, that is relevant? This is an unnecessarily complicated line for a trier of fact, especially a jury, to draw, and reads the statutory requirement of reasonable steps out of the offence, since the jury's sole focus is on knowledge. As Professor Hamish Stewart

145 *MacIntyre*, *supra* note 132 at para 63, citing *R v Barton*, 2017 ABCA 216 at 66–67, n 105.

146 *HW*, *supra* note 131 at para 98. This has now been adopted by the Court of Appeal of Alberta (see *Bilinski*, *supra* note 35 at paras 26–49) and by the Northwest Territories Court of Appeal (see *R v Lafferty*, 2024 NWTCA 9 at paras 24–30, leave to appeal to SCC refused, 41646 (5 June 2025)).

has noted, trying to assess knowledge of non-consent in the absence of evidence of belief in consent demands inquiries that "if not actually inconsistent, are in extreme tension with each other".[147]

In *Degale*, the reasoning in *HW* was relied on to acquit an accused of aggravated sexual assault against a complainant who was injured so seriously that she required vaginal and anal surgery to repair her grave wounds.[148] The complainant had appeared crying and naked from the waist down at the home of neighbours "with blood all over her lower body" claiming she had been raped by the accused.[149] The trial judge made a finding of non-consent but had a reasonable doubt that the accused knew the complainant was not consenting because neither the accused nor the complainant testified, and so there was no evidence of her body language or other behaviour at the time of the sexual activity. The Court of Appeal for Ontario overturned the acquittal and entered a conviction, but reinforced the finding in *HW* indicating that the judge should have found *mens rea* because the evidence he relied upon could only have gone to mistaken belief in consent and that evidence should have been excluded, so as not to allow the mistaken belief defence through the back door:

> [I]n this "consent-or-no-consent" case, where there was no defence of honest but mistaken belief in communicated consent, the trial judge as the finder of fact, permitted himself to consider on the issue of *mens rea*, whether there was evidence that could only have been relevant to whether the respondent had a mistaken belief in consent. In his analysis of the *actus reus* of the offence, the trial judge concluded that it "defied common sense" that J.K. was consenting despite neither J.K. nor the respondent having testified. However, during his *mens rea* analysis, he referred to there being "no evidence of how the sexual interaction transpired, what J.K.'s body language was during the interaction or what words were exchanged", and that "there was no evidence that J.K. communicated her lack of consent" to the respondent. When considered in relation to the trial judge's analysis of the *actus reus* of the offence, the evidence that the trial judge said was missing at the *mens rea* stage can only be understood as evidence that went to whether the respondent might have believed that J.K. was consenting. The trial judge ought to have excluded from consideration on the *mens rea*

147 Hamish Stewart, "Fault and 'Reasonable Steps': The Troubling Implications of *Morrison* and *Barton*" (2019) 24 Can Crim L Rev 379 at 380.

148 *Degale*, *supra* note 35.

149 *R v Degale*, 2023 ONCJ 346 at paras 9–10.

> issue evidence, or lack of evidence, that was pertinent to the respondent's belief in consent.[150]

The obvious error in the trial judge's reasons, which also appears in the trial judge's instructions in *MacIntyre*, is the focus on resistance or objection, which inverts the affirmative consent standard by requiring the complainant to communicate non-consent. *Mens rea* is supposed to focus on whether the accused believed that consent was affirmatively communicated by words or actions. This is the mental state that is required for the accused to not be at fault for sexually violating a woman's body. There is no obligation on complainants to communicate non-consent. The reasoning of the trial judge amounts to saying that it would have been obvious to everyone else that she was not consenting, but it might not have been obvious to the accused. Only the accused can logically lead evidence that he, unlike everyone else on planet Earth, believed that consent was being affirmatively communicated on these facts.

It is difficult to see under what circumstances a finding of no *mens rea* would be completely separate from evidence of a mistaken belief in consent. The whole point of reasonable steps is that the accused who gives no thought to consent is now blameworthy. Allowing the accused to evade this by requiring the Crown to first prove that he turned his mind to consent subverts the intention of Parliament and the Supreme Court in shifting the focus to the communication of voluntary agreement.

A mistake is simply another way of framing the lack of *mens rea*. To say that you can assess knowledge, in the absence of any evidence of a mistake, is like saying you can assess knowledge in the absence of evidence that there was no knowledge. If there is no evidence of communicated consent on the part of the complainant, or no evidence of reasonable steps, no further inquiry into *mens rea* is required.[151] This position is most consistent with the case law and the history of legislative reform. Otherwise, the reasonable steps provision does not limit the accused's ability to assert that he did not know the complainant was withholding consent, as Justice Wilson indicated was its purpose with regard to age so many years ago.[152]

---

150 *Degale*, *supra* note 35 at para 20.

151 For example, the Court of Appeal for British Columbia has upheld convictions in cases where there was no evidence of any reasonable steps taken by the accused to inquire into consent, without any further inquiry into his knowledge (see *GDL*, *supra* note 38 at paras 50–73). See also *R v Schank*, 2025 BCCA 345 at paras 60–63.

152 *Hess*, *supra* note 50 at 925.

Degale is being appealed, as of right, to the Supreme Court of Canada, along with the Alberta case of *Bilinski,* which raises similar issues in the absence of a *Charter* claim. *Degale* presents the Court with an opportunity to simplify the very confusing state of the law in Ontario and Alberta, which has not been followed in British Columbia, and to reaffirm its own decisions in *George* and *Barton.* Counsel for the accused in *Degale* has challenged the constitutionality of both the reasonable steps provision and the 2018 addition to the *Criminal Code* that for a belief in consent to operate as a defence, there must be evidence of voluntary agreement that is "affirmatively expressed by words or actively expressed by conduct, although the *Charter* arguments before the Supreme Court were limited to an attack on reasonable steps[153] No *Charter* arguments were raised in either of the lower courts.

The reasonable steps provision is a clear message from Parliament that an accused is not morally innocent if he fails to take reasonable steps to inquire into consent or where there is no evidence of communicated consent. Any assertion that either of these situations could result in punishing the morally innocent is premised on the erroneous idea that women exist in a presumed state of consent until the accused is told otherwise, and thus nothing is ordinarily required of an accused before engaging in sexual activity.

V. MORAL INNOCENCE AND THE EXTREME INTOXICATION DEFENCE

While *Morrison* was more explicitly based on the right to make full answer and defence, it is the principle of fundamental justice that one cannot punish the morally innocent that underlies the concern that an accused must have a sufficient *mens rea*. The Court once again relied on this principle in the context of the extreme intoxication defence, holding that the *Charter* prohibits punishing someone who puts themselves in such a state of extreme intoxication that they have no control over their violent actions. Victims of such violence have no place in the section 7 analysis because the Court rejected consideration of the role of the state in entrenching such a defence. As discussed above, it has long been established that intoxication is not a defence to general intent crime such as sexual assault. The Supreme

153 Appellant's Supplementary Factum, *supra* note 36. The authors were counsel for an intervener in *Degale* and were present at the oral hearing.

Court in *R v Daviault*[154] held that where intoxication reaches the point that the accused loses control over their actions, a defence of extreme intoxication is mandated by section 7, to avoid punishing the morally innocent. This was, in effect, a new form of the non-mental disorder automatism defence, which had traditionally excluded automatism caused by voluntary consumption of intoxicants. While strictly speaking, extreme intoxication is an issue of *actus reus*, it has a clear connection to moral blameworthiness.

The response to *Daviault* was quick and harsh, with critics noting the disproportionate impact this would have on women and children who are too often victims of male violence.[155] The Department of Justice immediately began consultations on the appropriate response to *Daviault* and eventually enacted section 33.1 of the *Criminal Code* precluding such a defence where the accused departed markedly from the standard of care. Further, section 33.1 deemed a marked departure where the accused "while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person."[156] The preamble to the legislation explicitly referenced the importance of protecting women and children from male violence.

Section 33.1 was not specific to sexual assault and applied across the board to various general intent crimes of violence although it is no coincidence that the defence of extreme intoxication first emerged in the context of a sexual assault of an elderly woman with a disability,[157] and that violence against women was deeply implicated in subsequent developments.[158] Professors Froc and Sheehy have carefully demonstrated the degree to which extreme intoxication claims arise in the context of violence against women, and sexual assault in particular.[159] In the year between the *Daviault* decision and the enactment of the original section 33.1 they found:

---

154 1994 CanLII 61 (SCC) [*Daviault*].

155 See e.g. Lyn Cockburn, "Sober Judgment Lacking at Supreme Court", *Herizons* 10:1 (Winter 1996). See also *Brown*, *supra* note 133 at para 57; Isabel Grant, "Second Chances: Bill C-72 and the *Charter*" (1995) 33:2 Osgoode Hall LJ 379; Isabel Grant, "The Limits of *Daviault*" (1995) 33 Criminal Reports (4th) 277; Martha Shaffer, "*R v Daviault*: A Principled Approach to Drunkenness or a Lapse of Common Sense?" (1996) 3:2 Rev Const Stud 311 at 324–27.

156 *An Act to amend the Criminal Code* (*self-induced intoxication*), SC 1995, c 32, s 33.1(2).

157 *Daviault*, *supra* note 154 at 140.

158 *Brown*, *supra* note 135; *R v Sullivan*, 2022 SCC 19.

159 Kerri A Froc & Elizabeth Sheehy, "Last Among Equals: Women's Equality, *R v Brown*, and the Extreme Intoxication Defence" (2022) 73 UNBLJ 268.

> the defence was advanced at least 29 times in reported decisions. Twelve of these cases involved clear violence against women: six sexual assaults; five spousal assaults; and the murder of a woman in the sex trade. Another two involved attacks on women: one man brutally beat his mother; another attacked a woman in a nightclub.[160]

Even when the original section 33.1 was in force, the issue came up disproportionately in sexual assault cases:

> Of the 86 cases where extreme intoxication was raised despite s 33.1, 35 cases involved sexual assault. Another five cases involved men who attacked their current or former partners. Beyond these 40 cases of what is understood as violence against women—where women are attacked because they are women—are 23 additional cases where women were victimized by intoxicated men's violence, possibly randomly, either as the sole target or as another victim in addition to male victims.[161]

Seven of the 16 cases involving the constitutionality of section 33.1 also involved sexual assault, all perpetrated by men, with six cases involving female complainants.[162] While Froc and Sheehy acknowledge that this could be a coincidence, they also raise the possibility that there is something about these cases that dovetails with lawyers' preconceptions of what amounts to moral innocence, just as was the case in *Daviault*.[163]

The accused in *Brown* consumed large amounts of alcohol along with "magic mushrooms" and broke into a woman's home naked where he brutally attacked her.[164] He was charged with aggravated assault.[165] Had he been very intoxicated, he would have had no defence of intoxication because aggravated assault is a general intent crime and intoxication is no defence. However, because he continued to consume intoxicants beyond the point of being very intoxicated and lost control over his actions, the Court held that the *Charter* required that he must have a defence of extreme intoxication akin to automatism.

Perhaps the most problematic part of this unanimous judgment was its rejection of the argument that the equality rights of women should be balanced with the section 7 rights of the accused on the basis that "[t]he

160 *Ibid* at 277.
161 *Ibid* at 279.
162 Five other cases involved violence against women (see *ibid* at 278).
163 *Ibid* at 279.
164 *Brown*, *supra* note 135 at para 1.
165 *Ibid* at para 19.

equality and dignity interests of women and children are certainly engaged as potential victims of crime—but in this context, by virtue of the accused's actions, not of some state action against them."[166] This elimination of women as true rights holders and its corresponding privatization of male violence could be the subject of its own article about the systemic nature of male violence against women and the role of the state in facilitating and excusing it, as well as the role of the courts as state actors in developing common law defences.[167] Instead, the Court offers reassurance that these interests will be given robust consideration under section 1, notwithstanding the fact that section 1 has never been used to uphold a violation of men's rights under section 7 and the deck is stacked against such a result.

The Court does not go so far as to argue that someone who voluntarily consumes intoxicants to the point where they lose control of their actions is morally innocent. However, the Court does note that one cannot substitute the blameworthiness for becoming extremely intoxicated for the blameworthiness required for a particular offence.[168] In other words, such a person might be able to be convicted of being extremely intoxicated, but could not be convicted for the specific violence perpetrated against, disproportionately, women.

It is important to note that all the Court's jurisprudence on intoxication is based on artificial legal categories that have no foundation in science. The distinction between specific and general intent offences is not based on science but rather on public policy—most specific intent offences have less serious included offences for which the accused can still be convicted thus allowing intoxication to mitigate but not excuse criminal behaviour. Similarly, the decision in *Daviault* that a man could be so drunk that he has no control over his actions was based on an assumption by the Court about alcohol intoxication that did not have a scientific foundation, something the Supreme Court acknowledged in *Brown*.[169]

Parliament did respond quickly to the decision in *Brown*, but not in the thoughtful and consultative manner witnessed after *Daviault*. Instead, the government introduced legislation with minimal consultation and subsequently enacted it despite concerns raised by feminist academics and at

166 *Ibid* at para 70.

167 Froc & Sheehy, *supra* note 159 at 284, 291–93.

168 *Brown*, *supra* note 135 at para 104.

169 *Ibid* at paras 61–62.

least one feminist legal organization.[170] The new legislation has a number of components. It requires the Crown to prove beyond a reasonable doubt that the accused, before the state of intoxication, demonstrated a marked departure from the standard of care expected of a reasonable person in consuming the intoxicants—what was deemed to be the case in the previous section 33.1. In assessing whether that marked departure has been satisfied the court must consider:

> the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.[171]

There are some obvious flaws in this legislation. The requirement of objective foreseeability of harm to another person is a considerable barrier. Most people who become extremely intoxicated do not go on to commit violent offences against another person. These cases are by their very nature unusual. What if an accused has become this intoxicated in the past and not harmed another person? Does that mean a reasonable person in his circumstances would not have foreseen that harm because it has never happened before? Conversely, what if the individual has never used these intoxicants before—how would a reasonable person in his circumstances have known that harm was likely to ensue if they had never experienced this state in the past? We worry that Parliament has created a nearly impossible hurdle for the Crown in these cases.

It did not take long after *Brown* to see some early cases of extreme intoxication defences in the sexual violence context. In *R v Morris*,[172] where the crimes took place before the new section 33.1 was enacted, the Saskatchewan Court of Appeal ordered a new trial on sexual assault and robbery for a man who violently sexually assaulted a store clerk while robbing her. He had been precluded by the old section 33.1 from raising intoxication

170 See generally House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 44-1, No 34 (27 October 2022) (Kerri Froc, Elizabeth Sheehy & Isabel Grant); Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 44-1, No 40 (1 February 2023) (Elizabeth Sheehy & Isabel Grant); Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 44-1, No 37 (8 December 2022) (Suzanne Zaccour). See also Letter from National Women and the Law (21 June 2022), *Bill C-28: Letter to Senators*, online: <nawl.ca/bill-c-28-letter-to-senators/>.

171 *Criminal Code*, *supra* note 3, s 33.1(2).

172 2024 SKCA 36 [*Morris*].

akin to automatism for the charge of sexual assault. *Morris* is particularly problematic given that the accused was convicted by a jury of robbery (in addition to sexual assault) in spite of the fact that the jury was instructed on the common law defence of intoxication negating the specific intent for robbery. The Court of Appeal held that the jury should have been instructed on automatism negating the voluntariness for robbery (and a subsequent attempted robbery).[173] How a jury could possibly have found that the accused met the threshold for intoxication akin to automatism, when he did not meet the lower threshold required to negate the specific intent, is puzzling.[174] The Court of Appeal ordered a new trial on the basis that while the jury had no reasonable doubt that he did not form the *mens rea* for robbery, it might have been persuaded on a balance of probabilities that he was so intoxicated that his conduct was involuntary.[175]

Several questions remain about this new section. What do we expect a reasonable person to contemplate when ingesting often large amounts of intoxicating substances? The way the section is framed, objective foreseeability is only one factor to be considered as to whether the marked departure standard has been met; the legislation does not set it up as a prerequisite. We would argue that where a loss of self-control is foreseeable to the reasonable person in the circumstances, then a risk of harm generally should be as well. The specific nature of the harm may not be foreseeable, but when one loses control over one's behaviour, harm to another person is in the realm of what a person ought to contemplate. Otherwise, victims will continue to bear the burden of this violence, and the criminal law will continue to grant impunity to those who become intoxicated to a point of loss of control and then inflict violence on others. The law currently sends a terrible message to young men that consent matters even if you are intoxicated, but if you are so intoxicated that you have lost self-control,

173 *Ibid* at para 107.

174 Justice Kasirer described intoxication akin to automatism as the "highest" form of intoxication (see *Brown*, *supra* note 135 at para 45).

175 In circumstances eerily reminiscent of *Brown*, the accused in *R v Barrett* attacked a woman just as she was coming home and violently sexually assaulted her. He was acquitted because the new section 33.1 had not yet been enacted—but even if it had, it is not clear whether it would have led to a different outcome. He had taken magic mushrooms with marijuana four times in the past and had never had a similar reaction. He had apparently done some research on the internet about magic mushrooms thus arguably attempting to "avoid the risk", one of the factors required to be considered by the new legislation (see *R v Barrett*, 2025 BCPC 94).

or do not even turn your mind to the question of consent (or age), you will likely be acquitted.[176]

VI. CONCLUSIONS

Many Canadians would be troubled by the idea that the *Charter* has made it harder to tackle online luring of children for sexual abuse, in the interest of protecting those who wish to "role-play" that abuse. They would question why the *Charter* protects out-of-control intoxicated people but does not offer much in the way of accountability for sexual violence because, we are told, male violence is a private phenomenon in which the state and the courts are not implicated. These conclusions are not inevitable from the *Charter*—they are choices that courts have made.

The understanding of what makes sexual assault blameworthy, and when it should be excused notwithstanding the harm to the victim, is not an abstract intellectual exercise. How we resolve this question needs to account for the fact that sexual offences, against both child and adult victims, are overwhelmingly committed by men against women and girls. Traditionally, our approach to rape normalized male sexual aggression and placed the onus squarely on women to make it clear, through physical and verbal objection, that the act of sexual intercourse was unwanted. Justice Dickson in *Pappajohn* endorsed the following passage from an Australian author: "it is easy for a man intent upon his own desires to mistake the intentions of a woman or girl who may herself be in two minds about what to do."[177] The passage goes on to suggest that women bring false allegations of rape to "justify [themselves] retrospectively".[178] This way of thinking, which reflected decades of entrenched sexism in the criminal law, does not contemplate the possibility that a man should desist in circumstances where he can conclude nothing more than that the woman's consent is unclear, much less the notion that he can control his own desires. On this view, the presumption of innocence, which is supposed to mean that the accused cannot be convicted in the absence of evidence that proves his guilt, morphs into a presumption of consent, in which sex is understood

176 In another case that took place before the new section 33.1 was enacted in 2022, the accused assaulted the complainant in her sleep, but the trial judge disbelieved his claim of extreme intoxication (see *R v Miskie*, 2024 ONCJ 145).

177 *Pappajohn*, *supra* note 16 at 149, citing Colin Howard, *Criminal Law*, 3rd ed (Sydney: Law Book, 1977) at 149.

178 *Ibid*.

as something that men are generally entitled to, unless they are clearly and unambiguously told otherwise. Changes to our understanding of what consent means in law, through both amendments to the *Criminal Code* and judicial decisions, have flipped the script. Resistance or objection is not required; evidence of passivity is consistent with non-consent as a state of mind.[179]

Where it is proven that the complainant did not want the sexual activity, the accused is at fault unless there is a doubt that he both took reasonable steps to ascertain consent and honestly believed that consent had been affirmatively communicated. If the Supreme Court does not treat the absence of fault as properly considered through the defence of honest belief in communicated consent, with its reasonable steps requirement, our law of sexual assault will remain mired in the same zone of male entitlement that suffused the law of rape. The accused will not be required to consider what the complainant wants, or to ask her if she wishes to proceed (including trying to ensure that an affirmative answer is genuine rather than coerced).

This analysis has resonance for the question of knowledge of age as well, as it feeds into longstanding narratives of teenage girls as seducing adult men with their precocious sexuality. The decision in *Morrison*, and its extension to other sexual offences against children, reflects an anxiety that a man "intent on his own desires" could easily forget to think about the age of his partner, especially in the face of an opportunity to sexually access the body of a teenage girl. The internet becomes a place where not knowing must be excused, because it is seen as a space that is designed for not needing to know, and that indifference must be protected.

The reasonable steps provision is one of the few requirements placed on men to inquire into whether consent exists, and whether the other person is old enough to consent, before engaging in sexual activity. It does not eliminate the fault requirement of sexual assault; it is a central piece of that fault requirement and adds an objective element that a man take reasonable steps, albeit only in the circumstances subjectively known to him at the time. The *Charter* does not preclude serious criminal offences that are defined to include objective fault components. Manslaughter, an offence punishable by a maximum of life imprisonment, is fundamentally a crime of objective fault that requires people to act with reasonable care

179 *Ewanchuk*, *supra* note 13; *R v Kirkpatrick*, 2022 SCC 33 at paras 29–31; *Criminal Code*, *supra* note 3, s 273.1.

where the safety of other people is at stake.[180] It is Parliament's job to define *mens rea* and, subject to the *Charter*, the courts' job to interpret parliamentary intent.

If you are having sex with someone who has not given voluntary agreement, or who is a child, you will know—or at least be aware of the risk that is the case. If you make a mistake as to consent or age, then it makes sense that you would have to point to some evidence to support it, either in the Crown's case or by calling defence evidence. A denial of *mens* rea is advanced through the defence of mistake, a state of mind that is logically within the purview of the accused. The Supreme Court has recognized, since *Pappajohn* in 1980, that it makes no sense for the Crown to have to negate this state of mind in every single case, but the result of recent case law in Ontario is to effectively require just that.

If you do not think about consent or age at all, the effect of the reasonable steps requirement is to make that state of indifference blameworthy. This is what makes the "little difficulty" instruction in *HW* incorrect; it ignores this central component of how fault is now defined by Parliament for sexual offences. The reasonable steps requirement does not relieve the Crown of its burden to prove the elements of the offence; rather, Parliament has criminalized not turning one's mind to the circumstances and doing nothing to avoid making a mistake. Mistakes are allowed, but one has to at least attempt to avoid them.

In circumstances where there is no reason to suspect that the complainant could possibly be underage and all signs point to her being an adult, or where there is spontaneous affirmative consent offered by an adult sexual partner, the accused will still have turned his mind to the question in order to form an affirmative belief in consent or age. Such an accused is not someone who fails to even consider the age (or consent) of his sexual partners. He is someone who is convinced, based on the circumstances, that there is no risk that his partner is underage (or not consenting, or incapable of consenting). It is in these unusual circumstances that proceeding based on the information that you have considered may be reasonable, and where the law permits the accused to be mistaken. Expecting men to raise evidence that they took reasonable steps to ascertain consent, in the subjective circumstances known to them, is entirely consistent with the principle of not punishing the morally innocent. Any other conclusion

180 *Creighton*, *supra* note 36 at 69–70; *R v Javanmardi*, 2019 SCC 54 at para 65.

allows men to assume that women are in a perpetual state of consent or that girls are always old enough for sex with adult men.

The relevance of the accused's self-induced intoxication to the assessment of fault in sexual offences also reflects a longstanding resistance to holding men accountable for sexual violence. Although the Supreme Court and Parliament have rejected intoxication as a defence to sexual assault,[181] that view has been revived by the decisions in *HW* and *MacIntyre*, which hold that while intoxication cannot be the basis for a belief in consent, it may be a reason for not thinking about it. When combined with the constitutionalizing of the defence of extreme intoxication (with statutory limitations that will no doubt attract a further *Charter* challenge), men are not going to be held accountable for their intoxicated violence, despite the frequency with which it occurs.

Degale gives the Supreme Court the opportunity to undo some of the harm that has resulted from *Morrison*. Appellate courts in Ontario and Alberta have taken *Morrison* further than it needed to go by building on one *obiter* paragraph to undermine decades of sexual assault law reform. It is not necessary for the Court to overrule *Morrison*, but simply to clarify that *Morrison* did not overrule *George*, and that the reasoning in *Morrison* is limited to the police sting context, where there was no actual complainant and no harm to a real child, such that Parliament had determined that proof of recklessness was insufficient. The approach of the Court of Appeal for British Columbia in *Angel* and subsequent cases offers a better path forward that is respectful of legislative reform and of the significant role the reasonable steps provision has played in Canada for nearly four decades.[182] The *Charter* does not prohibit Parliament from requiring that one at least inquire into consent or age before engaging in sexual activity.

181 *Criminal Code*, *supra* note 3, s 273.2(a)(i).

182 Nigel Olesen has argued the *Angel* Court does not distinguish *Morrison*—it refuses to apply it. We disagree. The interpretation in *Angel* puts *Morrison* in the context of a long line of SCC jurisprudence while respecting legislative intent to give some role to the reasonable steps provision in interpreting the *mens rea* for sexual assault. The *Angel* Court takes *Morrison* at its word in saying it was limited to the sting context. See Nigel Olesen, "The Effect of *R v Morrison* on Sexual Assault Law: Is the Reasonable Steps Requirement an Articulation of Mens Rea or a Statutory Bar on the Defence of Mistaken Belief?" (2025) 47 Man LJ 79 at 109.